

**IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

DAN McCALEB, Executive Editor of)
THE CENTER SQUARE,)
)
Plaintiff,)
)
v.)
)
MICHELLE LONG, in her official capacity)
as DIRECTOR of the TENNESSEE)
ADMINISTRATIVE OFFICE OF THE)
COURTS,)
)
Defendant.)
)

Case No. 3:22-cv-00439
Judge Richardson
Magistrate Judge Frensley

**NON-PARTY TENNESSEE SUPREME COURT JUSTICES’
MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER**

Tennessee Supreme Court Chief Justice Holly Kirby, Justice Jeffrey Bivins, Justice Roger Page, and Special Justice Sharon Lee,¹ non-parties to this action, respectfully move this Court pursuant to Rule 45(d) of the Federal Rules of Civil Procedure to quash the subpoenas for deposition issued by Plaintiff’s counsel. In the alternative, the non-party Justices seek a protective order barring the depositions pursuant to Rule 26(c)(1)(A). As set out in the accompanying memorandum of law, these subpoenas should be quashed as they seek to disclose privileged and protected matters and are unduly burdensome given the non-parties’ lack of factual knowledge regarding the underlying litigation.

¹ Justice Lee retired on August 31, 2023, but maintains the status of a “Special Justice” while she closes out business in her chambers.

I certify that I have in good faith conferred with counsel for the party serving the subpoena in an effort to resolve the dispute without court action pursuant to Fed. R. Civ. P. 26(c)(1).

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ Donna L. Green
DONNA GREEN (BPR 19513)
Assistant Attorney General
Managing Attorney
CODY BRANDON (BPR 37504)
Assistant Attorney General
Managing Attorney
LIZ EVAN (BPR 37770)
Assistant Attorney General
Law Enforcement and
Special Prosecutions Division
P.O. Box 20207
Nashville, TN 37202
(615) 532-6023
Donna.Green@ag.tn.gov
Cody.Brandon@ag.tn.gov
Liz.Evan@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to the parties named below. Parties may access this filing through the Court's electronic filing system.

M. E. Buck Dougherty III
James McQuaid
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, IL 60654
bdougherty@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

Andrew C. Coulam
Michael M. Stahl
Robert W. Wilson
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
Andrew.coulam@ag.tn.gov
Michael.stahl@ag.tn.gov
Robert.wilson@ag.tn.gov

Date: 11-22-2023

/s/ Donna Green

DONNA GREEN

Assistant Attorney General

IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DAN McCALEB, Executive Editor of)
THE CENTRE SQUARE,)

Plaintiff,)

v.)

Case No. 3:22-cv-00439-EJR-JSF

MICHELLE LONG, in her official capacity)
as DIRECTOR of the TENNESSEE)

ADMINISTRATIVE OFFICE OF THE)
COURTS,)

Defendant.)

**NON-PARTY TENNESSEE SUPREME COURT JUSTICES’
MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER**

Pursuant to Rules 45(d) and 26 (c)(1) of the Federal Rules of Civil Procedure, Tennessee Supreme Court Chief Justice Holly Kirby, Justice Jeffrey Bivins, Justice Roger Page, and Special Justice Sharon Lee,¹ non-parties to this action, move this Court to quash the subpoenas issued by Plaintiff’s counsel. In the alternative, the non-party Justices seek a protective order barring the depositions. These subpoenas were served on October 31, 2023, commanding each Justice to appear for deposition in this lawsuit between November 27-30, 2023.

BACKGROUND

Plaintiff, the executive editor of an online news organization, “The Center Square,” has

¹ Justice Lee retired on August 31, 2023, but maintains the status of a “Special Justice” while she closes out business in her chambers.

filed suit seeking to enforce his alleged First Amendment right of access to (1) meetings of the Tennessee Advisory Commission on the Rules of Practice and Procedure; and (2) meetings of any Tennessee Judicial Conference committees recommending the establishment of court rules. (D.E. 19.) At any given time, one Tennessee Supreme Court Justice acts as liaison between the Court and the Advisory Commission on the Rules of Practice and Procedure (“Advisory Commission”). During the time periods relevant to this Motion, Chief Justice Holly Kirby acted as liaison from September 1, 2014, to August 31, 2019, Special Justice Sharon Lee was the liaison September 1, 2019, to August 31, 2023, and Justice Tarwater is the current liaison, having been appointed at the end of Special Justice Lee’s term.

Plaintiff now subpoenas four non-party Tennessee Supreme Court Justices to testify at depositions: Chief Justice Kirby, Justice Bivins, Justice Page, and Special Justice Lee (“the Justices”). The Court should quash the subpoenas.

STANDARD OF REVIEW

A court must quash or modify a subpoena that “requires disclosure of privileged or other protected matter, if no exception or waiver applies” or “subjects a person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A)(iii) – (iv). “[C]ourts ‘consider one’s status as a nonparty to be a significant factor in the undue burden analysis,’” though the nonparty still bears the burden of demonstrating that the subpoena should be quashed. *Sinclair v. Lauderdale County, Tenn.*, No. 2:14-cv-02908, 2015 WL 1393423, at *3 (W.D. Tenn. Mar. 24, 2015) (quoting *In re Smirman*, 267 F.R.D. 221, 223 (E.D. Mich. May 12, 2010)).

ARGUMENT

The Justices are the high-ranking judicial officials in the State of Tennessee. The motivations behind the performance of their official duties are protected from discovery. Even in

the pursuit of factual information (as opposed to judicial motivations), the subpoenaed depositions pose an undue burden weighed against the Justices' lack of factual knowledge relevant to the underlying litigation. Therefore, the subpoenas should be quashed.

I. Plaintiff Must Clear an Extraordinarily High Bar to Compel the Testimony of Tennessee Supreme Court Justices.

The targets of Plaintiff's subpoenas are judicial officials, and not just any judges—Justices of the Tennessee Supreme Court. Compelling the testimony of judges regarding the motivations underlying performance of their official duties is not permitted. Even depositions limited to discovery of factual knowledge of the Justices would impose an undue burden in this case.

A. Judicial testimony regarding reasons behind official actions is prohibited and other judicial testimony is disfavored.

At the outset, it should be noted that “[j]udicial testimony is a ‘very delicate matter.’” *United States v. Porat*, No. CR 21-170, 2021 WL 5631746, at *1 (E.D. Pa. Nov. 30, 2021) (quoting *United States v. Frankenthal*, 582 F.2d 1102, 1107 (7th Cir. 1978)). “[T]he propriety of compelling a judge to attend a deposition in any given case is subject to considerations not afforded to a non-judge witness regardless of any privilege.” *France v. Chippewa Cnty.*, No. 2:20-CV-248, 2022 WL 20016164, at *1 (W.D. Mich. Apr. 14, 2022), *aff'd*, No. 2:20-CV-248, 2022 WL 20016166 (W.D. Mich. Nov. 7, 2022).

The United States Supreme Court has stated that “allowing an examination of a judge’s mental processes would be ‘destructive of judicial responsibility’ and such scrutiny cannot be permitted.” *United States v. Roth*, 332 F. Supp. 2d 565, 567 (S.D.N.Y. 2004) (quoting *U.S. v. Morgan*, 313 U.S. 409, 422 (1941)). The “overwhelming authority from the federal courts in this country, including the United States Supreme Court, makes it clear that a judge may not be compelled to testify concerning the mental processes used in formulating official judgments *or the reasons that motivated him in the performance of his official duties.*” *Roth*, 332 F. Supp. 2d at 567

(collecting cases) (emphasis added), *aff'd sub nom. United States v. St. John*, 267 Fed. Appx. 17 (2d Cir. 2008).

But even in the case of judicial testimony on purely factual, nondeliberative matters, judges receive heightened protections. *Kananian v. Brayton Purcell, LLP*, No. 1:07 CV 3188, 2009 WL 10689208, at *9 (N.D. Ohio May 29, 2009) (“A different standard applies if the information sought is factual only, unrelated to a judge’s mental processes.”). Even in these circumstances, there is a presumption against judicial testimony that “warrants heightened scrutiny.” *Porat*, 2021 WL 5631746, at *1 (quoting *Roth*, 332 F. Supp. 2d at 567); *Dalcour v. City Of Lakewood*, No. 08-CV-00747-MSK-KLM, 2008 WL 3845289, at *1 (D. Colo. Aug. 14, 2008) (same).

The purposes for this strong presumption against judicial testimony are obvious. Allowing litigants to routinely depose judges—especially Supreme Court Justices—would license harassment and unreasonable inquiry into judicial functions. For example, litigants may seek to depose Supreme Court Justices to determine how a rule of procedure applicable to their litigation was intended to operate. Or a party may ask to probe the reasoning of a binding decision beyond what the Court has put in the opinion.

Furthermore, repeated attempts to depose Justices of the Tennessee Supreme Court would interfere with the important everyday functions of their jobs. Justices must manage dockets, draft orders and opinions, prepare for and participate in oral arguments and in-chambers conferences, and supervise both the bench and bar of the State through their work on committees and commissions.

B. A subpoena for deposition of a non-party must be quashed or modified when it imposes an “undue burden.”

While the Justices enjoy absolute privilege regarding their deliberations in adjudicative matters and their motivations in performing their other official duties, this Court also must quash

a subpoena that imposes an undue burden on any non-party. Rule 45 requires a party serving a subpoena on a nonparty to “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Fed. R. Civ. P. 45(d)(1). Courts are thus required to quash or modify a subpoena that would subject the nonparty to an undue burden. Fed. R. Civ. P. 45(d)(3)(iv). Rule 26 informs the determination of when a burden is “undue.” *State Farm Mut. Auto. Ins. Co. v. Elite Health Centers, Inc.*, 364 F.Supp.3d 758, 767 (E.D. Mich. 2018) (holding that the scope of discovery for a subpoena under Federal Rule of Civil Procedure 45 is governed by Rule 26(b)(1)²).

To quash a subpoena for deposition under the undue burden analysis, one of the enumerated harms in Rule 26(c)(1) “must be illustrated ‘with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2013) (quoting *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir. 2004)). Rule 26(c)(1) provides that a “court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or *undue burden* or expense.” Fed. R. Civ. P. 26(c)(1)(a).

The Sixth Circuit in *Serrano* cited Wright & Miller to articulate what constitutes undue burden or unreasonable oppression. “To justify restricting discovery, the harassment or oppression should be unreasonable, but ‘discovery has limits and these limits grow more formidable as the showing of need decreases.’” *Serrano*, 699 F.3d at 901 (quoting 8A Charles Alan Wright & Arthur

² “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense in proportion to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and *whether the burden or expense of the proposed discovery outweighs its likely benefit.*” Fed. R. Civ. P. 26(b)(1) (italics added).

R. Miller, et al, Fed. Practice & Proc. § 2036 (3d ed. 2012)) (ellipsis omitted). “Thus even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it.” *Id.*

A deposition is improper “when the burden of discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Where there is no demonstrable benefit to a deposition, even a “slight inconvenience” imposed by a deposition is an undue burden and unreasonable annoyance under Rule 26(c)(1). *Goldblum v. Univ. of Cincinnati*, 62 F.4th 244, 257 (6th Cir. 2023). There is no benefit to deposing a witness without any knowledge of the essential facts of a case, thus rendering such deposition an undue burden and unreasonable annoyance. *See, e.g., id.* (quashing subpoena to university president because he had no knowledge essential to the underlying case); *Smith v. Cnty of Wayne, et al.*, No. 2:21-cv-12070, 2023 WL 4830585 (E.D. Mich. Jul. 27, 2023) (quashing subpoena because mayor had no knowledge of the facts underlying the case and other individuals had the knowledge sought); *Watson v. City of Cleveland*, 202 F. App’x 844, 852 (6th Cir. 2006) (quashing subpoena to mayor because although he had knowledge of essential facts, those same facts were also available from other individuals); *Graves v. Bowles*, 419 F.App’x 640, 645 (6th Cir. 2001) (quashing subpoena to mayor because he had no knowledge essential to the underlying case); *Nix v. Sword*, 11 F.App’x 498, 500 (6th Cir. 2001) (quashing subpoena to a congressman because he had no unique knowledge essential to the underlying case).

Moreover, “the court must limit the frequency or extent of discovery [] if it determines that the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C)(i).

C. Separation of Powers requires extraordinary circumstances to depose current and former high-ranking state government officials.

The “apex doctrine,” recognized in several Circuits, creates a presumption that deposing a high-ranking official is unduly burdensome unless the official possesses first-hand knowledge of facts³ that are essential to the party’s case⁴ and cannot be obtained from another source or less burdensome method.⁵ The presumption shifts the burden of opposing a motion to quash or a motion for protective order to the party seeking to take the deposition. *Cannavan v. Cnty. of Ventura*, No. CV-2010-012-FMO-PVCX, 2021 WL 4945186, at *6 (C.D. Cal. July 16, 2021) (“To invoke the protection of the apex doctrine, the party resisting discovery must first demonstrate he or she is a high-ranking official. Once that is shown, the burden shifts to the party seeking the deposition” to establish extraordinary circumstances.”) In *Serrano v. Cintas Corporation*, the

³ *In re Office of the Utah Attorney Gen.*, 56 F.4th at 1264 (Tenth Circuit holding a party must show “the official has first-hand knowledge related to the claim being litigated”); *France v. Chippewa Cnty.*, No. 2:20-cv-248, 2022 WL 20016164, at *2 (W.D. Mich. Apr. 14, 2022) (holding judge may only be required to testify if he “possesses factual knowledge”); *Williams v. Court Servs. & Offender Supervision Agency*, No. 08-CV-1538 (RCL-AK), 2014 WL 12788954, at *2 (D.D.C. Mar. 6, 2014) (holding “[t]he party seeking the deposition must demonstrate that the official has at least some personal knowledge about the underlying matter”).

⁴ *In re Office of the Utah Attorney Gen.*, 56 F.4th at 1264 (Tenth Circuit holding deposition must be “essential”); *Chippewa Cnty.*, 2022 WL 20016164, at *2 (W.D. Mich. holding official’s knowledge must be “highly pertinent to the jury’s task”); *McNamee v. Massachusetts*, No. CIV.A. 12-40050-FDS, 2012 WL 1665873, at *1 (D. Mass. May 10, 2012) (holding court will quash subpoena unless “the information sought is essential (not merely relevant) to the case”); *United States v. Menominee Tribal Enterprises*, 70 Fed. R. Serv. 3d 1185, 2008 WL 2273285, at *13 (E.D. Wis. 2008) (holding deposition must be “necessary”).

⁵ *In re Office of the Utah Attorney Gen.*, 56 F.4th at 1264 (Tenth Circuit requiring showing that “information cannot be obtained from an alternative source or via less burdensome means”); *Chippewa Cnty.*, 2022 WL 20016164, at *2 (W.D. Mich. holding official must be “the only possible source of testimony on the relevant factual information”); *Williams*, 2014 WL 12788954, at *2 (D.D.C. holding party must demonstrate “that the information is available only from that official and not from another source”); *McNamee*, 2012 WL 1665873, at *1 (D. Mass. holding information sought must not be “obtainable elsewhere”); *Menominee Tribal Enterprises*, 2008 WL 2273285, at *13 (E.D. Wis. holding party must seek “information that cannot be obtained from any other source”).

Sixth Circuit rejected application of the apex doctrine to a high-ranking corporate executive who moved the district court to bar his deposition, instead requiring a showing of undue burden or other specific harm listed in Fed. R. Civ. P. 26(c). *Serrano*, 699 F.3d at 901.

While the apex doctrine is inapplicable to corporate executives in the Sixth Circuit, “it is not clear” whether the apex doctrine extends to depositions involving “high-ranking government officials.” *EMW Women's Surgical Center, P.S.C.*, Case No. 17CV-00189, 2017 WL 3749889 *2 (W.D. Ky. Aug. 20, 2017). “[T]he apex doctrine is the application of the rebuttable presumption that the deposition of a high-ranking [government official] either violates Rule 26(b)(2)(C)’s proportionality standard or, on a party’s motion for a protective order, constitutes ‘good cause’ for such an order as an ‘annoyance’ or ‘undue burden’ within the meaning of Rule 26(c)(1).” *Elvis Presley Enters.*, 2020 WL 4015476, at *11 (W.D. Tenn. Jul. 16, 2020) (citing *Turner*, 2012 WL 4839139, at *2). Should the deposing party fail to overcome this presumption, the court must then limit or even prohibit the deposition.” *Id.*

Regardless, United States Supreme Court precedent establishes certain protections from deposition for high-ranking government officials, with some similarity to the apex doctrine. In *Morgan v. United States*, a district court allowed the Secretary of Agriculture to testify at deposition and at trial on “the process by which he reached the conclusions [to take an agency action], including the manner and extent of his study of the record and his consultation with subordinates.” *Morgan v. United States*, 313 U.S. 409, 422 (1941). Criticizing the district court’s decision to compel the Secretary’s deposition and trial testimony, Justice Frankfurter wrote:

[T]he short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary has a quality resembling that of a judicial proceeding. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that it was not the function of the court to probe the mental processes of the Secretary. Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative

process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

Id. (internal quotation marks and citations omitted).

Unlike the corporate apex doctrine which is based upon a presumption that corporate executives are presumptively burdened by a deposition due to their busy schedules, the *Morgan* doctrine⁶ is grounded in deliberative process protections and separation of powers. ““If the Commissioner [of an agency] was asked to testify in every case which the [agency] prosecuted, his time would be monopolized by preparing and testifying in such cases.” *In re U.S. Dep’t of Educ.*, 25 F.4th 692, 701 (9th Cir. 2022) (quoting *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993)). “In order to protect officials from the constant distraction of testifying in lawsuits, courts have required that defendants show a special need or situation compelling such testimony.” *Id.*

After surveying *Morgan* and its progeny, the 9th Circuit Court of Appeals concluded, “[t]he executive branch’s execution of the laws can be crippled if courts can unnecessarily burden [high ranking government officials] with compelled depositions.” *Id.* Furthermore, “*Morgan* stands for the proposition that high-ranking government officials should not be subject to the taking of depositions absent extraordinary circumstances.” *U.S. v. Sensient Colors*, 649 F.Supp.2d 309, 321 (D.N.J. 2009).

⁶ To avoid confusion with the apex doctrine, this Memorandum uses the term “*Morgan* doctrine” to refer to the Supreme Court’s discussion of protecting high-level government officials from deposition and trial testimony in *Morgan v. United States*.

1. Without knowledge essential to the underlying case and unable to be obtained from any other source, high-ranking government officials should not be deposed.

Morgan created a strong disinclination against deposing high-ranking government officials, but some courts have, nevertheless, allowed for the taking of such depositions only in extraordinary circumstances. *In re U.S. Dep't of Educ.*, 25 F.4th at 701. The extraordinary circumstances test “is applied almost universally by state and federal courts across the country” in analyzing motions to quash subpoenas to high-ranking government officials. *In re Office of the Utah Attorney Gen.*, 56 F.4th 1254, 1263 (10th Cir. 2022). While the Circuits “vary on what constitutes extraordinary circumstances, [] nearly all of them agree that a party must show at a minimum that the information sought is not obtainable from another source” and that the facts known to the official are essential to the requesting party’s claims or defenses. *Id.* at 1260.

Although the apex doctrine used in other Circuits has its genesis in *Morgan v. United States*, the Court in *Morgan* did not impose a presumption that high-level depositions are *per se* unduly burdensome or intended to harass and annoy under Rule 26, nor does *Morgan* shift the burden of proof in a motion to quash to the party seeking the deposition. Those are features of judicial construction in other Circuits which the Sixth Circuit clearly rejected, at least as to corporate executives, in *Serrano*. To the extent that the elements of the extraordinary circumstances test developed in other Circuits may inform the Rule 26 “undue burden” analysis here, that test is addressed in Part II(C), *infra*.

2. The *Morgan* doctrine applies to current and former high-ranking state officials in the Sixth Circuit.

A district court in Michigan has reasoned that the *Morgan* doctrine applies to both current and *former* government officials. “Separation of powers concerns and the potential of discouraging persons from taking high-ranking positions still exist when the potential deponent no

longer holds the high-ranking position.” *Burgess v. United States*, No. 17-11218, 2022 WL 17725712, at *5 (E.D. Mich. Dec. 15, 2022); *see also United States v. Newman*, 531 F.Supp. 3d 181, 188 (D.D.C. 2021) (“The need to protect the integrity of the underlying decision-making process, and encourage public service by protecting officials from ‘indiscriminate depositions,’ continue to persist after the official leaves government service. Therefore, the [*Morgan*] doctrine still applies to former officials.”).

In short, between the strong general presumption against judicial testimony, the lack of relevant factual knowledge possessed by the Justices, and the burden imposed upon high-ranking government officials, Plaintiff is not entitled to depose the Tennessee Supreme Court Justices in this matter.

II. The Subpoenaed Depositions Impermissibly Seek to Discover Protected Motivations Underlying the Justices’ Official Actions and Would Impose an Undue Burden on Each of the Justices.

The Justices have the burden to demonstrate why the subpoenas should be quashed or protective orders barring the depositions should be entered. First, Plaintiff appears to be seeking the reasons underlying the Justices’ performance of their official duties with the Tennessee Advisory Commission on the Rules of Practice and Procedure. Second, even if Plaintiff seeks only testimony about factual, non-deliberative matters, the depositions impose an undue burden on the Justices when weighed against their complete lack of relevant factual knowledge. And third, if applicable to high-ranking government officials in the Sixth Circuit, the subpoenas fail the *Morgan* doctrine’s extraordinary circumstances test, because any relevant information possessed by the Justices is available from other sources.

A. Plaintiff appears to seek deliberative information he cannot compel.

Plaintiff cannot discover the Justices’ mental processes and reasoning for the performance of their official duties as justices. *See* Part I(A), *supra*. But all evidence indicates Plaintiff in fact

seeks to inquire into the Justices' reasoning to the extent they were involved in decisions to open or close the meetings at issue in the litigation.

Plaintiff included each of the Justices in his Rule 26 initial disclosures. In summarizing the "subjects of information" he believed the Justices possessed, Plaintiff listed for each Justice "decisions on whether meetings are open or closed to the public." ("Plaintiff's Rule 26(a)(1) Initial Disclosures," attached as Exhibit 1, at 2-3.) In direct conflict with Plaintiff's initial disclosures, the Justices have submitted affidavits in support of this Motion indicating that they have no such knowledge. (Exhibit 2.) Since Plaintiff clearly knows whether the meetings are in fact open or closed, (D.E. 1, PageID# 133, ¶ 7), the only information Plaintiff could be referencing in his initial disclosures is the mental processes and reasoning the Justices may possess animating any decision to close meetings.

When Plaintiff supplemented his interrogatory responses on November 6, 2023, he did not identify any additional information possessed by the Justices. ("Plaintiff's First Supplemental Response to Defendant's First Set of Interrogatories and Requests for Production of Documents," attached as Exhibit 3, at 3.)

In Plaintiff's own deposition, he testified that he was first alerted to the facts forming the basis of his complaint when he heard of a statement by Michelle Long, the Defendant in this case, about closing the Tennessee Judicial Conference. ("Deposition of Dan McCaleb," excerpt attached as Exhibit 4, at 11-12.) Never did he mention any of the Justices being relevant to his case. (Exhibit 4.)

In fact, in the deposition of Rachel Harmon—Deputy Director of the Administrative Office of the Courts—Rachel Harmon testified that that "Michelle Consiglio-Young is the AOC employee who has the most knowledge of what takes place at Advisory Commission meetings."

(“Deposition of Rachel Harmon,” excerpt attached at Exhibit 5, at 49.) Only two statements from Rachel Harmon evidence even a tenuous connection between the subpoenaed Justices and this case. First, Rachel Harmon testified that she gave privileged legal advice to Justices Kirby and Page when this Court entered a preliminary injunction in this case, long after the events that gave rise to the Complaint. (Exhibit 5, at 51-52, 54.) Of course, Plaintiff cannot learn the content of that privileged conversation in a deposition. Second, Rachel Harmon testified that she advised Chief Justice Kirby that a particular meeting of the advisory commission could not “go forward” because there was no public notice of the meeting compliant with the preliminary injunction entered by this Court. (Exhibit 5, at 79-81.) That conversation occurred (again long after the events alleged in the Complaint) when the “primary liaison was on leave,” resulting in some amount of confusion. (Exhibit 5, at 80.) But Rachel Harmon made it clear that Chief Justice Kirby does not set the dates for the advisory commission, and that Harmon’s communication was passed along to other individuals, like the chair of the committee, who would make those decisions. (Exhibit 5, at 81-82.)

In sum, there is no evidence that there is *factual* information possessed by any of the Justices that Plaintiff could discover in a deposition. That is no surprise when two of the subpoenaed Justices have never even served as the Supreme Court’s liaison to the Advisory Commission. The Justices, and this Court, must be left to conclude that Plaintiff seeks what he cannot have: to have the Justices explain their mental processes and reasoning in the performance of their official duties as Justices of the Tennessee Supreme Court.

B. The depositions impose an undue burden on the Justices when weighed against their complete lack of relevant factual knowledge.

The subpoenas for deposition of Chief Justice Kirby, Justice Bivins, Justice Page, and Special Justice Lee must be quashed because they impose an undue burden on the recipients. The

Justices must illustrate the requisite undue burden “with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.” *Serrano*, 699 F.3d at 901.

Justice Bivins and Justice Page stated in their affidavits that they have never acted as liaisons to the Advisory Commission on the Rules of Practice and Procedure. Each further stated that he possesses no knowledge of the decisions to designate the Advisory Commission meetings as open or closed to the public. Finally, Justice Bivins and Justice Page each indicated that, to the best of their recollection, they have never personally interacted with Plaintiff or his online news organization.

Chief Justice Kirby and Special Justice Lee stated in their affidavits that they each acted as liaisons to the Advisory Commission on the Rules of Practice and Procedure in the past. Each stated the original decision to close Advisory Commission meetings to the public was made prior to her tenure as liaison and that she did not take part in that decision. Each Justice confirmed that she possesses no knowledge of any decision to designate the Advisory Commission meetings as open or closed to the public during her tenure. Both Justices stated that any facts known to them regarding decisions to open or close Advisory Commission meetings would also be known to others, including Administrative Office of the Courts staff members and other members of the Advisory Commission. Finally, Chief Justice Kirby and Special Justice Lee each indicated that, to the best of their recollection, they have never personally interacted with Plaintiff or his online news organization.

All four Justices stated in their sworn affidavits that preparing for and submitting to a deposition regarding subject matter of which they have no knowledge would be unduly burdensome and an unreasonable annoyance, detracting from their duties as Tennessee Supreme Court Justices.

A deposition is improper “when the burden of discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Where there is no demonstrable benefit to a deposition, even a “slight inconvenience” imposed by a deposition is an undue burden and unreasonable annoyance under Rule 26(c)(1). In *Goldblum v. Univ. of Cincinnati*, 62 F.4th 244 (6th Cir. 2023), the Sixth Circuit recently upheld a district court’s decision to grant a protective order barring the deposition of a university president in a former staff member’s retaliatory discharge action against the university. *Id.* at 257. The president submitted an affidavit stating that he had limited knowledge of the staff member’s termination and disclaimed any role in the decision to terminate her. *Id.* The Court found that “[g]iven the unlikely chance of [the university president’s] deposition proving beneficial, the district court properly found that even a ‘slight inconvenience’ imposed by a deposition would ‘amount to unreasonable harassment’ under Rule 26.” *Id.*

In *Overall v. Oakland Cnty.*, No. 20-12869, 2022 WL 351068, at *2 (E.D. Mich. Feb. 4, 2022), the County Sheriff demonstrated that he had no unique knowledge of any relevant facts, but he failed to claim any specific harm would result from being deposed. *Id.* The district court quashed the subpoena, finding that “a purpose to harass or annoy may be inferred where there is no showing the high-ranking official has relevant and personal knowledge about the facts at issue.” *Id.* (citing *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2006 WL 2578277, at *3 n.3 (N.D. Cal. Sept. 6, 2006)).

Here, the four subpoenaed Justices have submitted affidavits reflecting their lack of knowledge and involvement regarding the underlying case. They have also established the duplicative nature of any knowledge they might possess as Plaintiff has already deposed Defendant Long and Deputy Director Harmon. As such, even the slight inconvenience of preparing for and

attending a deposition unlikely to spawn any discovery benefit creates an undue burden requiring the subpoena to be quashed under Rule 45 or barred by protective order under Rule 26.

C. If applicable to high-ranking government officials in the Sixth Circuit, the subpoenas fail the *Morgan* doctrine’s extraordinary circumstances test, because any relevant information possessed by the Justices is available from other sources.

Finally, while the applicability of the extraordinary circumstances test to high-ranking government officials is unsettled in the Sixth Circuit, application of the test results in the same conclusion as the undue burden analysis: the subpoenas must be quashed. To invoke the extraordinary circumstances test of the *Morgan* doctrine, “the party resisting discovery must first demonstrate he or she is a high-ranking official.” *Cannavan*, 2021 WL 4945186, at *6 (quoting *Estate. of Silva by & through Allen v. City of San Diego*, 2021 WL 211613, at *2 (S.D. Cal. Jan. 21, 2021)).

The proposed deponents in this case, as Supreme Court Justices, are “high-ranking officials,” *In re Guzman*, No. 2:16-CV-00303, 2017 WL 2210519, at *1 (W.D. Tex. May 19, 2017), who “have greater duties and time constraints than other witnesses,” *In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995).

Accordingly, to compel the depositions of the Justices, they must each possess facts which are essential to Plaintiff’s case and cannot be obtained through any other source. *In re Office of the Utah Attorney Gen.*, 56 F.4th at 1260. Through their respective affidavits, the Justices have carried their burden of demonstrating that they possess no facts that are essential to Plaintiff’s case. *See Part II(B), supra*. Further, Chief Justice Kirby and Special Justice Lee stated that there are other individuals who have knowledge of all facts known to the Justices in their role as liaison to the Advisory Commission. Specifically, the Justices have no relevant factual knowledge about the Advisory Commission that AOC staff and other Commission members would not also possess.

Because the Justices are high-ranking government officials and they possess no unique factual information essential to Plaintiff's claims, the extraordinary circumstances test of the *Morgan* doctrine requires the subpoenas to be quashed.

III. The Justices have demonstrated that less burdensome means of discovery exist.

Moreover, deposing four Tennessee Supreme Court Justices is not the least burdensome way to obtain whatever factual information Plaintiff seeks. Rachel Harmon testified that that “Michelle Consiglio-Young is the AOC employee who has the most knowledge of what takes place at Advisory Commission meetings.” (Exhibit 4, at 49.) And, of course, Plaintiff has deposed and issued written discovery to Defendant Long in her capacity as the Director of the AOC. The Justices are aware of no discovery question seeking an essential fact to which the responding party stated that only a Tennessee Supreme Court Justice could answer the question. Nothing indicates that the Justices possess essential information not obtainable through other witnesses.

Nor is there any indication that Plaintiff has attempted, and been thwarted from, less burdensome means of discovering facts in the Justices' knowledge. There is no plausible reason to depose *four* Justices, when none of them possess any relevant factual information about the underlying case. Likewise, if any such relevant information existed, Plaintiff could have served a Rule 30(b)(6) subpoena upon the Tennessee Advisory Commission on the Rules of Practice and Procedure describing with particularity the matters for examination. The Commission would have been able to designate knowledgeable individuals to testify with respect to each matter. The lack of any of these efforts by Plaintiff suggests that the depositions are intended to impermissibly explore the Justices' non-factual mental processes or simply to harass or annoy. *See EMW Women's Surgical Ctr., et al.*, 2017 WL 3749889, at *4.

CONCLUSION

For the foregoing reasons, the Court should quash pursuant to Rule 45(d)(3)(a)(iv) the subpoenas to depose Chief Justice Holly Kirby, Justice Jeffrey Bivins, Justice Roger Page, and Special Justice Sharon Lee. In the alternative, the Court should enter a protective order pursuant to Rule 26(c)(1)(A) forbidding the depositions of all four Justices.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

/s/ Donna L. Green
DONNA GREEN (BPR 19513)
Assistant Attorney General
Managing Attorney
CODY BRANDON (BPR 37504)
Assistant Attorney General
Managing Attorney
LIZ EVAN (BPR 37770)
Assistant Attorney General
Law Enforcement and
Special Prosecutions Division
P.O. Box 20207
Nashville, TN 37202
(615) 532-6023
Donna.Green@ag.tn.gov
Cody.Brandon@ag.tn.gov
Liz.Evan@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to the parties named below. Parties may access this filing through the Court's electronic filing system.

M. E. Buck Dougherty III
James McQuaid
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, IL 60654
bdougherty@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

Andrew C. Coulam
Michael M. Stahl
Robert W. Wilson
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, TN 37202
Andrew.coulam@ag.tn.gov
Michael.stahl@ag.tn.gov
Robert.wilson@ag.tn.gov

Date: 11-22-2023

/s/ Donna Green

DONNA GREEN

Assistant Attorney General

EXHIBIT 1

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Dan McCaleb, Executive Editor of THE CENTER SQUARE, Plaintiff, v. Michelle Long, in her official capacity as DIRECTOR OF TENNESSEE ADMINISTRATIVE OFFICE OF THE COURTS, Defendant.	Case No. 3:22-cv-00439 District Judge Richardson Magistrate Judge Frensley
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------

PLAINTIFF'S RULE 26(a)(1)(A) INITIAL DISCLOSURES

Plaintiff Dan McCaleb, Executive Editor of The Center Square, pursuant to Fed. R. Civ. P. 26(a)(1)(A)(i)-(iv), and in accordance with the Court's Initial Case Management Order [ECF No. 50, Page ID #1148 at ¶E.], respectfully provides Defendant Michelle Long his required Initial Disclosures. Plaintiff reserves the right to supplement these Initial Disclosures in accordance with the Federal Rules, Local Rules, and the Court's Initial Case Management Order as additional information becomes available through the discovery process.

(i) Individuals likely to have discoverable information:

RESPONSE:

1. Plaintiff Dan McCaleb, Executive Editor of The Center Square
c/o LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-637-2280-telephone

Subject: Information related to facts that forms the basis for this lawsuit. *See* First Amended Complaint (“Am. Compl.”), ECF No. 19. This information further includes his three supporting declarations submitted in this lawsuit in support of a preliminary injunction, including facts related to assigning reporters to report on Tennessee State court rulemaking meetings of (1) the Tennessee bench-bar advisory commission (“Advisory Commission”), created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the Tennessee Judicial Conference (TJC) committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq.

2. Defendant Michelle Long, Director Administrative Office of the Courts
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to facts that forms the basis for any and all defenses in Answer (ECF No. 48) to Plaintiff’s claims alleged in the Amended Complaint. ECF No. 19. This information further includes all statutory duties imposed on the AOC Director and the AOC’s administrative support related to Tennessee State court rulemaking meetings of (1) the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. This includes decisions on whether meetings are open or closed to the public.

3. Roger A. Page, Chief Justice Tennessee Supreme Court
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to Tennessee State court rulemaking meetings of (1) the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. Information related to August 2, 2022, comments as reported via AOC article on livestreaming. *See* ECF No. 33-4. Information related to the

supervision of AOC Director Long. This includes decisions on whether meetings are open or closed to the public.

4. Sharon G. Lee, Justice Tennessee Supreme Court
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to Tennessee State court rulemaking meetings of (1) the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. Information related to duties on Advisory Commission. This includes decisions on whether meetings are open or closed to the public.

5. Jeffrey S. Bivins, Justice Tennessee Supreme Court
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to Tennessee State court rulemaking meetings of (1) the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. This includes decisions on whether meetings are open or closed to the public.

6. Holly Kirby, Justice Tennessee Supreme Court
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to Tennessee State court rulemaking meetings of (1) the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees,

created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. This includes decisions on whether meetings are open or closed to the public.

7. Sarah K. Campbell, Justice Tennessee Supreme Court
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to Tennessee State court rulemaking meetings of (1) the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. This includes decisions on whether meetings are open or closed to the public.

8. Michael Swiney, Presiding Judge Tennessee Court of Appeals
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to August 2, 2022, comments as reported via AOC article on livestreaming. *See* ECF No. 33-4.

9. Rachel Harmon, AOC Deputy Director
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to facts that forms the basis for any and all defenses in Director Long's Answer (ECF No. 48) to Plaintiff's claims alleged in the Amended Complaint. ECF No. 19. This information further includes all statutory duties imposed on the AOC Director and the AOC's administrative support related to Tennessee State court rulemaking meetings of (1) the Advisory Commission,

created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. Information related to all declarations by Harmon submitted in this lawsuit thus far. This includes decisions on whether meetings are open or closed to the public.

10. Michelle Consiglio-Young, AOC Administrative Support Advisory Commission
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to her administrative support provided to the Tennessee State court rulemaking meetings of the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601. This includes decisions on whether meetings are open or closed to the public.

11. Jeana Hendrix, former AOC Assistant General Counsel
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to her administrative support provided to the public and Advisory Commission regarding the May 20, 2016, open Tennessee State court rulemaking meeting of the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601. *See* ECF No. 26-2. This includes decisions that this meeting would be open to the public.

12. Bill Lee, 50th Governor of Tennessee
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to 2022-23 TN State Fiscal Budget, ECF No. 27-1, including fiscal information submitted on the Courts and Judiciary by Director Long in accordance with her statutory duties.

13. Janet Kleinfelter, Retired Deputy Attorney General
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

Subject: Information related to Agenda and Program for 69th Annual Tennessee Judicial Conference, filed under seal at ECF No. 12. *See* ECF No. 11.

14. Advisory Commission members. *See* ECF No. 26-3.

Subject: Information related to their duties as members of the Tennessee State court rulemaking meetings of the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601. This includes decisions on whether meetings are open or closed to the public.

15. Commission Members on the Future of the Tennessee Judicial System, ECF No. 33-3, Page ID #1010-1019, including Court Executive Team, Page ID #1019-1020.

Subject: Information related to Tennessee State court rulemaking meetings of (1) the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601; and (2) the TJC committees, created by the enabling statute, Tenn. Code Ann. §17-3-101, et seq. This includes decisions on whether meetings are open or closed to the public and whether they should be open in the future.

16. Fed. R. Civ. P. 30(b)(6) deposition(s) as applicable described with reasonable particularity and directed to the Administrative Office of the Courts.
c/o JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
615-253-5463-telephone

(ii) Description by category of documents, ESI, and tangible things:

RESPONSE:

1. Agenda and Program for 69th Annual Tennessee Judicial Conference, filed under seal at ECF No. 12. *See* ECF No. 11.
2. May 20, 2016, Public Meeting Notice of Advisory Commission. *See* ECF No. 26-2.
3. List of Advisory Commission Members as of July 21, 2022. *See* ECF No. 26-3.
4. 2022-23 TN State Fiscal Budget, ECF No. 27-1.
5. TN Supreme Court Order, ECF No. 33-1.
6. Advisory Commission Rule Recommendations, ECF No. 33-2.
7. 30-year Vision Report, ECF No. 33-3.
8. August 2, 2022, comments as reported via AOC article on livestreaming. ECF No. 33-4.
9. TN Supreme Court Order. ECF No. 37-1.
10. TN Supreme Court Order. ECF No. 38-1.
11. TN Supreme Court Order. ECF No. 38-2.
12. TN Supreme Court Order. ECF No. 38-3.
13. AOC website (tncourts.gov) calendar and public notices on meetings of boards and commissions.
14. Federal Court judicial website on public notices of bench-bar rulemaking meetings. *See* ECF No. 19.

(iii) Computation of damages:

RESPONSE:

1. Plaintiff is seeking declaratory and injunctive relief. *See* ECF No. 19.
2. To the extent Plaintiff is a prevailing party, he is seeking reasonable attorneys' fees and costs pursuant to the applicable federal statute at issue. *See* ECF No. 19.

(iv) Insurance agreement:

RESPONSE:

1. This is inapplicable to Plaintiff.

May 19, 2023

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474

James McQuaid, Admitted *pro hac vice*

LIBERTY JUSTICE CENTER

440 N. Wells Street, Suite 200

Chicago, Illinois 60654

312-637-2280-telephone

312-263-7702-facsimile

bdougherty@libertyjusticecenter.org

jmquaid@libertyjusticecenter.org

Attorneys for Plaintiff, Dan McCaleb,
Executive Editor of The Center Square

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2023, a copy of the foregoing Plaintiff's Initial Disclosures was served via electronic mail upon the Office of Tennessee Attorney General and Reporter, counsel for Defendant Administrative Director Michelle Long, as follows:

JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Andrew C. Coulam, *Deputy Attorney General*
Michael M. Stahl, *Senior Assistant Attorney General*
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
andrew.coulam@ag.tn.gov
michael.stahl@ag.tn.gov

/s/ M. E. Buck Dougherty III
M. E. Buck Dougherty III, TN BPR #022474

EXHIBIT 2

**IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

DAN McCALEB, Executive Editor of)
THE CENTER SQUARE,)
)
Plaintiff,)
)
v.)
)
MICHELLE LONG, in her official capacity)
as DIRECTOR of the TENNESSEE)
ADMINISTRATIVE OFFICE OF THE)
COURTS,)
)
Defendant.)

Case No. 3:22-cv-00439
Judge Richardson
Magistrate Judge Frensley

AFFIDAVIT OF JUSTICE ROGER PAGE

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Comes now the affiant, Justice Roger Page, who after being duly sworn, state that I am of sound mind, over the age of 18 years and make the following statements under oath:

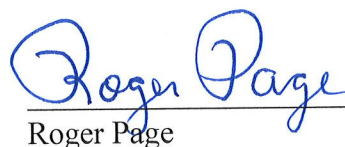
1. I am a Tennessee Supreme Court Justice.
2. I have never acted as the Supreme Court liaison to the Advisory Commission on the Rules of Practice and Procedure.
3. I possess no firsthand knowledge of the decisions to designate the Advisory Commission meetings as open or closed to the public.
4. To the best of my recollection, I have never personally interacted with Dan McCaleb or his online news organization, The Center Square.
5. Because it would detract from my duties as a Tennessee Supreme Court Justice, and because I have no unique knowledge of Mr. McCaleb, or The Center Square, or the administration

of the Advisory Commission, it would be unduly burdensome and annoying for me to prepare for and submit to a deposition in this matter.

FURTHER THE AFFIANT SAYETH NOT.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 20th day of November 2023.



Roger Page

**IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

DAN McCALEB, Executive Editor of)
THE CENTER SQUARE,)
)
Plaintiff,)
)
v.)
)
MICHELLE LONG, in her official capacity)
as DIRECTOR of the TENNESSEE)
ADMINISTRATIVE OFFICE OF THE)
COURTS,)
)
Defendant.)

Case No. 3:22-cv-00439
Judge Richardson
Magistrate Judge Frensley

AFFIDAVIT OF JEFFREY BIVINS

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Comes now the affiant, Jeffrey Bivins, who after being duly sworn, state that I am of sound mind, over the age of 18 years, and make the following statements under oath:

1. I am a Tennessee Supreme Court Justice.
2. I was appointed to the Tennessee Supreme Court in July 2016. During the over nine years that I have served on the Court, before this attempt, there has never been any attempt of any kind to compel my deposition testimony.
3. I have never acted as the Supreme Court liaison to the Advisory Commission on the Rules of Practice and Procedure.
4. I possess no knowledge of the decisions to designate the Advisory Commission meetings as open or closed to the public.

5. To the best of my recollection, I have never personally interacted with Dan McCaleb or his online news organization, The Center Square.

6. Because it would detract from my duties as a Tennessee Supreme Court Justice, and because I have no unique knowledge of Mr. McCaleb, or The Center Square, or the administration of the Advisory Commission, it would be unduly burdensome and annoying for me to prepare for and submit to a deposition in this matter.

FURTHER THE AFFIANT SAYETH NOT.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 21st day of November 2023.



Jeffrey Bivins

**IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

**DAN McCALEB, Executive Editor of
THE CENTER SQUARE,**)

Plaintiff,)

v.)

**MICHELLE LONG, in her official capacity
as DIRECTOR of the TENNESSEE
ADMINISTRATIVE OFFICE OF THE
COURTS,**)

Defendant.)

**Case No. 3:22-cv-00439
Judge Richardson
Magistrate Judge Frensley**

AFFIDAVIT OF SHARON LEE

STATE OF TENNESSEE
COUNTY OF KNOX

Comes now the affiant, Sharon Lee, who after being duly sworn, state that I am of sound mind, over the age of 18 years, and make the following statements under oath:

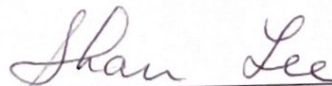
1. I am a former Justice of the Tennessee Supreme Court and am currently serving as a Special Justice.
2. I acted as the Supreme Court liaison to the Advisory Commission on the Rules of Practice and Procedure from September 1, 2019, to August 31, 2023. I do not know if or when any decision to close the Advisory Commission meetings to the public was made. If such a decision was made, it was made before I began my tenure as liaison. I attended all Commission meetings by teleconference and was not aware whether the meetings were open or closed to the public. I was never aware of any request by a member of the public to attend a meeting.

3. I did not take part in any decision to close Advisory Commission meetings to the public.
4. I possess no unique knowledge of the decisions to designate the Advisory Commission meetings as open or closed to the public.
5. The Director and staff of the Administrative Office of the Courts, including Michelle Long and Deputy Director Rachel Harmon, may have more knowledge than I about the administration of the Advisory Commission.
6. I have no relevant factual knowledge about the administration of the Advisory Commission that the Administrative Office of the Courts Director and Deputy Director would not also possess.
7. To the best of my recollection, I have never personally interacted with Dan McCaleb or his online news organization, The Center Square.
8. Because it would detract from my duties as a Tennessee Supreme Court Special Justice, and because I have no unique knowledge of Mr. McCaleb, or The Center Square, or the administration of the Advisory Commission, it would be unduly burdensome and annoying for me to prepare for and submit to a deposition in this matter.

FURTHER THE AFFIANT SAYETH NOT.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 21 day of November 2023.



Sharon Lee

**IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

DAN McCALEB, Executive Editor of)
THE CENTER SQUARE,)
)
Plaintiff,)
)
v.)
)
MICHELLE LONG, in her official capacity)
as DIRECTOR of the TENNESSEE)
ADMINISTRATIVE OFFICE OF THE)
COURTS,)
)
Defendant.)

Case No. 3:22-cv-00439
Judge Richardson
Magistrate Judge Frensley

AFFIDAVIT OF HOLLY KIRBY

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Comes now the affiant, Holly Kirby, who after being duly sworn, state that I am of sound mind, over the age of 18 years, and make the following statements under oath:

1. I am the Chief Justice of the Tennessee Supreme Court.
2. I acted as the Supreme Court liaison to the Advisory Commission on the Rules of Practice and Procedure from September 1, 2014, to August 31, 2019.
3. Any decision to close Advisory Commission meetings to the public was made prior to my tenure as liaison and prior to my appointment to the Supreme Court.
4. I did not take part in the original decision to close Advisory Commission meetings to the public.

5. Any facts I possess regarding decisions to designate the Advisory Commission meetings as open or closed to the public are also known to other Advisory Commission members or Administrative Office of the Courts (“AOC”) staff members.

6. To the best of my recollection, I have never personally interacted with Dan McCaleb or his online news organization, The Center Square.

7. Because it would detract from my duties as a Tennessee Supreme Court Justice, and because I have no unique knowledge of Mr. McCaleb, or The Center Square, or the decisions to designate the Advisory Commission meetings as open or closed, it would be unduly burdensome and annoying for me to prepare for and submit to a deposition in this matter.

FURTHER THE AFFIANT SAYETH NOT.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 21st day of November 2023.

A handwritten signature in cursive script that reads "Holly Kirby". The signature is written in black ink and is positioned above a horizontal line.

Holly Kirby

EXHIBIT 3

IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DAN McCALEB, Executive Editor of)
THE CENTER SQUARE,)

Plaintiff,)

v.)

MICHELLE LONG, in her official capacity)
as DIRECTOR of the TENNESSEE)
ADMINISTRATIVE OFFICE OF THE)
COURTS,)

Defendant.)

Case No. 3:22-cv-00439

Judge Richardson

Magistrate Judge Frensley

**PLAINTIFF’S FIRST SUPPLEMENTAL RESPONSE TO DEFENDANT’S FIRST SET
OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

GENERAL OBJECTIONS

Plaintiff retains all objections in his original Responses as though fully set forth herein,
unless expressly waived.

SUPPLEMENTAL RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 2: Identify each person who has knowledge of the facts or
information relevant to the subject matter of the allegations in your First Amended Complaint for
Declaratory and Injunctive Relief against Defendant Michelle Long, and for each person so
identified, provide a summary of the knowledge you understand that person to possess.

RESPONSE: McCaleb submits that any and all persons deposed in this matter by either his counsel or Defendant Long's counsel, have knowledge of the subject matter of this case.

Additionally, McCaleb responds as follows:

- John Styf, TN Staff Reporter, The Center Square. Business address: 20 N. Clark St., Suite 3300, Chicago IL 60602. Email address: jstyf@thecentersquare.com. Styf is the reporter in TN who would be assigned to cover Advisory Commission meetings if those meetings were open to the public.
- J.D. Davidson, TN Editor, The Center Square. See above for business address. Email: jdavidson@thecentersquare.com Davidson would be involved in assigning reporters to assign reporters to cover open Advisory Commission meetings, subject to McCaleb's editorial decision.
- Steve Wilson, former TN Editor, The Center Square. See above for business address. Email: swilson@thecentersquare.com Same knowledge as Davidson.
- Chris Krug, President, President, Franklin News Foundation. Business address: 20 N. Clark St., Suite 3300, Chicago, IL 60602, 847-497-5230. Email: ckrug@franklinnews.com Knowledge of operations of the Center Square.
- Professor Benjamin Barton (previously disclosed as expert witness)
- Gino Bulso, Chair of the Advisory Commission – information related to his duties as members of the Tennessee State court rulemaking meetings of the Advisory Commission, created by the enabling statute, Tenn. Code Ann. § 16-3-601. This includes decisions on whether meetings are open or closed to the public.
- Defendant Long's expert witness to be disclosed on or before November 1, 2023

In addition, the following people were identified in McCaleb's Rule 26 Initial Disclosures, along with the requested summary of knowledge. McCaleb incorporates his Initial Disclosure herein as if fully restated.

- Plaintiff McCaleb
- Defendant Long
- Justice Roger Page, formerly Chief Justice (identified as Chief Justice in the Initial Disclosures)
- Justice Sharon Lee (Ret.), formerly Chief Justice
- Justice Jeffrey Bivens, formerly Chief Justice
- Current Chief Justice of the TN Supreme Court, Holly Kirby (identified as Justice in the Initial Disclosures)
- Justice Sarah Campbell
- Presiding Judge Michael Swiney (TN Court of Appeals)
- TAOC Deputy Director Rachel Harmon
- TAOC employee Michelle Consiglio-Young, who provides administrative support to the Advisory Commission
- Jeana Hendrix, former AOC Assistant General Counsel
- Bill Lee, 50th Governor of Tennessee
- Janet Kleinfelter, Retired Deputy Attorney General
- Advisory Commission members
- Commission Members on the Future of the Tennessee Judicial System

INTERROGATORY NO. 8: Please list all of Plaintiff's and Reporters' attendances at meetings of a Bench-bar Advisory Commission or Bench-bar Advisory Committee during the

Relevant Time Period, including the name, date(s), and location(s) of the meetings, and whether the attendance was in person, telephonically, virtually, or by other means. In answering this Interrogatory, Identify Plaintiff and/or the Reporter(s) who attended the listed meetings.

RESPONSE: Dan McCaleb attended the June 9, 2023 Bench-bar Advisory Commission meeting by viewing the recording a few days later. Other than that, none.

INTERROGATORY NO. 9: Please list all of Plaintiff's and Reporters' requests to attend a meeting of a Bench-bar Advisory Commission or Bench-bar Advisory Committee during the Relevant Time Period, including the name, date(s), and location(s) of the meetings. In answering this Interrogatory, Identify Plaintiff and/or the Reporter(s) who made the request to attend the meeting(s).

RESPONSE: None.

INTERROGATORY NO. 10: Please list all meetings of a Bench-bar Advisory Commission or Bench-bar Advisory Committee that Plaintiff and Reporters were denied attendance, including the name, date(s), and location(s) of the meeting(s). In answering this Interrogatory, Identify Plaintiff and/or the Reporter(s) who were denied attendance.

RESPONSE: Neither McCaleb nor his reporters were specifically and expressly denied access to any meetings. However, the entire public, including McCaleb and his reporters, were denied access since the meetings were closed in 2022.

INTERROGATORY NO. 11: Please list all of Plaintiff's and Reporters' attendances at meetings of a Judicial Conference during the Relevant Time Period, including the name, date(s), and location(s) of the meetings, and whether the attendance was in person, telephonically, virtually, or by other means. In answering this Interrogatory, Identify Plaintiff and/or the Reporter(s) who attended the listed meetings.

RESPONSE: None

INTERROGATORY NO. 12: Please list all of Plaintiff's and Reporters' requests to attend a meeting of a Judicial Conference during the Relevant Time Period, including the name, date(s), and location(s) of the meetings. In answering this Interrogatory, Identify Plaintiff and/or the Reporter(s) who made the request to attend the meeting(s).

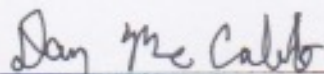
RESPONSE: None

INTERROGATORY NO. 13: Please list all meetings of a Judicial Conference that Plaintiff and Reporters were denied attendance, including the name, date(s), and location(s) of the meeting(s). In answering this Interrogatory, Identify Plaintiff and the Reporter(s) who were denied attendance.

RESPONSE: Neither McCaleb nor his reporters were specifically and expressly denied access to any meetings. However, the entire public, including McCaleb and his reporters, were denied access since the meetings were closed in 2022.

DECLARATION

I declare under penalty of perjury that the foregoing responses to these Interrogatories are true, accurate, and complete.



Dan McCaleb

RESPONSES TO REQUESTS FOR PRODUCTION

REQUEST NO. 8: Please produce a copy of all Documents and Communications relating to your response in Interrogatory No. 2.

RESPONSE: Plaintiff originally objected on vagueness and unduly burdensome grounds. Plaintiff further objected to “producing a privilege log for *every* Communication between Plaintiff and his employees Styf, Davidson, and Wilson is itself unduly burdensome and not likely to lead to relevant information.” In their initial written response, counsel for Defendant did not clarify the request. On a subsequent call, counsel for Defendant clarified the request to include only those documents pertaining to the people listed in the response to Interrogatory 2 that also pertain to those people’s knowledge of the facts of this case. With that understanding, Plaintiff WAIVES the previously-asserted objections to Request for Production 8, and produces documents marked McCALEB 0014-0015. In addition, see Privilege Log.

PRIVILEGE LOG

McCALEB 0016: Email chain originating from Buck Dougherty to Dan McCaleb, cc: LJC personnel James McQuaid, Morgan Bowles, and Chloe Edwards; sent March 22, 2023 at 4:46 PM. Forwarded by McCaleb to Center Square Employees Jon Styf, JD Davidson, and Alan Wooten.

- a) Author: Buck Dougherty
- b) Addressed to McCaleb, cc McQuaid, Bowles, Edwards. Forwarded by McCaleb to Styf, Davidson, Wooten
- c) Other individuals to whom the document or a copy of the document was sent or shown: unknown, believed to be none
- d) Date: March 22, 2023
- e) The email from Dougherty to McCaleb is a summary of the March 22, 2023 Memorandum Opinion issued by this Court (Dkt. 39). McCaleb forwarded it to his employees, telling them “FYI. We should plan a short story tomorrow.”
- f) The document is protected under the attorney-client privilege
- g) The document is responsive to Request 8.

McCALEB 0017: Email chain originating from Buck Dougherty to Dan McCaleb, cc: LJC personnel James McQuaid and Kristen Williamson; sent June 13, 2022.

- a) Author: Buck Dougherty
- b) Addressed to McCaleb, cc McQuaid, Williamson
- c) Other individuals to whom the document or a copy of the document was sent or shown: unknown, believed to be none
- d) Date: June 13, 2022
- e) The email is Attorney Dougherty informing his client that this lawsuit has been filed. In response, McCaleb asks Williamson when she will have a press release; Dougherty supplies the initial filings and discusses next steps.
- f) The document is protected under the attorney-client privilege
- g) The document is responsive to Request 8.

November 6, 2023

Respectfully submitted,

/s/ M.E. Buck Dougherty III
M.E. Buck Dougherty III, TN BPR #022474
James McQuaid, Admitted pro hac vice
LIBERTY JUSTICE CENTER
440 N. Wells St., Ste. 200
Chicago, IL 60654
bdougherty@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

CERTIFICATE OF SERVICE

I, counsel for Plaintiff Dan McCaleb, hereby certify that a true and correct copy of the foregoing document, along with responsive documents stamped “McCALEB 0014 - 0017,” have been served on the following counsel of record via email on this 6th day of November, 2023:

<p>Andrew Coulam Deputy Attorney General Public Interest Division P.O. Box 20207 Nashville, Tennessee 37202 Andrew.coulam@ag.tn.gov</p>	<p>Michael Stahl Senior Assistant Attorney General P.O. Box 20207 Nashville, Tennessee 37202-0207 615-253-5463 Michael.stahl@ag.tn.gov</p>
<p>Robert W. Wilson Senior Assistant Attorney General 40 South Main Street, Suite 1014 Memphis, Tennessee 38103 901-543-9031 robert.wilson@ag.tn.gov</p>	

s/ M. E. Buck Dougherty III
M. E. Buck Dougherty III
James McQuaid
LIBERTY JUSTICE CENTER
440 N. Wells St., Ste. 200
Chicago, IL 60654
bdougherty@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

EXHIBIT 4

McCALEB

vs.

LONG

DAN MCCALEB

October 13, 2023



Lexitas Legal TENNESSEE | 1015 Avery Park Dr | Smyrna, TN 37167 | (615) 595-0073 |
tn.scheduling@lexitaslegal.com

1 precipitated the change from the Illinois News
2 Network to Center Square?

3 A. Well, in 2017 when I joined, we were covering
4 just Illinois only. And then we expanded our
5 coverage to across the country and Illinois News
6 Network didn't work for Tennessee or Pennsylvania,
7 for example.

8 Q. Okay. Before you worked for Illinois News
9 Network, where did you work?

10 A. I worked for Shaw Media.

11 Q. Was that also in Tennessee -- or in Illinois?

12 A. Yes, Illinois. I was in Illinois. Illinois
13 and Iowa, yes.

14 Q. All right. Do you know why we are here
15 today?

16 A. Yes.

17 Q. What is your understanding of why we're here
18 today?

19 A. I am giving a deposition in a lawsuit against
20 Defendant Michelle Long.

21 Q. And what is the purpose of that lawsuit?

22 A. To open up the Bench Bar Advisory Commission
23 in Tennessee to public scrutiny, essentially.

24 Q. When you say public scrutiny, are you
25 limiting that to press or is it your understanding

1 that this lawsuit would apply to the entirety of the
2 public?

3 A. The press and the public.

4 Q. Okay. The caption in the lawsuit says that
5 you are the plaintiff as executive editor of The
6 Center Square. So is it your understanding that you
7 are filing this suit as a private citizen or as a
8 member of the press?

9 A. As a member of the press.

10 Q. Have you reviewed all the pleadings in this
11 case?

12 A. Yes.

13 Q. Do you agree with everything that's been
14 filed on your behalf?

15 A. Yes.

16 Q. Why did you initiate this lawsuit?

17 A. As a 30-plus-year journalist I believe in
18 open government. When I learned that this was
19 closed, I asked the question, what are they hiding,
20 as I would in any situation. So I looked into it
21 further and thought it was appropriate to get the
22 meetings open.

23 Q. When you say you learned that they were
24 closed, how did you learn that they were closed?

25 A. I think my first information about it had to

1 do with Ms. Long's statement or a policy position
2 that she put out that had to do with concerns about
3 safety and security and closing -- was it the
4 Tennessee Judicial Conference? I started looking
5 into it after that.

6 Q. So you believe that you saw a policy from
7 Michelle Long that indicated that the Tennessee
8 Rules Advisory Commission on Practice and Procedure
9 were closed to the public?

10 MR. DOUGHERTY: Object to the form of
11 the question.

12 BY MR. STAHL:

13 Q. You can answer.

14 A. Okay. No. No. Initially it was the
15 Tennessee Judicial Conference, I think is what the
16 name of it is. I think it came from Michelle Long,
17 yes.

18 Q. But that was a policy that you saw that
19 indicated that the Judicial Conference was closed to
20 members of the public?

21 A. I don't know if you'd call it a policy or a
22 rule or whatever but the Judicial Conference was
23 closed.

24 Q. Well, what would you call it?

25 A. I guess if they're acting on the policy, I'd

1 call it a rule that was put in place.

2 Q. And where did you see this rule?

3 A. On the Tennessee judicial website,
4 tncourts.gov, I believe it is.

5 Q. When was the last time you saw this policy?
6 Or the rule?

7 A. When I reviewed my filings, I believe.

8 Q. When did you review those filings?

9 A. Over the course of this week.

10 Q. So within the past week you saw a policy or a
11 rule on the Tennessee Judicial website from Michelle
12 Long that said the Tennessee Judicial Conference was
13 closed to members of the public?

14 MR. DOUGHERTY: Object to the form of
15 the question.

16 THE WITNESS: I have reviewed a lot of
17 documents in the past week, so I guess I can't state
18 specifically. I definitely read something related
19 to concerns over security and safety for members of
20 the Tennessee Judicial Conference.

21 BY MR. STAHL:

22 Q. Was this lawsuit filed in the last week?

23 A. No.

24 Q. Do you remember when you filed this lawsuit?

25 A. June of 2022.

EXHIBIT 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DAN MCCALED, Executive Editor of
THE CENTER SQUARE,

Plaintiff,

vs.

Case No. 3:22-cv-00439

MICHELLE LONG, in her official
capacity as DIRECTOR of the
TENNESSEE ADMINISTRATIVE OFFICE
OF THE COURTS,

Defendant.

Deposition of:

RACHEL HARMON

Taken on behalf of the Plaintiff
October 24, 2023
Commencing at 9:09 a.m. CST

Lexitas Legal
Jenny Checuga, LCR, RPR
555 Marriott Drive
Nashville, Tennessee 37214
(615)595-0073

1 were together in one room, okay? Would the AOC
2 office be the conduit to provide that support
3 to the Advisory Commission?

4 A. Yes.

5 Q. And how -- and the AOC office would
6 actually provide the physical space for the
7 meeting?

8 A. Yes.

9 Q. Let's say the Advisory Commission wanted
10 to meet by Webinar, livestreaming, would the
11 AOC office provide the administrative support
12 to help them have that meeting that way?

13 A. Yes.

14 Q. And let's say the Advisory Commission
15 wanted to have a meeting that was open to the
16 public, would the AOC office assist them in
17 making that happen?

18 A. Yes.

19 Q. Okay. There are different types of court
20 rules that you're aware of that the Advisory
21 Commission considers when it's making
22 recommendations?

23 A. Yes, but my experience and interaction
24 with that Commission is relatively limited.

25 The ultimate goal is to present to the

1 Tennessee Supreme Court a package of
2 recommended changes or additions or deletions
3 to really any court rule that the Tennessee
4 Supreme Court has purview over.

5 Q. So you don't really know the breakdown of
6 the various types of rules and procedures that
7 they consider; is that right?

8 A. Because I'm not directly connected with
9 them, no, I don't feel comfortable saying that.

10 Q. Would you -- is it fair to say that
11 Michelle Consiglio-Young is the AOC employee
12 who has the most knowledge of what takes place
13 at Advisory Commission meetings?

14 A. That would be my expectation, yes.

15 Q. Did you ever talk to Michelle
16 Consiglio-Young about the preliminary
17 injunction and how that might impact the AOC
18 office?

19 A. No, I don't think so.

20 Q. Ever talk to Michelle Long the director
21 about how the preliminary injunction might
22 impact the AOC office?

23 A. I recall one discussion that it affected
24 the need for public notice.

25 Q. And when was that discussion that you had

1 with Michelle Long?

2 A. I don't know exactly the date, but it
3 would have been shortly after the preliminary
4 injunction was filed.

5 Q. And what was discussed?

6 A. Just that it would impact the need to
7 have a public notice.

8 Q. And did either you or Michelle Long
9 consider if the AOC had ever provided public
10 notice in the past for Advisory Commission
11 meetings?

12 MR. STAHL: Object to the form.

13 THE WITNESS: We did not discuss
14 that.

15 BY MR. DOUGHERTY:

16 Q. Did you look to see if the AOC office had
17 ever issued any public notices in the past for
18 Advisory Commission meetings?

19 A. I did not.

20 Q. Did you also have a discussion with any
21 of the Tennessee Supreme Court justices after
22 the preliminary injunction?

23 MR. STAHL: Object to the form.

24 THE WITNESS: Yes.

25 ///

1 BY MR. DOUGHERTY:

2 Q. And tell me about those discussions and
3 who were they with?

4 MR. COKE: I'm going to object, ask
5 her not to answer that question.

6 MR. DOUGHERTY: Why is that?

7 MR. COKE: Just the discussions with
8 the Court is -- the Court is the ultimate
9 attorney -- the ultimate client for Rachel and
10 our office on these discussions, so I believe
11 those are privilege and protected.

12 MR. DOUGHERTY: You're claiming
13 privilege because of what? What's the
14 relationship?

15 MR. COKE: The legal -- Rachel Harmon
16 and others in our office providing the legal
17 advice to the Court on matters, and we believe
18 that constitutes attorney-client privilege.

19 BY MR. DOUGHERTY:

20 Q. Ms. Harmon, did you provide legal advice
21 to any of the justices on the Tennessee Supreme
22 Court?

23 A. About what?

24 Q. After the preliminary injunction was
25 issued.

1 A. Yes.

2 Q. Who did you provide legal advice to?

3 A. Holly Kirby.

4 Q. Was Justice Kirby a chief justice at that
5 point?

6 A. No.

7 Q. Did Justice Kirby become chief justice on
8 September 1 of 2023?

9 A. Yes.

10 Q. Is providing legal advice in the job
11 description for the deputy director of the AOC?

12 A. It can be.

13 Q. Is providing legal advice to the
14 Tennessee Supreme Court in the deputy director
15 job description?

16 A. Yes, it can be.

17 Q. Is there a formal job description for the
18 deputy director of the AOC?

19 A. There is.

20 Q. Where could I find that? Is that on the
21 Tennessee AOC website?

22 A. It is within our HR Department.

23 Q. Is there a particular statute that
24 governs the deputy director's responsibility
25 and obligations?

1 A. No.

2 Q. Do you know if there's a statute that
3 governs the director of the AOC's obligation --

4 A. Yes.

5 Q. I'll just ask it -- you're very clear on
6 your answers, but just let me finish the
7 question first.

8 So it's your understanding that there is
9 a state statute that governs the duties and
10 responsibilities of the director of the AOC,
11 correct?

12 A. Yes.

13 Q. Did you provide legal advice to director
14 Michelle Long?

15 A. Yes.

16 Q. When?

17 A. In May, when the preliminary injunction
18 was issued, which I believe was May.

19 Q. I believe it was March, but --

20 A. Whichever month --

21 Q. The actual date is not as important as --
22 we agree it came down in the spring of 2023,
23 correct, the preliminary injunction?

24 A. Whichever month it came down, that's --
25 that would have been the month I would have had

1 a discussion with her.

2 Q. So it would have been the month that
3 Judge Richardson issued it, that's when you
4 would have had these discussions?

5 A. Yes.

6 Q. Is that when you would have had the
7 discussion with Justice Holly Kirby, whenever
8 the injunction was issued?

9 A. Yes.

10 Q. That month?

11 A. Yes.

12 Q. Okay. Did you have a discussion with I
13 think he was the chief justice at the time,
14 Chief Justice Paige?

15 A. Yes.

16 Q. And was that a separate discussion that
17 you had with Justice Kirby?

18 A. Yes.

19 Q. Okay. What do you recall about that
20 discussion?

21 A. Simply notifying him about the
22 preliminary injunction.

23 Q. Did you also discuss that with the other
24 members of the Supreme Court at that time?

25 MR. STAHL: Object to the form.

1 THE WITNESS: No.

2 BY MR. DOUGHERTY:

3 Q. So other than Justice Paige and Justice
4 Kirby, have you had communications with any
5 other justices since the preliminary injunction
6 was issued?

7 A. About the preliminary injunction?

8 Q. Yes.

9 A. No.

10 Q. So it's your testimony that you've only
11 discussed the preliminary injunction with
12 Justice Kirby and Justice Paige?

13 A. On the Supreme Court, that's correct.

14 Q. Okay. I want to -- I appreciate you, I
15 want to be clear.

16 Since the preliminary injunction was
17 issued in 2023, you've had discussions about
18 the injunction with Michelle Long; is that
19 right?

20 A. Yes.

21 Q. You've had further discussions about the
22 preliminary injunction with Justice Kirby; is
23 that right?

24 A. Yes.

25 Q. And you've had further discussions about

1 A. It's not -- it's not a Tennessee Supreme
2 Court, Tennessee courts website, it is more of
3 a resourcing website. So it is not intended to
4 be a platform where we necessarily share court
5 opinions and put news out or articles out or
6 livestream events, it is more of a resource
7 tool.

8 Q. And do you know the web address for that
9 Access to Justice website?

10 A. Not off the top of my head.

11 Q. Is there a link to it on the Tennessee
12 AOC website?

13 A. I believe you can get through it through
14 the Access to Justice page.

15 Q. Okay. Who administers that Access to
16 Justice website?

17 A. I don't know who actually makes the key
18 strokes happen. I know that Anne-Louise
19 Wirthlin, who is our Access to Justice
20 director, she and her team manage that page
21 content.

22 Q. What is her name again?

23 A. Anne-Louise. It's A-N-N-E, hyphen,
24 L-O-U-I-S-E. Is that right? And Wirthlin,
25 W-I-R-T-H-L-I-N. Wirthlin, yes.

1 Q. Is Ms. Wirthlin an AOC employee?

2 A. She is.

3 Q. So when you say the Access to Justice
4 website is an offshoot, I understand how you
5 described it, does the AOC -- someone within
6 the AOC office administers that website?

7 A. Yes. I think there's a vendor that helps
8 support that, but the content is relegated by
9 those within the AOC.

10 Q. Okay. I think you made a comment or part
11 of your testimony that the Advisory Commission
12 was not having quarterly meetings this year in
13 2023; is that your testimony?

14 A. I think so. I'm not directly involved
15 with them. I know that there was a meeting
16 scheduled that did not happen this fall, so I
17 don't think that one has happened in the third
18 quarter.

19 Q. Let's talk about that meeting that did
20 not happen.

21 What is your understanding of the
22 Advisory Commission third quarter meeting that
23 did not happen?

24 A. It did not happen. What do you mean what
25 is my understanding?

1 Q. Well, you've -- why did it not happen?

2 A. I don't think it was properly noticed.

3 Q. And what leads you to that conclusion?

4 A. I don't remember now how it came up, but
5 someone brought to my attention that there was
6 an Advisory Commission meeting. I went to the
7 website to look, did not see a notice and --
8 I'm trying to remember the steps after that.
9 And I just remember telling -- I think it was
10 then Justice -- Chief Justice Kirby that it
11 couldn't go forward.

12 Q. And that was because of your
13 understanding of the preliminary injunction
14 that it couldn't go forward for that reason?

15 A. Correct.

16 Q. Because as you understand the preliminary
17 injunction, the AOC office is required to give
18 notice to the public; is that right?

19 A. That's right.

20 Q. And so once you communicated this to
21 Justice Kirby, do you recall what happened
22 after that?

23 A. Yes. A fair amount of confusion, largely
24 because our primary liaison was on leave.

25 Q. Is that -- I don't mean to interrupt, is

1 that Ms. Michelle Consiglio-Young?

2 A. Yes, yes. And I was confirming that my
3 suspicion was in fact correct. When I learned
4 that it was, I just told the Chief Justice
5 Kirby it couldn't go forward or we could be in
6 violation of a preliminary injunction.

7 Q. And what do you recall Justice Kirby
8 saying?

9 MR. STAHL: Object to the form. Do
10 you consider that legal advice?

11 THE WITNESS: No, I don't. She
12 understood and I indicated that we would not
13 hold the meeting. Well, I shouldn't say we,
14 the Advisory Commission would not meet.

15 BY MR. DOUGHERTY:

16 Q. Does Justice Kirby set the dates for
17 Advisory Commission meetings?

18 A. No.

19 MR. STAHL: Object to the form.

20 BY MR. DOUGHERTY:

21 Q. Who sets the dates for Advisory
22 Commission meetings?

23 A. I don't know.

24 Q. Who did you communicate to that the
25 meeting cannot go forward?

1 A. John Coke, Chief Justice Kirby and then I
2 communicated -- no, that's it.

3 Q. Do you know if anyone communicated with
4 any of the members on the Advisory Commission
5 meeting that the meeting cannot go forward?

6 MR. STAHL: Object to the form.

7 THE WITNESS: I -- I was not directly
8 part of those conversations. My understanding
9 is that the new liaison -- justice liaison
10 Dwight Tarwater, who came on the court
11 September 1st, was advised that it could not go
12 forward, as was the chair Gino Bulso, as was
13 the reporter. And I'm blanking, I think her
14 name is Kathy.

15 BY MR. DOUGHERTY:

16 Q. When you say "reporter," you're talking
17 about Advisory Commission reporter?

18 A. Reporter, uh-huh.

19 Q. Would that individual be listed on the
20 website for the members?

21 A. I don't know -- yes. I don't know if
22 she's considered a member or just a reporter.
23 There's a distinction with that particular
24 Commission I've never fully understood, but I
25 believe she's listed separately somehow.

1 Q. Would that person have been Lynn
2 Ridgeway?

3 A. That's it. I have no idea where I got
4 Kathy.

5 Q. Do you see a list of meetings for the
6 upcoming calendar year for the Advisory
7 Commission?

8 A. Do I see one?

9 Q. Uh-huh.

10 A. No.

11 Q. Do you see a list of meeting dates for
12 any of the boards or commissions that the AOC
13 office supports?

14 A. No.

15 Q. Do you know when those dates are chosen
16 for any of the commission or board meetings?

17 A. Not unless I need to be a part of the
18 meeting, which is almost never.

19 Q. Are you aware that the Advisory
20 Commission typically tries to hold a meeting, I
21 believe it's the second Friday per quarter?

22 A. As I've indicated in my declaration, my
23 understanding was they had a quarterly cadence,
24 I did not know anything about a second Friday.

25 Q. So you're not aware of -- as far as you