

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 MOTION TO COMPEL
NON-PARTY TENNESSEE SUPREME COURT
JUSTICES’ COMPLIANCE WITH SUBPOENA**

Plaintiff Dan McCaleb files this Motion to Compel pursuant to Fed. R. Civ. P. 45(g) and LR 7.01 and moves this Honorable Court for an Order compelling compliance with Subpoena that commands deposition testimony from Non-Party Tennessee Supreme Court Chief Justice Holly Kirby, Justice Jeffrey Bivins, Justice Roger Page, and Special Justice Sharon Lee (collectively the “Justices”).

In support of this Motion to Compel, McCaleb relies upon the Memorandum of Law filed herewith, along with the following attached exhibits:

- **Exhibit 1**, Michelle Long Deposition
- **Exhibit 2**, Gino Bulso Deposition

- **Exhibit 3**, Michelle Consiglio-Young Deposition
- **Exhibit 4**, Lang Wiseman Deposition
- **Exhibit 5**, James McQuaid Declaration
- **Exhibit 6**, Buck Dougherty Declaration
- **Exhibit 7**, Statement on the Record (CJ Kirby failure to appear)

1. The Justices’ remote depositions via Zoom were scheduled for this week on November 27, 28, 29, and 30. The Justices have not contested service of the four subpoenas and notices of deposition (collectively the “Subpoena”) served upon them on October 31, 2023.

2. However, the Justices filed a motion to quash the Subpoena or alternatively for a protective order on Thanksgiving Eve — 22 days after being served with the Subpoena and 1 business day before Chief Justice Kirby’s scheduled deposition on November 27. ECF No. 60.

3. Then after filing the motion, the Justices said they would not be appearing at their depositions this week to give testimony until they received a decision from the Court on the motion to quash.

4. But as more fully set forth in McCaleb’s Memorandum, merely filing — and resting on — a motion to quash was not an “adequate excuse” under Rule 45 for the Justices to then disobey the Subpoena and fail to appear at their scheduled depositions to give testimony when the Court had not ruled on the motion to quash.¹

¹ Although briefing has closed and the matter is ripe the Court has yet to rule on the Justices’ motion to quash the Subpoena, at or about the time of filing this motion to compel. *See* Justices’ Reply, ECF No. 64, filed on November 28, 2023.

5. Pursuant to LR 7.01(a)(1), Plaintiff's counsel's most recent communication with the Justices' counsel was email communication with attorney Cody Brandon on Monday, November 27, 2023, at approximately 9:15 am CDT. That email communication from Mr. Brandon is attached as **Exhibit 7** and is part of the Statement on the Record. At that time, Mr. Brandon said, "As we informed you on our call, none of the Justices will appear for deposition until we receive a decision on their Motion to Quash." See **Exhibit 7**, Statement on the Record. Thus, the relief McCaleb is requesting here is opposed by the non-party Justices.

RELIEF REQUESTED

Plaintiff Dan McCaleb respectfully requests that the Court grant his Motion to Compel and enter an Order compelling the Justices' compliance with the Subpoena that commands their deposition testimony.

November 30, 2023

Respectfully submitted,

/s/ M. E. Buck Dougherty III
M. E. Buck Dougherty III, TN BPR #022474
James McQuaid, *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
jmcquaid@libertyjusticecenter.org

Attorneys for Dan McCaleb,
Executive Editor of The Center Square

CERTIFICATE OF SERVICE

I, counsel for Plaintiff, hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record, via the Court's ECF system by email on this 30th day of November 2023:

JONATHAN SKRMETTI

Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207

Andrew C. Coulam
Michael M. Stahl
Robert W. Wison
andrew.coulam@ag.tn.gov
michael.stahl@ag.tn.gov
robert.wilson@ag.tn.gov

*Attorneys for Defendant
AOC Director Michelle Long*

Donna Green
Cody Brandon
Liz Evan
donna.green@ag.tn.gov
cody.brandon@ag.tn.gov
liz.evan@ag.tn.gov

*Attorneys for Non-Party
Tennessee Supreme Court Justices*

/s/ M.E. Buck Dougherty III

Exhibit

1

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:
MICHELLE LONG
Taken on behalf of the Plaintiff
October 25, 2023
Commencing at 9:04 a.m. CST

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

A P P E A R A N C E S

For the Plaintiff:

MR. M.E. BUCK DOUGHERTY III
Attorney at Law
Liberty Justice Center
440 North Wells Street, Suite 200
Chicago, IL 60654
(423) 326-7548
bdougherty@libertyjusticecenter.org

For the Defendant:

MR. MICHAEL M. STAHL
Assistant Attorney General
Office of the Attorney General & Reporter
PO Box 20207
Nashville, TN 37202-0207
(615) 741-3491
michael.stahl@ag.tn.gov

For the Deponent, Rachel Harmon:

MR. JOHN COKE
Attorney at Law
Administrative Office of the Courts
511 Union Street, Suite 100
Nashville, TN 37219

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

I N D E X

	Page
0Examination By Mr. Dougherty	5
Examination By Mr. Stahl	154
Further Examination By Mr. Dougherty	157

E X H I B I T S

(None marked.)

1 S T I P U L A T I O N S

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

The deposition of MICHELLE LONG was taken by counsel for the Plaintiff, at the offices of 500 Charlotte Avenue, Nashville, Tennessee, on October 25, 2023, by Notice for all purposes under the Federal Rules of Civil Procedure.

All formalities as to caption, notice, statement of appearance, et cetera, are waived. All objections, except as to the form of the questions, are reserved to the hearing, and that said deposition may be read and used in evidence in said cause of action in any trial thereon or any proceeding herein.

It is agreed that JENNIFER CHECUGA, LCR, RPR, and Court Reporter for the State of Tennessee, may swear the witness, and that the reading and signing of the completed deposition by the witness are not waived.

1 believe that is already part of this process.

2 So I don't have an opinion one way or the
3 other whether they should be open or closed, I
4 just look at the outcomes. And so I believe
5 that there is already process in place for the
6 outcomes for the public that promote the
7 administration of justice.

8 Q. And so are meetings -- is it your
9 understanding that Advisory Commission meetings
10 are open or closed?

11 A. For this particular commission, I
12 understand the history has been that at one
13 point they were open and at one point they were
14 closed.

15 Q. And at what point is it your
16 understanding on the history were they open?

17 A. It predates me. I want to say maybe
18 2017, 2018, but I am not certain.

19 Q. What is your understanding of history
20 wise when they became closed?

21 A. I don't know why they became closed.

22 Q. I didn't say "why," I said what is your
23 understanding of the process of getting closed
24 and why they became closed?

25 A. I don't know.

1 REPORTER'S CERTIFICATE


2
3 STATE OF TENNESSEE

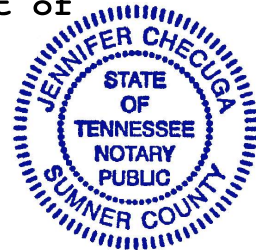
4 COUNTY OF SUMNER

5 I, JENNY CHECUGA, Licensed Court Reporter,
6 with offices in Nashville, Tennessee, and Registered
7 Professional Reporter, hereby certify that I reported
8 the foregoing deposition of MICHELLE LONG by machine
9 shorthand to the best of my skills and abilities, and
10 thereafter the same was reduced to typewritten form
11 by me.

12 I further certify that I am not related to
13 any of the parties named herein, nor their counsel,
14 and have no interest, financial or otherwise, in the
15 outcome of the proceedings.

16 I further certify that in order for this
17 document to be considered a true and correct copy, it
18 must bear my original signature and that any
19 unauthorized reproduction in whole or in part and/or
20 transfer of this document is not authorized, will not
21 be considered authentic, and will be in violation of
22 Tennessee Code Annotated 39-14-104, Theft of
23 Services.

24 
JENNY CHECUGA, LCR, RPR
Lexitas Legal
Licensed Court Reporter (TN)
Notary Public State of Tennessee



25 My Notary Commission Expires: 5/18/2027
LCR #690 - Expires: 6/30/2024

Exhibit

2

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

A P P E A R A N C E S

For the Plaintiff:

M. E. BUCK DOUGHERTY III
Attorney at Law
LIBERTY JUSTICE CENTER
440 N. Wells Street
Suite 200
Chicago, Illinois 60654
423.326.7548
Bdougherty@ljc.org

For the Defendant:

MICHAEL M. STAHL
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL & REPORTER
Federal Habeas Corpus Division
P.O. Box 20207
Nashville, Tennessee 37202
615.253.5463
Michael.stahl@ag.tn.gov

Also Present:

For Witness Bulso
ASHLEY CARTER
Attorney at Law
Senior Assistant Attorney General
STATE OF TENNESSEE
ATTORNEY GENERAL
315 Deaderick Street
Nashville, Tennessee 37243
615.741.7932

1 APPEARANCES CONTINUED:

2

3

For Witness Bulso
CAROLYN U. SMITH
Deputy Attorney General
Education and Employment Division
315 Deaderick Street
Nashville, Tennessee 37243
615.532.2578
Carolyn.Smith@ag.tn.gov

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

I N D E X

Page

Examination	
By Mr. Dougherty	6
By Mr. Stahl	77
By Mr. Dougherty	79
By Mr. Stahl	81

E X H I B I T S

(None marked)

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

S T I P U L A T I O N S

The deposition of GINO BULSO was taken by counsel for the Plaintiff, by Notice, at the John Sevier State Office Building, 500 Dr. Martin Luther King, Jr. Boulevard, Nashville, Tennessee, on October 9, 2023, for all purposes under the Federal Rules of Civil Procedure.

All formalities as to caption, notice, statement of appearance, et cetera, are waived. All objections, except as to the form of the question, are reserved for the hearing, and that said deposition may be read and used in evidence in said cause of action in any trial thereon or any proceeding herein.

It is agreed that SABA MC KINLEY, LCR, RPR, CRI, may swear the witness, and that the reading and signing of the completed deposition by the witness are waived.

1 BY MR. DOUGHERTY:

2 Q Can you describe the commission?

3 A A commission is a group of attorneys and judges
4 appointed by the Tennessee Supreme Court pursuant to
5 16-3-601 to assist it in modifying Rules of Civil and
6 Criminal Procedure.

7 Q We'll get to those different committees in a
8 moment.

9 So I think you said this already, but there are
10 members of the judiciary that serve on the commission?

11 A In an ex officio capacity, yes.

12 Q What does that mean?

13 A It means they're nonvoting members.

14 Q But they're on the actual Advisory Commission,
15 the judicial members?

16 A I'm not sure exactly how to answer that. I
17 know that the statute gives the Supreme Court the
18 authority to appoint members to the commission. I know
19 that we've got attorneys who vote on proposals that come
20 before the commission, and that we have judges who are
21 involved in the meetings but who do not actually vote.

22 When you say that they're members of the
23 commission, I'm not exactly sure I can answer that
24 specifically.

25 Q Have you ever gone to the AOC website and seen

1 Q Who was that?

2 A Michelle Consiglio.

3 Q So she's currently providing administrative
4 support. I think that's your testimony, correct?

5 A I believe she's currently on maternity leave.
6 But when she's not on maternity leave, yes, she is.

7 Q I think you're right. She'll be back in
8 November, is my understanding.

9 It's also your testimony when you joined the
10 Advisory Commission in 2016, Ms. Young was there
11 participating in your meetings?

12 A I believe so. I believe she was participating
13 then in the same respect that she participates now.

14 Q And that would be providing administrative
15 support?

16 A Yes.

17 Q From 2016 through 2022, during your time
18 serving on the commission, were any of those meetings
19 ever open to the public?

20 A I'm not sure.

21 Q How would you know if they were open to the
22 public?

23 A I mean, if someone had told me, I presume that
24 I would know.

25 Q If there were a public meeting notice still

1 operate as efficiently as possible, whether we should
2 use the committee structure, whether we should have
3 subcommittees, who we should perhaps assign to
4 committees to make sure that they're evenly and
5 appropriately staffed.

6 Q Okay. I think you said -- I want to make sure
7 I understood this.

8 Did you say in your earlier testimony that you
9 serve at the pleasure of the Tennessee Supreme Court?

10 A I did say that.

11 Q Is that language, is that in the statute?

12 A Yes.

13 Q It is?

14 A It is implicitly in 16-3-601.

15 Q I think, as I recall, the AOC director uses
16 that language, "Serves at the pleasure of the chief
17 justice of the Supreme Court"; would that be correct?

18 A I don't know.

19 Q But you're saying implicitly, you, as the
20 chair -- who do you serve at the pleasure of, the
21 Supreme Court or the Chief Justice?

22 A The Supreme Court.

23 Q Tell me how that is implicit. What does that
24 mean? What do you do vis-à-vis your relationship with
25 the Supreme Court members?

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

REPORTER'S CERTIFICATE

STATE OF TENNESSEE

COUNTY OF DAVIDSON

I, Saba Mc Kinley, court reporter, with offices in Clarksville, Tennessee, hereby certify that I reported the foregoing deposition of GINO BULSO by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I am not related to any of the parties named herein, nor related to their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

I further certify that in order for this document to be considered a true and correct copy, it must bear my original signature, and that any unauthorized reproduction in whole or in part and/or transfer of this document is not authorized, will not be considered authentic, and will be in violation of Tennessee Code Annotated 3-914-104, Theft of Services.



SABA MC KINLEY, LCR, RPR, CRI
Licensed Court Reporter
Registered Professional Reporter
Certified Reporting Instructor

LCR #843 - Expires: 6/30/2024

Exhibit

3

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

A P P E A R A N C E S

For the Plaintiff:

MR. M. E. BUCK DOUGHERTY, III
Attorney at Law
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, IL 60654
(312) 637-2280
bdougherty@libertyjusticecenter.org

For the Defendant:

MR. MICHAEL M. STAHL
Attorney at Law
Office of the Attorney General
PO Box 20207
Nashville, TN 37202-0207
(615) 741-3491
michael.stahl@ag.tn.gov

For the Administrative Office of the Courts:

MR. JOHN COKE
Attorney at Law
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219
john.coke@tncourts.gov

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

I N D E X

	Page
Examination By Mr. Dougherty	5
Examination By Mr. Stahl	73
Examination By Mr. Dougherty	81

E X H I B I T S

(None offered.)

1 S T I P U L A T I O N S

2
3
4 The deposition of MICHELLE CONSIGLIO-YOUNG
5 was taken by counsel for the Plaintiff, at the
6 offices of 500 Charlotte Avenue, Nashville,
7 Tennessee, on November 16, 2023, for all purposes
8 under the Tennessee Rules of Civil Procedure.

9 All formalities as to caption, notice,
10 statement of appearance, et cetera, are waived. All
11 objections, except as to the form of the questions,
12 are reserved to the hearing, and that said deposition
13 may be read and used in evidence in said cause of
14 action in any trial thereon or any proceeding herein.

15 It is agreed that MICHELLE CESSNA, LCR, RPR,
16 and Court Reporter for the State of Tennessee, may
17 swear the witness, and that the reading and signing
18 of the completed deposition by the witness are
19 waived.
20
21
22
23
24
25

1 of that, but I was aware that it had happened
2 and I checked it to be sure it was posted.

3 Q. Do you know who facilitated that public
4 meeting notice at the AOC office?

5 A. It was both our General Counsel John Coke
6 and Charlie Baldwin, who has assumed my role
7 essentially while I've been out on leave.

8 Q. Let's kind of backtrack a little bit.

9 So I think you said 2015 to 2016 you sat
10 in on some meetings?

11 A. Uh-huh.

12 Q. And the -- your recollection, they were
13 open to the public?

14 A. Yes.

15 Q. At what point did those Advisory
16 Commission meetings become closed to the
17 public?

18 A. I believe it was 2018.

19 Q. I'm sorry?

20 A. 2018. It was after I had taken over as
21 liaison. There was -- meetings were open to
22 the public, as far as I can recall. And there
23 was a meeting that we had that there was a
24 member of the public who had attended in person
25 who was there and became unruly and combative

1 with the Commission. And after that, the --
2 the Tennessee Supreme Court took the matter up
3 for discussion and then the meetings were
4 closed after that incident.

5 Q. And what -- where was this particular
6 meeting in 2018?

7 A. I wish I could recall the exact date. I
8 do believe it was 2018 and the meeting was at
9 the Administrative Office of the Courts, it was
10 in our conference room. And members of the
11 public would come periodically, sometimes we
12 didn't have any and sometimes some would
13 request to come.

14 And that particular meeting there was a
15 member of the public who attended, and he was
16 interested in a topic that was being discussed
17 by the Commission. And during that discussion,
18 he was speaking kind of out of term, you know,
19 without being called on or outside of the
20 public comment period that was allowed and
21 essentially became very assertive with the
22 members and -- and the meeting was stopped and
23 he was asked to leave.

24 Q. Do you recall how many members of the
25 public were at that particular meeting in 2018?

1 A. I believe it was just that gentleman and
2 his son.

3 Q. Do you recall his name?

4 A. I don't. I'm sorry.

5 Q. When you say "combative," do you mean --
6 what do you mean? Was it verbal combativeness
7 --

8 A. Yes.

9 Q. -- or physical?

10 A. It was verbal. He did leave his chair --
11 or, you know, get up from his chair while he
12 was having this discussion, which kind of
13 escalated the -- the tone that was going on in
14 there in his interaction with the members. So
15 it -- yeah, it just became more of an
16 aggressive action on his part. Clearly he was
17 upset with a topic that was being discussed.

18 Q. Do you recall the topic?

19 A. No.

20 Q. Do you recall who the chair was at that
21 time at that meeting?

22 A. I believe the chair was Allen Wade then.

23 Q. Is Mr. Wade currently a member on the
24 Advisory Commission?

25 A. Yes.

1 Q. Were there four quarterly meetings in
2 2018?

3 A. Yes. As far as I remember there were.

4 Q. And you were at this meeting in 2018?

5 A. I was at that meeting, yes.

6 Q. Who was the chief justice of the Supreme
7 Court at that time in 2018?

8 A. It was Justice Jeff Bivins at that time.

9 Q. So did the Chairman Wade ask this person
10 that was being verbal -- verbally combative to
11 leave? Did he -- did the person leave?

12 A. I don't recall who exactly asked him to
13 leave; however, he was asked to leave. We did
14 have to have several people help escort him
15 out. And I can't remember if security was
16 called at that meeting or not. I -- I do
17 believe that building security was made aware.

18 Q. Do you recall if any formal charges,
19 criminal charges were brought against this
20 person?

21 A. I -- I do not believe that there were
22 formal criminal charges.

23 Q. So the person that was verbally combative
24 was never prosecuted to the best of your
25 recollection?

1 A. Correct, I do not believe that he was.

2 Q. And so, I guess, was there a member of
3 the Tennessee Supreme Court that was attending
4 that particular meeting?

5 A. Yes.

6 Q. And who was that?

7 A. It was Justice Holly Kirby.

8 Q. So Justice Kirby was the Supreme Court
9 liaison on the Commission in 2018?

10 A. She was.

11 Q. Justice Kirby is now the Chief Justice of
12 the Supreme Court?

13 A. Yes, she is.

14 Q. So you said something about the -- the
15 justices at that point, they made the call,
16 they made the decision to close meetings.
17 Explain what -- explain what happened after
18 that.

19 A. After the meeting where the person got
20 combative -- and Justice Kirby was in
21 attendance in that meeting, so she had seen it
22 firsthand, the -- as far as I am aware, she
23 took that matter back to the Supreme Court for
24 discussion, and we at the AOC were told that
25 the meetings would no longer be open after

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

REPORTER'S CERTIFICATE

STATE OF TENNESSEE

COUNTY OF SUMNER

I, MICHELLE CESSNA, Licensed Court Reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of MICHELLE CONSIGLIO-YOUNG by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

I further certify that in order for this document to be considered a true and correct copy, it must bear my original signature and that any unauthorized reproduction in whole or in part and/or transfer of this document is not authorized, will not be considered authentic, and will be in violation of Tennessee Code Annotated 39-14-104, Theft of Services.



MICHELLE CESSNA, LCR, RPR
Lexitas Legal
Licensed Court Reporter (TN)
Notary Public State of Tennessee

LCR #864 - Expires: 6/30/2024

Exhibit

4

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

A P P E A R A N C E S

For the Plaintiff:

MR. M. E. BUCK DOUGHERTY, III
MR. JAMES MCQUAID
Attorneys at Law
Liberty Justice Center
440 N. Wells Street, Suite 200
Chicago, IL 60654
(312) 637-2280
bdougherty@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

For the Defendant:

MR. MICHAEL M. STAHL
Attorney at Law
Office of the Attorney General
PO Box 20207
Nashville, TN 37202-0207
(615) 741-3491
michael.stahl@ag.tn.gov

Also Present:

MS. BRIDGET CONLAN

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

I N D E X

	Page
Examination By Mr. Dougherty	5
Examination By Mr. Stahl	66
Examination By Mr. Dougherty	69

E X H I B I T S

	Page
Exhibit No. 2 Expert report	17

1 S T I P U L A T I O N S

2
3
4 The deposition of THOMAS LANG WISEMAN was
5 taken by counsel for the Plaintiff, whereupon all
6 parties participated via videoconference on November
7 21, 2023, for all purposes under the Tennessee Rules
8 of Civil Procedure.

9 All formalities as to caption, notice,
10 statement of appearance, et cetera, are waived. All
11 objections, except as to the form of the questions,
12 are reserved to the hearing, and that said deposition
13 may be read and used in evidence in said cause of
14 action in any trial thereon or any proceeding herein.

15 It is agreed that MICHELLE CESSNA, LCR, RPR,
16 and Court Reporter for the State of Tennessee, may
17 swear the witness, and that the reading and signing
18 of the completed deposition by the witness are not
19 waived.
20
21
22
23
24
25

1 A. The Supreme Court.

2 Q. And is that by statute?

3 A. Yes.

4 Q. Now, tell me again the years that you
5 served on the Advisory Commission.

6 A. I would -- in order to be specific I
7 would refer you to the information that I put
8 in my report as I -- I've said we'd go back
9 and -- and look at that, but I believe it was
10 2015 until late 2018.

11 Q. Okay. And do you recall -- during 2018
12 before you resigned, do you recall actually
13 participating in all four quarterly meetings
14 that years in 2018?

15 A. I don't have a specific recollection but
16 it would have been unusual for me to miss
17 something.

18 Q. I just didn't know if you resigned
19 midstream before all the committees had
20 actually -- I mean, excuse me, all the meetings
21 had taken place. That's kind of why I was
22 asking that about 2018.

23 Do you recall what point in 2018 you
24 resigned? Was that at the end of the year?

25 A. It would have been certainly after the

1 Amendment right, the government must show a
2 compelling interest that is narrowly tailored.

3 Do you agree with that?

4 MR. STAHL: Object to the form.

5 THE WITNESS: I think that any
6 litigant could avail themselves of potential
7 compelling interest to overcome the presumption
8 that a criminal trial would be open.

9 BY MR. DOUGHERTY:

10 Q. Are you aware of an incident in 2018
11 where a member of the public became verbally
12 combative with questions during a Tennessee
13 Advisory Commission that was open to the
14 public?

15 A. I'm not.

16 Q. You're not aware of that?

17 A. I do not recall that.

18 Q. Do you recall Michelle Consiglio-Young
19 serving as the AOC liaison in 2018?

20 A. I do not.

21 Q. Do you -- I think we discussed this
22 earlier. Do you -- do you know Michelle
23 Consiglio-Young?

24 A. I know her professionally.

25 Q. And tell me about that professional

1 A. I don't know that there's any objective
2 way to determine whether it's superior or not.
3 You know, obviously when you're making
4 judgments about the success of a particular
5 body, you're weighing that against outcomes
6 that did not occur by virtue of the fact that
7 you -- you can't know how something would have
8 turned out had the rules been differently.

9 But I think, again, there are
10 different -- there are different policy choices
11 to be made in this space. There are some
12 benefits and detriments to -- that attach to
13 both of those choices. But in my experience,
14 the admission -- the Advisory Commission
15 process in Tennessee has worked well, and so I
16 don't have any -- I don't have any problems
17 with it. And frankly, I think it's -- it's
18 probably better than the federal system, in my
19 judgment.

20 Q. What other Tennessee State boards and
21 commissions other than the Advisory Commission
22 work just fine with their meetings being open
23 to the public?

24 A. Say the question again.

25 Q. Yeah. Other Tennessee State boards and

1 commissions other than the Advisory Commission
2 work fine despite, you know, the public has
3 open access, they're open. Why are they okay
4 and the Advisory Commission is not?

5 A. Well, I think you need to ask the Supreme
6 Court that. Again, it's a policy choice, and I
7 think there are obviously differences in the
8 various commissions. I'm not in position to
9 tell you whether those -- those other
10 commissions work -- to your words, work fine or
11 not. I suspect that the Supreme Court must be
12 satisfied with them the way that they operate
13 if they continue to operate that way, but it's
14 ultimately up to the Court to decide.

15 Q. Are you familiar with the ADR Commission
16 in Tennessee?

17 A. Vaguely. Just by virtue and fact that
18 I'm listed as a mediator and turn in my
19 paperwork every couple years.

20 Q. What do you mean? Explain that.

21 A. I'm listed as a mediator, Rule 31
22 mediator, so you have to submit your -- not
23 sure -- your renewal of your -- your listing
24 every couple years to the ADR Commission.

25 Q. Were you aware that the ADR is made up of

1 REPORTER'S CERTIFICATE


2
3 STATE OF TENNESSEE

4 COUNTY OF SUMNER

5 I, MICHELLE CESSNA, Licensed Court Reporter,
6 with offices in Nashville, Tennessee, hereby certify
7 that I reported the foregoing deposition of THOMAS
8 LANG WISEMAN by machine shorthand to the best of my
9 skills and abilities, and thereafter the same was
10 reduced to typewritten form by me.

11 I further certify that I am not related to
12 any of the parties named herein, nor their counsel,
13 and have no interest, financial or otherwise, in the
14 outcome of the proceedings.

15 I further certify that in order for this
16 document to be considered a true and correct copy, it
17 must bear my original signature and that any
18 unauthorized reproduction in whole or in part and/or
19 transfer of this document is not authorized, will not
20 be considered authentic, and will be in violation of
21 Tennessee Code Annotated 39-14-104, Theft of
22 Services.

22 
23 MICHELLE CESSNA, LCR, RPR -
24 Lexitas Legal
25 Licensed Court Reporter (TN)
Notary Public State of Tennessee

LCR #864 - Expires: 6/30/2024

Exhibit

5

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


DECLARATION OF JAMES MCQUAID

I, James McQuaid, declare as follows:

1. I am a US citizen over the age of 18 years. If called to testify in this matter, I would do so as follows:
2. I am counsel of record for Plaintiff Dan McCaleb in this case.
3. In a series of emails on September 28, 2023, Robert Wilson and Andrew Coulam, counsel for Defendant, agreed to accept service of the subpoenas for depositions of the Supreme Court Justices Bivens, Page, Kirby, and Lee (“the Subpoenas”). An excerpt of that email chain containing a true and correct copy of the relevant emails is attached to this declaration as **Exhibit A**.
4. On October 31 2023, I electronically served the Subpoenas on attorneys Wilson and Coulam, as well as their colleague Michael Stahl. A true and correct copy of that email is attached as **Exhibit B**.
5. The Subpoenas and their proofs of service are attached to this Declaration as **Exhibit C**.

Under penalty of perjury, I affirm that the foregoing is true and correct.

November 26, 2023


James McQuaid

Exhibit


A



From: Buck Dougherty <bdougherty@libertyjusticecenter.org>
Sent: Thursday, September 28, 2023 7:15 PM
To: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: RE: McCaleb v. Long - Notices of Deposition

Let me know what time for a call tomorrow.

Prof. Barton confirmed his zoom depo next Tuesday. So, Barton and McCaleb have confirmed their zoom depositions per your notices.

Buck Dougherty Senior Counsel Liberty Justice Center	<ul style="list-style-type: none">  312-637-2280 (Main)  423-326-7548 (Cell)  bdougherty@libertyjusticecenter.org  libertyjusticecenter.org
---	---



From: Andrew Coulam <Andrew.Coulam@ag.tn.gov>
Sent: Thursday, September 28, 2023 7:04 PM
To: Buck Dougherty <bdougherty@libertyjusticecenter.org>; Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: Re: McCaleb v. Long - Notices of Deposition

Yes, to be clear, our office will accept service of the subpoenas.

It was our understanding that we had agreed on the depositions of Long and Harmon for next week and we were wondering why we had not received a notice and subpoena. That was one of the reasons for my call. So, we can tell Long and Harmon that their depositions for next week are off and will have to be rescheduled? If so, we'll inquire about their availability for the remainder of October.

We can discuss tomorrow about extending another discovery deadline to allow you to depose any expert(s) we disclose. We're obviously not trying to prevent you from deposing any such expert.

Andrew C. Coulam | Deputy Attorney General
 Public Interest Division
 Office of Tennessee Attorney General

Mailing Address:

P.O. Box 20207, Nashville, TN 37202-0207

p. [615.741.1868](tel:615.741.1868)andrew.coulam@ag.tn.gov**From:** Buck Dougherty <bdougherty@libertyjusticecenter.org>**Sent:** Thursday, September 28, 2023 6:15 PM**To:** Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>**Cc:** Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>**Subject:** RE: McCaleb v. Long - Notices of Deposition





1. Because Bulso can only do his deposition on **October 9** (and you were uncertain of his availability at the conference), it makes more sense practically and logistically to try and do Bulso, Long, and Harmon together in Nashville that week at your office. McCaleb's is on the 13th, and I will be in Chicago for that. So, if Bulso is on Monday October 9, which is fine with me, let me know if Long and Harmon can do 10, 11, and/or 12 (in any order). I do not want to depose Harmon and Long next week now that Bulso's schedule has been disclosed to us. As you know, I'm in Memphis and would prefer to depose the State folks you've stipulated to at your office the same week so I'm not making multiple trips. So please confirm Long and Harmon's availability as I've suggested.
2. I understand you object to the depositions themselves. I'm just asking about accepting service of process. Thanks for agreeing to accept service.
3. We've both already had 30-day extensions of experts. I think we probably need to discuss on a call tomorrow. While it normally might not be an issue, pushing your expert deadline back another 30 days as you've requested exceeds the discovery cutoff of Oct. 31 per the scheduling order, and we are obviously going to have to depose that individual. So, I think your request is much more than a simple 30-day extension; it's actually a request to push back the discovery deadline itself, which is currently set for Oct. 31. I'm available to jump on a video conference tomorrow to discuss, just let me know.

Thanks, Buck

Buck Dougherty

Senior Counsel

Liberty Justice Center

 [312-637-2280](tel:312-637-2280) (Main)
 [423-326-7548](tel:423-326-7548) (Cell)
 bdougherty@libertyjusticecenter.org
 libertyjusticecenter.org



From: Robert W. Wilson <Robert.Wilson@ag.tn.gov>
Sent: Thursday, September 28, 2023 6:01 PM
To: Buck Dougherty <bdougherty@libertyjusticecenter.org>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: RE: McCaleb v. Long - Notices of Deposition

Buck,

You agreed to depose Director Long on October 4. That date is still available for you to depose her. If you need to reschedule, then we will need to contact Director Long regarding her available dates.

Our Office will accept service for the subpoenas. We still object to the relevance of any Tennessee Supreme Court Justice being deposed in this matter.

We also need to know if Plaintiff objects to the expert disclosure deadline extension by 30 days, to November 1, 2023.

Thank you,

-Robert

Robert W. Wilson
 Senior Assistant Attorney General
 Memphis Division
 Office of Tennessee Attorney General
 40 South Main Street, Suite 1014
 Memphis, TN 38103-1877
 Phone: (901) 543-9031
 Email: Robert.Wilson@ag.tn.gov



From: Buck Dougherty <bdougherty@libertyjusticecenter.org>
Sent: Thursday, September 28, 2023 5:49 PM
To: Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: RE: McCaleb v. Long - Notices of Deposition

Please confirm via this email before close of business tomorrow on Friday Sep. 29 per our conference that you agree to accept service of process for the subpoenas for depositions for the 4 TN Supreme Court justices we've previously discussed.

Best, Buck

Buck Dougherty

Senior Counsel

☎ [312-637-2280](tel:312-637-2280) (Main)

☎ [423-326-7548](tel:423-326-7548) (Cell)

Case 3:22-cv-00439 Document 67-5 Filed 11/30/23 Page 6 of 37 PageID #: 1822

Exhibit

B

McCaleb v Long

James McQuaid <jmcquaid@libertyjusticecenter.org>

Tue 10/31/2023 4:48 PM

To:andrew.coulam@ag.tn.gov <Andrew.Coulam@ag.tn.gov>;Robert.Wilson@ag.tn.gov <Robert.Wilson@ag.tn.gov>;Stahl <Michael.Stahl@ag.tn.gov>

Cc:Buck Dougherty <bdougherty@libertyjusticecenter.org>

 8 attachments (3 MB)

McCaleb notice of kirby dep.pdf; McCaleb notice of bivens dep.pdf; McCaleb notice of lee dep.pdf; McCaleb notice of page dep.pdf; kirby subpoena.pdf; bivens subpoena.pdf; Lee subpoena.pdf; Page subpoena.pdf;

Please see the attached Notices of Deposition and corresponding Subpoenas.

Exhibit

C

UNITED STATES DISTRICT COURT

for the

Middle District of Tennessee

Dan McCaleb

Plaintiff

v.

Michelle Long

Defendant

Civil Action No. 3:22-cv-00439

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Holly Kirby

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (via Zoom) and Date and Time (11/27/2023 9:00 am)

The deposition will be recorded by this method: normal stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/31/2023

CLERK OF COURT

OR

/s/ M.E. Buck Dougherty III

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiff

Dan McCaleb, who issues or requests this subpoena, are:

M.E. Buck Dougherty III, 440 N. Wells St., Ste. 200, Chicago IL 60654
bdougherty@libertyjusticecenter.org, 312-637-2280

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed, Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00439

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Holly Kirby
on *(date)* 10/31/2023 .

I served the subpoena by delivering a copy to the named individual as follows: Emailed to counsel for
Defendants, who had previously represented that they were authorized to accept service
on *(date)* 10/31/2023 ; or


I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ 40 .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 11/21/2023



Server's signature

James J McQuaid
Printed name and title
440 N Wells St., Ste. 200
Chicago, IL 60654

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

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

NOTICE OF DEPOSITION OF HOLLY KIRBY

Pursuant to the Federal Rules of Civil Procedure, Plaintiff, Dan McCaleb, Executive Editor of The Center Square, through counsel, gives notice that he will take the deposition of Chief Justice Holly Kirby on November 27, 2023, beginning at 9:00 AM Central Time. Counsel for the parties and the witness may attend the deposition through a video conference platform such as Zoom. All participants will be sent a meeting invitation via email which will allow connection to the deposition and will provide the password/meeting ID for participation. The deposition will be taken by normal stenographic means before a court reporter duly authorized to take sworn testimony. By agreement of the parties, the witness may be sworn remotely and will be bound by that oath as if given in person. The oath to be administered to the witness is attached. The deposition will continue until completed or until otherwise agreed by counsel.

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474
James McQuaid, *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
jmcquaid@libertyjusticecenter.org

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

CERTIFICATE OF SERVICE

I, counsel for Plaintiff, hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record via email on this 31st day of October, 2023:

JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Andrew C. Coulam, *Deputy Attorney General*
Michael M. Stahl, *Senior Assistant Attorney General*
Robert W. Wison, *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
Robert.wilson@ag.tn.gov

/s/ M.E. Buck Dougherty III

Remote Witness Oath

Do you solemnly swear or affirm that the testimony you are about to give in this case is the truth, the whole truth and nothing but the truth so help you God. Do you solemnly swear or affirm that you are not consulting and will not consult any outside sources or information during the deposition such as cell phone, smartphone, computer, the internet, any text or instant messaging service, e-mail, any chat room, blog, or website such as Facebook, Myspace, LinkedIn, YouTube, or Twitter to communicate with anyone or to obtain any information or consultation in conjunction with your testimony.

UNITED STATES DISTRICT COURT

for the

Middle District of Tennessee

Dan McCaleb

Plaintiff

v.

Michelle Long

Defendant

Civil Action No. 3:22-cv-00439

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Jeffrey Bivens

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (via Zoom) and Date and Time (11/28/2023 9:00 am)

The deposition will be recorded by this method: normal stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/31/2023

CLERK OF COURT

OR

/s/ M.E. Buck Dougherty III

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiff

Dan McCaleb, who issues or requests this subpoena, are:

M.E. Buck Dougherty III, 440 N. Wells St., Ste. 200, Chicago IL 60654
bdougherty@libertyjusticecenter.org, 312-637-2280

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed, Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00439

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Jeffrey Bivens
on *(date)* 10/31/2023 .

I served the subpoena by delivering a copy to the named individual as follows: Emailed to counsel for
Defendants, who had previously represented that they were authorized to accept service
on *(date)* 10/31/2023 ; or


I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ 40 .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 11/21/2023



Server's signature

James J McQuaid
Printed name and title
440 N Wells St., Ste. 200
Chicago, IL 60654

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

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

NOTICE OF DEPOSITION OF JEFFREY BIVENS

Pursuant to the Federal Rules of Civil Procedure, Plaintiff, Dan McCaleb, Executive Editor of The Center Square, through counsel, gives notice that he will take the deposition of Justice Jeffrey Bivens on November 28, 2023, beginning at 9:00 AM Central Time. Counsel for the parties and the witness may attend the deposition through a video conference platform such as Zoom. All participants will be sent a meeting invitation via email which will allow connection to the deposition and will provide the password/meeting ID for participation. The deposition will be taken by normal stenographic means before a court reporter duly authorized to take sworn testimony. By agreement of the parties, the witness may be sworn remotely and will be bound by that oath as if given in person. The oath to be administered to the witness is attached. The deposition will continue until completed or until otherwise agreed by counsel.

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474
James McQuaid, *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
jmcquaid@libertyjusticecenter.org

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

CERTIFICATE OF SERVICE

I, counsel for Plaintiff, hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record via email on this 31st day of October, 2023:

JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Andrew C. Coulam, *Deputy Attorney General*
Michael M. Stahl, *Senior Assistant Attorney General*
Robert W. Wison, *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
Robert.wilson@ag.tn.gov

/s/ M.E. Buck Dougherty III

Remote Witness Oath

Do you solemnly swear or affirm that the testimony you are about to give in this case is the truth, the whole truth and nothing but the truth so help you God. Do you solemnly swear or affirm that you are not consulting and will not consult any outside sources or information during the deposition such as cell phone, smartphone, computer, the internet, any text or instant messaging service, e-mail, any chat room, blog, or website such as Facebook, Myspace, LinkedIn, YouTube, or Twitter to communicate with anyone or to obtain any information or consultation in conjunction with your testimony.

UNITED STATES DISTRICT COURT

for the

Middle District of Tennessee

Dan McCaleb

Plaintiff

v.

Michelle Long

Defendant

Civil Action No. 3:22-cv-00439

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Sharon Lee

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (via Zoom) and Date and Time (11/29/2023 9:00 am)

The deposition will be recorded by this method: normal stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/31/2023

CLERK OF COURT

OR

/s/ M.E. Buck Dougherty III

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiff

Dan McCaleb, who issues or requests this subpoena, are:

M.E. Buck Dougherty III, 440 N. Wells St., Ste. 200, Chicago IL 60654
bdougherty@libertyjusticecenter.org, 312-637-2280

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed, Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00439

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Sharon Lee
on *(date)* 10/31/2023 .

I served the subpoena by delivering a copy to the named individual as follows: Emailed to counsel for
Defendants, who had previously represented that they were authorized to accept service
on *(date)* 10/31/2023 ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ 40 .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 11/21/2023



Server's signature

James J McQuaid
Printed name and title
440 N Wells St., Ste. 200
Chicago, IL 60654

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

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

NOTICE OF DEPOSITION OF SHARON LEE

Pursuant to the Federal Rules of Civil Procedure, Plaintiff, Dan McCaleb, Executive Editor of The Center Square, through counsel, gives notice that he will take the deposition of Retired Justice Sharon Lee on November 29, 2023, beginning at 9:00 AM Central Time. Counsel for the parties and the witness may attend the deposition through a video conference platform such as Zoom. All participants will be sent a meeting invitation via email which will allow connection to the deposition and will provide the password/meeting ID for participation. The deposition will be taken by normal stenographic means before a court reporter duly authorized to take sworn testimony. By agreement of the parties, the witness may be sworn remotely and will be bound by that oath as if given in person. The oath to be administered to the witness is attached. The deposition will continue until completed or until otherwise agreed by counsel.

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474
James McQuaid, *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
jmcquaid@libertyjusticecenter.org

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

CERTIFICATE OF SERVICE

I, counsel for Plaintiff, hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record via email on this 31st day of October, 2023:

JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Andrew C. Coulam, *Deputy Attorney General*
Michael M. Stahl, *Senior Assistant Attorney General*
Robert W. Wison, *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
Robert.wilson@ag.tn.gov

/s/ M.E. Buck Dougherty III

Remote Witness Oath

Do you solemnly swear or affirm that the testimony you are about to give in this case is the truth, the whole truth and nothing but the truth so help you God. Do you solemnly swear or affirm that you are not consulting and will not consult any outside sources or information during the deposition such as cell phone, smartphone, computer, the internet, any text or instant messaging service, e-mail, any chat room, blog, or website such as Facebook, Myspace, LinkedIn, YouTube, or Twitter to communicate with anyone or to obtain any information or consultation in conjunction with your testimony.

UNITED STATES DISTRICT COURT

for the

Middle District of Tennessee

Dan McCaleb

Plaintiff

v.

Michelle Long

Defendant

Civil Action No. 3:22-cv-00439

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Roger Page

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (via Zoom) and Date and Time (11/30/2023 9:00 am)

The deposition will be recorded by this method: normal stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/31/2023

CLERK OF COURT

OR

/s/ M.E. Buck Dougherty III

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiff

Dan McCaleb, who issues or requests this subpoena, are:

M.E. Buck Dougherty III, 440 N. Wells St., Ste. 200, Chicago IL 60654
bdougherty@libertyjusticecenter.org, 312-637-2280

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed, Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00439

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Roger Page
on *(date)* 10/31/2023 .

I served the subpoena by delivering a copy to the named individual as follows: Emailed to counsel for
Defendants, who had previously represented that they were authorized to accept service
on *(date)* 10/31/2023 ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ 40 .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 11/21/2023



Server's signature

James J McQuaid
Printed name and title
440 N Wells St., Ste. 200
Chicago, IL 60654

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

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

NOTICE OF DEPOSITION OF ROGER PAGE

Pursuant to the Federal Rules of Civil Procedure, Plaintiff, Dan McCaleb, Executive Editor of The Center Square, through counsel, gives notice that he will take the deposition of Justice Roger Page on November 30, 2023, beginning at 9:00 AM Central Time. Counsel for the parties and the witness may attend the deposition through a video conference platform such as Zoom. All participants will be sent a meeting invitation via email which will allow connection to the deposition and will provide the password/meeting ID for participation. The deposition will be taken by normal stenographic means before a court reporter duly authorized to take sworn testimony. By agreement of the parties, the witness may be sworn remotely and will be bound by that oath as if given in person. The oath to be administered to the witness is attached. The deposition will continue until completed or until otherwise agreed by counsel.

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474
James McQuaid, *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
jmcquaid@libertyjusticecenter.org

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

CERTIFICATE OF SERVICE

I, counsel for Plaintiff, hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record via email on this 31st day of October, 2023:

JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Andrew C. Coulam, *Deputy Attorney General*
Michael M. Stahl, *Senior Assistant Attorney General*
Robert W. Wison, *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
Robert.wilson@ag.tn.gov

/s/ M.E. Buck Dougherty III

Remote Witness Oath

Do you solemnly swear or affirm that the testimony you are about to give in this case is the truth, the whole truth and nothing but the truth so help you God. Do you solemnly swear or affirm that you are not consulting and will not consult any outside sources or information during the deposition such as cell phone, smartphone, computer, the internet, any text or instant messaging service, e-mail, any chat room, blog, or website such as Facebook, Myspace, LinkedIn, YouTube, or Twitter to communicate with anyone or to obtain any information or consultation in conjunction with your testimony.

Exhibit

6

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

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

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 Frensey

DECLARATION OF M. E. BUCK DOUGHERTY III

Pursuant to 28 U.S.C. § 1746, I, M. E. Buck Dougherty III, declare:

1. I am a United States citizen over the age of 18 years. If called upon to testify in this matter, I would do so as follows:

2. I am a licensed Tennessee attorney and counsel of record in this case on behalf of the Plaintiff Dan McCaleb.

3. The parties have taken seven (7) total depositions thus far, as follows:

- October 3, 2023 (remote) – Prof. Benjamin Barton, Plaintiff’s Expert
- October 9, 2023 (in-person) – Gino Bulso, Chair Advisory Commission
- October 13, 2023 (remote) – Plaintiff Dan McCaleb

- October 24, 2023 (in-person) – AOC Deputy Director Rachel Harmon
- October 25, 2023 (in-person) – Defendant AOC Director Michelle Long
- November 16, 2023 (in-person) – AOC liaison Michelle Consiglio-Young
- November 21, 2023 (remote) – Lang Wiseman, Defendant’s Expert

4. Prior to the scheduled depositions of Chief Justice Kirby, Justice Bivins, Justice Page, and Special Justice Lee (collectively “Justices”), I instructed my employer, Liberty Justice Center, to tender \$40 checks to the Justices’ counsel for their attendance at the noticed depositions on November 27, 28, 29, and 30.

Attached as **Exhibit A** are copies of the checks, along with my correspondence.

5. On November 21, 2023, at approximately 1:30 pm CDT, I along with my colleague, James McQuaid, participated in a video conference call with counsel for the Justices regarding their Motion to Quash depositions. Counsel for the Justices participating on the call included Donna Green, Cody Brandon, and Liz Evan. I do not recall counsel for Defendant Michelle Long (Andrew Coulam, Michael Stahl, and Robert Wilson) participating on this video call.

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

Executed on November 27, 2023
Lakeland, Tennessee



M. E. Buck Dougherty III
LIBERTY JUSTICE CENTER

Exhibit

A

LIBERTY JUSTICE CENTER

440 N WELLS ST STE 200
CHICAGO, IL 60654-4550

1078

70-480/819 IL
11978

DATE Nov 10, 2023

PAY TO THE ORDER OF Chief Justice Holly Kirby

\$ 40.00

Forty and 00/100

DOLLARS



LIBERTY JUSTICE CENTER

440 N WELLS ST STE 200
CHICAGO, IL 60654-4550

1079

70-480/819 IL
11978

DATE Nov 10, 2023

PAY TO THE ORDER OF Justice Roger Page

\$ 40.00

Forty and 00/100

DOLLARS



BANK OF AMERICA

ACH R/T 081904808

McCaleb v. Long

LIBERTY JUSTICE CENTER

440 N WELLS ST STE 200
CHICAGO, IL 60654-4550

1080

70-480/819 IL
11978

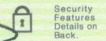
DATE Nov 10, 2023

PAY TO THE ORDER OF Justice Jeffrey Brown

\$ 40.00

Forty and 00/100

DOLLARS



LIBERTY JUSTICE CENTER

440 N WELLS ST STE 200
CHICAGO, IL 60654-4550

1081

70-480/819 IL
11978

DATE Nov 10, 2023

PAY TO THE ORDER OF Justice Shannon Lee

\$ 40.00

Forty and 00/100

DOLLARS



BANK OF AMERICA

ACH R/T 081904808

McCaleb v. Long

FOR daily witness fee-deposit
pursuant to 28 C.S.C. R21

⑈001081⑈ ⑆081904808⑆ 291031728377⑈



10 November 2023

Donna L. Green, Managing Attorney
Law Enforcement and Special
Prosecutions Division
Office of the Tennessee Attorney General
P.O. Box 20207
Nashville, Tennessee 37202-0207

*RE: Daily witness deposition fee pursuant to 28 U.S.C. 1821
McCaleb v. Long No. 3:22 -cv-00439*

Dear Ms. Green,

Enclosed, please find four checks in the amount of \$40.00 each made out to the following pursuant to 28 U.S.C 1821 daily witness deposition fees:

1. Chief Justice Holly Kirby
2. Justice Roger Page
3. Justice Jeffrey Bivens
4. Justice Sharon Lee

Sincerely,

M.E. Buck Dougherty, III
Senior Counsel
Liberty Justice Center

Exhibit

7

McCALEB

vs.

LONG

STATEMENT ON THE RECORD

November 27, 2023

1
2 IN THE UNITED STATES DISTRICT FOR
3 THE MIDDLE DISTRICT OF TENNESSEE
4 NASHVILLE DIVISION

5 DAN McCALEB, Executive Editor
6 of THE CENTER SQUARE,

7 Plaintiff,

8 vs.

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

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

14 Defendant.

15 STATEMENT FOR THE RECORD

16
17 Scheduled Videoconference
18 Deposition of:

19 CHIEF JUSTICE HOLLY KIRBY

20 November 27, 2023
21
22

23 LexitasLegal
24 Jerri L. Porter, RPR, CRR, LCR
25 555 Marriott Drive
Nashville, Tennessee 37214
(615) 595-0073

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

A P P E A R A N C E S

For the Plaintiff:

M. E. BUCK DOUGHERTY III
JAMES McQUAID
Attorneys at Law
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
312-637-2280
bdougherty@libertyjusticecenter.org
jmcquaid@libertyjusticecenter.org

For the Defendant:

NO APPEARANCE

Also present:

Bridget Conlan, Intern

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

E X H I B I T S

Page

Exhibit No. 1	4
Collective	
Kirby Notice of Deposition, Subpoena,	
Email correspondence	
Exhibit No. 2	4
11/27/23 Dougherty/Brandon	
Email correspondence	

1 * * *

2 MR. DOUGHERTY: So, it's Monday,
3 November 27th, 2023, approximately 9:22 a.m.
4 Central Standard Time.

5 My name is Buck Dougherty, attorney with
6 Liberty Justice Center, on behalf of the plaintiff,
7 Dan McCaleb, and my colleague, James McQuaid. Go
8 ahead, James.

9 MR. McQUAID: James McQuaid,
10 M-c-Q-u-a-i-d, attorney for plaintiff.

11 MR. DOUGHERTY: We're here today for the
12 remote Zoom deposition of Chief Justice Holly Kirby.

13 I'd like to mark into the record as
14 Exhibit 1 Chief Justice Kirby's notice of deposition
15 for today as well as her subpoena.

16 (WHEREUPON, a document was marked as
17 Exhibit Number 1.)

18 MR. DOUGHERTY: And then as Exhibit
19 Number 2, I would like to mark into the record email
20 correspondence that I had this morning with
21 Chief Justice Kirby's attorneys.

22 (WHEREUPON, a document was marked as
23 Exhibit Number 2.)

24 MR. McQUAID: They received the Zoom
25 link invitation for this deposition that was

1 scheduled to begin at 9:00 a.m. Central Standard
2 Time and the Justice's counsel informed us that they
3 were not -- would not be appearing today, that
4 Justice Kirby would not be appearing today. And
5 that is all I have for the record.

6 (The proceedings concluded at 9:25 a.m.
7 Central Standard Time.)

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

CERTIFICATE OF NONAPPEARANCE

FOR THE DEPOSITION OF

CHIEF JUSTICE HOLLY KIRBY

I, Jerri L. Porter, RPR, CRR, CSR,
LCR 335, with offices in Nashville, Tennessee, do
hereby certify I appeared remotely, on
November 27, 2023, at 8:45 a.m. Central Standard
Time;

That present were Attorneys Buck
Dougherty and James McQuaid, Attorneys at Law, and
myself;

That as of 9:25 a.m. Central Standard
Time Chief Justice Holly Kirby had not appeared for
the deposition.

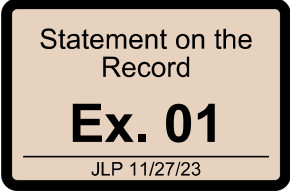
In witness whereof, I have hereunto set
my hand and affixed my seal this 27th day of
November, 2023.



Handwritten signature of Jerri L. Porter

Jerri L. Porter, RPR, CRR, LCR
Notary Public State of Tennessee
My Notary Public Commission Expires: 3/3/2026
LCR # 335 - Expires: 6/30/2024



<hr/> <p style="text-align: center;">Exhibits</p> <hr/> <p>Ex 01 - Kirby 3:4 4:14,17</p> <p>Ex 02 - Kirby 3:6 4:18,19,23</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 4:14,17</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 4:19,23</p> <p>2023 4:3</p> <p>27th 4:3</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>9:00 5:1</p> <p>9:22 4:3</p> <p>9:25 5:6</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>a.m. 4:3 5:1,6</p> <p>ahead 4:8</p> <p>appearing 5:3,4</p> <p>approximately 4:3</p> <p>attorney 4:5,10</p> <p>attorneys 4:21</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>begin 5:1</p> <p>behalf 4:6</p> <p>Buck 4:5</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>Center 4:6</p> <p>Central 4:4 5:1,7</p>	<p>Chief 4:12,14,21</p> <p>colleague 4:7</p> <p>concluded 5:6</p> <p>correspondence 4:20</p> <p>counsel 5:2</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>Dan 4:7</p> <p>deposition 4:12, 14,25</p> <p>document 4:16, 22</p> <p>Dougherty 4:2,5, 11,18</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>email 4:19</p> <p>Exhibit 4:14,17, 18,23</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Holly 4:12</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>informed 5:2</p> <p>invitation 4:25</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>James 4:7,8,9</p> <p>Justice 4:6,12,14, 21 5:4</p> <p>Justice's 5:2</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kirby 4:12 5:4</p> <p>Kirby's 4:14,21</p>	<hr/> <p style="text-align: center;">L</p> <hr/> <p>Liberty 4:6</p> <p>link 4:25</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>M-C-Q-U-A-I-D 4:10</p> <p>mark 4:13,19</p> <p>marked 4:16,22</p> <p>Mccaleb 4:7</p> <p>Mcquaid 4:7,9,24</p> <p>Monday 4:2</p> <p>morning 4:20</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>notice 4:14</p> <p>November 4:3</p> <p>Number 4:17,19, 23</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>plaintiff 4:6,10</p> <p>proceedings 5:6</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>received 4:24</p> <p>record 4:13,19 5:5</p> <p>remote 4:12</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>scheduled 5:1</p> <p>Standard 4:4 5:1, 7</p> <p>subpoena 4:15</p>	<hr/> <p style="text-align: center;">T</p> <hr/> <p>Time 4:4 5:2,7</p> <p>today 4:11,15 5:3, 4</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zoom 4:12,24</p>
---	---	---	--



From: Buck Dougherty <bdougherty@libertyjusticecenter.org>
Sent: Thursday, September 28, 2023 7:15 PM
To: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: RE: McCaleb v. Long - Notices of Deposition

Let me know what time for a call tomorrow.

Prof. Barton confirmed his zoom depo next Tuesday. So, Barton and McCaleb have confirmed their zoom depositions per your notices.

<p>Buck Dougherty Senior Counsel Liberty Justice Center</p>	<ul style="list-style-type: none">  312-637-2280 (Main)  423-326-7548 (Cell)  bdougherty@libertyjusticecenter.org  libertyjusticecenter.org
--	---



From: Andrew Coulam <Andrew.Coulam@ag.tn.gov>
Sent: Thursday, September 28, 2023 7:04 PM
To: Buck Dougherty <bdougherty@libertyjusticecenter.org>; Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: Re: McCaleb v. Long - Notices of Deposition

Yes, to be clear, our office will accept service of the subpoenas.

It was our understanding that we had agreed on the depositions of Long and Harmon for next week and we were wondering why we had not received a notice and subpoena. That was one of the reasons for my call. So, we can tell Long and Harmon that their depositions for next week are off and will have to be rescheduled? If so, we'll inquire about their availability for the remainder of October.

We can discuss tomorrow about extending another discovery deadline to allow you to depose any expert(s) we disclose. We're obviously not trying to prevent you from deposing any such expert.

Andrew C. Coulam | Deputy Attorney General
 Public Interest Division
 Office of Tennessee Attorney General

Mailing Address:

P.O. Box 20207, Nashville, TN 37202-0207

p. [615.741.1868](tel:615.741.1868)

andrew.coulam@ag.tn.gov



From: Buck Dougherty <bdougherty@libertyjusticecenter.org>

Sent: Thursday, September 28, 2023 6:15 PM

To: Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>

Cc: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>

Subject: RE: McCaleb v. Long - Notices of Deposition

1. Because Bulso can only do his deposition on **October 9** (and you were uncertain of his availability at the conference), it makes more sense practically and logistically to try and do Bulso, Long, and Harmon together in Nashville that week at your office. McCaleb's is on the 13th, and I will be in Chicago for that. So, if Bulso is on Monday October 9, which is fine with me, let me know if Long and Harmon can do 10, 11, and/or 12 (in any order). I do not want to depose Harmon and Long next week now that Bulso's schedule has been disclosed to us. As you know, I'm in Memphis and would prefer to depose the State folks you've stipulated to at your office the same week so I'm not making multiple trips. So please confirm Long and Harmon's availability as I've suggested.

2. I understand you object to the depositions themselves. I'm just asking about accepting service of process. Thanks for agreeing to accept service.


3. We've both already had 30-day extensions of experts. I think we probably need to discuss on a call tomorrow. While it normally might not be an issue, pushing your expert deadline back another 30 days as you've requested exceeds the discovery cutoff of Oct. 31 per the scheduling order, and we are obviously going to have to depose that individual. So, I think your request is much more than a simple 30-day extension; it's actually a request to push back the discovery deadline itself, which is currently set for Oct. 31. I'm available to jump on a video conference tomorrow to discuss, just let me know.

Thanks, Buck

Buck Dougherty

Senior Counsel

Liberty Justice Center

 [312-637-2280](tel:312-637-2280) (Main)

 [423-326-7548](tel:423-326-7548) (Cell)

 bdougherty@libertyjusticecenter.org

 libertyjusticecenter.org



From: Robert W. Wilson <Robert.Wilson@ag.tn.gov>
Sent: Thursday, September 28, 2023 6:01 PM
To: Buck Dougherty <bdougherty@libertyjusticecenter.org>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: RE: McCaleb v. Long - Notices of Deposition

Buck,

You agreed to depose Director Long on October 4. That date is still available for you to depose her. If you need to reschedule, then we will need to contact Director Long regarding her available dates.

Our Office will accept service for the subpoenas. We still object to the relevance of any Tennessee Supreme Court Justice being deposed in this matter.

We also need to know if Plaintiff objects to the expert disclosure deadline extension by 30 days, to November 1, 2023.

Thank you,

-Robert

Robert W. Wilson
 Senior Assistant Attorney General
 Memphis Division
 Office of Tennessee Attorney General
 40 South Main Street, Suite 1014
 Memphis, TN 38103-1877
 Phone: (901) 543-9031
 Email: Robert.Wilson@ag.tn.gov



From: Buck Dougherty <bdougherty@libertyjusticecenter.org>
Sent: Thursday, September 28, 2023 5:49 PM
To: Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>
Subject: RE: McCaleb v. Long - Notices of Deposition

Please confirm via this email before close of business tomorrow on Friday Sep. 29 per our conference that you agree to accept service of process for the subpoenas for depositions for the 4 TN Supreme Court justices we've previously discussed.

Best, Buck

Buck Dougherty

Senior Counsel

☎ [312-637-2280](tel:312-637-2280) (Main)

☎ [423-326-7548](tel:423-326-7548) (Cell)

Case 3:22-cv-00439 Document 67-7 Filed 11/30/23 Page 12 of 23 PageID #: 1871

McCaleb v Long

James McQuaid <jmcquaid@libertyjusticecenter.org>

Tue 10/31/2023 4:48 PM

To:andrew.coulam@ag.tn.gov <Andrew.Coulam@ag.tn.gov>;Robert.Wilson@ag.tn.gov <Robert.Wilson@ag.tn.gov>;Stahl <Michael.Stahl@ag.tn.gov>

Cc:Buck Dougherty <bdougherty@libertyjusticecenter.org>

 8 attachments (3 MB)

McCaleb notice of kirby dep.pdf; McCaleb notice of bivens dep.pdf; McCaleb notice of lee dep.pdf; McCaleb notice of page dep.pdf; kirby subpoena.pdf; bivens subpoena.pdf; Lee subpoena.pdf; Page subpoena.pdf;

Please see the attached Notices of Deposition and corresponding Subpoenas.

UNITED STATES DISTRICT COURT

for the

Middle District of Tennessee

Dan McCaleb

Plaintiff

v.

Michelle Long

Defendant

Civil Action No. 3:22-cv-00439

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Holly Kirby

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (via Zoom) and Date and Time (11/27/2023 9:00 am)

The deposition will be recorded by this method: normal stenographic means

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 10/31/2023

CLERK OF COURT

OR

/s/ M.E. Buck Dougherty III

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiff

Dan McCaleb, who issues or requests this subpoena, are:

M.E. Buck Dougherty III, 440 N. Wells St., Ste. 200, Chicago IL 60654
bdougherty@libertyjusticecenter.org, 312-637-2280

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed, Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:22-cv-00439

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Holly Kirby
on *(date)* 10/31/2023 .

I served the subpoena by delivering a copy to the named individual as follows: Emailed to counsel for
Defendants, who had previously represented that they were authorized to accept service
on *(date)* 10/31/2023 ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ 40 .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 11/21/2023



Server's signature

James J McQuaid

Printed name and title

440 N Wells St., Ste. 200
Chicago, IL 60654

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

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

NOTICE OF DEPOSITION OF HOLLY KIRBY

Pursuant to the Federal Rules of Civil Procedure, Plaintiff, Dan McCaleb, Executive Editor of The Center Square, through counsel, gives notice that he will take the deposition of Chief Justice Holly Kirby on November 27, 2023, beginning at 9:00 AM Central Time. Counsel for the parties and the witness may attend the deposition through a video conference platform such as Zoom. All participants will be sent a meeting invitation via email which will allow connection to the deposition and will provide the password/meeting ID for participation. The deposition will be taken by normal stenographic means before a court reporter duly authorized to take sworn testimony. By agreement of the parties, the witness may be sworn remotely and will be bound by that oath as if given in person. The oath to be administered to the witness is attached. The deposition will continue until completed or until otherwise agreed by counsel.

Respectfully submitted,

/s/ M. E. Buck Dougherty III

M. E. Buck Dougherty III, TN BPR #022474
James McQuaid, *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
jmcquaid@libertyjusticecenter.org

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

CERTIFICATE OF SERVICE

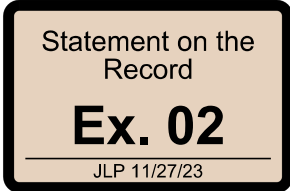
I, counsel for Plaintiff, hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record via email on this 31st day of October, 2023:

JONATHAN SKRMETTI
Office of the Attorney General & Reporter
Andrew C. Coulam, *Deputy Attorney General*
Michael M. Stahl, *Senior Assistant Attorney General*
Robert W. Wison, *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
Robert.wilson@ag.tn.gov

/s/ M.E. Buck Dougherty III

Remote Witness Oath

Do you solemnly swear or affirm that the testimony you are about to give in this case is the truth, the whole truth and nothing but the truth so help you God. Do you solemnly swear or affirm that you are not consulting and will not consult any outside sources or information during the deposition such as cell phone, smartphone, computer, the internet, any text or instant messaging service, e-mail, any chat room, blog, or website such as Facebook, Myspace, LinkedIn, YouTube, or Twitter to communicate with anyone or to obtain any information or consultation in conjunction with your testimony.



RE: Meeting Invitation - DAN MCCALEB VS MICHELLE LONG

Buck Dougherty <bdougherty@libertyjusticecenter.org>

Mon 11/27/2023 9:16 AM





To:Cody N. Brandon <Cody.Brandon@ag.tn.gov>;Donna Green <Donna.Green@ag.tn.gov>;Liz Evan <Liz.Evan@ag.tn.gov>
Cc:Andrew Coulam <Andrew.Coulam@ag.tn.gov>;Michael Stahl <Michael.Stahl@ag.tn.gov>;Robert W. Wilson
<Robert.Wilson@ag.tn.gov>;James McQuaid <jmcquaid@libertyjusticecenter.org>

Thank you for your response.

However, we do not recall you saying that on our call. But thank you for the Justices' position.

Best, Buck

Buck Dougherty
Senior Counsel
Liberty Justice Center

-  [312-637-2280 \(Main\)](tel:312-637-2280)
-  [423-326-7548 \(Cell\)](tel:423-326-7548)
-  bdougherty@libertyjusticecenter.org
-  libertyjusticecenter.org



From: Cody N. Brandon <Cody.Brandon@ag.tn.gov>
Sent: Monday, November 27, 2023 9:15 AM
To: Buck Dougherty <bdougherty@libertyjusticecenter.org>; Donna Green <Donna.Green@ag.tn.gov>; Liz Evan <Liz.Evan@ag.tn.gov>
Cc: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>; Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Subject: RE: Meeting Invitation - DAN MCCALEB VS MICHELLE LONG

Buck,

As we informed you on our call, none of the Justices will appear for deposition until we receive a decision on their Motion to Quash.

Cody N. Brandon
Managing Attorney
Phone: (615) 532-7400
Email: Cody.Brandon@ag.tn.gov



From: Buck Dougherty <bdougherty@libertyjusticecenter.org>
Sent: Monday, November 27, 2023 9:05 AM
To: Donna Green <Donna.Green@ag.tn.gov>; Liz Evan <Liz.Evan@ag.tn.gov>; Cody N. Brandon <Cody.Brandon@ag.tn.gov>
Cc: Andrew Coulam <Andrew.Coulam@ag.tn.gov>; Michael Stahl <Michael.Stahl@ag.tn.gov>; Robert W. Wilson <Robert.Wilson@ag.tn.gov>; James McQuaid <jmcquaid@libertyjusticecenter.org>
Subject: FW: Meeting Invitation - DAN MCCALEB VS MICHELLE LONG

Hi Donna,

Please advise if Chief Justice Kirby will be joining in the deposition per the zoom link you received below.

Thanks,

Buck Dougherty
 Senior Counsel
 Liberty Justice Center

☎ [312-637-2280](tel:312-637-2280) (Main)
 ☎ [423-326-7548](tel:423-326-7548) (Cell)
 ✉ bdougherty@libertyjusticecenter.org
 🌐 libertyjusticecenter.org



LIBERTY JUSTICE CENTER



From: TN.Scheduling@lexitaslegal.com <TN.Scheduling@lexitaslegal.com>
Sent: Wednesday, November 22, 2023 8:00 AM
To: Buck Dougherty <bdougherty@libertyjusticecenter.org>; robert.wilson@ag.tn.gov; Cody.Brandon@ag.tn.gov; Donna.Green@ag.tn.gov; Liz.Evan@ag.tn.gov; James McQuaid <jmcquaid@libertyjusticecenter.org>
Cc: TN.SCHEDULING@LEXITASLEGAL.COM
Subject: Meeting Invitation - DAN MCCALEB VS MICHELLE LONG

LEXITAS ON DEMAND - JOB ORDER DETAILS

PHONE: [888-893-3767](tel:888-893-3767) /
 EMAIL: TN.Scheduling@lexitaslegal.com

Greetings!

Below is the **Lexitas LegalView Video-Conference** "LINK-information" for your assignment (sent to all law firm attendees we were notified of). A second "detailed confirmation" will follow shortly to the SCHEDULING FIRM

Name of Case: DAN MCCALED VS MICHELLE LONG

727516 [NEW! - Click here to add this to your calendar.](#)

**SCHEDULE & BILLING
DETAILS**

Job Number 727516

Claim Number

Date Of Loss

Firms Name LIBERTY JUSTICE CENTER

Address 440 N WELLS ST #200

City CHICAGO

State IL

Zip 60654

Phone

Interpreter Name N/A

Interpreter Time to report

Interpreter Language

DEPOSITION DETAILS

Scheduled By buck dougherty | bdougherty@libertyjusticecenter.org

scheduled Date 11/27/2023 09:00 AM

scheduled Timezone US/Central

Name of Case DAN MCCALED VS MICHELLE LONG

MEETING DETAILS

Click to join meeting <https://lexitas.zoom.us/j/93173848893?pwd=V2VQZUdDUXVHc3oxYXE1SmVydHRTZz09>

Zoom Meeting Id 93173848893

Zoom Meeting Password 77779308

Join by phone If calling in without Video Dial-in: 646 876 9923 & enter the Link-ID 93173848893

Join by SIP 93173848893@zoomcrc.com

Join by H.323 162.255.37.11 (US West)
162.255.36.11 (US East)

MEETING ATTENDEES

bdougherty@libertyjusticecenter.org m.e. buck DOUGHERTY III

robert.wilson@ag.tn.gov

Cody.Brandon@ag.tn.gov CODY BRANDON

Donna.Green@ag.tn.gov

Liz.Evan@ag.tn.gov

jmcquaid@libertyjusticecenter.org

Important Note: Zoom is releasing an update on February 4, 2023 that requires your Zoom application to be updated to the minimum version of 5.10.3 or above. Users not updated to the minimum version may not be able to log in to their remote proceedings.

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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION
TO COMPEL NON-PARTY TENNESSEE SUPREME COURT
JUSTICES' COMPLIANCE WITH SUBPOENA**

Respectfully submitted,

M. E. Buck Dougherty III, TN BPR #022474
James McQuaid, *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
jmcquaid@libertyjusticecenter.org

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

QUESTION PRESENTED 1

INTRODUCTION 1

BACKGROUND 3

 A. Plaintiff McCaleb’s First Amendment Right of Access Claim to Advisory Commission Meetings; Defendant Long’s Defenses and Deposition; and the Case Management Order that Discovery is Not Stayed During Motions Unless Further Ordered by the Court 3

 B. Court’s Preliminary Injunction Issued on March 22, 2023 6

 C. Depositions Thus Far Including Advisory Commission Chair Gino Bulso, AOC Liaison Michelle Consiglio-Young, and Defendant’s Expert Witness Lang Wiseman 7

 D. Subpoena Served on October 31, 2023, for the Justices’ Remote Depositions to Give Testimony Scheduled for November 27, 28, 29, and 30 15

 E. Justices’ Motion to Quash Filed on Thanksgiving Eve 16

 F. The Justices Did Not Obey the Subpoena and Said They Would Not Appear Until They Received a Decision From the Court on their Motion to Quash.... 17

LEGAL STANDARD..... 18

ARGUMENT 19

 The Court should order the Justices to comply with the Subpoena because the act of filing a motion to quash was not an “adequate excuse” under Rule 45 for the Justices to then disobey the Subpoena and fail to appear at their depositions to give testimony when the Court had not ruled on the motion ... 19

 A. Merely filing a motion to quash did not automatically stay the depositions and did not relieve the Justices of their duty to attend.... 20

 B. They have unique knowledge of Advisory Commission meetings..... 22

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

<i>Barnes v. Madison</i> , 79 Fed. Appx. 691 (5th Cir. 2003).....	18, 20
<i>Batt v. Kimberly-Clark Corp.</i> , 438 F. Supp. 2d 1315 (N.D. Okla. Jul. 14, 2006)	18
<i>Goodwin v. City of Boston</i> , 118 F.R.D. 297 (D. Mass. Feb. 4, 1988)	19
<i>Hahn v. Star Bank</i> , 190 F.3d 708 (6th Cir. 1999)	19
<i>Hepperle v. Johnston</i> , 590 F.2d 609 (5th Cir. 1979)	19
<i>Raymond James & Assocs. v. 50 N. Front St. TN, LLC.</i> , 2023 U.S. Dist. LEXIS 99271 (W.D. Tenn. Jun. 6, 2023)	21
<i>Stephen L. Lafrance Holdings, Inc. v. Sorensen</i> , 278 F.R.D. 429 (W.D. Ark. Dec. 13, 2011)	18, 20, 22
<i>Sutherland v. Mesa Air Group, Inc.</i> , 2003 WL 21402549 (S.D. Fla. Jun. 6, 2003).....	19

Statutes

Tenn. Code Ann. § 16-3-601	3
Tenn. Code Ann. § 17-3-101	3

Rules

Fed. R. Civ. P. 26	18, 19, 20
Fed. R. Civ. P. 45	18
LR 16.01	19, 20, 21, 22
Tenn. R. Civ. P. 45.04	2

QUESTION PRESENTED

1. Is filing a motion to quash a subpoena an “adequate excuse” under Rule 45 for a person to then disobey the subpoena and not appear at their deposition to give testimony when the court has not ruled on the motion?

INTRODUCTION

Plaintiff Dan McCaleb, Executive Editor of The Center Square, files this Memorandum of Law in support of his Motion to Compel compliance with subpoena that commands deposition testimony from Non-Party Tennessee Supreme Court Chief Justice Holly Kirby, Justice Jeffrey Bivins, Justice Roger Page, and Special Justice Sharon Lee (collectively the “Justices”). Motion to Compel, ECF No. 67.

The Justices’ remote depositions via Zoom were scheduled for this week on November 27, 28, 29, and 30. The Justices have not contested service of the four subpoenas and notices of deposition (collectively the “Subpoena”) served upon them on October 31, 2023. However, the Justices filed a motion to quash the Subpoena or alternatively for a protective order on Thanksgiving Eve — 22 days after being served with the Subpoena and 1 business day before Chief Justice Kirby’s scheduled deposition on November 27. ECF No. 60. Then after filing the motion, the Justices said they would not be appearing at their depositions this week to give testimony until they received a decision from the Court on the motion to quash.

But merely filing — and resting on — a motion to quash was not an “adequate excuse” under Rule 45 for the Justices to then disobey the Subpoena and fail to appear at their scheduled depositions to give testimony when the Court had not

ruled on the motion to quash.¹ Indeed, the Federal Rules of Civil Procedure make clear that a subpoena recipient must appear in person for a testimonial deposition. Under the Federal Rules, subpoenas commanding deposition testimony are distinguished from those that command the production of documents. For example, when a subpoena recipient is commanded to produce documents, they may choose to not appear in person at the place of production if they produce the requested documents. Or they may choose to serve a written objection to the command that they produce specific documents.²

But a subpoena recipient — like the Justices here — may not resist a subpoena that commands *deposition testimony* by simply resting on a motion to quash without further court intervention, such as a ruling on the pending motion or staying discovery. In other words, the Justices were obligated to obey the Subpoena, appear at their depositions, and give testimony even though they had filed a motion to quash the Subpoena that was pending before the Court.

The question presented to the Court is straightforward. And the answer is, No. Filing a motion to quash a subpoena is not an “adequate excuse” under Rule 45 for a

¹ Although briefing has closed and the matter is ripe the Court has yet to rule on the Justices’ motion to quash the Subpoena, at or about the time of filing this motion to compel. *See* Justices’ Reply, ECF No. 64, filed on November 28, 2023.

² By contrast, the Tennessee Rules of Civil Procedure make no distinction between objecting to a “deposition subpoena for testimony or subpoena for production of document[s].” *See* Tenn. R. Civ. P. 45.04(1) (Advisory Commission Comments [2013] “The amendment requires a notice to be placed on a deposition subpoena issued to a non-party witness with the information that the witness has until twenty-one days after service of the subpoena to serve an objection to the subpoena on the issuing attorney”).

person to then disobey the subpoena and not appear at their deposition to give testimony when the court has not ruled on the motion. Accordingly, Plaintiff McCaleb requests a Court Order compelling the Justices' compliance with the Subpoena that commands their deposition testimony.

BACKGROUND

A. Plaintiff McCaleb's First Amendment Right of Access Claim to Advisory Commission Meetings; Defendant Long's Defenses and Deposition; and the Case Management Order that Discovery is Not Stayed During Motions Unless Further Ordered by the Court

On June 30, 2022, Plaintiff McCaleb filed his First Amended Complaint ("Compl.") against Defendant Michelle Long, in her official capacity as Director of the Administrative Office of the Courts ("AOC"). Compl., ECF No. 19. McCaleb sought declaratory and injunctive relief, which included a Section 1983 and First Amendment right of access claim to state court rulemaking meetings of the Tennessee Advisory Commission on the Rules of Practice & Procedure ("Advisory Commission"), created by Tenn. Code Ann. § 16-3-601. *Id.*³

Tennessee's Supreme Court appoints members to the Advisory Commission, "whose duty shall be to advise the [Justices and Supreme Court] from time to time respecting the rules of practice and procedure." *See* Tenn. Code Ann. § 16-3-601(a). Under Defendant Long's direction, the AOC provides logistical and administrative support to the Advisory Commission. *See* Tenn. Code Ann. § 16-3-601(d). AOC

³ McCaleb amended his complaint and requested access to rulemaking meetings of the (1) Advisory Commission, as well as the (2) Tennessee Judicial Conference (TJC) committees, created by Tenn. Code Ann. § 17-3-101, et seq. Compl., ECF No. 19.

employee Michelle Consiglio-Young is the liaison to the Advisory Commission, and she provides administrative support to assist the Commission's members in discharging their duties. Memorandum Opinion, ECF No. 39, PageID #1089.

McCaleb sought public access to these Advisory Commission meetings under the “experience and logic test” first articulated by the United States Supreme Court in *Richmond Newspapers* and later adopted in its subsequent precedents. Compl., ECF No. 19. Specifically, McCaleb argued pursuant to the “experience and logic test” that, because the federal analogue to the Advisory Commission had opened its rulemaking meetings to the public over 34 years ago, history, tradition, and the favorable judgment of experience counsel that the First Amendment attaches to Tennessee Advisory Commission meetings, and the meetings should also be open to the public as well, absent a compelling governmental reason that is narrowly tailored. *See id.* And McCaleb requested “a preliminary injunction, later to be made a permanent injunction, ordering Director Long to provide him with both virtual and in-person access so he can assign reporters to report on future meetings” of the Advisory Commission. *Id.*, at PageID #149, ¶ B.

In her Answer in response to McCaleb's allegations that Advisory Commission meetings were “closed to the public and press,” Director Long “Denied” that these meetings were closed. Answer, ECF No. 48, PageID #1126, ¶30; Compl., ECF No. 19, PageID #137, ¶30. As part of her theories and defenses to McCaleb's First Amendment right of access claim to meetings, Director Long contends that under *Richmond Newspapers'* two-part test, “there is no historically recognized right of

access to the Tennessee Advisory Commission on the Rules of Practice & Procedure.” Initial Case Mgt. Order, ECF No. 50, PageID #1147, ¶ B. In the same Order governing discovery, the Court said, “Discovery is not stayed during dispositive or other motions, unless ordered by the Court.” *Id.* at PageID #1149, ¶ G.

Although in her Answer she “Denied” that Advisory Commission meetings were closed to the public and press, in her recent deposition last month Director Long testified that meetings were open to the public in the past, but at some point, before her tenure they became closed. She testified that she does not know why meetings became closed. Excerpts from Director Long’s relevant deposition testimony (“Long Depo.”) are attached to the Motion as **Exhibit 1** and set forth below:

Q. And so are meetings -- is it your understanding that Advisory Commission meetings are open or closed?

A. For this particular commission, I understand the history has been that at one point they were open and at one point they were closed.

Q. And at what point is it your understanding on the history were they open?

A. It predates me. I want to say maybe 2017, 2018, but I am not certain.

Q. What is your understanding of history wise when they became closed?

A. I don't know why they became closed.

Q. I didn't say “why,” I said what is your understanding of the process of getting closed and why they became closed?

A. I don't know.

ECF No. 67, **Exhibit 1**, Long Depo., p. 106, Lines 8-25.

B. Court's Preliminary Injunction Issued on March 22, 2023

On March 22, 2023, effective at 3:00 pm, along with its Memorandum Opinion (ECF No. 39), the Court issued an Order And Preliminary Injunction (ECF No. 40), finding that McCaleb had shown a likelihood of success on the merits of his First Amendment right of public access claim to Advisory Commission meetings. In its Order And Preliminary Injunction, the Court said:

It is, therefore, **ORDERED** that, pursuant to Federal Rule of Civil Procedure 65, Defendant and her officers, agents, employees, servants, attorneys, and all persons in active concert or participation with them are hereby **ENJOINED** and **RESTRAINED** from:

Holding future meetings of the Tennessee bench-bar advisory commission established to recommend rules without providing the public with access either via livestreaming or in-person attendance; provided, however, that such access may be denied with respect to a particular meeting, such that the meeting is closed in whole or in part on a case-specific basis; based on a particular stated reason that purportedly justifies such closure; provided further, however, that any such disclosure shall be separately subject to challenge in its own right by any party with standing to do so.

Defendant is **FURTHER ORDERED** to provide notice of this Order to her officers, directors, agents, servants, representatives, attorneys, employees, and affiliates, and those persons in active concert or participation with them. Defendant shall take whatever means are necessary or appropriate to ensure proper compliance with this Order. ECF No. 40, PageID ##1103-04.

**C. Depositions Thus Far Including Advisory Commission
Chair Gino Bulso, AOC Liaison Michelle Consiglio-Young, and
Defendant’s Expert Witness Lang Wiseman**

The parties have taken seven (7) total depositions thus far, as follows:

- October 3, 2023 (remote) – Prof. Benjamin Barton, Plaintiff’s Expert
- October 9, 2023 (in-person) – Gino Bulso, Chair Advisory Commission
- October 13, 2023 (remote) – Plaintiff Dan McCaleb
- October 24, 2023 (in-person) – AOC Deputy Director Rachel Harmon
- October 25, 2023 (in-person) – Defendant AOC Director Michelle Long
- November 16, 2023 (in-person) – AOC liaison Michelle Consiglio-Young
- November 21, 2023 (remote) – Lang Wiseman, Defendant’s Expert

Relevant excerpts from the depositions given by Gino Bulso, Chair of the Advisory Commission (“Bulso Depo.”), and Michelle Consiglio-Young, (“Consiglio-Young Depo.”), attached to the Motion as **Exhibit 2** and **Exhibit 3**, respectively, as to whether meetings have historically been open to the public, and the Tennessee Supreme Court’s and Justices’ involvement with the Commission, are as follows:

Gino Bulso, Chair Advisory Commission

Q. Can you describe the commission?

A. A commission is a group of attorneys and judges appointed by the Tennessee Supreme Court pursuant to 16-3-601 to assist it in modifying Rules of Civil and Criminal Procedure.

ECF No. 67, **Exhibit 2**, Bulso Depo., p. 18, Lines 2-6.

Q. From 2016 through 2022, during your time serving on the commission, were any of those meetings ever open to the public?

A. I'm not sure.

Id., p. 28, Lines 17-20.

Q. Okay. I think you said -- I want to make sure I understood this. Did you say in your earlier testimony that you serve at the pleasure of the Tennessee Supreme Court?

A. I did say that.

Q. Is that language, is that in the statute?

A. Yes.

Q. It is?

A. It is implicitly in 16-3-601.

Q. I think, as I recall, the AOC director uses that language, "Serves at the pleasure of the chief justice of the Supreme Court"; would that be correct?

A. I don't know.

Q. But you're saying implicitly, you, as the chair -- who do you serve at the pleasure of, the Supreme Court or the Chief Justice?

A. The Supreme Court.

Id., p. 68, Lines 6-22.

Q. How do you communicate with your Supreme Court liaison? Do you do it while you're at the meeting or at a later time?

A. By telephone, typically.

Q. Who was the Supreme Court liaison in 2022 from the Supreme Court?

A. Justice Lee.

Q. How often did you communicate by telephone with Justice Lee during the 2022 calendar year?

A. Likely once or twice.

Q. Once or twice?

A. (Witness nods head up and down.)

Q. Do you recall what the nature of those calls were about?

A. Yes. Questions about reappointment as chair. Reappointment to the commission.

Q. Why would you communicate with Justice Lee about that, those issues?

A. Because it's -- the Supreme Court appoints the members of the commission. It's the Supreme Court who appoints the chair, the vice chair, the reporter, and the other offices of the commission.

Id., p. 69, Line 17 through p. 70, Line 13.

Michelle Consiglio-Young, AOC Liaison to the Advisory Commission

Q. Let's kind of backtrack a little bit. So I think you said 2015 to 2016 you sat in on some meetings?

A. Uh-huh.

Q. And the -- your recollection, they were open to the public?

A. Yes.

Q. At what point did those Advisory Commission meetings become closed to the

public?

A. I believe it was 2018.

Q. I'm sorry?

A. 2018. It was after I had taken over as liaison. There was -- meetings were open to the public, as far as I can recall. And there was a meeting that we had that there was a member of the public who had attended in person who was there and became unruly and combative with the Commission. And after that, the -- the Tennessee Supreme Court took the matter up for discussion and then the meetings were closed after that incident.

Q. And what -- where was this particular meeting in 2018?

A. I wish I could recall the exact date. I do believe it was 2018 and the meeting was at the Administrative Office of the Courts, it was in our conference room. And members of the public would come periodically, sometimes we didn't have any and sometimes some would request to come.

And that particular meeting there was a member of the public who attended, and he was interested in a topic that was being discussed by the Commission. And during that discussion, he was speaking kind of out of term, you know, without being called on or outside of the public comment period that was allowed and essentially became very assertive with the members and -- and the meeting was stopped and he was asked to leave.

Q. Do you recall how many members of the public were at that particular meeting in 2018?

A. I believe it was just that gentleman and his son.

Q. Do you recall his name?

A. I don't. I'm sorry.

Q. When you say "combative," do you mean -- what do you mean? Was it verbal combativeness --

A. Yes.

Q. -- or physical?

A. It was verbal. He did leave his chair -- or, you know, get up from his chair while he was having this discussion, which kind of escalated the -- the tone that was going on in there in his interaction with the members. So it -- yeah, it just became more of an aggressive action on his part. Clearly he was upset with a topic that was being discussed.

Q. Do you recall the topic?

A. No.

Q. Do you recall who the chair was at that time at that meeting?

A. I believe the chair was Allen Wade then.

Q. Is Mr. Wade currently a member on the Advisory Commission?

A. Yes.

Q. Were there four quarterly meetings in 2018?

A. Yes. As far as I remember there were.

Q. And you were at this meeting in 2018?

A. I was at that meeting, yes.

Q. Who was the chief justice of the Supreme Court at that time in 2018?

A. It was Justice Jeff Bivins at that time.

Q. So did the Chairman Wade ask this person that was being verbal -- verbally combative to leave? Did he -- did the person leave?

A. I don't recall who exactly asked him to leave; however, he was asked to leave. We did have to have several people help escort him out. And I can't remember if security was called at that meeting or not. I -- I do believe that building security was made aware.

Q. Do you recall if any formal charges, criminal charges were brought against this person?

A. I -- I do not believe that there were formal criminal charges.

Q. So the person that was verbally combative was never prosecuted to the best of your recollection?

A. Correct, I do not believe that he was.

Q. And so, I guess, was there a member of the Tennessee Supreme Court that was attending that particular meeting?

A. Yes.

Q. And who was that?

A. It was Justice Holly Kirby.

Q. So Justice Kirby was the Supreme Court liaison on the Commission in 2018?

A. She was.

Q. Justice Kirby is now the Chief Justice of the Supreme Court?

A. Yes, she is.

Q. So you said something about the -- the justices at that point, they made the call, they made the decision to close meetings. Explain what -- explain what happened after that.

A. After the meeting where the person got combative -- and Justice Kirby was in attendance in that meeting, so she had seen it firsthand, the -- as far as I am aware, she took that matter back to the Supreme Court for discussion, and we at the AOC were told that the meetings would no longer be open after that. And that was really my interaction with that. They were -- I was informed that they would be closed.

Q. How were you told? How were the members of the Commission told that from now on they were going to be closed, the meetings?

A. I don't recall exactly. I do know that if our General Counsel Rachel Harmon at the time had told me that there was no need to put public notice out because they were going to be closed the next meeting after that incident. And I cannot recall if Justice Kirby told the members directly or if a member of our office told them that we -- that they would be closed. I just don't remember exactly.

Q. But that decision would have come from either the justices or the AOC office to the Advisory Commission?

A. One of the two, yes, would have told either the Commission as a whole or the chair and the chair would have relayed that to the Commission.

Q. So the Chair, Mr. Wade, didn't make that decision?

A. No.

Q. Did -- was it reported, do you recall, that meetings were going to be closed and formally in the minutes?

A. I do not recall. I would have to look back at the minutes to see if they were -- if there was any mention.

Q. Where are the minutes kept?

A. Like I had said earlier, they're housed within the Tennessee Supreme Court building overseen by the Appellate Court Clerk's Office, so there is -- whether they're electronic or paper filed.

ECF No. 67, **Exhibit 3**, Consiglio-Young Depo., p. 40, Line 8 through p. 46, Line 12.

Defendant's Expert Witness Lang Wiseman

Defendant Long's expert witness, Lang Wiseman, recently testified, and his deposition transcript excerpts are attached to the Motion as **Exhibit 4** ("Wiseman Depo."). These excerpts include Wiseman's confirmation that he served on the Advisory Commission from 2015-2018, his failure to recall the 2018 incident involving the verbally combative man at a public meeting, and his opinion on why meetings of other Tennessee boards and commissions have been open to the public:

Q. Now, tell me again the years that you served on the Advisory Commission.

A. I would -- in order to be specific I would refer you to the information that I put in my report as I -- I've said we'd go back and -- and look at that, but I believe it was 2015 until late 2018.

ECF No. 67, **Exhibit 4**, Wiseman Depo., p. 27, Lines 4-10.

Q. Are you aware of an incident in 2018 where a member of the public became verbally combative with questions during a Tennessee Advisory Commission that was open to the public?

A. I'm not.

Q. You're not aware of that?

A. I do not recall that.

Id. at p. 39, Lines 10-17.

Q. Yeah. Other Tennessee State boards and commissions other than the Advisory Commission work fine despite, you know, the public has open access, they're open. Why are they okay and the Advisory Commission is not?

A. Well, I think you need to ask the Supreme Court that.

Id. at p. 50, Line 25 through p. 51, Line 6.

D. Subpoena Served on October 31, 2023, for the Justices' Remote Depositions Noticed for November 27, 28, 29, and 30

On October 31, 2023, McCaleb's counsel served four subpoenas and notices of remote Zoom depositions upon the Justices for their testimony noticed for November 27-30, 2023. These documents and the Subpoena were initially served upon Defendant Long's counsel, who represented to Plaintiff's counsel that they would accept service on behalf of the Justices. Attached to the Motion as **Exhibit 5** is the Declaration of James McQuaid ("McQuaid Decl."), counsel for Plaintiff, along with the relevant documents perfecting service of the Subpoena.

The box labeled, "*Testimony*," was checked on page one of each of the Justices' specific subpoena. And it said, "**YOU ARE COMMANDED** to appear at the time,

date, and place set forth below to testify at a deposition to be taken in this civil action.” ECF No. 67, **Exhibit 5**, McQuaid Decl. The box labeled, “*Production*,” was not checked and left blank for each of the Justices’ specific subpoena. *Id.* On page three of each subpoena, there were instructions on applicable provisions of Rule 45 that provided the subpoena recipient with information pertaining to their obligations in responding. *Id.*

Moreover, attached to the Motion as **Exhibit 6** is the Declaration of Buck Dougherty (“Dougherty Decl.”), counsel for Plaintiff. In advance of the Justices’ scheduled depositions this week, Plaintiff’s counsel tendered four \$40 checks to the Justices’ counsel (the applicable statutory amount for one day’s attendance) for their attendance at the depositions. ECF No. 67, **Exhibit 6**, Dougherty Decl.

E. Justices’ Motion to Quash Subpoena Filed on Thanksgiving Eve

On Thanksgiving Eve, November 22, 2023, at approximately 11:43 am CDT, the Justices filed their motion to quash their depositions. ECF No. 60. Accompanying their motion was a supporting memorandum of law (ECF No. 61), Plaintiff’s Rule 26 Initial Disclosures served on May 19, 2023 (ECF No. 61-1), four Affidavits signed and dated by the Justices (ECF No. 61-2), Plaintiff’s First Supplemental Response to Interrogatories (ECF No. 61-3), excerpts from Plaintiff’s deposition (ECF No. 61-4), and excerpts from AOC Deputy Director Harmon’s deposition (ECF No. 61-5).

In the memorandum in support of their motion to quash, they said, “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.” ECF No. 61, PageID # 1221-22. In their memorandum the Justices acknowledge that they were each issued the Subpoena specifically to “testify.” The Justices said, “Plaintiff now subpoenas four non-party Tennessee Supreme Court Justices to testify at depositions.” *Id.* at PageID #1221. One of their theories supporting why they should be shielded from giving deposition testimony is that Harmon testified that “Michelle Consiglio-Young is the AOC employee who has the most knowledge of what takes place at Advisory Commission meetings.” *Id.* at PageID #1231.

F. The Justices Did Not Obey the Subpoena and Said They Would Not Appear Until They Received a Decision From the Court on their Motion to Quash

On November 27, 2023, Plaintiff’s counsel Dougherty and McQuaid appeared as scheduled for the remote deposition. Chief Justice Kirby and her counsel failed to appear, and statements were entered on the record at 9:22 am CDT. Attached to the Motion as **Exhibit 7** is a transcript of the Statement on the Record, along with two exhibits.⁴ The exhibits include Chief Justice Kirby’s subpoena, notice, Zoom instructions sent to counsel in advance of the deposition, including to the Justices’ counsel Donna Green, Cody Brandon, and Liz Evan, and emails among counsel. Attorney Brandon emailed Plaintiff’s counsel and said, “As we informed you on our call, none of the Justices will appear for deposition until we receive a decision on their Motion to Quash.” ECF No. 67, **Exhibit 7**, Statement on the Record.

⁴ The transcript further reflects that Bridget Conlan, Intern, was present at the remote deposition. Ms. Conlan is a 3L student at the University of Chicago and is a legal intern for Liberty Justice Center, counsel for Plaintiff McCaleb.

LEGAL STANDARD

Under the Federal Rules of Civil Procedure governing subpoena enforcement, a “court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.” Fed. R. Civ. P. 45(g). “In civil litigation, it would be rare for a court to use contempt sanctions without first ordering compliance with a subpoena, and the order might not require all the compliance sought by the subpoena.” *Id.* (Advisory Committee Notes on Rules — 2013 Amendment). Parties are entitled to discover “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1); *see* Fed. R. Civ. P. 45, Advisory Committee Notes (1970) (The scope of discovery through a subpoena is the same as the other discovery rules.).

It is well settled law that “the filing of a motion to quash does not automatically stay a deposition.” *Stephen L. Lafrance Holdings, Inc. v. Sorensen*, 278 F.R.D. 429, 436 (W.D. Ark. Dec. 13, 2011). “The mere act of filing a motion [to quash or for a protective order] does not relieve a party of the duty to appear; the party is obliged to appear until some order of the court excuses attendance.” *Id.* and n. 40 (citing *Barnes v. Madison*, 79 Fed. Appx. 691, 707 (5th Cir. 2003)). *See also Batt v. Kimberly-Clark Corp.*, 438 F. Supp. 2d 1315, 1317-18 (N.D. Okla. Jul. 14, 2006) (holding that the filing of a motion to quash does not automatically stay a deposition.); *Sutherland v. Mesa Air Group, Inc.*, 2003 WL 21402549, at *5 and n.10

(S.D. Fla. Jun. 6, 2003) (holding that the filing of a motion for protective order alone would not have relieved counsel of obligation to attend the depositions; the obligation to comply dissipates only when court grants the motion.); *Hepperle v. Johnston*, 590 F.2d 609, 613 (5th Cir. 1979) (holding that the court's inaction on plaintiff's motion for a protective order to postpone the taking of his deposition did not relieve plaintiff of the duty to appear for deposition.); *Goodwin v. City of Boston*, 118 F.R.D. 297, 298 (D. Mass. Feb. 4, 1988) (holding that filing a motion to quash does not automatically stay deposition.).

“Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.” *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999). In the Middle District of Tennessee, this “broad discretion and inherent power” the Sixth Circuit discussed has produced Local Rules and the practice of not staying discovery: “Discovery is not stayed, including during the pendency of dispositive motions, unless specifically authorized by Fed. R. Civ. P. 26(d) or by order of the Court.” LR 16.01(g).

ARGUMENT

The Court should order the Justices to comply with the Subpoena because the act of filing a motion to quash was not an “adequate excuse” under Rule 45 for the Justices to then disobey the Subpoena and fail to appear at their depositions to give testimony when the Court had not ruled on their motion.

The Court should grant Plaintiff McCaleb’s Motion to Compel (ECF No. 67) and order the Justices to comply with the Subpoena that commands their deposition testimony. Merely filing a motion to quash is not an adequate excuse under Rule 45(g) for the Justices to disobey the Subpoena and not appear at their scheduled

depositions. The act of filing the motion to quash (1) did not automatically stay the depositions and did not relieve the Justices of their duty to attend; and (2) they have unique knowledge of Advisory Commission meetings.

A. Merely filing a motion to quash did not automatically stay the depositions and did not relieve the Justices of their duty to attend.

Merely filing a motion to quash did not automatically stay the depositions and did not relieve the Justices of their duty to attend.

It is well settled law that “the filing of a motion to quash does not automatically stay a deposition.” *Sorensen*, 278 F.R.D. at 436. “The mere act of filing a motion [to quash or for a protective order] does not relieve a party of the duty to appear; the party is obliged to appear until some order of the court excuses attendance.” *Id.* and n. 40 (citing *Barnes*, 79 Fed. Appx. at 707). Local Rules provide that “[d]iscovery is not stayed, including during the pendency of dispositive motions, unless specifically authorized by Fed. R. Civ. P. 26(d) or by order of the Court.” LR 16.01(g).

Here, the Justices failed to appear for their scheduled depositions this week. ECF No. 67, **Exhibit 7**, Statement on the Record. The Justices’ counsel was clear why they would not be appearing for their depositions, and attorney Brandon, said, “As we informed you on our call, none of the Justices will appear for deposition until we receive a decision on their Motion to Quash.” *Id.* Indeed, the Justices elected to simply rest on their motion to quash the Subpoena and did not file a parallel motion to stay discovery (and their depositions) pending resolution of their quash motion.

To be sure, the Local Rules disfavor parties staying discovery during the pendency of dispositive motions. But they also contemplate that a party may move for an “order of the Court” to stay discovery pending resolution of a motion, which would include a motion to quash like the Justices filed here. *See* LR 16.01(g). Moreover, while the Order governing discovery in this matter reflects the Local Rules’ usual practice of not staying discovery during the pendency of motions, it also contemplates that a party may move for a Court order to stay discovery pending resolution of a motion. *See* Initial Case Mgt. Order, ECF No. 50, PageID #1149, ¶ G.

In other words, the Justices could have chosen a more measured and prudent litigation strategy and filed a motion to stay discovery pending resolution of their motion to quash, simultaneously with the filing of the quash motion. *See e.g.*, *Raymond James & Assocs. v. 50 N. Front St. TN, LLC.*, 2023 U.S. Dist. LEXIS 99271 (W.D. Tenn. Jun. 6, 2023). And they could have done so much earlier in the process after receiving service of the Subpoena on October 31. This would have allowed the Court adequate time to potentially rule on a motion to stay discovery before the Justices’ scheduled depositions this week — even if the Court had not yet decided the quash motion. This approach would have provided the Justices — as well as their counsel — clear guidelines on whether they were to appear this week for their depositions and give testimony. However, that door — filing a discovery stay motion along with the quash motion — has now closed.

Instead, the Justices adopted a more aggressive litigation strategy and chose to file their quash motion on Thanksgiving Eve one business day before the

depositions were to begin. And then sit back and simply rest on their quash motion and not obey the Subpoena and not appear at their scheduled depositions. But filing a quash motion did not automatically stay the Justices' depositions. And filing a motion to quash the Subpoena did not relieve the Justices of the "duty to appear" at their scheduled depositions this week in accordance with well settled law, the Local Rules, and the Order governing discovery in this case. *See Sorensen*, 278 F.R.D. at 436; LR 16.01(g); Initial Case Mgt. Order, ECF No. 50, PageID #1149, ¶ G.

B. They have unique knowledge of Advisory Commission meetings.

The Justices have unique knowledge of Advisory Commission meetings. Even as non-parties to this case, the Justices are integral to this lawsuit and the Advisory Commission meetings, which has been confirmed by the depositions thus far.

Although the Justices contend, they do not possess relevant factual information, the record before this Court shows otherwise. Their argument that they should be shielded from giving their depositions because "Michelle Consiglio-Young is the AOC employee who has the most knowledge of what takes place at Advisory Commission meetings," is not actually supported by *Michelle Consiglio-Young's deposition testimony*. *See* ECF No. 61, PageID #1231; *see also* ECF No. 67, **Exhibit 3**, Consiglio-Young Depo., p. 40, Line 8 through p. 46, Line 12.

First, Consiglio-Young testified that, after the 2018 public Advisory Commission meeting when the gentleman became verbally combative and disruptive, the Tennessee Supreme Court took the matter up for discussion and then the meetings were closed after that incident. According to their bios on the AOC webpage, Chief

Justice Kirby, Justices Bivins and Page, and Special Justice Lee all served on the Tennessee Supreme Court in 2018 during the time of this incident.⁵

Second, Consiglio-Young testified that current Chief Justice Kirby was the Supreme Court liaison in 2018 and was at that specific public Advisory Commission meeting involving the verbally combative man and had “firsthand” knowledge of this incident. Chief Justice Kirby confirmed that she was in fact Supreme Court liaison to the Advisory Commission in 2018. ECF No. 61-2, PageID #1256.

Third, Consiglio-Young testified that Justice Bivins was the Chief Justice during the time of this incident in 2018 when the Supreme Court “took the matter up for discussion and then the meetings were closed after that incident.”

Fourth, as one of her theories and defenses, Director Long has squarely injected into this case whether there is a “historically recognized right of access to the Tennessee Advisory Commission on the Rules of Practice & Procedure.” Initial Case Mgt. Order, ECF No. 50, PageID #1147. But she also does not know about the historical nature of meetings and whether they were open or closed to the public because that predates her tenure as AOC Director according to her testimony. Moreover, under *Richmond Newspapers* and its progeny, once the First Amendment attaches to meetings, the government must come forward with a compelling governmental reason that is narrowly tailored why meetings should be closed. And

⁵ (Chief Justice Kirby) <https://tncourts.gov/courts/supreme-court/judges/holly-kirby> (Justice Bivins) <https://tncourts.gov/courts/supreme-court/judges/jeffrey-s-bivins> (Justice Page) <https://tncourts.gov/courts/supreme-court/judges/roger-page> (Special Justice Lee) <https://www.tncourts.gov/press/2022/11/15/justice-lee-announces-august-2023-retirement>

from his excerpted testimony, Chairman Bulso likewise does not know if Advisory Commission meetings historically have been open or closed, and Chairman Wade did not make the decision in 2018 to close meetings according to Consiglio-Young.

Fifth, Consiglio-Young provided compelling testimony involving the 2018 incident, narrowing the issues in dispute over the historical nature of open and closed meetings. But she also pointed directly back at the Justices since they “took the matter up for discussion and then the meetings were closed after that incident.”

Finally, perhaps Lang Wiseman — Director Long’s retained expert witness — best summarized the current status of discovery in this case as to whether Advisory Commission meetings historically have been open or closed to the public. In response to a question asking him why meetings of other boards and commissions in Tennessee were open to the public but not Advisory Commission meetings, Mr. Wiseman said, “Well, I think you need to ask the Supreme Court that.”

CONCLUSION

For these reasons, Plaintiff McCaleb requests that the Court grant his Motion to Compel and enter an Order compelling the Justices’ compliance with the Subpoena that commands their deposition testimony.

November 30, 2023

Respectfully submitted,

/s/ M. E. Buck Dougherty III

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

James McQuaid, *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

jmcquaid@libertyjusticecenter.org

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

CERTIFICATE OF SERVICE

I, counsel for Plaintiff, hereby certify that a true and correct copy of the foregoing document has been served on the following counsel of record, via the Court's ECF system by email on this 30th day of November 2023:

JONATHAN SKRMETTI

Office of the Attorney General & Reporter
Public Interest Division
P.O. Box 20207
Nashville, Tennessee 37202-0207

Andrew C. Coulam
Michael M. Stahl
Robert W. Wison
andrew.coulam@ag.tn.gov
michael.stahl@ag.tn.gov
robert.wilson@ag.tn.gov

*Attorneys for Defendant
AOC Director Michelle Long*

Donna Green
Cody Brandon
Liz Evan
donna.green@ag.tn.gov
cody.brandon@ag.tn.gov
liz.evan@ag.tn.gov

*Attorneys for Non-Party
Tennessee Supreme Court Justices*

/s/ M.E. Buck Dougherty III