JUDICIAL DISCIPLINE AND DISABILITY COMMISSION
STATE OF ARKANSAS

In the Matter of the Investigation of the Honorable Wendell Griffen

Case No. 17-172

SUPPLEMENTAL RESPONSE TO COMPLAINT, AND MOTION TO DISMISS OR IN THE ALTERNATIVE, REQUESTS FOR PRODUCTION OF DOCUMENTS

The Honorable Wendell Griffen, by his undersigned counsel, responds to the Complaint brought by David J. Sachar as Executive Director of the Arkansas Judicial Discipline and Disability Commission (the "Commission") as follows. This submission supplements Judge Griffen's May 5, 2017 letter to Director Sachar. As set forth below, the law, particularly the First Amendment to the U.S. Constitution and the Arkansas Religious Freedom Restoration Act, requires immediate dismissal of the Complaint. If the Complaint is not dismissed, then Judge Griffen requests production of the documents and information set forth below.

INTRODUCTION

The gravamen of the Commission's Complaint is the allegation that, because of Judge Griffen's personal religious and moral views on the death penalty, he cannot rule impartially in death penalty cases. However, in the only death penalty case to come before Judge Griffen in recent months, Judge Griffen ***dismissed*** nine death row inmates' complaint challenging the constitutionality of their method of execution and ***denied*** the inmates' request for leave to amend, thereby allowing their executions to go forward. *See Johnson v. Kelley*, Case No. 60CV-15-2921 (Pulaski Cty. Cir. Ct. Mar. 28, 2017 Order) (attached hereto as Ex. 1). In *Johnson v. Kelley*, despite his personal religious and moral views, Judge Griffen ruled that he was bound to follow Arkansas Supreme Court precedent. (*See id.* ("This Court must and will abide by the ruling issued by the Arkansas Supreme Court. . . .").) This is conclusive proof of Judge Griffen's

ability to apply the law impartially in death penalty cases and reason enough alone to dismiss this meritless Complaint. None of Judge Griffen's conduct violated the law, including any provision in the Arkansas Code of Judicial Conduct.

This Complaint, and its underlying referral by the Arkansas Supreme Court, is nothing other than an attempt to intimidate and punish Judge Griffen for exercising his rights to freedom of speech, freedom of religion, freedom of religious expression, and right to peaceful assembly protected by the First Amendment to the United States Constitution, as supported by the legion of case law cited below. The "appearance" of impropriety or partiality is not a compelling state interest, and the Commission cannot identify any "actual improprieties," which are limited to "violations of the law" or rules. (Comment 5 to Rule 1.1. and 1.2 of the Code of Judicial Conduct.) Judge Griffen is being targeted for expressing religious and moral views that members of the power structure in Arkansas dislike, which is the very evil against which the First Amendment protects. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Judge Griffen is an elected official, and the voters can determine whether they approve of his views and his conduct as a judge. This Commission may not usurp the will of the people, without any evidence that Judge Griffen committed himself to rule for a particular party appearing before him and in direct contradiction of conclusive evidence that he follows the law in death penalty cases. For these reasons and those that follow, the Commission should dismiss this meritless Complaint before it tramples further on the Constitution, the Arkansas Religious Freedom Restoration Act, and the fundamental rights the judiciary was designed to uphold.

BACKGROUND

Judge Griffen was elected to the Sixth Judicial Circuit in 2010 and reelected for a second term in 2016. He is also an ordained Baptist minister and, since May 2009, has served as pastor of New Millennium Church, a congregation affiliated with the Cooperative Baptist Fellowship (CBF), the Cooperative Baptist Fellowship of Arkansas (CBFAR), the Samuel DeWitt Proctor Conference (SDPC), and the Association of Welcoming and Affirming Baptists (AWAB). He is currently a trustee of the SDPC.

The impetus for this Complaint was Judge Griffen's April 14, 2017 decision granting a temporary restraining order in *McKesson Medical-Surgical Inc. v. State of Arkansas*, Case No. 60CV-17-1921 (Pulaski Cty. Cir. Ct.). McKesson filed its action on the afternoon of Good Friday, April 14, 2017, seeking to temporarily enjoin the Arkansas Department of Correction from using McKesson's drug vercuronium bromide. By verified complaint supported by exhibits, McKesson provided evidence that its property had been wrongfully obtained through deception and was in imminent risk of being disposed of by the respondent parties. Applying well-settled Arkansas property and contract law, Judge Griffen ruled that McKesson had demonstrated it was threatened by conduct causing imminent irreparable harm unless a TRO was issued and that McKesson was likely to succeed on the merits of its claim. Judge Griffen set a hearing for the following Tuesday, April 18, which was the first date the parties indicated they were available, but invited the parties to apply to the Court "should Defendant desire an earlier hearing." (Compl. Ex. B.)

Rather than ask for an earlier hearing, or ask Judge Griffen to reconsider or overturn the TRO, or ask Judge Griffen to recuse or disqualify himself, the Attorney General and her staff applied to the Arkansas Supreme Court to have Judge Griffen removed from the *McKesson* case. On April 17, 2017, the Arkansas Supreme Court issued an order immediately reassigning all

cases involving the death penalty or the State's execution protocol to judges other than Judge Griffen, including "permanent reassignment" of any "future cases involving this subject matter." (Compl. Ex. A.) The order cited only a single rule from the Code of Judicial Conduct, Rule 2.11, which, the Court noted, requires a judge to "disqualify himself in any proceeding in which . . . the judge . . . has made a ***public statement*** . . . that ***commits*** or appears to commit the judge to reach a particular result or rule in a particular way in ***the*** proceeding or controversy." *Id.* (emphasis supplied).

The Arkansas Supreme Court did not identify any "public statement," much less in the *McKesson* proceeding, that "committed" or appeared to commit Judge Griffen to reach a particular result or rule in a particular way in the proceeding. The *McKesson* case, "the" proceeding at issue, was not even pending yet at the time of Judge Griffen's April 10 blog post, so that post could not have been a violation of Rule 2.11 (or Rule 2.10 (Judicial Statement on Pending and Impending Cases)). And Judge Griffen is not alleged to have uttered a word outside the Capitol or the Governor's mansion on April 14, much less a "public statement" that "committed" Judge Griffen to rule a particular way in the *McKesson* case. Judge Griffen did not wear a robe, did not state that he was a member of the judiciary, and did not exercise any judicial duties while he was engaged in quiet prayer. Just three days after its decision in the *McKesson* case, the Arkansas Supreme Court denied the death row inmates' stay of execution in the *Kelley v. Johnson* case (*see* attached Exhibit 2), the same case in which Judge Griffen committed to follow the law as governed by Arkansas Supreme Court precedent. The Arkansas Supreme Court made no comment in that order about Judge Griffen's ability to impartially adjudicate death penalty cases.

This Complaint ensued. Although the Arkansas Supreme Court only mentioned Rule 2.11 in making its referral, the Complaint piles on, alleging violations of Rules 1.1, 1.2, 1.3, 2.1, 2.2, 2.10, 2.11 and 3.1. The Commission appears to rest its case primarily on three largely undisputed facts: that, on April 10, 2017, Judge Griffen wrote a blog post about religious faith and the Holy Week in which he opined that the death penalty is "*morally*" (not legally) unjustifiable; that, on the afternoon of Good Friday, April 14, 2017, Judge Griffen was a silent participant in an anti-death penalty gathering at the Capitol building and a prayer vigil in front of the Governor's mansion; and that on April 14, Judge Griffen granted the TRO to McKesson based on McKesson's showing under Arkansas property and contract law that its property and reputational rights would be irreparably harmed should the State be permitted to dispose of McKesson's property. None of these actions violated the law or any provision of the Code of Judicial Conduct. Instead, it is the continued prosecution of this case that violates the law, specifically, the First Amendment of the U.S. Constitution and the Arkansas Religious Freedom Restoration Act, for the reasons set forth below.

ARGUMENT

I. The Commission's Action Violates Judge Griffen's First Amendment Rights to Freedom of Expression, Freedom of Religion, and Peaceable Assembly

The Commission's proposed application of the Code of Judicial Conduct in this matter would restrict a duly elected judge from engaging in speech, religious expression, or peaceable assembly with respect to a disputed issue of importance to the public, religious communities, and voters in the State – in short, it targets expression "at the core of our First Amendment freedoms." *Republican Party of Minn. v. White*, 536 U.S. 765, 774 (2002). The Commission, however, cannot justify the overbreadth of its politically motivated sanction, and, as a result, the Complaint violates the Constitution and should be dismissed.

A. The Commission Seeks to Impose Restrictions On Core First Amendment Expression That Cannot Withstand Strict Scrutiny

Restrictions on such speech "at the core of our First Amendment freedoms" are subject to strict scrutiny. *White*, 536 U.S. at 774; *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 355 Ark. 38, 56 (2003) (applying strict scrutiny and holding that Commission's admonishment of Judge Griffen for a speech to the Legislative Black Caucus regarding race could not withstand such scrutiny). When a public official speaks on "a matter of great public concern," such core freedoms are implicated, and the state's ordinary interests in regulating the conduct of its judiciary must give way to Constitutional concerns. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571 (1968); *see also Scott v. Flowers*, 910 F.2d 201, 210-11 (5th Cir. 1990) (holding that elected judge's open letter criticizing the judiciary's handling of a class of cases is a matter of legitimate public concern entitled to strict scrutiny). Judge Griffen's status as an elected official weighs even more heavily against restrictions on his political or religious expression. As the Court in *Scott* noted in overturning a disciplinary action against a judge, "the state's interest in suppressing Scott's criticism is much weaker than in the typical public employee situation" because he was "an elected official, chosen directly by the voters of his justice precinct." *Scott*, 910 F.2d at 211-12; *see also In the Matter of Disciplinary Proceedings Against Justice Richard B. Sanders*, 955 P.2d 369, 374 (Wash. 1998) (noting that courts must consider the special "need for free expression of . . . views in a system wherein members of the judiciary are elected to office by the vote of the people").

Where, as here, the expression at issue arises from religious belief and practice, First Amendment concerns are implicated with equal, if not greater, force. Indeed, "[t]he right to worship free from governmental interference lies at the heart of the First Amendment. It embraces not only the right to free exercise of religion, but also the right to freedom of

expression." *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984). Moreover, "the right to free exercise of religion unquestionably encompasses the right to preach, proselyte and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (holding unconstitutional a law that disqualified clergy members from serving as delegates to a state constitutional convention).

Here, the Commission has the burden to prove that the restrictions it seeks to impose on Judge Griffen's right to free speech are "(1) narrowly tailored, to serve (2) a compelling state interest." *White,* 536 U.S. at 775. Similarly, to burden Judge Griffen's religious expression, the Commission must show that it has imposed "the least restrictive means of achieving a compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1980). Further, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

B. The Commission's Proposed Application of the Rules Is Not Narrowly Tailored to Meet Any Compelling State Interest

Although the Complaint alleges the violation of a number of provisions of the Code of Judicial Conduct, all of the alleged violations relate to the Code's requirements for impartiality and its prohibition on creating the appearance of impartiality. *E.g.* Rule 1.1 (a judge must "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary"); Rule 2.11 ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"). Although promoting impartiality and independence in the judiciary is a compelling state interest, promoting the "appearance" of impartiality and independence is not a compelling state interest. *White*, 536 U.S. at 777-78 ("[S]ince avoiding judicial preconceptions on legal issues is neither

possible nor desirable, pretending otherwise by attempting to preserve the 'appearance' of that type of impartiality can hardly be a compelling state interest either.").

Moreover, "impartiality" does not mean silence on issues of public concern. Rather, the "root" meaning of "impartiality in the judicial context" is "the lack of bias for or against either *party* to the proceeding." *White*, 536 U.S. at 775 (emphasis in original). In contrast, so-called "impartiality" as to a particular *legal view* has never been found to be a compelling state interest. As the Supreme Court held in *White*, "A judge's lack of predisposition regarding relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason." 536 U.S. at 778. Indeed, "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* . . . would be evidence of lack of qualification, not lack of bias." *Id.* (quotations omitted).

The Arkansas Code of Judicial Conduct on its face adheres to this concept of impartiality as a lack of bias against particular *parties*. The Code defines "impartiality" as the "absence of bias or prejudice in favor of, or against, *particular parties or classes of parties*, as well as maintenance of an open mind in considering issues that may come before a judge." Terminology, Code of Conduct (emphasis added). The Code also now recognizes explicitly that it is permissible that "each judge comes to the bench with a unique background and personal philosophy," as long as the judge interprets and applies the law without regard to whether the judge personally approves or disapproves of the law in question, Comment 2 to Rule 2.2, as Judge Griffen did in his March 28, 2017 Order in *Johnson v. Kelley*. To date, neither the Arkansas Supreme Court nor anyone else has explained how or why Judge Griffen allegedly did not interpret and apply Arkansas property and contract law in the *McKesson* TRO order, nor has the Court explained how Judge Griffen could have possibly failed to follow the law in the

McKesson order when the judge who replaced him on the case ruled the same way Judge Griffen did. (*See* April 20, 2017 Order of Judge Alice Gray Granting Plaintiff's Motion for Preliminary Injunction in the *McKesson* case, attached as Exhibit 3.)

In addition, the Commission itself has recognized that the very class of charges now asserted finds no basis in the Arkansas Code of Judicial Conduct. Dismissing a similarly harassing and meritless complaint against Judge Griffen in 2007, the Commission pronounced, "There is no Arkansas Canon that expressly prohibits a judge or judicial candidate from publicly discussing disputed political or legal issues." Final Decision and Order dated Sept. 27, 2007, Comm'n Case Nos. 05-328 & 05-356 (attached as Exhibit 4). The Commission further stated that the Code of Conduct "cannot be used as a basis for a finding of judicial misconduct if the alleged misconduct is solely related to a public discussion of disputed political or legal issues." *Id.*

The attempt to punish Judge Griffen for viewpoint-based expression is precisely the kind of sanction that has failed to pass Constitutional muster time and time again. In *White*, the Supreme Court held unconstitutional Minnesota's rule prohibiting a judicial candidate from "announcing his or her views on disputed legal or political issues." 536 U.S. at 768. In *Scott*, the Fifth Circuit held that disciplinary action against an elected judge based on his public criticism of his judicial district's treatment of certain types of cases curtailed his right to free speech; the sanction was neither narrowly tailored, nor effective at all to promote the interest of an impartial judiciary. 910 F.2d at 213 (holding that the goals of an "efficient and impartial judiciary" are "ill served by casting a cloak of secrecy around the operations of the courts, and that by bringing to light an alleged unfairness in the judicial system, [Judge] Scott in fact furthered the very goals that the Commission wishes to promote").

Particularly where issues of great public importance are at issue, courts have held that judges, while bounded by their duty to remain impartial to the parties that appear before them, cannot be restricted from speaking in ways that do not implicate that duty. The Washington Supreme Court in *In the Matter of Disciplinary Proceedings Against Justice Richard B. Sanders*, 955 P.2d 369 (Wash. 1998), held that a judge's appearance and speech about preserving human life at an anti-abortion rally could not, consistent with the First Amendment, be punished under judicial conduct rules against "diminishing public confidence in the judiciary," engaging in certain political conduct, or "lending the prestige of judicial office" to advance a judge's private interests.

Similarly, in *Mississippi Commission on Judicial Performance v. Judge Connie Glen Wilkerson*, 876 So.2d 1006 (Miss. 2004) (citing *Republican Party of Minn. v. White*, 536 U.S. 765 (2002)), the Court dismissed sanctions against a judge who made statements, based on his religious beliefs, that gays and lesbians should be put in mental institutions. The court held that the First Amendment prevented sanctions based on this protected political and religious speech. *Id.* at 1013-14. Rejecting an argument that the state had an interest in promoting the "appearance of impartiality," the court noted, "We find no compelling state interest in requiring a partial judge to keep quiet about his prejudice so that he or she will appear impartial." *Id.* at 1015; *see also Buckley v. Illinois Judges Assoc.*, 997 F.2d 224, 228 (7th Cir. 1993) (holding that a rule prohibiting judicial candidates from announcing views on "disputed legal or political issues" reached "far beyond speech that could reasonably be interpreted" to compromise the speaker's impartiality and was unconstitutional).

The Commission must decide – while other judges who publicly rail against abortion and spew hate speech that all gays and lesbians belong in mental institutions are protected from

discipline by the First Amendment – does the Commission want to discipline a preacher who silently prays while laying on a cot in solidarity with Jesus on Good Friday? Does the Commission want to create the precedent that judges are not permitted to pray, outside the courtroom and on their own time? Permitting this Complaint to remain pending sends a message to members of the Arkansas judiciary that they may not express views on topics of public concern unless those views are in line with those of the Commission. This sort of chilling effect is antithetical to the values of integrity and judicial independence that the Code of Conduct is intended to promote. Where, as here, the judge targeted for punishment ~~proposed to be punished~~ has expressly demonstrated his ability to follow the rule of law, the proposed sanction is both unconstitutional and unjust.

II. The Complaint Also Violates Arkansas Law, Specifically, the Arkansas Religious Freedom Restoration Act

Under the Arkansas Religious Freedom Restoration Act ("RFRA"), Ark. Code Ann. § 16-123-401 et seq., the "government shall not substantially burden a person's exercise of religion," except "in furtherance of a compelling governmental interest" and where "the least restrictive means of furthering that compelling governmental interest" is employed. § 16-123-404. Enacted in 2015, the RFRA has yet to be interpreted by the Arkansas courts. However, the RFRA provides that it is to "be interpreted consistent with the [federal] Religious Freedom Restoration Act of 1993, 42 U.S.C., § 2000bb, federal case law, and federal jurisprudence." § 16-123-402(2).

The RFRA is worded in language that is plain, unambiguous, and directly relevant to Judge Griffen's defense to the April 17, 2017 per curiam decision by the Arkansas Supreme Court that disqualified him from presiding over the *McKesson* case, any cases involving capital

punishment and the method of execution protocol, as well as the instant investigation and threat of judicial disciplinary action. Arkansas Code Annotated § 16-123-404 states:

> Free exercise of religion protected.
>
> (a) A government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except that a government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is: (1) In furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest.
> (b) (1) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.
> (2) Standing to assert a claim or defense under this section is governed by the general rules of standing under statute, the Arkansas Rules of Criminal Procedure, the Arkansas Rules of Civil Procedure, or any court holding from the state's appellate courts.

Moreover, Arkansas Code Annotated § 16-123-405 states:

> Construction and applicability.
>
> (a) This subchapter applies to all state law, and the implementation of state law, whether statutory or otherwise, and whether adopted before or after the effective date of this act.
> (b) State statutory law adopted after the effective date of this act is subject to this subchapter unless the state statutory law explicitly excludes the application by reference to this subchapter.
> (c) This subchapter does not authorize any part of a government to burden a religious belief.

The Arkansas General Assembly took special effort to demonstrate that religious liberty is not to be threatened by governmental action such as the instant Commission investigation and the actions of the Arkansas Supreme Court against Judge Griffen. Any lingering uncertainty as to its intention is dispelled in the following excerpt from the emergency clause to the RFRA:

> It is found and determined by the General Assembly of the State of Arkansas that there is not a higher protection offered by the State than the protection of a person's right to religious freedom; and that this act is immediately necessary because every day that a person's right to religious freedom is threatened is a day that the First Amendment to the United States Constitution is compromised.

As the U.S. Supreme Court has held, the federal "RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014). So too, the explicit intent of the Arkansas RFRA is to "provide a claim or defense to persons whose religious exercise is substantially burdened by government" by imposing a more robust strict scrutiny standard than is required under the First Amendment to the U.S. Constitution. *Id.*; RFRA § 16-123-402(1), (3).

Judge Griffen intends to pursue his claim for relief for violation of the federal and Arkansas RFRA based on the action of the Arkansas Supreme Court barring him from hearing cases involving the death penalty in another forum. For purposes of the instant Commission Complaint, however, the foregoing analysis and the reasons stated in Section I, *supra*, abundantly demonstrate that the Commission's improper Complaint violates Judge Griffen's right to free exercise of religion under the U.S. Constitution. That reasoning applies with even greater force under the more expansive protections of the Arkansas RFRA. The Commission's Complaint should therefore also be dismissed because it violates the RFRA.

III. The Commission Has Not Alleged Any Conduct In Violation of the Code of Judicial Conduct

Even aside from the Constitutional and Arkansas RFRA obstacles noted above, the Commission has not alleged any conduct by Judge Griffen that violates the Code of Conduct. The Commission cites Canon 1 (which requires a judge to "uphold and promote the independence, integrity, and impartiality of the judiciary" and to " avoid impropriety and the appearance of impropriety") and Canon 2 (requiring judicial duties to be performed "impartially, competently, and diligently"). As noted above, "impartiality," according to the "Terminology"

provisions of the Code of Conduct, refers primarily to a lack of bias as to *parties*, not issues – and, as discussed above, to construe the Code otherwise would render it unconstitutional.

Here, the Commission does not allege, nor could it, that Judge Griffen has made any statement indicating bias for or against any *party*. On the contrary, his decisions in both *McKesson* and *Johnson* demonstrate that, regardless of his personal views, he has open-mindedly applied the law to the facts of each case before him – the very definition of impartiality. Thus, the Commission's allegations concerning violation of various impartiality rules cannot stand. *See, e.g.*, Rule 1.2 (requiring judges to act in a manner that promotes public confidence in, *inter alia*, the impartiality of the judiciary); Rule 2.2 (requiring judges to act "fairly and impartially"); Rule 2.11 (requiring disqualification based on the impartiality of a judge); and Rule 3.1 (prohibiting extrajudicial activities that might undermine the appearance of impartiality). To the contrary, the Code expressly endorses the types of activities criticized in the Complaint. *See* Rule 3.1 cmt. 1 ("Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities . . . .").

Similarly, the Commission cannot allege any facts underpinning the alleged violation of Rule 1.3, which prohibits "abus[ing] the prestige of judicial office to advance the personal or economic interests of the judge or others." It is indisputable that Judge Griffen has no economic interest in the *McKesson* case or the State's execution of death-row inmates. Nor does Judge Griffen have a "personal" interest in such matters. Under the Code, to be a "personal interest," the interest must be a "prospective liability, gain, or relief to the judge" that "turn[s] on the

outcome of the suit." *Worth v. Benton Cty. Circuit Court*, 89 S.W.3d 891, 896 (Ark. 2002). Further, "the interest must be more than that of an ordinary citizen or taxpayer" to be "personal." *Id.* at 897. Here, the Commission has not identified a single proceeding in which Judge Griffen has any personal or economic interest. Thus, there can be no violation of the rule.

Nor can the Commission establish a violation of the Code's rules concerning "independence" and "integrity." The Code defines "independence" as "a judge's freedom from influence or controls other than those established by law" and "integrity" as "probity, fairness, honesty, uprightness, and soundness of character." The allegations in the Complaint, taken in context of the *Johnson v. Kelley* decision, show only that Judge Griffen has been open and forthright in his personal and religious life concerning his moral views about the death penalty, while at the same time, demonstrating his commitment to follow the law when applying the law.

Any allegation that Judge Griffen took actions that could "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court" (Rule 2.10) are entirely unfounded: there were no death penalty actions pending before Judge Griffen when he wrote his blog and participated in the identified death penalty vigil and gathering, and even if there were, no reasonable person could expect those activities to affect Judge Griffen's independence or impartiality given his decision in *Johnson v. Kelley*. Interpreting the corresponding District of Columbia rule of judicial conduct, a court held that a judge who gave a law school lecture expressing views on certain cases pending before her did not violate the impending-case rule because she expressed no views that she had not already expressed in published opinions in those pending cases. *In re Charges of Misconduct*, 769 F.3d 762, 798 (D.C. Cir. 2014). For the same reasons, Judge Griffen's expressions of his anti-death penalty

views in April cannot be said to violate Rule 2.10 because his views were well known to anyone who had read his March 28 decision in *Johnson* permitting the executions to go forward.

It is remarkable that the instant complaint arises from a referral from the Arkansas Supreme Court in a per curiam order issued April 17, 2017, after that Court granted an application that sought to disqualify Judge Griffen from further action in the *McKesson* case that was scheduled for an evidentiary hearing on April 18, 2017. The movants in that proceeding did not move Judge Griffen to enter an order to "disqualify himself" as Rule 2.11 contemplates. The Arkansas Supreme Court did not invite or provide time for Judge Griffen to respond to the disqualification motion before granting it. The Arkansas Supreme Court held no hearing at which Judge Griffen and his counsel have been allowed to appear and confront any disqualification motion by the *McKesson* movants. Thus, the instant Commission Complaint is based on a referral and disqualification ruling where the trial judge involved was not presented with a recusal motion to disqualify himself, let alone offered any legitimate basis for recusal.

The instant Complaint is, therefore, remarkable for many reasons.

In the first place, Arkansas courts have consistently held a "judge's decision to recuse is within the trial court's discretion and will not be reversed absent abuse." *Searcy v. Davenport*, 352 Ark. 307, 312, 100 S.W.3d 711, 714 (2003). "[T]here is a presumption of impartiality on the part of judges." *Id.* "The party seeking recusal must demonstrate bias." *Id.* "[U]nless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias." 352 Ark. at 313, 100 S.W.3d at 714. Nothing about the instant complaint shows that the recusal movants in the *McKesson* proceeding before the Arkansas Supreme Court satisfied this this well-known standard, or that the Arkansas Supreme Court followed it.

Above all, the instant Complaint is remarkable for its disregard for the controlling ruling by the Supreme Court of the United States in *Republican Party of Minnesota v. White, supra*, in which Justice Antonin Scalia set forth the following exposition about the meaning of "impartiality":

> It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preoccupation in favor of or against a particular *legal* view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest ... but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law.

536 U.S. at 777 (emphasis in original).

> ...Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

536 U.S. at 777 (quoting *Laird v. Tatum*, 409 U.S. 824, 835 (1972)).

> [S]ince avoiding preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.
>
> ...A third possible meaning of "impartiality" (again not a common one) might be described as openmindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so.

536 U.S. at 777 (emphasis in original).

In the same opinion, Justice Scalia addressed the relationship between impartiality and the personal and extrajudicial activities of judges, and asserted:

> Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. *See*, e.g., *Laird*, 409

> U.S. at 831-833 (describing Justice Black's participation in several cases construing and deciding the constitutionality of the Fair Labor Standards Act, even though as a Senator he had been one of its principal authors; and Chief Justice Hughes's authorship of the opinion overruling *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), a case he had criticized in a book written before his appointment to the Court). More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But *judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches.*

White, 536 U.S. at 779 (emphasis added).

In *White*, Justice Scalia set out the traditional way the term "impartiality" is used in the judicial context in his majority opinion authored fifteen years ago. In view of the instant Complaint and the referral by the Arkansas Supreme Court on which it is based, Justice Scalia's analysis bears repeating.

> One meaning of "impartiality" in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used...
>
> ...To be sure, when a case arises that turns on a legal issue on which the judge ... has taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

536 U.S. at 775-77 (emphasis in original).

It is remarkable that Judge Griffen is now forced to re-litigate, in 2017, the meaning of a term the U.S. Supreme Court explained fifteen years ago. In light of what the entire American legal and judicial establishment has known for fifteen years based on the holding in *White* and Justice Scalia's plainly worded and clearly reasoned majority opinion, it is remarkable, to put it charitably, that the Arkansas Supreme Court would entertain, let alone act to disqualify Judge Griffen or any other judge, based on a proceeding about Judge Griffen's exercise of his First

Amendment rights to speech, religion, religious expression, and peaceful assembly. And given that the Arkansas Supreme Court applied the holding in *White* and Justice Scalia's analysis to a previous case involving Judge Griffen more than a decade ago in *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 355 Ark. 38, 56 (2003), the instant complaint is more than merely misguided. It demonstrates a hostility toward Judge Griffen, freedom of speech, religious liberty, and the notion that Judge Griffen dares to live out his faith as a follower of Jesus and a Baptist pastor in a prophetic and peaceful way.

CONCLUSION

The Commission is urged to dismiss the Complaint immediately. The Complaint purports to threaten Judge Griffen with judicial discipline for engaging in lawful conduct protected by the First Amendment to the Constitution of the United States and the Arkansas Religious Freedom Restoration Act. The Complaint is not based on any act or omission by Judge Griffen that violated any part of the Arkansas Code of Judicial Conduct. The Complaint should, therefore, be dismissed, immediately, in order to avoid further waste of the time and other resources of the Judicial Discipline and Disability Commission and Judge Griffen, and to avoid further chilling effect on judges in Arkansas.

Accordingly, Judge Griffen demands that the Commission inform him, no later than June 1, 2017, whether it intends to dismiss its meritless Complaint.

In the event that the Commission persists in this proceeding, Judge Griffen demands that the following information be produced to his undersigned counsel no later than June 1, 2017, pursuant to Commission Rule of Procedure 7(C)(1):

> 1. All communications received by the Commission's members and their staffs regarding the Complaint, including voice mail, electronic mail, or any other communications from all persons who contacted them about instituting a disciplinary complaint, including, without limitation, members of the Arkansas Supreme Court, Attorney General Leslie Rutledge or any member of her staff, members of the Arkansas

General Assembly or any member of their staff, Governor Asa Hutchinson or any member of his staff and/or executive branch agencies, and members of the Judicial Discipline and Disability Commission.

2. All communications concerning the issues and events surrounding JDDC Case No. 17-172 made prior to May 1, 2017 by David Sachar to any person, including, without limitation, members of the Arkansas Supreme Court, Attorney General Leslie Rutledge or any member of her staff, members of the Arkansas General Assembly or any member of their staff, members of the Commission, and any other person whatsoever including Governor Asa Hutchinson and all other persons identified in the preceding numbered request.

3. All legal authorities considered by Mr. Sachar before he issued the Complaint, including all consultations with scholars concerning judicial discipline.

4. All other investigatory records, files and reports of the Commission relating to Case No 17-172.

Dated: May 8, 2017

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