ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION

CASE NO. 17-171 and 17-172

RACHEL MICHEL, Special Counsel **COMPLAINANT**

v.

CIRCUIT JUDGE WENDELL GRIFFEN **RESPONDENT**

MEMORANDUM BRIEF OF JUDGE WENDELL GRIFFEN IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

Respondent, JUDGE WENDELL GRIFFEN (hereafter "Judge Griffen"), by and through his attorneys, submits this memorandum brief in support of his Motion for Summary Judgment because there are no genuine issues of material fact and he is entitled to judgment as a matter of law.

INTRODUCTION

At issue in the instant matter is the actual propriety of certain activities – one judicial, and the other extrajudicial – in which Judge Griffen, a Pulaski County circuit judge, engaged on Good Friday afternoon, April 14, 2017. Judge Griffen granted a petition for a temporary restraining order in a property matter. Judge Griffen also participated in an extra-judicial prayer vigil protesting the death penalty which occurred later that day that had been planned days earlier. The Judicial Discipline and Disability Commission ("JDDC" or "Commission") seeks to punish Judge Griffen for the activities, alleging violations of judicial canons.

However, Judge Griffen operated well within his rights at all times, a sentiment shared by David J. Sachar, who has served as Director of the JDDC for well over ten years. See David J. Sachar Deposition Transcript, attached hereto as Exhibit 1 at 12. Throughout his tenure, Director Sachar has provided counsel and expertise to lawyers and judges alike, routinely fielding and

providing consultation on judicial ethics. See Ex. 1 at 15. Quite simply, Director Sachar is an expert in this area, and he has provided sworn testimony demonstrating unequivocally that Judge Griffen is entitled to summary judgment in the instant matter:

> **Q:** We have no evidence of any bad faith, not just for [Judge Griffen's] decision on the TRO. But, you, having read everything and apprised yourself of the facts and with the experience and the skills and talents and the expertise that you bring in the time frame that you were involved in this, you didn't see any fraud; corrupt motive; or bad faith in any of the activities that the judge engaged in, true?
>
> **A:** As far as I know, his ruling was correct on law and fact.
>
> **Q:** And we've already established that he's well within his rights to engage in free speech extrajudicially?
>
> **A:** Correct. (See Exhibit 1, p. 125, lines 5 thru 16)

Hence, the Commission lacks jurisdiction to sanction Judge Griffen, procedurally and constitutionally. See JDDC Rule 6(B); see also U.S. Constitution (Art. VI, Clause 2) (the "Supremacy Clause"). Specifically, because the TRO entered by Judge Griffen involved his "making findings of fact, reaching a legal conclusion [and] applying the law as he [] understands it," the Commission lacks jurisdiction to punish or discipline him for entering the order. See JDDC Rule 6(B).

Judge Griffen's April 14 ruling was totally correct on the law, but that is beside the point. What counts is his inherent discretion as a judge presiding over a legal matter. And, as established conclusively by Director Sachar, there is no evidence that fraud, corrupt motives or bad faith guided Judge Griffen's correct decision. By its express terms, Rule 6(B) divests the JDDC of jurisdiction in such instances. Therefore, any challenge to Judge Griffen's rulings–be they a decision not to recuse or to issue a TRO–must fail. See JDDC Rule 6(B).

Director Sachar's position is unassailable whether one examines Judge Griffen's lawful, correct entry of an April 14, 2017 TRO or his constitutionally-protected expression of free speech

opposing the death penalty generally. This is because Judge Griffen had an unfettered right to engage in each activity, albeit derived from different sources. Simply put, his legal ruling cannot be challenged because of his judicial discretion. His expression of religion and free speech cannot be abridged because of the U.S. Constitution.

As for the other activity–Judge Griffen's April 14 constitutionally-protected participation in extrajudicial freedoms of speech and religion–the Commission's jurisdictional arm has even shorter reach. See *Republican Party of Minnesota v. White*, 536 U.S. 765, 774 (2002). Restrictions on speech "at the core of our First Amendment freedoms" will not lie. *Id.*; see also *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 355 Ark. 38, 56 (2003). This includes, of course, symbolic speech. See Ex. 1 at 63. The method of speech delivery is of little import when compared to the expression of sentiment. See Ex. 1 at 63. Thus, whether a U.S. citizen speaker eloquently pounds a podium, sings a satirical song, draws a political cartoon or engages in some other symbolic speech – such as by being tied to a cot to symbolize solidarity with Jesus Christ – that speaker is protected by the First Amendment of the U.S. Constitution, without regard to his or her vocation. This is well-settled law and means that any challenge to Judge Griffen's constitutional rights must fail. The instant motion for summary judgment should therefore be granted.

LEGAL STANDARD

The standards applicable to summary judgment are axiomatic and reflected in the Arkansas Rules of Civil Procedure ("ARCP") which govern adjudication procedures for the Commission. See JDDC Rule 9. Rule 56 of the ARCP addresses summary judgment, reading in pertinent part:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. Absent leave of court for good cause shown, the party must file any such motion no later than 45 days before any scheduled trial date.

> (c) Motion and Proceedings Thereon. (1) The motion shall specify the issue or issues on which summary judgment is sought and may be supported by pleadings, depositions, answers to interrogatories and admissions on file, and affidavits. The adverse party shall serve a response and supporting materials, if any, within 21 days after the motion is served. The moving party may serve a reply and supporting materials within 14 days after the response is served. For good cause shown, the court may by order reduce or enlarge the foregoing time periods. No party shall submit supplemental supporting materials after the time for serving a reply, unless the court orders otherwise. The court, on its own motion or at the request of a party, may hold a hearing on the motion not less than 7 days after the time for serving a reply. For good cause shown, the court may by order reduce the foregoing time period. (2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion.

Rule 56(e) of the Arkansas Rules of Civil Procedure is clear. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, **shall** be entered against him (emphasis added)." Judge Griffen's summary judgment motion and supporting material are filed within the time period prescribed by ARCP 56 and the Commission's scheduling order. The Special Counsel cannot "set forth specific facts showing that there is a genuine issue for trial" for a simple reason. There are none.

STATEMENT OF FACTS

Judge Griffen writes and publishes essays about faith and justice on his personal Internet blog, *Justice Is a Verb!* During Holy Week, 2017, Judge Griffen wrote and published essays on that blog that expressed his personal moral and religious opposition to capital punishment.

On Good Friday, April 14, 2017, at approximately 2:00 pm, while on his personal time, Judge Griffen attended a public rally held on the steps of the Arkansas State Capitol to demonstrate opposition to the death penalty. This rally was planned and scheduled by local organizers well in advance of April 14, 2017. This was a legitimate expression of free speech and Judge Griffen was well within his rights to attend such a rally. This is important because the Arkansas Rules of Judicial Conduct do not empower the Commission to ban or otherwise censor judges from extrajudicial expressions of free speech.

Later that day, at approximately 4:22 pm, a petition for a temporary restraining order (TRO) was filed in the Circuit Court of Pulaski County–where Judge Griffen presides–in a new lawsuit styled *McKesson Medical-Surgical, Inc. v. State of Arkansas* (Case No. 60CV-17-1921). In the suit, the petitioner, McKesson Medical-Surgical, Inc., sought a determination of the rightful ownership of certain property (the drug, vecuronium bromide) which was obtained by the State of Arkansas under false pretenses and which the State refused to return despite repeated requests. The TRO petition was randomly assigned to Judge Griffen, who reviewed the petition materials and concluded that McKesson Medical-Surgical, Inc.'s submission satisfied the elements for securing a TRO. He therefore granted the petition, with the TRO being filed at 4:37 pm and emailed to the parties at 5:33 pm.

After the entry and circulation of the TRO, Judge Griffen joined his parishioners from New Millennium Church in a prayer vigil in front of the Arkansas Governor's Mansion. Other

opponents of capital punishment were gathered there also. Judge Griffen was photographed lying on a cot while his parishioners led others in singing religious songs ("Amazing Grace" and "This Little Light of Mine"). The images from the prayer vigil went viral. Like the rally before it, this vigil was planned and scheduled well before Good Friday and the filing of the McKesson TRO petition. Within hours, Director Sachar received communications that voiced concern that the TRO put the execution schedule in jeopardy.

On Saturday, April 15, 2017, the Arkansas Attorney General presented an emergency petition to in the Arkansas Supreme Court, seeking to vacate the *McKesson* TRO and remove Judge Griffen from *McKesson*. *Id.* ¶ 28. On Monday, April 17, 2017, the Supreme Court granted the petition. Then it also issued, separately, Order No. 17-155, *per curiam*, which "immediately reassign[ed] all cases in the Fifth Division that involve the death penalty or the state's execution protocol, whether civil or criminal," and indicated that this was to be "permanent reassignment" for "all future cases involving this subject matter [the death penalty or the state's execution protocol]." Order 17-155 also directed the Commission to investigate whether to charge Judge Griffen with violating the Arkansas Code of Judicial Conduct by engaging in the aforementioned April 14, 2017 activities: his decision to authorize the issuance of the *McKesson* TRO and his extrajudicial participation in the prayer vigil protest.

On December 11, 2018, Commission Special Counsel, Timothy Discenza filed the Commission's amended statement of allegations against Judge Griffen. See Amended Statement of Allegations, attached hereto as Exhibit 2. Director Sachar, who reviewed the entirety of materials in the matter prior to recusing himself, has testified that the complaint against Judge Griffen would require discovery if it could be sustained at all. Yet, the Commission has engaged

in no discovery and, therefore, can present no material facts, evidence or bases for its claims, making summary judgment warranted pursuant to ARCP 56(e).

ARGUMENT

I

JDDC RULE 6B REQUIRES THAT SUMMARY JUDGMENT BE GRANTED

Summary judgment must be granted to Judge Griffen because the Commission is obliged to comply with the exception found in JDDC Rule 6(B), which negates any jurisdiction over a judge's ruling unless there is evidence of "fraud, corrupt motive or bad faith." Rule 6(B) states:

> B. Distinguished from Appeal. In the absence of fraud, corrupt motive or bad faith, the Commission shall not take action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it. Claims of error shall be considered only in appeals from court proceedings.

The Commission claims Judge Griffen violated Judicial Code Canon 2 by ruling on the *McKesson* TRO and, necessarily, not recusing himself from that case and all death penalty cases. The crux of the Special Counsel's case against Judge Griffen is that while "Judge Griffen holds a right to free speech," once he "asserted his free speech in unequivocal opposition to the death penalty, he had an obligation to disqualify himself in every case effecting [sic] the death penalty," which he did not do in *McKesson*. See Ex. 2 at 3 (¶ 13). That contention is refuted by Director Sachar's deposition testimony that *McKesson* was not a death penalty case and did not result in an execution stay. Director Sachar testified that *McKesson* was a replevin claim. See Ex. 1 at p. 71, line 13.

Because there is no evidence of fraud, corrupt motive or bad faith, the Commission cannot maintain an action against Judge Griffen regarding his TRO, including his decision to not recuse.

The decision not to recuse was addressed by the Supreme Court of Arkansas when it granted the April 15, 2017 petition seeking to remove Judge Griffen from the McKesson case.

Neither can the JDDC show evidence of fraud, corrupt motive or bad faith as to Judge Griffen's expressions of free speech and religion. No one has–or can–produced a shred of proof that Judge Griffen's moral and religious opposition to capital punishment are not sincere or that he is a religious imposter. Director Sachar acknowledged that Judge Griffen is a minister of the religion of Jesus. The Special Counsel has not even alleged fraud, corrupt motive or bad faith by Judge Griffen. Simply put, the Special Counsel cannot produce any facts showing that Judge Griffen's TRO decision and failure to recuse was tainted by "fraud, corrupt motive or bad faith." Thus, Judge Griffen is clearly entitled to summary judgment on that basis alone.

Moreover, the JDDC must apply the same Rule 6B standard to Judge Griffen's judicial decision to not recuse from the *McKesson* case that the JDDC applied to the Arkansas Supreme Court Justices' decision to permanently bar Judge Griffen from death penalty cases and granted the Justices' motion to dismiss the charges against them on November 18, 2018. There is no dispute that Judge Griffen is "absolutely" allowed to exercise his freedom of expression, as David Sachar confirmed in his deposition testimony (at pp. 140-41), and that Judge Griffen cannot be disciplined for such expression.

The crux of the Special Counsel's case against Judge Griffen is that while "Judge Griffen holds a right to free speech," once he "asserted his free speech in unequivocal opposition to the death penalty, he had an obligation to disqualify himself in every case effecting [sic] the death penalty," which he did not do in the *McKesson* case. While this assertion is both unconstitutionally infirm and factually wrong as applied to the *McKesson* case as set forth below (in Sections II and III), the case against Judge Griffen must be dismissed pursuant to Rule 6B alone because the

Special Counsel is asserting that Judge Griffen incorrectly applied the law in his judicial decision to not recuse from the *McKesson* case.

The uncontroverted testimony of Director Sachar establishes that Judge Griffen's decision to grant the *McKesson* TRO, rather than recuse, is "covered by Rule 6B." (Sachar Deposition, at 72). And Special Counsel does not allege "fraud, corrupt motive or bad faith," the only exceptions to Rule 6B's mandate that the JDDC may not discipline judges for their judicial decisions.

The JDDC must apply Rule 6B evenly to all judges, at whatever level of the Arkansas judicial system. The JDDC November 18, 2018 application of Rule 6B to dismiss misconduct charges against all seven Justices of the Arkansas Supreme Court requires – as a matter of fundamental fairness and equal treatment – dismissal of the charges against Judge Griffen for his decision not to recuse. As the saying goes, "what's sauce for the goose is sauce for the gander."

II

THE CHARGES AGAINST JUDGE GRIFFEN VIOLATE BEDROCK PRECEDENT FROM THE UNITED STATES SUPREME COURT IN *WITHERSPOON v. ILLINOIS*

Essentially, the Statement of Allegations charges that Judge Griffen's conduct extrajudicial conduct – "Judge Griffen regularly posts remarks in opposition to the death penalty on his social and electronic media sites" and "appeared at publicized events in opposition to the death penalty while presiding over the *McKesson* case" (See Exhibit 2, Factual Allegation 10) – imposed an affirmative duty on him to recuse from handling the TRO petition in *McKesson Medical-Surgical Inc. v. State*. To that point, Factual Allegation 13 in the Statement of Allegations states:

> Judge Griffen holds a right to free speech, but once Judge Griffen asserted his free speech in unequivocal opposition to the death penalty, he had an obligation to disqualify himself in every case effecting [sic] the death penalty.

That allegation suffers from two glaring flaws.

The Supreme Court of the United States decided more than fifty years ago, in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), that persons who hold moral or religious opposition to the death penalty cannot be automatically disqualified for cause from serving as jurors – fact-finders – in murder cases where the death penalty is a possible punishment. In *Witherspoon,* the Court invalidated the death sentence of a defendant convicted of murder because jurors who held moral or religious objections to capital punishment were excluded based on an Illinois statute that provided the prosecution unlimited challenges for cause of jurors who held moral or religious objections to capital punishment. Writing for the majority, Justice Stewart concluded: "We hold that that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. 522.

The holding in *Witherspoon v. Illinois* demonstrates that personal opposition to capital punishment does not make Judge Griffen or any other judge unfit to preside over cases involving the death penalty. Factual Allegation 13, the foundation for the charges against Judge Griffen are based has been wrong, as a matter of law, since 1968. While JDDC Rule 6B alone requires dismissal, Special Counsel's legal assertion that Judge Griffen was required to recuse from every case involving the death penalty is directly contrary to bedrock United States Supreme Court precedent.

There is good reason for Rule 6B. It allows judges to freely make judicial decisions as they see fit, subject only to reversal by higher courts rather than face judicial discipline for making erroneous decisions. But here the failure to dismiss pursuant to Rule 6B would be even

more egregious, as the Special Counsel's assertion – that Judge Griffen "had an obligation to disqualify himself in every case effecting [sic] the death penalty" because of his personal moral and religious objections to the death penalty – is legally wrong in the face of the holding in *Witherspoon v. Illinois*.

Factual Allegation 13 is wrong for another – and equally compelling – reason. *McKesson Medical-Surgical, Inc. v. State of Arkansas* was, factually, not a "case effecting [sic] the death penalty." It was a case brought by a medical supplier to obtain the return of property the defendants wrongfully obtained and refused to return.

Again, the testimony of Director Sachar is clear.

> **Q:** Are you saying that he [Judge Griffen] should have denied the Temporary Restraining Order because the executions were pending for the following week?
>
> **A:** Now I get what you're getting at, Counsel. Judge Griffen's ruling should – should have been based on the law and the facts, regardless of when the executions were set.
>
> **Q:** Right... So even if it's a technical point, you agree with me that the Judge did not stay an order of execution at any time in this matter; right?
>
> **A:** Not that I know... I will say that no, **this was a replevin case about whether the drug was going to be useful at whatever point the execution was – was scheduled.**
>
> **Q:** He did not enjoin anyone from any activities with that TRO in terms of ... a death penalty schedule, correct?
>
> **A:** Correct. If he – if they had been able to find chemicals somewhere else, I'm sure they would have gone forward. It was scheduled.
>
> **Q:** Right.
>
> **A:** My only point – and, again, I'll point this out. My only point about the schedule was that it put in context that he seemed to be protesting these executions. If this – you know, if he would have been – if the execution would have been two years from then and there's 15 others between then and two years, it wouldn't seem as close to this actual execution. **But as far as the schedule or the Judge's ruling, I agree with your that he – that it has nothing to do with it.**
>
> **Q: You agree that Judge Griffen's granting of the TRO was a judicial decision?**

A: Correct.

Q: The type of which judges are entitled to discretion?

A: Correct.

Q: The type of which is covered by Rule 6B?

A: Correct. [Sachar deposition transcript, p. 70, lines 6 thru 12, line 24 thru p. 71, line 2; p. 71, line 13 thru p. 72 , line 14, emphasis added]

Director Sachar's testimony is unmistakably clear. *McKesson* "was a replevin case..." Judge Griffen didn't enjoin or block the defendants from conducting executions when he granted the TRO. He simply enjoined the defendants from disposing of property that belonged to the plaintiff whenever they held the executions. Judge Griffen was under no obligation, ethical or otherwise, to disqualify himself from that case because of his personal moral and religious opposition to capital punishment.

Judge Griffen followed the law when he granted the TRO in the *McKesson* case. His decision was legally correct regardless to his views about the death penalty. His views on the death penalty were not implicated by the TRO petition. Any notion that he was somehow obligated to recuse from deciding that case because of his views is wrong, as a matter of law.

III

THE CHARGES AGAINST JUDGE GRIFFEN VIOLATE HIS FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH, ASSEMBLY, AND RELIGIOUS EXPRESSION

The Supreme Court of the United States declared years ago that "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). Hence, the Special Counsel must show that the restrictions the Commission would 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 Special Counsel must show that the Commission 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).

In *White*, the Supreme Court invalidated Minnesota's rule that prohibited a judicial candidate from "announcing his or her views on disputed legal or political issues." 536 U.S. at 768. 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).

And this Commission recognized over a decade ago, in dismissing a similarly harassing and meritless complaint against Judge Griffen, that "[t]here 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. 05328 & -05-356 (attached hereto as Exhibit 3). In that ruling, this Commission declared that the Code of Judicial 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.*

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).

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). Thus, any rule or canon which serves to obstruct a citizen's free speech must yield to the protections of the U.S. Constitution.

The assertion by Special Counsel at Factual Allegation 11 (Exhibit 2, p. 2) that "none of the photographic representations or [sic] of the signs disavowing capital punishment presented to the JDDC in this investigation contain reasonably visible reference to Jesus or His crucifixion" at

the prayer vigil insinuates that Judge Griffen, an ordained Baptist Minister, was not really expressing religious beliefs at the prayer vigil.

However, during his February 13, 2019 deposition, Director Sachar testified about a photograph of Judge Griffen on a cot in front of the Governor's Mansion on April 14, 2017. That testimony concerning is clear and unmistakable.

> **Q:** So the last exhibit here is one previously marked Exhibit No. 2..And this is of course the photograph – and it's probably the photograph that was sent to you by Justice Womack, correct?
>
> **A:** It very well could have been.
>
> **Q:** And – and this is a photograph of Judge Griffen on the cot at this prayer vigil. And I call it a "prayer vigil" because there – you will agree with me that there's indicia here of the death penalty, but there's also indicia here certainly of religious concerns, correct? For instance, near his head, there's "Thou shall not kill," which is a biblical – which is a Commandment, right?
>
> **A:** Correct, Yes, I see the sign.
>
> **Q:** And you can't quite see it behind this gentleman in the pink shirt, but there's a "What would Jesus do?" sign behind him, correct?
>
> **A:** Certainly I see the – the Sermon on the Mount comment "Blessed are the peacemakers" by the woman straight ahead.
>
> **Q:** Right. And so you know Judge Griffen to be a Baptist minister, correct?
>
> **A:** Yes, sir. I know that he is – he is a minister.
>
> **Q: And, again, this type of extrajudicial freedom of expression is – is allowable for judges?**
>
> **A: In and of itself, absolutely.** (See Ex. 1 at 140-141, emphasis added).

Director Sachar's testimony shows that the assertion in Factual Allegation 11 is patently inaccurate. His testimony also shows that the inaccurate assertion in Factual Allegation 11 is immaterial because Judge Griffen was engaged in "extrajudicial freedom of expression" that "[i]n and of itself [is] absolutely" "allowable for judges." As it relates to constitutional protections, it

does not matter whether the expression was religious or political. These are equally-hallowed rights that cannot be fettered by judicial rules or canons.

Special Counsel insinuates that Judge Griffen's Good Friday prayer vigil required something more in order to be sincere. What more? Does Special Counsel argue that Judge Griffen should have been placed on a cross with actual nails in his hands and a crown of thorns? Such skepticism is precisely why we have the First Amendment right to freedom of expression of our religious beliefs as we see fit, without judgment by the government. Neither laypersons nor judges may be publicly shamed or disciplined for not having the "correct" expression of their love for Jesus or other religious and moral beliefs.

Again, there is no "genuine" issue of "material fact" to be resolved by an evidentiary hearing. The charges against Judge Griffen are based on naked political disagreement with his opposition to capital punishment and political intolerance for his principled public religious expression of his viewpoint. The Commission should not allow political displeasure – however vociferous it may be and from whatever source it may come – to drive its analysis about charges of judicial misconduct.

CONCLUSION

JDDC Rule 6B, standing alone, mandates dismissal of the charges against Judge Griffen. His Good Friday, 2017 decisions to rule on and grant a TRO in the *McKesson* case were judicial decisions subject to correction by appellate review. They cannot be used to discipline Judge Griffen because there is no genuine issue of material fact concerning whether the rulings involved fraud, corrupt motive or bad faith. Rule 6B compels dismissal of the charges against Judge Griffen – both based on the plain language of the rule and as a matter of fundamental fairness and equal treatment – because the JDDC is obligated to apply the same standard (and apply it the same way)

to Judge Griffen that it applied Rule 6B in the November 18, 2018 ruling that dismissed misconduct charges against all seven Justices of the Arkansas Supreme Court.

There is no genuine of issue of material fact that *McKesson* was a replevin case, not a case "effecting [sic] the death penalty." Director Sachar's deposition testimony is unequivocal on that point, and that Judge Griffen was obliged to follow the law, regardless whether there were executions pending – or whenever they might be scheduled – and regardless to his moral and religious opposition to the death penalty. Beyond that, the bedrock holding in *Witherspoon v. Illinois* makes it clear that the Special Counsel's assertion that Judge Griffen was ethically obligated to recuse from every case involving the death penalty because he holds moral and religious objections to capital punishment is wrong as a matter of law.

There is no genuine issue of material fact concerning Judge Griffen's identity as a follower and ordained minister in the religion of Jesus. There is no genuine issue of material fact concerning whether there were religious references to Jesus and the religion of Jesus visible when Judge Griffen lay on a cot in front of the Governor's Mansion on Good Friday, 2017. Whether one views Judge Griffen's Good Friday, 2017 conduct in front of the Governor's Mansion as a prayer vigil, an expression of opposition to capital punishment, or both, his conduct involved speech and religious expression protected from the threat of governmental punishment by the First Amendment to the Constitution of the United States.

The open secret is that the charges against Judge Griffen are a naked governmental attempt to threaten and punish him for viewpoint-based expression. That kind of governmental intimidation against unpopular speech and religious expression has been declared unconstitutional time after time. The JDDC recognized this when it dismissed politically-motivated misconduct charges against Judge Griffen in 2007, and the Arkansas Supreme Court overturned a 2003

disciplinary sanction against Judge Griffen on the same basis. Now, as then, the politically-motivated charges against Judge Griffen should be dismissed.

WHEREFORE and for the foregoing reasons, JUDGE WENDELL GRIFFEN, prays that the Commission grant his Motion for Summary Judgment, and provide all other relief requested and which it deems just and appropriate.

DATED: April 5, 2019

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2019, this pleading was served on Special Counsel Timothy Discenza, by email addressed to his email address (trdiscenza@att.net) and hand-delivered for him at the office of the Commission, 323 Center Street, Suite 1060, Little Rock, AR 72201.

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Austin Porter, Jr.