IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION

COURTNEY RAE HUDSON PLAINTIFF

VS. Case No. 60CV-24-7576

ARKANSAS ADMINISTRATIVE OFFICE OF THE COURTS;
SUPREME COURT OFFICE OF PROFESSIONAL CONDUCT;
MARTY SULLIVAN, EXECUTIVE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS; and
CHARLENE FLEETWOOD, ACTING DIRECTOR OF THE OFFICE OF PROFESSIONAL CONDUCT DEFENDANTS

PLAINTIFF'S BRIEF IN SUPPORT OF HER PRELIMINARY INJUNCTION UNDER RULE 65

I. Introduction

On September 6, 2024, Associate Supreme Court Justice Courtney Hudson filed her Complaint seeking injunctive relief regarding an August 23, 2024 Freedom of Information Act Request sent to Defendants seeking emails, text messages, electronic communications, files, interoffice memoranda or communications between Lisa Ballard and Justice Hudson. (**Exhibit 1**). Justice Hudson's Complaint alleges that Defendants were instructed to answer the Freedom of Information Request and produce emails, text messages, electronic communications, files, interoffice memoranda or communications between Lisa Ballard and Justice Hudson based upon the instructions of five other Arkansas Supreme Court Justices. *See Complaint* ¶ 20. This Court granted a preliminary injunction on September 6, 2024, and has now set

a hearing for the continuation of the preliminary injunction pursuant to Ark. R. Civ. Pro. 65(b)(2). Justice Hudson's Complaint sets forth straightforward, yet significant questions regarding the proper party to respond to requests under the Freedom of Information Act. Ensuring proper parties respond to FOIA requests is the only way to make certain that citizens are getting complete and proper responses under FOIA. As such, the issues presented in this matter not only are significant for Justice Hudson, but the public at large.

II. STANDARD UNDER RULE 65

In determining whether to continue a preliminary injunction or temporary restraining order pursuant to Rule 65, the trial court must consider (1) whether the plaintiff will suffer irreparable harm and (2) whether he or she has demonstrated a likelihood of success on the merits. *City of Jacksonville v. Smith*, 2018 Ark. 87, 540 S.W.3d 661. Harm under Rule 65 is normally considered irreparable and sufficient to justify a preliminary injunction when it cannot be adequately compensated by money damages or redressed in a court of law. *Ark. Dep't of Human Servs. v. Ledgerwood*, 2017 Ark 308, 530 S.W.3d 336. In determining the likelihood of success, the party seeking a preliminary injunction must only show a reasonable probability of success in the litigation, actual success on the merits is not required. *Apprentice Info. Sys., Inc. v. DataScouty, LLC,* 2018 Ark. 146, 544 S.W.3d 39. Put simply, a party seeking a preliminary injunction does not have to prove his or her case on the merits, but only needs to show a "fair chance of succeeding on merits." *Edwards v. Beck*, 946 F. Supp. 2d 843, 847 (E.D. Ark. 2013).

III. Justice Hudson can demonstrate a reasonable probability of success.

"Custodian, with respect to any public record, means the person having *administrative control of that record*." Ark. Code Ann. § 25-19-103(1)(A) (Supp 2007) (emphasis added). As stated in *Fox v. Perroni*, 358 Ark. 251, 188 S.W.2d 881 (2004), the FOIA does not define the term "administrative control." *Id.* at 260. The act is clear though that FOIA requests are to be directed to the "custodian" of the records. Ark. Code Ann. § 25-19-105(a). This is because the custodian must be able to locate the records with reasonable effort. Ark. Code Ann. § 25-19-105(a)(2)(C). The custodian is also charged with the responsibility to determine whether or to what extent the record is a "public record," and whether it is exempt from disclosure. Ark. Code Ann. 25-19-105(a)(3)(B). Here, the only person who has administrative control for the "emails, text messages, electronic communications, files, interoffice memoranda or communications" requested is Justice Hudson. Neither the Administrative Office of the Courts or the Office of Professional Conduct can assert administrative control over Justice Hudson's emails, text messages, electronic communications, files, interoffice memoranda or communications.

Indeed, if they were to be considered custodians, it would entitle AOC and OPC to not only assert administrative control over all communications and files of a sitting Supreme Court Justice but would mean AOC and OPC would have to search all of Justice Hudson's emails, text messages, electronic communications, files, interoffice memoranda or communications. Such a conclusion is not only absurd, as Defendants do not have access to all these materials, but also violates an express exemption of

documents subject to a FOIA request for precisely these types of documents when kept by a Supreme Court Justice. *See* Ark. Code Ann. § 25-19-105(b)(7) (exempting unpublished memoranda, working papers, and correspondence of the Governor, members of the General Assembly, Supreme Court Justices, Court of Appeals Judges, and the Attorney General).

The probability that Justice Hudson will succeed in her legal position that she is the custodian of the requested records is supported by the initial correspondence of the Administrative Office of the Court (**Exhibit 2)**, as well as subsequent correspondence from Arkansas Business (**Exhibit 3)**. Additionally, Defendants themselves raised concerns regarding the application of exemptions to the subject FOIA request. (**Exhibit 4)**. The Arkansas Attorney General's office also shared a legal opinion supporting Justice Hudson's position. (**Exhibit 6).**

Conventionally, AOC and OPC, as the addressees for the original FOIA requests, would assert these legally valid positions in responding to the FOIA request. Then the requestor, Arkansas Business, could decide to challenge those positions in the circuit court or not. Instead, Defendants are under instruction from five Supreme Court Justices to produce materials in response to the FOIA request, despite the contrary positions taken by AOC, OPC and the true custodian of the records, Justice Hudson (**Exhibit 5).**

Instead of allowing Defendants to properly respond to the FOIA request by identifying Justice Hudson as the custodian or even allowing Justice Hudson to respond to the FOIA request herself and assert any exemptions she may or may not

wish to assert, the five Supreme Court Justices have bypassed her rights under FOIA and attempted to unilaterally mandate production of documents by Defendants. The "vote" of the Justices was wholly improper because, in essence, the Court acted to determine an issue of statutory construction without jurisdiction and without any pending appeal. Worse, because the Court does not have any pending appeal before it on this issue, the Court's "decision" will not be memorialized in any Court opinion. The Court lacks any authority whatsoever under which to order Defendants to respond to the request in a particular way or to order Justice Hudson to turn over documents. Moreover, these five Supreme Court Justices have personal knowledge of facts surrounding the dispute in this proceeding mandating their disqualification from deciding any issues from this case. Ark. Code of Jud. Conduct Rule 2.11(A)(1) (a judge should disqualify himself or herself in an proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances …. the judge has …. personal knowledge of facts that are in dispute in the proceeding).

Defendants, nevertheless, have been instructed by these five Supreme Court Justices to improperly produce materials in response to the Arkansas Business FOIA request. As detailed above, Defendants responding to the FOIA request and producing Justice Hudson's "emails, text messages, electronic communications, files, interoffice memoranda or communications" is contrary to the plain and unambiguous language of the Arkansas Freedom of Information Act, as well as the due process and constitutional rights of Justice Hudson.

As detailed above, Justice Hudson can show a substantial likelihood of prevailing on the merits at a final hearing. The Defendants will suffer no harm from delay pending review of this matter on the merits. The public interest will be served in the issuance of a preliminary injunction so that discovery can be conducted and issues can be heard fully on the merits, and not secretly decided by five Arkansas Supreme Court Justices with no guidance given by them on future requests under the Freedom of Information Act.

IV. Justice Hudson can demonstrate irreparable harm under Rule 65.

The prospect of irreparable harm or lack of an otherwise adequate remedy is the foundation of the power to issue injunctive relief. *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002). Harm is normally considered irreparable, and thus sufficient to justify a preliminary injunction, only when it cannot be adequately compensated by money damages or redressed in a court of law. *City of Jacksonville v. Smith*, 2018 Ark. 87, 540 S.W.3d 661.

Here, Justice Hudson has no other remedy available but to seek a preliminary injunction. No other legal mechanism exists to prevent the unauthorized, release of her correspondence, emails, text messages, electronic communications, files, interoffice memoranda or communications. Irreparable harm takes place in this matter when documents are produced by a public official who is not the custodian of the requested materials. Particularly when there are valid exemption under the Freedom of Information Act applicable to the request. Allowing Defendants to produce Justice Hudson's emails, text messages, electronic communications, files,

interoffice memoranda or communications is not something that can be turned back. Not only can the action not be undone, but Justice Hudson is unable to sue for money damages or seek any other redress if Defendants produce her "emails, text messages, electronic communications, files, interoffice memoranda or communications." Any doubts on the issue of irreparable harm must clearly evaporate given that Defendants are immune from money damages. If money cannot be recovered, then there indisputably is no adequate remedy at law besides seeking a preliminary injunction.

To avoid any prejudice or irreparable injury, Justice Hudson requests that preliminary injunctive relief be issued until the time that the parties can conduct discovery and the Court can set a hearing on the merits.

Respectfully submitted,

By:_____

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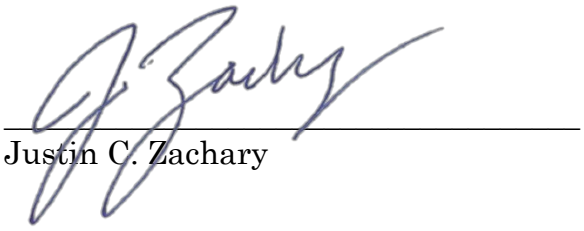
CERTIFICATE OF SERVICE

I, Justin C. Zachary, hereby certify that the foregoing was served on all parties on September 18, 2024 via the Court's electronic filing system.



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