

IN THE SUPREME COURT OF THE STATE OF OREGON  
INQUIRY CONCERNING A JUDGE

Re: The Honorable Vance D. Day,

Respondent.

Commission on Judicial Fitness and  
Disability 12139, 1486

Supreme Court No. S063844

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**RESPONSE BRIEF OF THE COMMISSION ON JUDICIAL FITNESS  
AND DISABILITY**

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## TABLE OF CONTENTS

	<b>Page</b>
STATEMENT OF THE CASE .....	1
A.    Response to Statement of the Nature of the Action and Relief Sought.....	1
B.    Response to Statement of the Statutory Basis of Appellate Jurisdiction .....	1
C.    Summary of Argument.....	1
D.    Statement of Facts .....	3
1.    Soccer.....	3
2.    BAS and Veterans Treatment Court.....	11
3.    The “Hall of Heroes” and Solicitation of Funds from Lawyers.....	28
4.    Instructions to Court Staff about Handling Same Sex Marriage Requests. ....	32
ARGUMENT .....	34
A.    Count 1 - Soccer Incidents. ....	34
1.    Clear and convincing evidence to sustain Count 1.....	34
2.    No claim preclusion.....	35
B.    Count 2 - Lying to Commission about soccer incidents.....	37
C.    Counts 3 and 4 - Judge Day authorizes gun possession and was in the presence of BAS handling guns.....	39
1.    The November 18, 2013 gun incident. ....	40
2.    The January 5, 2014 gun incident.....	41
3.    Attempts by Judge Day to have BAS’s credible, eye- witness testimony stricken.....	42

D.	There is clear and convincing evidence to sustain the Commission’s recommendations on Count 5. ....	43
1.	Lying to the Commission investigator.....	43
2.	Lying to Judge Rhoades and Judge Penn. ....	43
E.	There is clear and convincing evidence to sustain the Commission’s recommendations on Count 6. ....	45
F.	There is clear and convincing evidence to sustain the Commission’s recommendation on Count 9.....	48
G.	There is clear and convincing evidence to sustain the Commission’s recommendation on Count 12.....	50
	CONCLUSION.....	52

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases</b>	
<i>An Inquiry Concerning the Honorable Ruth Neely, a Municipal Judge and Circuit Court Magistrate, Ninth Judicial District, Pinedale, Sublette County, Wyoming Judge Ruth Neely v. Wyoming Commission on Judicial Ethics, 2017 WY 25 (Wyo., 2017)</i> .....	51
<i>Bloomfield v. Weakland, 339 Or 504, 123 P3d 275 (2005)</i> .....	36
<i>Geiger v. Kitzhaber, 994 F Supp 2d 1128 (D Or 2014)</i> .....	32
<i>Matter of Field, 281 Or 623, 576 P2d 348 (1978)</i> .....	3
<i>Riehle v. Margolies, 279 U.S. 218 (1929)</i> .....	37
<i>Welch v. Washington County, 314 Or 707, 842 P2d 793 (1992)</i> .....	37
<i>Williams-Yulee v. Florida Bar, 135 S Ct 1656 (April 29, 2015)</i> .....	51
<b>Statutes</b>	
ORS 161.155(2)(b) .....	40
ORS 166.270.....	40
Title VII of the Civil Rights Act of 1964, §§ 701(j), 703(a)(1), 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1) .....	51
<b>Treatises</b>	
Restatement (Second) of Judgments § 26 (1982).....	36
<b>Constitutional Provisions</b>	
Or Const, Art VII, § 8(1)(e).....	34, 38, 40
<b>Oregon Code of Judicial Conduct</b>	
Rule 2.1(A) .....	39, 52
Rule 2.1(C).....	34, 38, 39
Rule 2.1(D) .....	38, 51, 52
Rule 2.2 .....	34
Rule 3.12(A) .....	38
Rule 3.9(A) .....	39

## STATEMENT OF THE CASE

### **A. Response to Statement of the Nature of the Action and Relief Sought**

The Commission on Judicial Fitness and Disability (“the Commission”) accepts Judge Day’s Statement of the Nature of the Action and the Relief Sought.

### **B. Response to Statement of the Statutory Basis of Appellate Jurisdiction**

The Commission accepts Judge Day’s Statement of the Statutory Basis of Appellate Jurisdiction.

### **C. Summary of Argument**

There is clear and convincing evidence supporting the Commission’s determinations that Judge Day has committed the violations set forth in Counts 1 through 6, 9 and 12, as well as related violations. The evidence supporting Count 1 establishes that Judge Day intimidated a college soccer referee on October 17, 2012. The evidence supporting Count 2 establishes that Judge Day lied to the Commission regarding the October 17 incident and another incident at a college soccer game on November 7, 2012. The evidence supporting Counts 3 and 4 establishes that, on two occasions, Judge Day gave permission to a felon under his supervision to handle a gun, that the felon handled the gun in Judge Day’s presence, and that Judge Day purported to waive the statutory prohibition against such possession. The evidence supporting Count 5 establishes that Judge Day lied to the Commission about waiving the

prohibition against a felon possessing a gun and lied to two Marion County Circuit Judges by claiming that he did not know the person he allowed to possess a gun -- whom Judge Day himself sentenced to the felony -- was a felon. The evidence supporting Count 6 establishes that Judge Day singled out the same individual he allowed to possess a gun for attention and improperly imposed himself onto that person. The evidence supporting Count 9 establishes that Judge Day collected money from lawyers, including those appearing before him in court, to sponsor war and military-related wall hangings in the courthouse hallways. The evidence supporting Count 12 establishes that Judge Day instructed his employees to determine if couples asking Judge Day to marry them were same-sex couples and, if they were, to tell them Judge Day was unavailable on the day the couple chose for their marriage, whether Judge Day was unavailable or not.

Judge Day denied many of these claims under oath at the hearing and continues to deny them on appeal. As the Commission's Opinion demonstrates, however, Judge Day's testimony is contradicted in each respect by credible, third party witnesses whose recollections of events were consistent with those of other witnesses and who had no reason to lie under oath. This Court should impose the sanction the Commission recommends.

## D. Statement of Facts

The Commission rejects Judge Day's Statement of Facts because it is misleading and incomplete.<sup>1</sup>

### 1. Soccer

Judge Day's son, \_\_\_\_\_ played soccer for the Chemeketa Community College ("CCC") team. Tr. 2068. The soccer coach at relevant times was Marty Limbird, a friend of the Day family. Tr. 565, 1641-42, 2077; Ex 98. The Chemeketa team regularly played on the Willamette University campus at Sparks Field. Judge Day attended these "home" games to support his son and the team. Tr. 1641-42; Ex. 98. As is customary, at Sparks Field the designated referees' area is segregated from the public and across the field from the spectator area. Ex. 59; Tr. 531. Referees are trained to keep spectators away from the referees' table. Tr. 505-06, 588; Ex 71. If spectators request the names or titles of referees, referees are trained to tell them to contact the league or refer to the coaches' scoresheets for such information. Tr. 502, 535; Ex. 71. Referees at this level of play are trained not to give out their names to spectators. Tr. 507; Ex. 71.

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<sup>1</sup> Large parts of this statement of facts are taken *verbatim* from the statement of facts in the Opinion. This brief does not specifically address facts related to counts 7, 8, 10, 11 and 13, as the Commission recommended dismissal of those counts. The Commission otherwise relies on the on the record to the extent this Court addresses them. Likewise, facts and testimony that emerged during the hearing and cited as aggravating factors (such as \_\_\_\_\_ internship with the District Attorney's Office and identification as Judge Day's son to the jury in a criminal trial, ER 85; Tr. 2072-74), are not all specifically addressed herein.

On October 17, 2012, a year after Judge Day took the bench, Chemeketa soccer team played Clark Community College at Sparks Field. Tr. 2068; Ex 97. The game was particularly contentious. The center referee at the game was Andrew Deuker, an experienced referee. Tr. 547.

started the game but was seriously injured with a concussion 12 minutes into the match. Ex. 97, DAY0077. Judge Day was quite upset and believed that his son's injury was due to poor officiating on the part of Mr. Deuker.

It is highly unusual for spectators to cross the soccer field and approach game officials. Ex. 71 pp. 3, 6, 8, 37, 38, 39; Tr. 506, 588, 1645-46, 1653. After the game, Judge Day crossed the field from the spectators' section to the officials' side of the field and approached the referees' table. Tr. 508, 531; Exs. 41, 71, 97. At the referee's table, Judge Day asked Deuker for his name but, consistent with Deuker's training, did not receive it. Tr. 507. Instead, Judge Day was directed to check Coach Limbird's scoresheet. Ex. 41; Tr. 508. Then, according to Deuker's witness statement, which he affirmed at the hearing, Judge Day

“laid a business card on the table and forcefully pushed it toward Mr. Deuker so that the writing on the card was facing Mr. Deuker. He said something to the effect of, I need your name now and I'm going to report you because you lacked control over player safety and didn't manage the game. He also said he had watched Mr. Deuker officiate before over the last

year, and asserted that players were always getting injured in those games.”

Ex. 71; Tr. 508, 513-14, 531-32, 534; Ex. 56 and Tr. 503.

During this encounter, Judge Day’s voice was loud and forceful and his behavior was condescending and intimidating. Exs. 41, 71; Tr. 532. Deuker had not asked for the business card and did not pick it up. Tr. 502, 526, 531-32. Judge Day then picked up his judicial business card and walked away. Tr. 509-10; Ex. 71. Deuker realized that he may need the card to include in his referee’s report. *Id.* Deuker asked a *second* referee to get the card from Judge Day. *Id.* While Judge Day was on the phone with his daughter, the second referee ran up to Judge Day, asked for and received the card. *Id.*; Tr. 2063; Ex. 98. Referee Shayla Sharp Green, who was also at the referee’s table, testified that she thought Judge Day was trying to intimidate all of the referees at the table, “but it was mainly directed at Mr. Deuker.” Tr. 532.

It was only after the second referee had retrieved the card that Deuker actually read it and realized that the person who he had encountered was a judge. Tr. 508. At that time Deuker felt both intimidated and disappointed because he believed that a judge was abusing his power within the community. Tr. 508, 510.<sup>2</sup>

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<sup>2</sup> Judge Day’s witness, Coach Limbird, testified that he was 15-20 feet away from the referee table during the exchange between Judge Day and Deuker. Tr. 1652.

While sitting in his car after leaving the field, Deuker was frightened and nervous as a result of his interaction with Judge Day. Tr. 511. He called Steve Brooks, the Assignor of the Oregon Intercollegiate Soccer Referee Association, and told him what happened. *Id.* Deuker then started his car to drive home. As Deuker was driving away from Sparks Field, Judge Day and his son stopped while crossing the street and made a note of Deuker's license plate number. Tr. 511, 2079; Ex. 41; Ex. 97, DAY 0077. Deuker observed this, which further intimidated him. Tr. 511. Deuker testified:

“A. After I contacted Steve, I got in my car and started to leave the parking lot. When I pulled up to the stop sign there as you're leaving Willamette, across the street is the Ram, and Mr. Day and his son were about to walk across the street as I pulled up to the stop sign. They stopped, I then proceeded to turn left. And as I turned left and passed them, they began walking across the street, and Mr. Day pulled out a piece of paper and a pen and appeared to write something down. I initially thought that it was my license plate number.

\* \* \*

“Q. And how did that make you feel when you saw that?

“A. I was incredibly frightened. My permanent address and registration for my vehicle is at my parents' house, and they were the first people -- person -- people that I contacted right after that and said I don't know what could occur, I don't know what he's capable of doing, but he now has our information.

“Q. Did anything happen as a result of that?

“A. No. Nothing as of now.”

Tr. 511.

After the game, Deuker called Mike Allen, who was a soccer referee for 22 years and a highly decorated national assessor for another 25 years. Tr. 514; Ex. 71, pp. 3-4. Deuker told Allen about the interaction he had with Judge Day. Tr. 514, 545. Allen urged him to come to Allen’s Portland home to discuss the matter further, which Deuker did. Tr. 516. Allen urged Deuker to file a complaint with the Commission, which Deuker also did. Tr. 514-16, 546. The Commission received Deuker’s complaint on October 21, 2012. Ex. 96.

Due to Deuker’s concerns about Judge Day, Allen attended the next Chemeketa game held at Sparks Field on November 7, 2012. Tr. 547; Ex. 71 pp. 3-4. Allen communicated his concerns regarding Judge Day’s prior conduct to the other referees so all were alert for possible inappropriate spectator behavior. Tr. 547-48, 584-85. Separately, Steve Brooks had contacted CCC Athletic Director Cassie Belmodis and alerted her that a CCC player’s parent had intimidated a referee at the October 17, 2012 game. Tr. 565- 66; Ex. 71, pp. 7-8. As a result, and at the request of Brooks, Belmodis also attended the November 7, 2012 game. Tr. 567. Judge Day attended the same game. Tr. 567-68.

At the conclusion of the game, an altercation broke out between two opposing players. Tr. 549-50. As the altercation was ending, Judge Day left

the spectator section, crossed the field, and approached the officials' table.

Tr. 550-51. To prevent Judge Day from engaging with the officials, Allen, who is roughly six feet tall and 240 pounds, yelled at Judge Day to return to the spectator section, saying things similar to "get the hell out of here" and "you can't be here." Tr. 548-50, 554.

At the time Judge Day approached the referees, he was a significant distance away from the location of the prior player altercation and a significant distance from Allen. Tr. 550-51 and Ex. 135 (Allen testified he was about 15 yards from Day); Tr. 569 and 573 (Belmodis testified that the altercation was over by the time Day crossed the field and stopped 17-20 feet away from Allen); Tr. 592-93 and Ex. 137 (referee Horner testified that the altercation had calmed down by the time Judge Day was crossing the field, and that the sticky notes he placed on Exhibit 137 could have been 10 yards closer to the center line, which corroborates Ex. 135 and 136 Allen and Belmodis recollections).

On November 14, 2012, Allen sent the Commission an additional complaint regarding the events of October 17 and November 7. Tr. 552-53; Ex. 41. Allen reported that there was "great concern among the officials that [Judge Day] is using his judicial position to express his views and intimidate officials where he feels his son has been wronged." Ex 41. The Commission received Allen's complaint on November 21, 2012. *Id.*

In response to Deuker's and Allen's complaints, the Commission's executive director queried Judge Day by letter about the two games. She received Judge Day's response on February 11, 2013. Ex. 98. Judge Day represented that it was his "normal custom" to go over to the official's table during soccer games. Ex. 98, p. 2.<sup>3</sup> Judge Day also represented that at the October 17 game, the center referee "requested" his business card which was the only reason he gave it, and that the same referee brushed the business card off to the side of the table after Judge Day "politely" placed there. Ex. 98, pp. 3, 4. Regarding the November 7 game, Judge Day claimed that he approached the referees' side of the field post-game to thank the officials but that, "[b]efore I could finish the sentence I was grabbed by my shoulders from behind without warning, whirled around, and nearly picked off my feet and forcefully thrown forward. I nearly went down on my hands and knees but was able to right myself." Ex. 98, p. 4. Judge Day continued in his response to the Commission: "As best I could tell, the person who grabbed me was about 6' 3" and perhaps

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<sup>3</sup> Several witnesses testified contrary to Judge Day's claim that it was his usual custom to go over to the referees' table after each game (Ex. 98, DAY 0011).. In fact, Cassie Belmodis, CCC Athletic Director, told the Commission investigator and confirmed during her hearing testimony that the October 17 game was the first time she ever saw Judge Day approach the officials, that it was not his custom to do that, and that Judge Day called her on October 18 and apologized for being where he was not supposed to be the prior day, which she understood to mean the official's tent area. Ex. 71, p. 6; Tr. 566-67.

Coach Limbird testified that he could get the names of referees and information about their association from the game scoresheet. Tr. 1653-54.

260 lbs. He then yelled at me something along the lines of ‘you have no authority to be near these officials’.” *Id.* The Commission found that Judge Day was referring to Allen, who is roughly 6’ and 240 pounds and who yelled to Judge Day that he had no authority to be on that end of the field. ER 69-70.<sup>4</sup>

All of the hearing witnesses who were present at the November 7, 2012 game, save Judge Day himself, testified that neither Allen nor anyone else made any physical contact with Judge Day on the field that day.<sup>5</sup> Allen (who was 71 years old) testified that he raised his hands up and yelled at Judge Day, but that he did not grab and toss Judge Day at that game, and he did not see Judge Day stumble before he yelled at him. Tr. 548-49. Allen also testified that there were not a lot of people milling around about Judge Day when Allen yelled at him. Tr. 548-49.

Richard Horner, who had been a college soccer official for 25 years, corroborated Allen’s testimony. Ex. 71, p. 38. Horner affirmed what he told the Commission investigator: he saw an adult male coming across the field towards the officials’ side, he saw Allen “face this person with one or both of his hands raised in the universal stop position, in effect telling this person come no closer,” the person stopped short of Allen and left the area and “there was no

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<sup>4</sup> References to “ER” are to the excerpt of record accompanying Judge Day’s opening brief.

<sup>5</sup> testified he did not see his father on the field after the altercation, and he only relayed what Judge Day had told him about it. Tr. 2070, 2078.

contact between Mike [Allen] and the other person.” Tr. 581, 583-84. Horner also testified that he did not see anyone make physical contact with Judge Day at any time during this game or afterwards. Tr. 588.

Belmodis’ testimony also confirmed the accuracy of her statement to the Commission investigator that she observed Judge Day walk towards the players, then saw that he was heading towards the officials’ tent and, as he approached it, “an adult male who she believes was there at the request of Steve Brooks put his hands up and said to Judge Day, you can’t be here. Go away, or words to that effect.” Tr. 567-68. She then saw Judge Day walk away from the tent and toward the CCC players. Belmodis confirmed that “there was no physical contact between Judge Day and this man or any other person during this episode.” Tr. 563, 567-68.

## **2. BAS and Veterans Treatment Court**

In 2013, Marion County transitioned its Veterans Treatment Docket (“VTD”) to a Veterans Treatment Court (“VTC”). During the relevant time, the VTC team included, among others, Judge Day as the judge presiding, assigned Deputy District Attorney Bryan Orrio, Defense Attorney Daniel Wren, Probation Officer Austin Hermann and VTC Coordinator and Evaluator E’lan Lambert. Tr. 698, 901, 1021, 1407, 1873.<sup>6</sup> The VTC also tapped local veterans to serve as mentors. VTC met every other Friday morning. VTC was informal

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<sup>6</sup> Orrio resigned from the DA’s office October 2, 2015. Tr. 1920.

compared to other court settings. Judge Day required the veterans speaking to stand in “parade rest.” Tr. 364-65. He occasionally called the probationers “raggedy asses.” Tr. 366, 1103. Occasionally, Judge Day had the VTC participants watch certain videos or read certain books that he thought would be helpful to their progress.<sup>7</sup> The Commission found that “there are no special provisions in the Code of Judicial Conduct that pertain to specialty or treatment courts or exempt judges presiding over those courts from the rules in the code.” ER 95, FN 20. *See also* Ex. 71, p. 53 and Tr. 910-11.

To participate in the Marion County VTC, a defendant must be a veteran who was charged with and pled guilty to a qualifying crime in Marion County. Tr. 404. The veteran must also have an injury-induced, addiction, and/or mental health issues. Finally and ideally, a nexus would exist between the crime and the veteran’s service.

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<sup>7</sup> Judge Day ordered the veteran at the heart of this case (“BAS”) to read “Fearless,” which has graphic descriptions of the death of BAS’s fellow SEAL. BAS was audibly shaken during the VTC session, “Adam was a friend of mine, he was my brother \* \* \*. I’m kind of losing it emotionally.” Judge Day responded that a “good cry” can be helpful. Ex. 55, Ex. 120 (video of VTC session); Ex. 71, pp. 66-67; Tr. 1112-14 (BAS explains he was infuriated but read the book because he “needed to feel some kind of level of control over something, because I felt very helpless \* \* \* I didn’t want Judge Vance Day to win on something like this.”). .”) *See also* Tr. 2008 (Dr. Craig Bryan testifying that “asking a veteran to read a book about a friend/peer, who was killed in combat, could definitely have an adverse impact on the veteran’s mental health”).

Each VTC participant must sign a contract setting forth terms and conditions of participation. *See e.g.* Ex. 3. Paragraph 24 of the VTC contract in effect between January 25, 2013 and February 5, 2015, says: “I agree that the VTD Judge may communicate with others about my participation in VTD without the presence of my attorney or myself.” Tr. 346-47; Ex. 3, ¶ 24 (contract revision date 01/25/13); Ex. 132, ¶ 24 (contract revision date 11/17/14 and changing “VTD” to “VTC”). This was the language permitting the treatment team to meet and communicate about cases without the defendant, or potentially his attorney, being present.

On June 28, 2013, BAS appeared before Judge Day, pleaded guilty to felony DUII and entered VTC in Marion County.<sup>8</sup> Tr. 404; Exs. 1, 2. Judge Day placed BAS on 24 months of supervised probation, with the standard conditions of probation applying, including that BAS not possess any weapons, including firearms. Tr. 404; Ex. 2. The plea negotiations also included the mandatory 90 days jail sanction as well as successful completion of VTC. *Id.* If successful, at the end of his probationary period, BAS’s felony conviction would be reduced to a misdemeanor at the recommendation of the VTC team. As part of the entry into VTC, BAS signed the VTC contract containing the provision in paragraph 24 noted above, allowing Judge Day to “communicate

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<sup>8</sup> The Commission identifies this particular veteran by these initials for security.

with others about my participation in VTD without the presence of my attorney or myself.” Ex. 3.

As the Commission found, “BAS is, without question, a national hero.” ER 73. A Navy SEAL who was deployed 12 to 15 times abroad, BAS received a Bronze Star and was lauded by his fellow Navy SEALs. Tr. 597, 1099. BAS was wounded multiple times and suffers from Traumatic Brain Injury and Post-Traumatic Stress Disorder. Tr. 597.<sup>9</sup> BAS no longer lives in Oregon, but appeared by telephone at the hearing in these proceedings.

In late September, 2013, after a VTC session, Judge Day met with BAS alone in his chambers to interview him for an article that Judge Day was writing for the Oregon Trial Lawyers Association Trial Magazine about VTC. Tr. 1100-01. This article described identifying and personal information about BAS, including that he was a member of certain high-profile Navy SEAL teams and that he had a TBI and PTSD. The article quoted BAS concerning trauma he experienced during his service career.<sup>10</sup> Ex. 12; Tr. 409. BAS felt that he was in no position to decline the interview or to object to the release of his

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<sup>9</sup> Judge Prall’s witness statement to Commission investigator Saul says: “As for the lens through which Judge Day may see his own conduct in this matter, Judge Prall is aware of his fascination with WWII, the “Band of Brothers,” and military heroes.” Ex. 71, p. 52.

<sup>10</sup> See Exhibit 12 -- “What got to me, what I see in my dreams, is what the enemy did to the women and children. The combat I could handle, but the inhumanity to the enemy toward its own people is what haunts me today.” Pg. 3.

personal information for fear that it would harm his chances of being successful on probation and obtaining the benefits of his plea bargain. Tr. 1101. Judge Day's article, submitted for publication on October 1, 2013, also said that BAS was in the VTC for a felony DUII to which he pleaded guilty. Ex. 12.

During VTC hearings in the fall of 2013, Judge Day reiterated to BAS on the record that he was not allowed to possess or handle firearms. On October 11, 2013, Judge Day told BAS in court: "No guns, you don't get any guns." Ex. 123 (approx. 11:30:20 AM). The following month, on November 8, 2013, BAS again appeared in VTC and asked, "Can I touch a gun now?" Judge Day said, on the record and unequivocally, "No." Ex. 124 (approx. 11:16:38 AM).

Just before Thanksgiving, 2013, Judge Day arranged for BAS to do some paint preparation work on cabinets for Judge Day's son-in-law,

Ex. 563, DAY00242. Judge Day picked BAS up at his house on November 18, 2013 to drive him to the house. After picking BAS up, Judge Day informed him that they would stop at a wedding at which Judge Day was officiating. Judge Day asked BAS to accompany him. Tr. 1104. BAS did not believe he could refuse the request. Tr. 940-2, 1046, 1104. The wedding was a small affair -- five or six guests in total, plus the bride and groom. Tr. 1392, 1396. Judge Day introduced BAS as a Navy SEAL and used BAS's call sign. Tr. 1152, 1392. The identification of his military call-sign was of particular concern to BAS because he feared identification as a result of his

many Navy SEAL missions. Tr. 942, 1098. BAS felt like he was being exploited and put on display. Tr. 941-42, 1104.

After the wedding, Judge Day took BAS to the \_\_\_\_\_ house. Although BAS had been told there would be other veterans present, BAS was the only non-\_\_\_\_\_ family member there. Tr. 1104-05. The \_\_\_\_\_ house has a living room containing a homemade cabinet. The family regularly challenged visitors to find secret compartments that Judge Day had built into the cabinet. Tr. 1105. While at the \_\_\_\_\_ house, Judge Day challenged BAS to find a secret compartment and told him that one of the hidden drawers contained a gun.<sup>11</sup> BAS found the compartment quickly and opened the drawer to see the gun. *Id.* BAS asked Judge Day for permission to check the gun for safety. Tr. 1105. Judge Day said, “yes, go ahead.” Tr. 1110.<sup>12</sup>

Between November 28 and December 26, 2013, BAS received numerous texts from Judge Day and his family repeatedly inviting him to \_\_\_\_\_ family events. BAS’s text messages establish that he was trying, tactfully, to evade these out-of-court contacts with Judge Day. Ex. 27, DAY00464-67 (texts with \_\_\_\_\_ Day); Ex. 28, DAY00615-33 (texts with Judge Day).

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<sup>11</sup> Judge Day told Lambert that “he wanted to see how good [BAS] was.” Tr. 1159.

<sup>12</sup> The Commission recognized that these facts were inconsistent with the testimony of Judge Day and his son-in-law. However, the Commission specifically found, “that BAS is the most credible source on this information.” ER 75. *See also* Tr. 2025-2026 (Judge Day’s witness Dr. Craig Bryan on military conditioning when encountering a weapon).

In early December, 2013, Judge Day attended a conference in Washington D.C. with his wife, Lambert and Judge Tracy Prall. The conference was for veterans' court judges and treatment teams throughout the country. Before the trip, Judge Day asked BAS to connect the Marion County team with some of BAS's friends in D.C. Judge Day particularly solicited an introduction to a famous Navy SEAL, Tr. 1101. BAS complied. When Judge Day met with Mr. he found out the full extent of the extraordinary nature of BAS's military experience and service.

While at the conference, Judge Prall and Judge Day talked about VTC, focusing on boundaries and out of court contact with probationers. Judge Prall told Judge Day that she limited her contact with participants to the courtroom, other than responding with "hello" or similar pleasantries when a participant addressed her out in the community. Tr. 909-10; Ex. 71, p. 53. Judge Prall also told Judge Day that she believed that out of court contact can result in concerns that inappropriate influence has affected the handling of a case. *Id.* Judge Prall told the Commission investigator that she believes the same fundamental rules apply to all judges with respect to out of court contact with parties, and that these rules do not change for judges presiding in treatment courts. Ex. 71, pp. 53; Tr. 910-11. Notwithstanding Judge Prall's advice, Judge Day's out of court contacts with BAS increased. Ex. 71, pp. 50-53.

On December 26, 2013, Judge Day texted BAS and invited him to a brunch at his house celebrating Judge Day's birthday. Ex. 28, DAY00632. Judge Day picked up BAS and brought him to his home. There were no other veterans present, nor any other judges or VTC team members. Tr. 706. The only people present were the immediate Day family and BAS. *Id.* Among other things, BAS was asked about his religious beliefs and what his opinions were on Jesus Christ. Tr. 1107. It was an uncomfortable event for BAS. *Id.* While at Judge Day's house that day, BAS saw an H&K gun case and commented to Judge Day that it was a good weapon, to which Judge Day replied, "Shhh." Tr. 1108.

Twice after the birthday brunch, on December 27, 2013 and January 7, 2014, Day asked BAS via text messaging if BAS would go shooting with him. Ex. 27, DAY00468-74. On both dates, BAS declined. *Id.* In response to the second invitation, BAS said no, texting that he was worried about getting in trouble with his probation officer for having possession of a gun. Ex. 27, DAY00473.

During this same time period, BAS had a broken pellet stove and was living in the country in a farmhouse without heat. Tr. 1109. The weather was extremely cold. On January 5, 2014,<sup>13</sup> Judge Day texted BAS about he and his

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<sup>13</sup> The gun handling event at BAS's home was on Sunday, January 5, 2014, as evidenced by text messages between Judge Day and BAS in Exhibit 28, DAY00641-42, and text messages between \_\_\_\_\_ and BAS in Exhibit 20,

son coming over to BAS's home. Ex. 28, DAY00641-43. While Judge Day was in BAS's house, went to their car and returned with the H&K pistol case BAS had seen in the Day house at the birthday party.

Tr. 1109. pulled out the gun from the case and handled it. *Id.*

Judge Day was present and sitting at a table a few feet away. *Id.* BAS watched handle the gun and asked Judge Day if he could show how to handle it safely. *Id.*

BAS testified that Judge Day said, "No problem." *Id.* BAS also testified that Judge Day said that, as he was the judge who put him on probation, he could make "adjustments." Tr. 1110; *see also* Tr. 941. Judge Day also said that since, "you're teaching someone I love how to handle a weapon, I don't have any objections with you, you know, teaching someone I love how to -- how to, you know, shoot and handle a weapon." Tr. 1045 and Ex. 49 (Lambert notes from January 13, 2014); Tr. 1110 (BAS); Tr. 941 (Curry); Tr. 1053-54 (Judge Penn). Judge Day had no objections to BAS handling the gun. Tr. 1109-10, 1159-60. Before Judge Day and left, BAS confirmed with Judge Day that would be returning to shoot the H&K pistol later that day. Tr. 1138. did in fact return to BAS's house later that day and the two of them

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DAY00468-70. The Commission's briefing below inadvertently used the incorrect date of January 12 and subsequently the Opinion used the same.

shot the H&K pistol. Tr. 1110. BAS thought he was allowed to do so based on Judge Day's permission. Tr. 1110.<sup>14</sup>

On January 10, 2014, Judge Day texted BAS that he would like to come over to the farmhouse the next day, and on January 11, BAS declined that offer. Ex. 28, DAY00645-46. Later on January 11, Judge Day again asked to come over to BAS's home, and BAS again declined, texting on January 12 that he would not be home and that he would get someone else to fix the stove. Ex. 28, DAY00653-56.

On January 13, 2014, BAS told Judge Day's clerk, Megan Curry, about Judge Day and coming over to his house with the gun. Curry in turn told VTC coordinator E'lan Lambert. Tr. 943, 1043. Lambert went to BAS's house to learn firsthand what had happened. Tr. 1043. BAS told Lambert about Judge Day authorizing him to handle the guns. Lambert returned home and wrote detailed pages in her journal about what BAS had told her. Tr. 1043-46; Ex.49. She then confronted Judge Day with the information, reminding him about BAS's probation conditions and status as a convicted felon. Tr. 1158-60. Judge Day "panicked" during that conversation with Lambert. ER 78; Tr. 1158-60, 2321. She testified:

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<sup>14</sup> Judge Day's brief says that he did not partake in the interaction, but he did see [BAS] handle the gun. Br. 10. The transcript page Day cites, page 417, does not say that Day did not partake in the interaction. It says that Day knew BAS was handling a gun that day, but denies telling BAS he would waive the prohibition against a felon holding a gun.

“And -- but I also told him that I knew about the -- you know, with both of these -- with the gun there, but also the gun in the cabinet. And so he didn’t -- you know, he said that he had done that, he didn’t deny that.

“Q. So when you talked to him about [BAS] having access -- did you talk to him about handling a gun in the cabinet?

“A. I said that that was one of the things that [BAS] had told me. And he said that he -- yes, he wanted to see how good he was.

“Q. So Judge Day at that time with you didn’t deny that that incident took place?

“A. No, he didn’t deny it.

“Q. And did he deny that he saw [BAS] handle the gun in [BAS’s] home?

“A. No.

“Q. Did he admit that he gave [BAS] permission to handle the gun on either event?

“A. I’m trying to remember that day. He basically listened to what I was saying. And he didn’t -- he didn’t say he didn’t.

Tr. 1159-60.<sup>15</sup>

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<sup>15</sup> Judge Day’s witness statement says that Judge Ochoa told him to report the January, 2014 gun incident to Judge Rhoades, but that Judge Day “forgot about” the incident after he talked to Orrio, Wren and Herman and did not talk to Judge Rhoades about it. Ex. 71, p. 27. After Lambert confronted Judge Day in January, 2014, he told her he would self report and she assumed that had happened. Tr. 1157-58. It was only after BAS spoke with Judge Rhoades in August, 2014 that Lambert learned Judge Day had not done that.

At that point, the number of out-of-court contacts between Judge Day and BAS decreased dramatically. Judge Day met with the VTC prosecutor Orrio, Tr. 1901-02, and had a phone conversation with BAS's defense attorney. Tr. 1415, 1423-24.<sup>16</sup> Judge Day did not invite the probation officer to the meeting and only later told Mr. Herman there had been an incident with Judge Day, \_\_\_\_\_ and BAS being around a gun. Tr. 1455-56.<sup>17</sup> Judge Day did not disclose that BAS had actually handled the gun, Tr. 1930, 1936-37, or that \_\_\_\_\_ went target shooting with BAS later in the day. Tr. 1425, 1938. Judge Day did not disclose BAS's handling a gun at the \_\_\_\_\_ residence. Tr. 1932. Judge Day downplayed the full extent of BAS's access to guns in, \_\_\_\_\_ and due to, Judge Day's presence.<sup>18</sup>

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<sup>16</sup> Wren testified that he does not know why there was no sanction for BAS's probation violation, Tr. 1418-19, and that Judge Day told him "there would be no adverse consequences." Tr. 1424.

<sup>17</sup> Herman testified that it would have been very concerning to him if he saw BAS and Judge Day together with a gun, Tr. 1462, but that "based on my interaction with the judge at that time, I did not believe it was my place to pursue a probation violation given that the judge who oversees the probation was at the location if that makes sense." Tr. 1456.

<sup>18</sup> It is misleading for Judge Day to assert that "Judge Day then informed the VTC prosecutor who handled [BAS's] case, Bryan Orrio, [BAS's] criminal defense attorney, Daniel Wren, and [BAS's] probation officer, Austin Herman." Br. 11. Judge Day told them *his* version of what happened; he did not tell them that he saw the gun or about the other gun incidents. Orrio never even talked to BAS about what happened. Tr. 1905, 1936-37 (Orrio's decision not to take legal action against BAS for the gun violation was based on what Judge Day told him about what happened).

On January 24, BAS appeared in VTC. During that court appearance, BAS indicated to Judge Day that he would not possess firearms if permitted to go knife hunting while in Texas for brain trauma treatment. Ex. 126 (at approx. 10:50:35). Orrio gave his permission, saying, “I’ve bent over backwards a lot here, I think I’m due” and Judge Day told BAS that he is “a man of your word” and allows him to apply for “phase three” of the VTC program. *Id.*

During a morning hearing on February 21, 2014 (in which the courtroom gallery appears empty),<sup>19</sup> Judge Day dropped BAS’s felony status to a misdemeanor, signing the judgment *nunc pro tunc* to June 28, 2013. Ex. 127 (at approx. 9:47:15 AM); Ex. 510. At that time, BAS had not yet completed his probation, nor had he completed the 90-day jail sentence ordered in the original judgment, which is required under ORS 813.011(3). As part of the February 21, 2014 judgment, Judge Day gave BAS credit for time he had spent in inpatient treatment instead of having him complete the mandatory minimum term of incarceration. Ex. 510. Orrio said his recommendation was that BAS serve the 90 days, but he understood that “speaking with the court and Mr. Wren in chambers, this court wishes to grant day for day credit for inpatient treatment.” Ex. 127 (at approx. 9:44:20 AM). Mr. Wren, who also appears with BAS in that video, explains that BAS understands the proposed

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<sup>19</sup> Judge Day held a private hearing session for BAS prior to the VTC session. During the VTC session immediately afterwards, BAS appears and Judge Day promotes him to “phase three” of the program. Ex. 127 (at approx. 10:15:00 AM).

judgment/probation allows him to work in Texas and to handle firearms, and “that is really important to where he’s at right now.” *Id.* (at approx. 9:44:04 AM).<sup>20</sup>

BAS left Oregon in February 2014. He continued to appear at VTC hearings telephonically. After a particularly frustrating hearing on August 8, 2014, during which Judge Day asked BAS, on the record and in front of other veterans, if he knew what an “order” was, Ex. 130 (at approx. 11:01:55AM), BAS reached out to Lambert. Tr. 1170. He was upset by his treatment by Judge Day, and indicated that he would like to speak to the presiding judge. Tr. 1170-1. Lambert took BAS’s concerns to Presiding Judge Rhoades and asked that she call BAS. Tr. 655-57.

Judge Rhoades talked to BAS, telephonically, on August 14, 2014. Ex. 71, pp. 55; Ex. 47 and Tr. 657. During that phone call, BAS told Judge Rhoades about:

(1) the events at Judge Day’s house on December 26, 2013, including seeing the H&K gun case and “initially VDD saying don’t touch,” Ex. 47 and Tr. 658;

(2) the events and gun handling at BAS’s house in January, 2014, *Id.*;

(3) Judge Day waiving the prohibition against BAS handling the gun;<sup>21</sup>

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<sup>20</sup> A second order was signed 03/04/15, which also conflicts with the initial Addendum to Plea Petition requiring “90 days jail with no jail alternatives under ORS 137.750.” Compare Ex. 501 with 510 and 511.

(4) Judge Day making BAS feel like Judge Day's possession and that he was being put "on display" while with Judge Day, Tr. 659;

(5) Judge Day making BAS attend the November, 2013 wedding against his wishes, Tr. 658; and

(6) Judge Day and his son wanting BAS to be mentor.  
Ex. 47 and Tr. 657-64.

Judge Rhoades was very concerned about what BAS told her.<sup>22</sup> Tr. 670. On August 21, 2014, Judge Rhoades entered an order transferring BAS's case to Judge Prall. Exs. 29, 65. That evening, Judge Rhoades and Judge Penn met with Judge Day in Judge Penn's office. Ex. 29; Tr. 670-71, 1051. The conversation centered on the gun incidents and Judge Day's ex parte contacts with BAS. Although the conversation was pointed, Judge Rhoades was not aggressive and she did not engage in rapid-fire questioning tactics. Tr. 671-72, 1051. During the meeting, Judge Day claimed he did not know that BAS was a felon when he allowed BAS to possess a gun and justified his contacts with BAS. Tr. 421-22, 1052-53. Initially Judge Day did not recall the incident with

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<sup>21</sup> Judge Rhoades' contemporaneous notes say: "D. said, "Do you mind if I show him some safety stuff?" VDD told D that he cd [*sic*] make the exception because he gave D the probation and cd [*sic*] grant exception." Ex. 47.

<sup>22</sup> Judge Rhoades also spoke with probation officer Herman on August 21. Tr. 666; Ex. 47. Herman said he "vaguely" remembered "something" about Judge Day's son and a gun, he didn't know if BAS handled it or not or whether it was a felony if he didn't handle it, and "didn't have any idea about it." Herman also told her that "some people were very enamored with [BAS]." Tr. 667; Ex. 47.

the gun at BAS's home at all, but as his memory was refreshed by Judge Rhoades' questions, he admitted to making statements to the effect of, "because you're a Navy SEAL, you're trained with guns, you could give some pointers to my son." Tr. 1053-54. Judge Rhoades did not feel Judge Day was being forthcoming with information. Tr. 672. Judge Day modified his answers as Judge Rhoades told him there was contrary information, and Judge Penn did not think Judge Day's responses sounded truthful. Tr. 1051-52.

Judge Rhoades and Judge Penn determined that Judge Day's conduct needed to be reported to the Commission. Tr. 421, 1054. Judge Penn testified that they suggested that Judge Day should make the report and told Judge Day that if he did not, he and Judge Rhoades would. Tr. 1054. Judge Day then said that he would make the report. *Id.*

On August 23, 2014 -- more than 8 months after the gun possession incidents -- Judge Day wrote the Commission a vague letter as his self-report. It said: "I was recently advised that one of the veteran participants in our court contacted our presiding judge with concerns about an interaction he had with me in January of this year." Ex. 94. The letter named BAS and gave his case number but did not identify any factual circumstances. Exs. 94, 604.

Judge Day's "self-report" prompted the Commission to hire an attorney, Karen Saul, to investigate the matter further. Saul interviewed over a dozen

people, including Judge Day, other Marion County judges and BAS. At the Commission's request, Saul also investigated the 2012 soccer complaint.

On February 6, 2015, Judge Day's then-counsel Mark Fucile wrote a lengthy defense of Judge Day's conduct to the Commission. Ex. 609. One of the points Mr. Fucile made was that the VTC contract *expressly permitted ex parte contact*. He attached a copy of a contract and cited this language:

I understand and agree that there will be discussions about my case, my treatment program, and my condition which may take place out of my presence or the presence of my attorney. *I also understand that out of court contact with any members of the VTC team, including the VTC Judge and court personnel, authorized by the VTC team or treatment professionals is not considered ex parte contact.*

(emphasis added).

This was not, however, the language in BAS's VTC contract. Ex. 3, ¶ 24. The emphasized language in the provision that Mr. Fucile cited is (presumably unknown to Fucile) from a VTC contact with a "Revised" date of February 6, 2015 -- the same date as Mr. Fucile's letter to the Commission. Ex. 131, ¶ 19 and see lower left hand footer for revision date. The Commission found that Judge Day changed the VTC contract to allow ex parte contact like that he had with BAS without input from other members of the VTC team. ER 81. *See also* Tr. 1427 (Wren does not remember discussion of change);<sup>23</sup>

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<sup>23</sup> Wren testified he was aware of the current contract language, but his description of ex parte contact was such as "where the judge may see somebody

Tr. 1169 (Lambert would “absolutely not” have approved such a change).<sup>24</sup>

Judge Day presumably told Mr. Fucile that this new language was contained in BAS’s contract. Mr. Fucile withdrew as counsel for Judge Day on August 1, 2015.

### **3. The “Hall of Heroes” and Solicitation of Funds from Lawyers**

Judge Day decided to compile and display a collection of war art and military memorabilia in the Marion County Courthouse. He publically dubbed the fourth floor of the courthouse the “Hall of Heroes.” *See* Ex. 95 (video of hallways). He personally selected all the artwork to be displayed, including pieces from his own family, and was the only person at VTC who purchased war memorabilia for the project. Tr. 1274. The overall appearance of this military art collection, including the volume and content, created an atmosphere of implied partiality. ER 82; Tr. 680, 882-83. Several of Judge Day’s

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in the hallway, or they come up and drop off paperwork and the judge will say hi. I think that’s appropriate” but it would be inappropriate for a VTC judge to go to the home of a participant, or the participant to go to the judge’s home, Tr. 1419-21, and it was inappropriate for a judge to take a probationer to a wedding, or have constant text messages. Tr. 1432. Wren only found out about Judge Day going over to BAS’s home after it had happened. Tr. 1433.

<sup>24</sup> Judge Day represents that the VTC team revised the contract at its procedural meeting on February 6, 2015. Br. 100. His citation to Tr. 1923 (Orrio) is misleading. Orrio testified he did not propose the change to the language in paragraph 19, Tr. 1951, and said “I don’t honestly know where the change came from and who proposed it.” Tr. 1952. None of the VTC team members testified they agreed to the paragraph 19 language change.

colleagues on the fourth floor were uncomfortable with the scope and nature of the art. Tr. 674-76, 1230-31; Ex. 57.

The war art and military memorabilia were acquired through the Partnership for Veterans at Risk (PVR), a registered 501(c)(3) non-profit that Ms. Lambert had established in around 2011 to provide training to law enforcement regarding working with veterans. Tr. 373; Ex. 71, p. 45. Judge Day declined a position on the PVR Board of Directors because thought it would appear improper. *Id.* Nevertheless, he exercised authority over the PVR. ER 81-82. He created its budget. Tr. 1188 and Ex. 48, page 1; Tr. 1199-200; Ex. 625 and Tr. 1203 (Lambert testifies she “had nothing to do with approving this budget”); Tr. 1235 and Ex. 48; Tr. 1262-63,.1271, He also directed that more than 40% of its funds be used to pay for the fourth floor war art. Ex. 71, p. 45; Ex. 38; Tr. 1271-72.

Judge Day, and Judge Day alone, sought and obtained donations from attorneys, some of whom appeared before him, to pay for additional matting and framing of some of the military art. Tr. 1164-65, 1271-72; Tr. 387; Ex. 71, pp. 12-13 (Brown) and 20-21 (Curry). Judge Day set the price each donor should pay for the piece they wished to “sponsor.” Judge Day solicited and collected funds from Marion County attorneys Kevin Mannix (Tr. 1688), Keith Bauer (Tr. 1677-79), Phil Parks, his counsel of record in these proceedings Ralph Spooner (Tr. 607-09), Joe Much and Paul Ferder Tr. 2114-15, 2117.

Tr. 776-77. While Judge Day also accepted donations from some Marion County judges, the judges collectively donated \$100, while the smallest individual attorney donation was \$225. Ex. 48. The largest donation, \$793.50, came from Mr. Spooner, who was scheduled to appear in a trial before Judge Day the week following the donation. Tr. 387, 792. On at least one occasion, Judge Day solicited funds during a status conference involving a matter pending trial before Judge Day in Judge Day's chambers. Tr. 1169-70.

Some of the "sponsor" checks were delivered directly to Judge Day and some were collected by his staff at his direction. Tr. 1165-66, 935-46 (Curry testifying she overheard Judge Day soliciting a donation for a Justice DeMuniz related hanging and that Judge Day initially instructed her that the donation check to be made out to himself). The amount of each piece specifically sponsored by the attorneys exceeded the actual cost of that piece. Ex. 48; Tr. 386-88.

Judge Day knew that the donors expected something in return for their donations<sup>25</sup> and he created placards identifying the attorneys or law firms who donated the funds. Ex. 142 and 90 (identifying Spooner's firm). He also wrote descriptive placards for all of the art. At the direction of Judge Rhoades, Judge Day later removed the "sponsored by" portions of the placards. Ex. 71, p. 57

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<sup>25</sup> When Judge Rhoades invited local attorneys, judges and county commissioners to discuss setting up a committee on art for the courthouse, "lawyers who were going to appear in front of Judge Day were reluctant to be on the committee that would say no." Tr. 683; Ex. 58.

(Judge Rhoades); compare to Tr. 381 (Judge Day); and Ex. 133 (Judge Day deposition at approx. 83:9-84:4). However, the descriptive placards remained, some of which were inappropriate and showed bias and a lack of neutrality. ER 83.<sup>26</sup>

Judge Day also used his personal funds to make purchases, then asked Lambert for PVR to reimburse him. Tr. 384-399; Ex. 37; 76-82 (receipts for Judge Day's purchases). Lambert was uncomfortable with Judge Day's demands for reimbursement, but she felt she had no choice. Tr. 1263.

One of the pieces was a collage donated by the family of Dr. Ken Vollmar containing a portrait of Adolph Hitler. Ex. 35. Judge Day advanced \$879.20 to mat and frame this piece. Tr. 385. PVR reimbursed him that amount. Tr. 385. When Judge Rhoades told Judge Day to take that piece down, he responded, "You don't want to go there because some very influential people in this town want it up." Tr. 675-76. Judge Rhoades viewed this as a veiled political threat. Tr. 676. Judge Day did remove it, but returned it to the

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<sup>26</sup> For example, there was artwork with a placard that declared a bias against mental illness defenses. *See* Ex. 599. *See* Commission's Closing Argument, pp. 42-43 for more examples of Judge Day's poor judgment in the images selected and placard descriptions. One veteran told Curry that he had a panic attack from being around all the war art, and Judge Day told Curry that if he lost one soldier to suicide it would be for the greater good. Tr. 947. Lambert expressed her concerns about triggering images and Judge Day told her that if it does something good for two or three veterans then it doesn't matter what happened to the rest, and if any veteran committed suicide it would not be on his conscience. Tr. 1032-33. *See also* Tr. 794-95.

Vollmar family rather than giving it to the non-profit. Tr. 384. The Vollmar family then reimbursed Judge Day \$879.20 for the expense associated with framing it. Tr. 384.

**4. Instructions to Court Staff about Handling Same Sex Marriage Requests.**

Although performing marriages is not a mandatory judicial duty, from the beginning of Judge Day's tenure, he had officiated marriage ceremonies. On May 19, 2014, Judge Michael McShane overturned Oregon's ban on same-sex marriage. *Geiger v. Kitzhaber*, 994 F Supp 2d 1128 (D Or 2014). In early summer of 2014, Judge Day instructed his staff to "screen" marriage applicants to determine if they were a same sex couple. Tr. 178; 785-86

Specifically, Judge Day directed his staff that when anyone called to inquire about him conducting a marriage, staff must get the couple's names, dates of birth and phone numbers, tell them they would call back after checking the judge's schedule, search the OJIN database -- something they did not do for same sex couples -- for indications of same sex and, if staff found that the couple was of the same sex, to call the couple back and indicate that Judge Day was "unavailable" on the day of their service and refer them to other judges. Tr. 785-86, 861, 947-49. However, if staff learned the couple was two people of the opposite-sex, and his calendar was open, his staff was instructed to schedule the wedding. Tr. 861. Judge Day's staff members were uncomfortable that what he required them to do may be illegal. Tr. 857.

Between early summer 2014 and November 2014, Judge Day's staff implemented his discriminatory screening plan. A couple inquired about scheduling a wedding ceremony. Per Judge Day's instructions, staff reviewed OJIN and determined that this was a same-sex couple. Tr. 785. They also determined that Judge Day had an actual scheduling conflict (he was gone that week) with the proposed ceremony time. Tr. 787. While the full screening process did not have to be used because Judge Day was actually gone that week, staff followed Judge Day's instructions and the plan was implemented.

Judge Day continued to marry opposite-sex couples. He performed his last marriage on or after August 2014. In November 2014, Judge Day removed himself from the Marion County list of wedding officiants.

After Judge Pellegrini was appointed to the bench in 2014, Judge Day invited her to breakfast. Tr. 1291,1294-95. Judge Day had been opposed to her appointment. Tr. 2307-08. At that breakfast, Judge Day indicated to her that his objections were not due to her qualifications to serve on the bench, but were due to her sexual orientation as a lesbian. Tr. 1291. Judge Day's testimony was inconsistent with Judge Pellegrini's on this topic. Judge Day testified that he told Judge Pellegrini he did not support her appointment because she was a government lawyer. Tr. 2307-8. Given all of its other factual and credibility findings, the Commission found Judge Pellegrini to be the more credible.

ER 86.

## ARGUMENT

### A. **Count 1 - Soccer Incidents.**

Regarding Count 1, the Commission found that

“[i]t has been established by clear and convincing evidence that Judge Day intentionally intimidated Mr. Deuker by the use of his judicial position for his own personal gain. Judge Day was acting with a conscious objective to cause a result. His violation of the above judicial disciplinary rules [Rules 2.1(c) and 2.2] was willful. Thus, Judge Day is in violation of Article VII, § 8(1 )(e) of the Oregon Constitution.

#### 1. **Clear and convincing evidence to sustain Count 1**

Judge Day “does not dispute the facts as specified in Count 1.” Br. 69.<sup>27</sup>

That is, he admits that he approached the soccer referees’ table and complained about the performance of a referee, stated that he intended to send a report to higher authorities, said he had been watching the referee over the past year and this was not the first poor performance by the referee, and produced his business card, which identified him as a circuit court judge.

Yet Judge Day also says that the recommended finding that he was trying to intimidate Deuker is “contrary to the overwhelming evidence presented in this proceeding.” What Judge Day must mean by “the overwhelming evidence presented,” however, is *his* testimony. All of the other evidence pertaining to the soccer claims, set forth at pages 3 through 11 above, contradicts Judge Day’s testimony and plainly describes intimidation by flouting judicial office.

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<sup>27</sup> References to “Br.” are to Judge Day’s opening brief.

The Commission believed Deuker and the other witnesses called by the Commission. Concerning Deuker, the Commission found:

“Mr. Deuker has absolutely no motivation to misrepresent what occurred. He made a timely complaint about Judge Day’s behavior, which he memorialized in writing very shortly after the event. Mr. Deuker’s testimony was consistent and corroborated by other witnesses. Mr. Deuker’s demeanor on the stand was earnest. Clearly nervous, he expressed fear about potential repercussions for reporting Judge Day’s conduct. The depth of his concern was evident in his voice and manner on the witness stand.”

The Commission did not believe Judge Day. It found:

“Judge Day’s testimony regarding the soccer incidents was internally inconsistent and inconsistent with his initial written response to the Commission. His testimony is contrary to virtually every other witness.”<sup>28</sup>

The Commission also noted that, “when challenged by contrary evidence, [Judge Day’s] facial expressions and responses were tinged with a bit of sarcasm” and that Judge Day’s demeanor while Mr. Deuker was testifying “bordered on mockery.” ER 70.

## **2. No claim preclusion**

Judge Day contends, however, that he cannot be disciplined because the Commission initially dismissed the soccer complaints based on his

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<sup>28</sup> The Commission’s reference to internal inconsistencies likely refers to the inconsistency between Judge Day’s trial testimony, deposition testimony (Ex. 133), Answer to the Commission’s Complaint (¶¶ 3, 6) and the statement he initially gave in his written response to the Commission (Ex. 98).

misrepresentations to the Commission in the initial investigation. Br. 66. In other words, Judge Day argues that because he got away with a dismissal the first time the soccer complaint was considered, there was nothing the Commission could do about it when the truth came to light. Judge Day is wrong for at least three reasons.

First, claim preclusion requires a conclusive determination of a controversy between parties. *Bloomfield v. Weakland*, 339 Or 504, 510–511, 123 P3d 275 (2005). No such determination was made here. In her analysis, the Commission’s executive director wrote: “The judge’s recollection of the events in question is diametrically opposed to the allegations of the complainants.” Ex. 655. Her recommendation was: “Dismiss due to insufficient evidence and lack of jurisdiction.” *Id.* At that particular point, therefore, the Commission did not have probable cause to pursue any further action or investigation. The Commission did not make a conclusive adjudication on the merits. Judge Day misleads this Court and misconstrues Exhibit 655 (the Commission’s internal memo) when he says “the Commission *deemed* the soccer referee complaint *meritless, finding* that Judge Day had not used his judicial position ‘inappropriately or unethically’ and that judge Day did not act inappropriately in a public place. Ex. 655.” BR 68 (emphasis added).

Second, there is a fraud exception to claim preclusion. *See*, Restatement (Second) of Judgments § 26, comment j (1982) (“A defendant cannot justly

object to being sued on a part or phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud."); *See also*, *Riehle v. Margolies*, 279 U.S. 218, 225 (1929) (only "in the absence of fraud or collusion" does a judgment from a court with jurisdiction operate as res judicata.)

Third, Judge Day is barred from asserting issue preclusion by equitable estoppel. Equitable estoppel applies where: (1) there is a false representation; (2) it is made with knowledge of the facts; (3) the other party was ignorant of the truth; (4) the representation was made with the intention that it should be acted on by the other party; and (5) the other party was induced to act on it. *Welch v. Washington County*, 314 Or 707, 715, 842 P2d 793 (1992). That is precisely what happened here.<sup>29</sup> Judge Day lied to the Commission in his initial response to the soccer complaints. *See* pages 8 through 11 above. When the Commission later learned the truth, it was authorized to initiate a formal complaint.

**B. Count 2 - Lying to Commission about soccer incidents.**

Regarding Count 2, the Commission found:

"Judge Day was not forthright to the Commission in his February 2013 response regarding the soccer incidents. He claimed that, at the October game, he

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<sup>29</sup> The cases Judge Day cites hold only that claim preclusion *could* apply to administrative proceedings.

only produced his card because Mr. Deuker requested it. That was not true.

\* \* \*

Day further claimed that at the November game, Mr. Allen had physically accosted him. That is likewise not true.

The Commission concluded that those misrepresentation violated Rule 2.1(C) and (D) as well as Rule 3.12(A) and, because they were willful, also violated Article VII, § 8(1)(e) of the Oregon Constitution.

In his letter to the Commission in January 2013, Judge Day represented that, at the November 7 soccer game, he approached the referees' side of the field post-game to thank the officials but that, "[b]efore I could finish the sentence I was grabbed by my shoulders from behind without warning, whirled around, and nearly picked off my feet and forcefully thrown forward. I nearly went down on my hands and knees but was able to right myself." Ex. 98, p. 4. Count 2 alleges, and the Commission found, based on the clear and convincing evidence described at pages 3 through 11 above, that representation to be false.

Judge Day says that, "[t]he Commission ignores much of the evidence, and fails to clarify that no witness testified that no individual made any physical contact with Judge Day on the field after the November 7th game." The man who Judge Day claims accosted him, Dale Allen, denied under oath having any physical contact with Judge Day or seeing Judge Day stumble or fall. Tr. 541. The Commission believed Mr. Allen. It said:

“Mr. Allen presented as a very straightforward, honest and genuine person in his demeanor on the witness stand. Mr. Allen had no motivation to misrepresent what occurred on the soccer field. At the time of the November 7, 2012 game, Mr. Allen was being a careful observer of events. In fact, that was the very reason he was present. His testimony was consistent and was corroborated by other witnesses who were, likewise, disinterested observers.”

Two other credible witnesses -- referee Horner and athletic director Belmodis -- recalled Judge Day being approached by the man Judge Day says accosted him. They did not see that man or anyone else touch Judge Day, much less grab him, whirl him around, pick him off his feet, or throw him forward. Nor did they see Judge Day nearly falling to the ground. Br. 80-81. Either Allen, Belmodis and Horner were all lying, or Judge Day was. The Commission did not believe Judge Day. The evidence that Judge Day lied to the Commission is clear and convincing.

**C. Counts 3 and 4 - Judge Day authorizes gun possession and was in the presence of BAS handling guns..**

Regarding Counts 3 and 4, the Commission found:

On November 18, 2013 and January 12, 2014, Judge Day facilitated the handling of a firearm by BAS, a convicted felon on active supervised probation. On January 12 [*sic*], 2014, Judge Day was also aware of his son’s plans to target shoot with BAS, which would also facilitate BAS’ s handling of a firearm.

ER 95. The Commission also found that “[b]y facilitating the handling of a firearm by a convicted felon on active supervised probation on each of these dates,” Judge Day violated Rule 2.1(A), 2.1(C), 3.9(A) and that he, “aided and

abetted in the commission of the crime of felon in possession of a firearm, which is a felony. *See* ORS 166.270 and ORS 161.155(2)(b).” Because Judge Day’s acts were willful, the Commission also found violations of Article VII, § 8(1)(e) of the Oregon Constitution. The Commission’s findings are supported by clear, credible and convincing evidence.

**1. The November 18, 2013 gun incident.**

BAS testified that Judge Day gave him permission to handle a gun at the home on November 18, 2013. BAS’s testimony is corroborated by Lambert’s testimony that when she confronted Judge Day with BAS’s claim, he did not deny it. Tr. 1159-60 (cited in full on pages 20 and 21 above). Judge Day and testified that BAS did not possess a gun on that occasion. The Commission found “that BAS is the most credible source on this information.”<sup>30</sup> ER 75. BAS’s credible testimony constitutes clear and convincing evidence proving that Judge Day gave BAS permission to possess a gun on November 18, 2013.

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<sup>30</sup> The Commission also noted “that declaration, submitted in support of his father-in-law, and his testimony on the stand were not consistent.” In his declaration, testified: “My father-in law was not involved in Tiny [BAS] opening the drawer or seeing the gun.” Ex 609, Ex. 9. At the hearing he testified:

Q. Do you deny that Judge Day was aware that [BAS] saw the gun that day in the cabinet?

A. I can’t recall.

## 2. The January 5, 2014 gun incident

Judge Day admits that he witnessed BAS handling a gun again in January 2014, but says he did not give BAS permission to do so. Tr. 417, 427, Br. 89-90 (“[BAS] handled the gun, \* \* \*. Judge Day witnessed the latter part of incident but did not partake in it.”) Tr. 1045. an eye-witness to these events, was listed as a hearing witness for Judge Day but was not called to testify.<sup>31</sup> BAS, on the other hand, testified that Judge Day did give him permission to handle the gun. See pages 18 through 20 above. The Commission found BAS’ testimony to be credible:

“BAS has no motive to lie. He received no benefit from testifying. In fact, some of his testimony was against his interest. BAS did not initiate a complaint against Judge Day with the Commission and clearly did not want to participate in these proceedings. Although BAS’s concerns about repercussions for participating were evident, his testimony was consistent with his numerous prior interviews, the notes of which are in evidence. And, although he appeared by telephone, his demeanor was genuine, sincere, heartfelt, and he displayed authentic emotion at appropriate times.”

ER 73. The Commission also said:

“Although Judge Day continues to deny this, it is actually inconceivable that BAS would handle a firearm in the presence of Judge Day without asking and receiving permission from the judge. BAS was on Judge Day’s caseload and had every motivation to be successful on probation. For this veteran, success

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<sup>31</sup> was not a VTC team member, and was over the age of 21 at the time of the January, 2014 gun incident. Tr. 2314-16.

meant not having a felony conviction on his record at the end of his probationary period. Judge Day clearly waived the prohibition against BAS handling a firearm during these incidents.”

ER 95. And again, BAS’s testimony is corroborated by Lambert’s testimony that when she confronted Judge Day with BAS’s claim, he did not deny it.

Tr. 1159-60.

**3. Attempts by Judge Day to have BAS’s credible, eye-witness testimony stricken.**

Judge Day argues that BAS’s eye-witness testimony “should not be given any weight.” Br. 88. As this Court knows from two prior motions filed by Judge Day, he has gone to great lengths -- arguably rising to the level of witness intimidation<sup>32</sup> -- to eliminate BAS’s testimony from the record. *See* “Motion to Strike; Supplement and Correct the Record; and Re: Briefing in its Entirety” and “Motion to Strike Witness testimony and Interview Summary.” As this Court also knows, those motions appear to have been disingenuous attempts to create the misimpressions that the Commission intentionally kept BAS from appearing at the hearing, that BAS was evading service, and that Judge Day did not have a fair opportunity to question BAS at the hearing. This Court rejected those claims presented by motion and should reject them here. BAS’s credible

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<sup>32</sup> BAS testified that he was afraid of what Judge Day might do to him. Tr. 1097. He testified that he was worried about his name being made public because of a security risk. Tr. 1098. Judge Day’s public filings have included unredacted personal information about BAS and his fiancé.

testimony provides clear and convincing evidence to sustain the charge in Counts 2 and 3.

**D. There is clear and convincing evidence to sustain the Commission's recommendations on Count 5.**

**1. Lying to the Commission investigator.**

Noting that investigator Saul's December 12, 2014 interview with Judge Day was memorialized (Ex. 71; Tr. 71-72) and that Judge Day had an opportunity to review and revise the interview summary (Tr. 72), the Commission found that Judge Day "was not forthright with the Commission's investigator" when he denied that BAS had any contact with a gun at the home, Tr. 76, and when he denied that there was any conversation about waiving the weapons prohibition for BAS in January, 2014 when BAS handled gun in Judge Day's presence. Again, Judge Day's only defense is that he was told the truth and BAS lied. BAS testified that Judge Day expressly waived those restrictions. Lambert testified that when she confronted Judge Day about BAS's description of events at the home, Judge Day did not deny that he waived the prohibition against BAS possessing a gun. Tr. 1159-60. The Commission believed BAS and Lambert and disbelieved Judge Day.

**2. Lying to Judge Rhoades and Judge Penn.**

During the meeting with Judges Rhoades and Penn, Judge Day claimed he did not know that BAS was a felon when he allowed him to possess a gun

and justified his contacts with BAS. Tr. 421-22, 1052-53. Judge Day also said that he had not known about his son showing BAS the gun on January 5 because he was busy with fixing the pellet stove. The Commission thus found that “Judge Day was not forthright to his colleagues, Judge Rhoades and Judge Penn when he indicated to them that he had not waived those same prohibitions and when he claimed to not know that BAS was a felon.” The Commission noted: “Those statements were simply not true.” ER 97.

As noted above, Judge Day *himself* accepted BAS’ plea of guilty to a *felony* on June 28, 2013. Tr. 404; Ex 1. Judge Day placed BAS on 24 months of supervised probation, including the condition that BAS not possess any weapons, including firearms. Tr. 404; Ex. 2. At VTC on October 11, 2013, Judge Day told BAS in court: “No guns, you don’t get any guns.” Ex. 123. On November 8, 2013, BAS again appeared in VTC and asked, “Can I touch a gun now?” Judge Day said, on the record and unequivocally, “No.” Ex. 124. Less than two months later, according to Judge Day, he forgot all about BAS’s felony status. That simply is not credible.

Judge Day says that he was not given adequate notice and an adequate opportunity to defend against the charge that he committed a criminal act by permitting BAS to possess a gun because “the alleged violations were not charged in the Complaint.” Br. 81-82. Judge Day knew that he was at risk of being charged with a criminal act. That is presumably why, when Lambert told

Judge Day she knew about BAS's gun possession and reminded him about BAS's probation conditions and status as a convicted felon, he "panicked." Tr. 1158-60. Or, as Judge Day tells it, he became "sick to his stomach, foolish and frankly a bit afraid." Br. 90; Tr. 2321. Even if this Court were to believe that the very same judge who sentenced BAS to a felony as a prerequisite to admission to the VTC program simply forgot that BAS was a felon in January, 2014, by Judge Day's own admission, he had ample notice that his conduct could give rise to a violation of Oregon law long before he was formally charged.

**E. There is clear and convincing evidence to sustain the Commission's recommendations on Count 6.**

Regarding Count 6, the Commission found that "Judge Day's unsolicited, and often unwanted, personal out-of-court contacts with BAS were completely inappropriate." The following facts are largely uncontested:

- Judge Day texted BAS repeatedly.<sup>33</sup>
- Judge Day showed up at BAS's home uninvited.
- Judge Day took BAS to a wedding.
- Judge Day solicited introductions to BAS's out of town friends.
- Judge Day brought BAS to Judge Day's home.

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<sup>33</sup> Exhibit 48 consists of 46 pages of text messages between BAS and Judge Day, including personal photos.

- Judge Day nurtured a relationship between BAS and Judge Day's son, allowing BAS to handle firearms and facilitating other favors for BAS in the form of rides, food, etc.
- Judge Day encouraged his judicial clerk to befriend BAS.<sup>34</sup>
- Judge Day met with BAS more than once in his chambers and wrote an article about BAS for the Oregon Trial Lawyers Association newsletter.

“In many, if not most, of these instances,” the Commission pointed out, “BAS actively tried to avoid Judge Day’s overt attentions.” ER 98. However, “in the end, due to Judge Day’s conduct, this criminal defendant had no choice but to acquiesce to Judge Day’s requests to avoid any negative impact on the outcome of his probation.” *Id.*

In the face of overwhelming evidence, Judge Day now says that he “acknowledged that during a brief time at the end of December 2013 and into early January 2014, his out-of-court contact with [BAS] crossed appropriate boundaries.” But what Judge Day did to BAS was not some excusable oversight. Judge Prall warned Judge Day about improper ex parte conduct in early December, 2013. *See* page 17 above. It was immediately after that that

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<sup>34</sup> One of his judicial assistants testified: “He [Day] brought me into his chambers and said, so I am not ordering you to, but would you be willing to become friends with [BAS]?” Tr. 937. He also said: “If you want to go on a date, I know somebody who wants to go on a date with you. Tr. 938.

Judge Day admits he “crossed appropriate boundaries.” Br. 101. He had to have known full well what he was doing and that it was wrong.

Even with his belated acknowledgment, Judge Day makes excuses for what are plainly inexcusable ex parte contacts. Regarding the wedding, Judge Day says that, when they arrived at the wedding site, Judge Day “asked [BAS] if he wanted to join me, or he could wait in the car, and [BAS] said no, I want to go.” Tr. 2303. Judge Day still does not recognize that when a judge “invites” a probationer (whose felony conviction could be reduced to a misdemeanor or not by that same judge), to do something, the probationer has little or no choice. That is one reason why, as Judge Prall explained to Judge Day shortly before Day invited BAS to his house for dinner and let him use guns, judges reasonably avoid such situations. *See* Ex. 71, pp. 51; Tr. 910-11.

Judge Day claims that “there was no ex parte contact, only contact that was out-of-court.” Br. 105.<sup>35</sup> Judge Day then says that BAS provided the only evidence of ex parte contacts and suggests that BAS lied. Judge Day says that BAS “was already in violation of his probation because he possessed his own gun during this time” and that he needed an excuse for the possession if it was discovered, so he had ample motivation to lie about the alleged ‘permission’ given to him by Judge Day.” Br. 105-06. As explained above, there is ample,

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<sup>35</sup> Judge Day admitted that text messaging with VTC probationers is “ex parte contact,” but he testified that it depended on the “context” whether it was appropriate or not. Tr. 351.

undisputed evidence of ex parte contacts. Moreover, the Commission found BAS's testimony credible and did not believe Judge Day in several respects.

Finally, Judge Day says that, "individual courts have crafted standard-form agreements which allow out of court contact with, among others, the judge, without being considered ex parte communication." Br. 106. Whatever other courts may have done, and notwithstanding Judge Day's false representation in his attorney's letter to the Commission, BAS's contract contained no such provision.<sup>36</sup>

Judge Day was BAS's supervising judge. Judge Day had full authority to send BAS to jail for probation violation and to ruin BAS's chance to complete VTC and reduce his felony conviction to a misdemeanor. Judge Day generally had ultimate say over sanctioning VTC probationers Tr. 349-50. Judge Day had no business texting BAS repeatedly, dropping in on BAS without being invited, taking BAS to a wedding and encouraging BAS to handle guns.

**F. There is clear and convincing evidence to sustain the Commission's recommendation on Count 9.**

Regarding Count 9, the Commission found:

"The "Hall of Heroes" was Judge Day's personal project and he was the sole fundraiser for it. Either directly or under the guise of PVR, Judge Day secured all the funds, decided how they would be spent, gathered the materials and artwork, worked with the framer, drafted the placards, and hung the pieces.

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<sup>36</sup> Judge Day testified that believes the paragraph 19 language of the VTC contract, Ex. 131, is appropriate. Tr. 348-49.

“To this end, there is no question that Judge Day sought and received money from attorneys. \* \* \*

As explained at pages 28 through 32 above, there is clear and convincing evidence to support these findings.

While Judge Day still maintains that he did not solicit funds, Lambert testified:

“Q. Do you know who solicited donations?

“A. Judge Day.

“Q. Did you or anyone at PVR ask him to make those solicitations?

“A. No.”

Tr. 1165.

Judge Day says: “There is a significant difference between alleging ‘collecting’ money and the finding of ‘soliciting’ funds.” Br. 110. Judge Day fails to explain, however, what that “significant difference” is. Presumably, he is saying that he did not solicit funds because he did not literally ask, “will you please give me money?” As the Commission found, however, Judge Day managed to solicit funds without being so direct. “In various contexts,” the Opinion observes, “Judge Day talked to attorneys about the project and donations, prompting the attorneys to ask about donating. Judge Day would then solicit financial support from them and collect the money.” ER 100. The above-described clear and convincing evidence, including Judge Day’s own

explanation of how attorneys happened to contribute money, supports that conclusion. Tr. 607-609.

Judge Day says that the Commission improperly found that his solicitation of funds violated Rule 4.5(A) because that rule was not referenced in the Complaint. He concludes that, “this finding must be disregarded because Judge Day was given neither adequate notice of, nor the opportunity to defend against, this new charge.” Br. 110. The Commission Counsels’ Hearing Memorandum, however, lists Rule 4.5(A) as one of the “ethics rules from the Oregon Code of Judicial Conduct may be implicated in this case.” Memo, pp. 8, 10.

**G. There is clear and convincing evidence to sustain the Commission’s recommendation on Count 12.**

Paragraph 51 of the complaint alleges:

“Judge Day inappropriately screened and ordered his court staff to screen wedding applicants to ensure that they were not same-sex applicants, because Judge Day refused to marry same-sex partners even though they could lawfully marry under Oregon law.”

The uncontested evidence described at pages 32 and 33 above, shows that Judge Day generally accepted and performed weddings requested by members of the public from late 2011 until the summer of 2014. Tr. 975-76, 1008.” Br 116, 121. Then, after Judge McShane struck down Oregon’s ban on same sex marriage in May, 2014, Judge Day instructed his staff to “screen” marriage applicants by searching the OJIN database -- something they did not do before

same sex marriages were legal -- for indications of same sex relations. Judge Day instructed his staff that if the couple was of the same sex, they were to say that he was unavailable, even if untrue. Tr. 861.<sup>37</sup> This required Judge Day's staff to lie. There is clear and convincing evidence to support the Commission's findings.<sup>38</sup>

Finally, Judge Day says that the Commission's recommendations "improperly add new charges not made against Judge Day." Count 12 alleges violations of Rule 3.3(B). The Commission also found violations of Rule 2.1(A) by "corrod[ing] the integrity and impartiality of the judiciary" and by failing to promote public confidence in the judiciary and judicial system by implementing a discriminatory practice, and a violation of Rule 2.1(D) by Judge

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<sup>37</sup> Judge Day says he "suggested" the discriminatory plan. Br. 59.

<sup>38</sup> Pages 17 through 29 of the Commission Counsels' Hearing Memorandum addresses Judge Day's constitutional challenges to the Commission's Opinion and its rules, including the lead United States Supreme Court case, *Williams-Yulee v. Florida Bar*, 135 S Ct 1656 (April 29, 2015), and the cases from other states dealing with refusals by judges to perform same sex marriage. The Commission asks the Court to consider that briefing as incorporated herein.

In addition to the cases cited, the Wyoming Supreme Court recently addressed whether the United States Constitution permits disciplining a judge for announcing that her religious beliefs prevent her from officiating same-sex marriages and whether the provisions of the Wyoming Code of Judicial Conduct alleged to have been violated by the judge are void for vagueness. *See An Inquiry Concerning the Honorable Ruth Neely, a Municipal Judge and Circuit Court Magistrate, Ninth Judicial District, Pinedale, Sublette County, Wyoming Judge Ruth Neely v. Wyoming Commission on Judicial Ethics*, 2017 WY 25 (Wyo., 2017). The court in that case also addressed the judge's claims regarding Title VII of the Civil Rights Act of 1964, §§ 701(j), 703(a)(1), 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1).

Day's "discriminatory plan requir[ing] his staff to lie to the public in order to conceal Judge Day's discriminatory tactics." Judge Day says he "was not given either adequate notice or the opportunity to defend against these new charges."

Br. 119. Judge Day does not claim in his brief that he did not have actual knowledge that these rules were in play. In any event, the Commission Counsel's Hearing Memorandum placed Judge Day on notice that Rules 2.1(A) and (D) were at issue. That Memorandum lists those provisions among the "ethics rules from the Oregon Code of Judicial Conduct that may be implicated in this case." Memo, pp. 8, 10.

### CONCLUSION

Judge Day repeatedly attempted to create the impression that the only reason for the Commission's investigation of his conduct is his position regarding same sex marriage. *See* Ex. 100-108; 112-14; 116. Judge Day made repeated public assertions that the Commission is attacking him due solely to his religious beliefs concerning same sex marriage. *Id.* The truth is that Judge Day is guilty of numerous violations of the Code of Judicial Conduct and at least one violation of Oregon law. The Commission did not discover his direction to his staff about screening wedding inquiries and lying about his availability until *after* the investigation of his other misconduct was well underway.

According to Judge Day, many people lied under oath and only he told the truth. But as the Commission's Opinion demonstrates, Judge Day's testimony is contradicted in each respect by credible, third party witnesses whose recollections of events were consistent with that of other witnesses and the surrounding circumstances and who had no reason to lie under oath. Those witnesses provided overwhelming evidence supporting the Commission's determinations that Judge Day has committed the violations set forth in Counts 1 through 6, 9 and 12, as well as related violations. The Commission's findings demonstrate a clear pattern of conduct in a variety of contexts that justify Judge Day's removal from office.

Dated this 25th day of April, 2017.

TIM VOLPERT, P.C.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH  
AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,768 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

s/ Timothy R. Volpert

Timothy R. Volpert, OSB #814074  
Of Attorneys for Commission on Judicial  
Fitness and Disability

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 25th day of April, 2017, I filed the original of the foregoing RESPONSE BRIEF OF THE COMMISSION ON JUDICIAL FITNESS AND DISABILITY by using the court's electronic filing system; I served the same on:

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Dated this 25th day of April, 2017.

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with the corrected signature page by email and mail pursuant to agreement with Judge Days' counsel.

Dated this 27th day of April, 2017.

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