

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

_____)	
JANET JENKINS, ET AL.,)	
)	
Plaintiffs,)	
)	Docket No. 2:12-cv-00184
v.)	
)	
KENNETH L. MILLER, ET AL.,)	
)	
Defendants.)	
_____)	

**DECLARATION OF HORATIO G. MIHET, ESQ.
IN OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL**

HORATIO G. MIHET, being first duly sworn, deposes and states as follows:

1) I am over the age of 18, competent to testify to the matters herein, and, if called upon to testify, I could and would do so competently, based upon my personal knowledge, as follows:

2) I am Vice President of Legal Affairs and Chief Litigation Counsel for Liberty Counsel. I am one of the attorneys representing Liberty Counsel and Rena Lindevaldsen as defendants in this litigation. I was personally involved in searching for documents responsive to Jenkins’ discovery requests, as well as meet and confer attempts to request that Jenkins narrow some of her requests to make them reasonable and proportional to the needs of this case.

A) The Protracted, Multi-Jurisdictional Jenkins-Miller Custody Litigation Has Produced A Gigantic Paper and Electronic File.

3) Beginning in 2004, Liberty Counsel attorneys, including Rena Lindevaldsen and Mathew Staver, represented Lisa Miller in protracted, multi-jurisdictional litigation against Janet Jenkins, in connection with their custody dispute over Isabella Miller (hereinafter the “Dispute.”).

4) The Dispute was massive. It spanned multiple years (over five), two jurisdictions (Virginia and Vermont), and multiple courts within each jurisdiction at every level (trial, appellate and supreme courts). Indeed, as defined by Jenkins in her document requests, the Dispute included at least **eleven separately docketed cases**, including:

17. "Vermont Proceedings" means any Vermont state court case concerning Plaintiff

Isabella Miller-Jenkins, including but not limited to:

- a. *Miller-Jenkins v. Miller-Jenkins*, No. 2007-271 (Vt.);
- b. *Miller-Jenkins v. Miller-Jenkins*, No. 2009-473 (Vt.);
- c. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 Rddm (Vt. Super. Ct. Rutland Fam. Div.); and
- d. *Miller-Jenkins v. Miller-Jenkins*, Nos. 2004-443, 2005-030 (Vt.).

18. "Virginia Proceedings" means any Virginia state court case concerning Plaintiff

Isabella Miller-Jenkins, including but not limited to:

- a. *Jenkins v. Miller*, No. CL09000723-00 (Va. Cir. Ct. Frederick Cty.);
- b. *Miller v. Jenkins*, No. JJ019920-01-00 (Va. Juv. & Dom. Rel. Dt. Ct. Bedford Cty.);
- c. *Miller-Jenkins v. Miller-Jenkins*, No. 070933 (Va. Ct. App.);
- d. *Miller v. Jenkins*, No. 0705-09-4 (Va. Ct. App.);
- e. *Miller-Jenkins v. Miller-Jenkins*, No. CH04-280 (Va. Cir. Ct. Frederick Cty.);
- f. *Miller-Jenkins v. Miller-Jenkins*, No. CH05-000336-00 (Va. Cir. Ct. Frederick Cty.); and
- g. *Miller-Jenkins v. Miller-Jenkins*, No. JJ018902-01-00 (Va. Juv. & Dom. Rel. Dt. Ct. Frederick Cty.).

(Jenkins' RFP to Lindevaldsen, dkt. 361-1, p. 4; Jenkins' RFP to Liberty Counsel, dkt. 361-2, p. 4).

5) The Dispute produced a gigantic **paper file**, currently housed in 17 bankers' boxes, each of which contains 18 linear inches of documents, and each is estimated to hold over 2,500 pages. Combined, the paper file spans over **25.5 linear feet**, and is estimated to comprise over **42,500 pages**. The following is a true and accurate picture of the paper file generated by the Dispute:



6) The voluminous paper file is comprised either of pleadings that were publicly-filed in the above cases within the Dispute (and thus available to the public, including Jenkins), or of attorney notes, research memoranda, non-public document drafts, client communications, and attorney communications, the overwhelming majority of which are work-product or attorney-client privileged, as can be expected of any typical attorney litigation file.

7) Even if a speedy review rate of 100 pages per hour could be achieved, I estimate that it would take a Liberty Counsel attorney over **425 hours**, or over **10 work-weeks**, to review this entire paper file and catalog all of the privileged documents.

8) The Dispute similarly produced a very large **electronic file**, consisting of **over 15 gigabytes** of data, which comprises tens of thousands of separate documents, many of them consisting of tens or hundreds of pages. As with the paper file, the electronic file consists either of pleadings that were publicly-filed in the above cases within the Dispute (and thus available to the

public, including Jenkins), or of attorney notes, research memoranda, non-public document drafts, client communications, and attorney communications, including emails, the overwhelming majority of which are work-product or attorney-client privileged, as would be true with any typical attorney litigation file.

9) Even at a very efficient review rate of 60 documents per hour (one document per minute), I estimate that it would take a Liberty Counsel attorney over **200 hours**, or over **5 work-weeks** to review this entire electronic file and catalog all of the privileged documents.

10) Liberty Counsel is a multi-faceted Christian ministry, which maintains among other divisions a small public interest litigation department, that employs only a handful of attorneys who are exceedingly busy in conducting pro bono First Amendment litigation throughout the nation. For example, I am currently involved in two related First Amendment cases in California, one of which will have a two-week evidentiary hearing in the first half of September 2019, and the other will have a six-week jury trial commencing at the end of September 2019. Each of my few litigation colleagues is similarly occupied. We do not have the resources to conduct a document-by-document review of either the paper or the electronic file. Assigning even one attorney on this task for 15 or even 10 weeks of full-time document review will seriously and adversely impact our ability to maintain all of our litigation commitments, and will cripple our ability to provide pro bono, public interest services to our numerous clients that rely upon us to defend their First Amendment rights.

B) Liberty Counsel Has Already Expended Substantial Resources To Search For Documents Responsive To Numerous Specific Document Requests From Jenkins.

11) Among her 69 separate and sweeping document requests to each of Lindevaldsen and Liberty Counsel (not including numerous subparts), Jenkins included numerous specific and targeted requests, such as (a) communications with one “Matthew Cullinan Hoffman”; (b)

communications with “the Beachy Amish Mennonite Church in Nicaragua”; (c) documents concerning “aid directly or indirectly given to Defendant Lisa Miller or Plaintiff Isabella Miller-Jenkins concerning their departure from ... Virginia ... travel to Canada, departure from the United States, travel to Nicaragua, living in Nicaragua, or remaining in Nicaragua”; and (d) communications with numerous other **specific** individuals and **specific** email addresses. (Jenkins RFP to Lindevaldsen, dkt. 361-1, ## 29, 39, 41, 42, 43, 44, 45, 49, 55, 56, 57, 58, 59, 60, 61, 62, 63; Jenkins RFP to Liberty Counsel, dkt. 361-2, ## 29, 39, 41, 42, 43, 44, 45, 49, 55, 56, 57, 58, 59, 60, 61, 62, 63).

12) Liberty Counsel attorneys and staff expended **over 65 hours** devising **over 28 search terms**, running separate searches on individual email databases of all personnel and on the electronic litigation file, reviewing results and providing responses and responsive documents to Jenkins, or certifying that none exist.

C) Liberty Counsel Cannot Reasonably Respond To Numerous Other Requests From Jenkins Because They Are Oppressively Overbroad.

13) Numerous of Jenkins’ other requests, however, contain broad and non-specific requests expressly designed to encompass Liberty Counsel’s **entire litigation file, both paper and electronic**. For example, Jenkins requests (a) “**all documents and communications concerning the Dispute**,” (Jenkins’ RFP to Lindevaldsen, dkt. 361-1, p. 9 ¶17; Jenkins’ RFP to Liberty Counsel, dkt. 361-2, p. 9 ¶17); (b) “**all communications with Defendant Lisa Miller**” (Jenkins’ RFP to Lindevaldsen, dkt. 361-1, p. 8 ¶8; Jenkins’ RFP to Liberty Counsel, dkt. 361-2, p. 8 ¶8); (c) “**all documents and communications concerning Defendant Lisa Miller**” (Jenkins’ RFP to Lindevaldsen, dkt. 361-1, p. 8 ¶6; Jenkins’ RFP to Liberty Counsel, dkt. 361-2, p. 8 ¶6); (d) “**all documents and communications concerning Plaintiff Janet Jenkins**” (Jenkins’ RFP to Lindevaldsen, dkt. 361-1, p. 8 ¶4; Jenkins’ RFP to Liberty Counsel, dkt. 361-2, p. 8 ¶4); and

numerous others.

14) As stated above, Liberty Counsel cannot comply with these requests, because they would essentially require Liberty Counsel to review every piece of paper in its massive paper and electronic files, and to catalog the overwhelming majority of them as privileged.

15) For example, in Liberty Counsel's electronic file alone, the word "Lisa" appears in **13,094 documents**, the word "Miller" appears in **28,163 documents**, and the word "Jenkins" appears in **10,539 documents**. These are not individual **instances** or even **individual** pages, but rather multi-page documents, each of which is likely to have numerous instances of these terms. Reviewing each of these tens of thousands of documents and cataloging them for privilege would effectively shut our litigation program down for several weeks.

D) Liberty Counsel Has Attempted In Good Faith To Convince Jenkins To Narrow Her Broad Requests, But She Has Refused Because She Admits She Does Not Know What She Seeks And Wants "Everything."

16) During two separate meet-and-confer sessions with Jenkins' counsel, on February 11, 2019 and again on April 12, 2019, I informed them that several of Jenkins' document requests were too broad, encompassed our entire paper and electronic litigation file comprising of tens of thousands of documents, and could not reasonably be searched without undue burden. I asked counsel to narrow these requests and to ask for specific things, as they have done with other requests. I indicated to Jenkins' counsel that we are ready, willing and able to search for specific documents on narrow, targeted and specific topics, **as we have already done**, if they are willing to provide more such requests.

17) On both occasions, attorney Tyler Clemmons of the Southern Poverty Law Center, who represents Jenkins, indicated that Jenkins' requests were purposefully overbroad, and that they were not willing to narrow the broad requests, for various reasons, including because "we don't know what we are looking for," "we don't know what you have," "we don't know what to

request,” “we don’t want to miss certain things by asking only for others,” and “we want everything.”

E) The Southern Poverty Law Center Has Designated Liberty Counsel As A “Hate Group” Because Of Our Support And Advocacy For Man-Woman Marriage, And Is Committed to “Completely Destroying” Us.

18) The Southern Poverty Law Center, which represents Jenkins in this litigation, has placed Liberty Counsel on its well-publicized and circulated list of “hate groups,” along with neo-Nazi and KKK groups, solely because the Southern Poverty Law Center disagrees with Liberty Counsel’s support and advocacy for natural, man-woman marriage. *See* Charlotte Allen, *King of Fearmongers: Morris Dees and the Southern Poverty Law Center, scaring donors since 1971*, <http://www.weeklystandard.com/king-of-fearmongers/article/714573> (last visited August 27, 2019).

19) In fact, the Southern Poverty Law Center has explicitly stated that its “hate group” designation is strictly an ideological principle espoused against groups, like Liberty Counsel, whose viewpoint the Southern Poverty Law Center disagrees with. It has stated: “we’re not predicting that they’ll commit violence. We say very explicitly that we’re listing them based on the basis of their ideology.” *Id.*

20) Mark Potok, Senior Fellow at the Southern Poverty Law Center, has stated unequivocally: “Our criteria for a ‘hate group,’ first of all, have nothing to do with criminality or violence or any kind of guess we’re making about this group could be dangerous. **It’s strictly ideological.**” Bill Holiday, Interview with Mark Potok at Track 9, <https://archive.org/details/MarkPotok/Potok-6.aif> (last visited August 27, 2019).

21) The Southern Poverty Law Center has candidly and publicly admitted that its goal is to completely destroy the nonprofit organizations the Southern Poverty Law Center characterizes as “hate groups,” including Liberty Counsel. According to Mark Potok: “We see this

political struggle, right. . . . **We're trying to wreck the groups, and we are very clear in our head, this is – we are trying to destroy them . . . as a political matter, to destroy them.**" *Id.* at Track 13.

22) Indeed, in Southern Poverty Law Center's own words, destroying Liberty Counsel, among other conservative groups, is its *raison d'être*: **"Sometimes the press will describe [Southern Poverty Law Center] as monitoring hate groups and so on. I want to say plainly that our aim is to destroy these groups, to completely destroy them."** Speech of Mark Potok, Senior Fellow at Southern Poverty Law Center, *Mark Potok Speech 1*, YOUTUBE (Sept. 11, 2007), https://www.youtube.com/watch?v=fnTz2ylJo_8&feature=reImfu (discussing SPLC's purpose behind attaching the "hate group" label to certain organizations, including Liberty Counsel, with which it disagrees (emphasis added)).

23) Among the "others" that Southern Poverty Law Center recklessly lumps together with neo-Nazis and the KKK, are a large number of Christian organizations who advocate for Biblical and Christian principles in a lawful and peaceful manner, including Liberty Counsel, Family Research Council, Traditional Values Coalition, Alliance Defending Freedom, American Family Association, and Pacific Justice Institute. Southern Poverty Law Center, *Hate Map*, <https://www.splcenter.org/hate-map> (last visited August 27, 2019).

24) With varying degrees of success, the Southern Poverty Law Center has instigated boycotts and threats against Liberty Counsel and its attorneys and staff, and even actual violence and acts of domestic terrorism against groups similarly situated to Liberty Counsel.

25) In 2012, Floyd Lee Corkins II attempted to commit mass murder in the Washington D.C. office of Family Research Council. During an FBI interrogation of Corkins, he confessed that he intended to commit mass murder and that his motivation for doing so was based on the Southern

Poverty Law Center's designation of the Family Research Council as a "hate group." Family Research Council, *Confessed Terrorist Floyd Corkins Admits to Using SPLC Target List*, YouTube (Apr. 24, 2014), <https://www.youtube.com/watch?v=hgjI3wavx-I> (last visited August 27, 2019).

26) Corkins also admitted that he became aware of Family Research Council by studying the Southern Poverty Law Center's "hate group" designations and "hate map" that provides the addresses of those nonprofit organizations labeled as "hate groups," including Liberty Counsel. *Id.*

27) On June 15, 2017, James Hodgkinson attempted to commit mass murder of Republican members of Congress and their staff. Congressman Steve Scalise was critically injured in that shooting, as were several other congressional staffers. Hodgkinson followed the Southern Poverty Law Center on Facebook and admitted to targeting Republicans in his attempted mass murder. *Scalise critical, shooter ID'd as James Hodgkinson*, FoxNews (June 14, 2017), <http://www.foxnews.com/us/2017/06/14/virginia-gop-baseball-practice-shooting-multiple-people-shot.html> (last visited August 27, 2019).

28) As a fan of Southern Poverty Law Center's website and a follower of its "hate group" designations, Hodgkinson was likely aware of the SPLC's attempts to link Congressman Scalise to groups that the SPLC designates as "hate groups." The SPLC's efforts to link Congressman Scalise date back to at least 2014. *See* Mark Potok, *Steve Scalise's Denials Are Not Believable*, Southern Poverty Law Center, Hatewatch (Dec. 30, 2014), <https://www.splcenter.org/hatewatch/2014/12/30/steve-scalise%E2%80%99s-denials-are-not-believable> (last visited August 27, 2019).

29) Laird Wilcox, founder of the Wilcox Collection on Contemporary Political

Movements at the University of Kansas’s Kenneth Spencer Research Library and a leading expert on “extremist” organizations, has identified the false, misleading, and destructive nature of the Southern Poverty Law Center’s “hate group” designations. Mr. Laird has noted that the Southern Poverty Law Center has gone into “ideological overdrive and has developed many of the destructive traits that characterize moral crusaders, including the demonization of critics and dissenters.” Laird Wilcox, *An Expert on Fringe Political Movements Reflects on the SPLC’s Political Agenda – An Exclusive Interview with Author and Researcher Laird Wilcox*, The Social Contract Press (Spring 2010), available at http://www.thesocialcontract.com/artman2/publish/tsc_20_3/tsc_20_3_wilcox_interview.shtml (last visited June 28, 2017).

30) Mr. Laird stated that the “hate group” designations reflect a “kind of selective attention and biased reporting” that “simply illustrates [the Southern Poverty Law Center’s] unscrupulousness.” *Id.* He continued that it is “**pretty hard to deny that the SPLC is a political operation that is trying to tar right-wingers and conservative Republicans.**” *Id.* (emphasis added).

31) Mr. Laird concluded, “When you get right down to it, all the SPLC does is call people names. It’s specialized a highly developed and ritualized form of defamation, however—a **way of harming and isolating people by denying their humanity** and trying to convert them into something that deserves to be hated and eliminated.” *Id.* (emphasis added). He has also noted that the SPLC’s “victims are usually ordinary people expressing their values, opinions, and beliefs—and they’re up against a very talented and articulate defamation machine.” *Id.*

32) Mr. Laird is not alone in his findings on the SPLC’s reckless and ideological “hate group” label. Liberal commentators have also been harsh critics of the tactics employed by the

SPLC in its ideological crusade. Alexander Cockburn, a columnist for the liberal publication *The Nation*, has labeled the SPLC and its leaders as “the archsalesmen of hatemongering.” Alexander Cockburn, *King of the Hate Business* (Apr. 29, 2009), <https://www.thenation.com/article/king-hate-business/> (last visited August 27, 2019). Mr. Cockburn noted that the SPLC represents nothing more than “hate-seekers scour[ing] the landscape for hate like the arms manufacturers inventing new threats, and for the same reason: it’s their staple.” *Id.*

33) *Foreign Policy Magazine* has been harshly critical of SPLC’s “hate group” label, noting, “The problem is that the SPLC and the ADL are not objective purveyors of data.” J.M. Berger, *The Hate List: Is America really being overrun by right-wing militias*, *Foreign Policy* (Mar. 12, 2013), <http://foreignpolicy.com/2013/03/12/the-hate-list/> (last visited August 27, 2019). *Foreign Policy* concluded that the methodology used by the SPLC is fundamentally flawed, and that “[i]f there is any lesson in all of this [hate group labeling], it’s that the study of domestic American extremism shouldn’t be the exclusive province of activists.” *Id.*

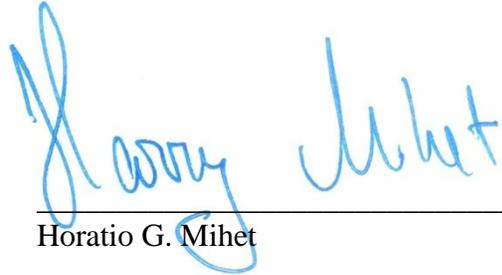
34) The Philanthropy Roundtable has noted the SPLC’s “hate group” designation is “not a Consumer Reports Guide. It’s a political tool.” Karl Zinsmeister, *Some People Love To Call Names: The Southern Poverty Law Center’s extremist list isn’t a Consumer Report Guide: It’s a political tool*, Philanthropy Roundtable: Excellence in Philanthropy, http://www.philanthropyroundtable.org/topic/excellence_in_philanthropy/some_people_love_to_call_names (last visited August 27, 2019). The Philanthropy Roundtable also noted that the Southern Poverty Law Center is a “notoriously partisan attack group” and that its “hate group” designations are intended solely as a fundraising tool. *Id.* It also concluded that the Southern Poverty Law Center is a “bullying organization that aims to intimidate and even criminalize philosophical opponents” and that “the SPLC’s tactics lead directly to hate and violence.” *Id.*

35) Just this year, *Current Affairs* magazine published a lengthy article criticizing the Southern Poverty Law Center for its fraudulent “hate group” labels and efforts to destroy organizations it disagrees with. Nathan Robinson, a self-described liberal, stated that the “biggest problem” with the Southern Poverty Law Center’s “hate group” designations “is that **it’s an outright fraud.**” Nathan Robinson, *The Southern Poverty Law Center Is Everything That’s Wrong With Liberalism*, *Current Affairs* (March 26, 2019), available at <https://www.currentaffairs.org/2019/03/the-southern-poverty-law-center-is-everything-thats-wrong-with-liberalism> (last visited August 27, 2019) (emphasis added). Mr. Robinson noted that he did not use the term “fraud” casually, but that “the whole [hate group] thing is **a willful deception** designed to scare older liberals into writing checks to the [Southern Poverty Law Center].” *Id.* (emphasis added). Indeed, “[t]his whole SPLC set up strikes me as **fraudulent in the extreme . . . They’re perpetrating a deception. . . . To me this is a scam bordering on criminal mail fraud.**” *Id.* (emphasis added).

36) The Southern Poverty Law Center’s efforts to raise substantial sums of money off of its “hate group” designations and fundamental mission to destroy its ideological opponents demonstrates that it views the non-profit legal sector as a competitive enterprise, with Liberty Counsel as one of its chief competitors. Both groups represent clients pro bono, primarily in the area of First Amendment law, and operate from a limited pool of non-profit donors who seek to advance such free speech rights. Thus, the SPLC and Liberty Counsel are competitors in the marketplace, albeit approaching if from differing ideological viewpoints.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 27, 2019.



Horatio G. Mihet

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2019, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notice system.

/s/ Horatio G. Mihet
Horatio G. Mihet