IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

THE ARKANSAS STATE CONFERENCE NAACP, *et al.*, **PLAINTIFFS,**

v. **Case No. 4:21-cv-01239-LPR**

THE ARKANSAS BOARD OF APPORTIONMENT, *et al.* **DEFENDANTS.**

BRIEF IN SUPPORT OF MOTION TO QUASH CONSTITUTIONAL-OFFICER SUBPOENAS

With less than two weeks' notice, Plaintiffs served a slew of subpoenas for witnesses to appear at next week's preliminary-injunction hearing. Three of those subpoenas were directed to Arkansas constitutional officers: the Governor, Attorney General, and Secretary of State. These subpoenas are improper and should be quashed.

The constitutional officers' testimony would not be relevant because this case is not about their motivations in voting to approve the challenged maps. It would therefore be grossly unjust to require high-level government officials—all of whom have scheduling conflicts, two of which include significant travel out of state on official business—to attend the upcoming hearing. Even if relevance were not at issue, their internal motivations and deliberations prior to voting are shielded from disclosure by privilege, so their presence at the hearing is not justified. Finally, the apex witness rule requires Plaintiffs to seek relevant testimony from lower-level officers before disrupting the workings of State government by commandeering the presence of its highest-level leaders. All of these reasons justify quashing the subpoenas, and any one of them is sufficient.

BACKGROUND

This is a Section 2 Voting Rights Act case, the sole allegation of which is that the map approved by the Board of Apportionment "dilutes Black voting strength . . . ." Compl., Doc. 1 at

9. As this Court has recognized, "Plaintiffs do not allege or argue that anyone, including the three members of the Board of Apportionment, had the purpose, intent, or motivation to discriminate against Arkansans of color." *Ark. State Conf. NAACP, et al. v. Ark. Bd. of Apportionment, et al.*, — F. Supp. 3d —, 2022 WL 555000, at *2 (E.D. Ark. Jan. 5, 2022).

The Supreme Court has noted that evidence that "the policy underlying the State's . . . use of the contested practice or structure is tenuous may have probative value," *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986), to which testimony by decision makers such as the Board members could conceivably be relevant in the abstract. But Plaintiffs do not argue that the criteria used by the Board in drawing Arkansas's legislative districts were pretextual. S*ee generally* PI Brief, Doc. 3. Instead, they claim that Arkansas could have furthered those interests while also drawing more majority-minority districts. Any testimony by the three constitutional officers serving as members of the Board of Apportionment would therefore be irrelevant to their Section 2 claim.

Nevertheless, Plaintiffs served the constitutional officers with subpoenas to appear at next week's preliminary-injunction hearing so that they might be called to testify. *See* Ex. 1 (subpoenas). They did so without attempting to confer regarding the constitutional officers' availability. Had they done so, they would have been made aware of substantial conflicts. The Governor is travelling out of state to attend the winter conference of the National Governors Association, of which he is the Chairman. He will be out of state starting on Thursday, January 27, and through the weekend. As Chairman, he has significant responsibilities related to this event (in addition to his duties as Governor, including overseeing Arkansas's response to the COVID-19 pandemic),

and he is thus not available to testify, even if it could be done remotely.[1] The Attorney General is likewise out of state on official business, and the Secretary of State is at the very least unavailable on Friday, January 28.

The constitutional officers ask the Court to quash the subpoenas and ask the Court to expedite consideration of this motion and order any response be filed no later than Monday, January 24.

ARGUMENT

The constitutional-officer subpoenas should be quashed for three reasons. First, there is no reason for the three constitutional officers to testify at the preliminary-injunction hearing, as their testimony has a slim-at-best chance of relevance to Plaintiffs' claims. Weighed against the significant disruption to State business, there is no justification for the subpoenas except to subject the constitutional officers to the inconvenience of being hauled into court. Second, any testimony they could give would likely be barred by common-law privilege, either legislative or deliberative-process. Third, the apex witness rule requires Plaintiffs to first exhaust lower-level employees for the information necessary to their case before compelling the testimony of high-level government officials.

I. The constitutional-officer subpoenas are not reasonably calculated to lead to relevant evidence.

As explained above, the constitutional officers' testimony is not relevant to Plaintiffs' claims because Plaintiffs do not allege that the Board intentionally discriminated against their members in adopting the final plans. Plaintiffs' subpoenas would not pass muster if they were

[1] After being notified of the scheduling conflicts of the constitutional officers, counsel for Plaintiffs refused to withdraw the subpoenas but indicated that testimony by video would be acceptable in lieu of being physically present. *See* Ex. 2 at 1.

issued for discovery, let alone a hearing. *See* Fed. R. Civ. P. 26(b)(1) (limiting discovery to information "that is relevant"). Rule 45 requires courts to quash a subpoena that "subjects a person to an undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). Taking the highest-level executive officials in Arkansas away from their duties—including official travel—is an undue burden in light of the lack of relevance of their testimony to Plaintiffs' claims.

There is no arguable basis that the constitutional officers' testimony is needed at all, let alone at this stage of the litigation. Their reasons for voting to approve the final district plans are not relevant. And to the extent that Plaintiffs might wish to introduce evidence on why certain map-drawing choices were made rather than others, they can call the Board staff members who applied the Board's published criteria to create the proposed maps that were approved by the Board. Indeed, they have issued subpoenas to *four* such witnesses. *See* Ex. 1 at 4, 7, 16, and 19. Simply wanting to haul Arkansas's constitutional officers to the witness stand to generate publicity is not grounds for requiring their testimony. The subpoenas should be quashed.

II. Privilege bars compelling the constitutional officers to appear and testify at the preliminary-injunction hearing.[2]

Even if the constitutional officers' testimony were relevant, they would still be entitled to an order quashing the subpoenas on the basis of privilege under Fed. R. Civ. P. 45(d)(3)(A)(iii). Plaintiffs have not indicated the purpose for which they intend to call the constitutional officers. Assuming that they intend to probe the pre-vote decision-making process, that inquiry is barred

[2] Defendants reserve their right to assert available privileges as to any testimony given at the preliminary-injunction hearing, including as to witnesses for whom Defendants have not sought to quash testimonial subpoenas.

by privilege. Courts have analyzed claims of common-law privilege under the auspices of legislative privilege and deliberative-process privilege, either of which would cover any potential testimony to be given by the constitutional officers.

A. Legislative privilege bars the constitutional-officer subpoenas.

"Most decisions in redistricting cases involving claims of legislative privilege . . . recognized a qualified legislative privilege, and have balanced the parties' competing interests when determining if and to what extent the privilege applies and protects against compelled disclosure." *Favors v. Cuomo*, 285 F.R.D. 187, 213 (E.D.N.Y. 2012). "State legislative privilege in federal question cases protects state legislators and their staffs from compelled disclosure of documentary and testimonial evidence with respect to actions within the scope of legitimate legislative activity." *Id.* at 209. Legislative activity includes preliminary fact-finding and drafting activity. *See id.* (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y.) (magistrate's order), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003)). The privilege protects the legislative process, "encompasses legislative work product and confidential deliberations (including communications even as between political adversaries), extends to staffs (and retained experts), and, where the balance weighs in favor of nondisclosure, protects against both compelled document discovery and testimony." *Favors*, 285 F.R.D. at 210.

Because bodies charged with reapportionment act in a quasi-legislative capacity in reviewing proposed maps and voting to approve them, many courts have analyzed claims of privilege under the framework of legislative privilege. This is true even where maps are not approved by actual legislators. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) (holding "[i]t is the function of the government official that determines whether or not he is entitled to legislative immunity, not his title" and holding that Governor and

his redistricting advisors were entitled to legislative immunity). Although the constitutional officers hold positions in the executive branch of Arkansas's government, unlike many states where legislators themselves are tasked with redistricting, the Board members are acting in a legislative capacity as members of the Board of Apportionment.

Courts have generally settled on a five-factor test when analyzing claims of legislative privilege:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Rodriguez, 280 F. Supp. 2d at 101. These factors support quashing the constitutional-officer subpoenas.

As to the first factor, the testimony sought is irrelevant for the reasons explained above. Plaintiffs have not disclosed the exact nature of the testimony they which to elicit, but to the extent it pertains to the Board members' reasons for approving the final maps, the criteria used are published online,[3] as is the video of all public hearings.[4] Because Plaintiffs have not claimed that the Board members engaged in intentional discrimination, their internal motives for adopting the plan (for which other evidence would be difficult to come by) is not an issue. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 341 (E.D. Va. 2015) (finding this factor weighed in favor of disclosure where intentional discrimination claim was alleged).[5]

[3] https://arkansasredistricting.org/about-the-process/redistricting-criteria-and-goals/.

[4] https://arkansasredistricting.org/events-calendar/.

[5] Courts generally find the third and fourth factors to weigh against privilege in VRA cases. *E.g., Favors*, 285 F.R.D. at 219.

"Finally, the need to encourage frank and honest discussion among lawmakers favors nondisclosure." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011). "In the redistricting context, full public disclosure would hinder the ability of party leaders to synthesize competing interests of constituents, special interest groups and lawmakers, and draw a map that has enough support to become law. This type of legislative horse trading is an important and undeniable part of the legislative process." *Id.* As Judge Willett recently put it: "Districting is the politics of politics." *Thomas v. Bryant*, 938 F.3d 134, 175 (5th Cir. 2019) (Willett, J., dissenting), *vacated on reh'g en banc sub nom.. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020). The fact that it was the Board and its staff that completed the task, rather than legislators, makes no difference. The Board engaged in a months-long process that involved taking into account the interests of numerous communities, in addition to considerations of incumbent lawmakers. The need for frank and honest discussion in this process is paramount.

The subpoenas should be quashed because the scope of legislative privilege would cover any conceivably relevant testimony the constitutional officers could give. *See Comm. For a Fair & Balanced Map*, 2011 WL 4837508, at *10 ("This court therefore concludes that the legislative privilege shields from disclosure pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation."); *id.* (holding that "(1) information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers to draw the 2011 Map; and (2) information concerning the identities of persons who participated in decisions regarding the 2011 Map" was subject to legislative privilege).

B. To the extent the Court concludes that the deliberative-process privilege is the appropriate framework, it bars the constitutional-officer subpoenas.

Some courts have analyzed claims of privilege in the redistricting context "under the related deliberative process privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Favors*, 285 F.R.D. at 210 n.22; *see also Kay v. City of Rancho Palos Verdes*, No. CV 02–3922, 2003 WL25294710, at *15 (C.D. Cal. Oct. 10, 2003) (analyzing a redistricting case under the deliberative-process privilege); *but see In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) (applying deliberative-process privilege to legislators). Courts generally apply the same five-factor test as in legislative privilege claims. *See Benisek v. Lamone*, 241 F. Supp. 3d 566, 575 (D. Md. 2017); *Bone Shirt v. Hazeltine*, No. CV. 01-3032-KES, 2003 WL 27384631, at *2 (D.S.D. Dec. 30, 2003) (applying the same factors except the "seriousness" factor). Courts have observed that the "balancing tests that courts have suggested for challenges to both the legislative privilege and the deliberative process privilege are quite similar and functionally interchangeable." *Kay*, 2003 WL 25294710, at *7 n.9.

The deliberative-process privilege bars the subpoenas at issue for the same reasons as above. No matter under which framework the Court analyzes the issue, there is no justification for requiring the constitutional officers to appear at the preliminary-injunction hearing. The Court should quash the subpoenas.

III. The constitutional-officer subpoenas are barred by the apex witness rule.

Even if the constitutional officers theoretically could be compelled to testify in this case, the apex witness rule dictates that Plaintiffs first seek any necessary information from subordinates before burdening high-level officers. The Court should quash the subpoenas on this basis,

as Plaintiffs can seek any relevant non-privileged testimony from Board staff, rather than the Board members themselves.

High-ranking government officials are shielded from compelled testimony by the apex witness rule, which provides that, before a plaintiff may compel the testimony of a high-ranking or "apex" governmental official or corporate officer, the plaintiff must demonstrate both that the governmental official or corporate officer possesses superior or unique information relevant to the issues being litigated and that the information cannot be obtained by a less intrusive method, such as by obtaining the testimony of lower-ranking employees. *See, e.g., Baine v. Gen. Motors Corp.*, 141 F.R.D. 332, 334-35 (M.D. Ala. 1991). Courts generally apply this rule in the context of compelled deposition testimony, but the rule's rationale is equally applicable in the context of a pre-trial hearing. *See, e.g., Abu Dhabi Com. Bank v. Morgan Stanley & Co. Inc.*, No. 08 CIV 7508, 2013 WL 1155420, at *5 (S.D.N.Y. Mar. 20, 2013) (denying request to call corporate CEO as a trial witness due to, *inter alia*, "his 'apex witness' status").

Courts have applied the apex witness rule not necessarily to shield high-ranking officers from discovery altogether, but instead to sequence discovery in order to prevent litigants from deposing high-ranking governmental officials as a matter of routine procedure before less burdensome discovery methods are attempted. *See, e.g., Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771, 794 n. 33 (E.D.N.Y. 1978). Courts have reasoned that giving compelled testimony on a regular basis would impede high-ranking governmental officials in the performance of their duties, and thus contravene the public interest. *See, e.g., Union Sav. Bank v. Saxo n*, 209 F. Supp. 319, 319-20 (D.D.C. 1962). In essence, the apex witness rule prevents high-ranking public officials from being compelled to give oral testimony unless a preliminary showing is made

that their testimony is necessary to obtain relevant information that cannot be obtained from another discovery source or mechanism. *Baine*, 141 F.R.D. at 334-36. *See also State v. Canady*, 475 S.E.2d 154, 161 (W. Va. 1996) (holding that "highly placed public officials are not subject to a deposition absent a showing that the testimony of the official is necessary to prevent injustice to the party requesting it").

Courts have applied the apex witness rule to prohibit depositions to state constitutional officers, including governors and attorneys general. *See, e.g.*, *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982) (finding no abuse of discretion where the "[p]laintiffs failed to show that Governor Bond possessed information which was essential to plaintiffs' case and which could not be obtained from . . . other staff members"); *Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999) (affirming the district court's decision to deny request to depose the Illinois Attorney General where the court concluded that the deposition "would have served little purpose other than to disrupt a busy official who should not be taken away from his work to spend hours or days answering lawyers' questions.").

Courts have also applied the rule in the context of high-level federal officers. *Davis v. United States*, 390 A.2d 976, 981 (D.C. 1978) (quashing subpoena of U.S. Attorney General); *Cal. State Bd. of Pharmacy v. Superior Ct.*, 144 Cal. Rptr. 320, 322-23 (Cal. 1978) (state attorney general should not be required to give deposition testimony absent compelling reasons; "It is patently in the public interest that the Attorney General be not unnecessarily hampered or distracted in the important duties cast upon him by law . . . A highly placed public officer should not be required to give a deposition in his official capacity in the absence of 'compelling reasons.'") (citing *Weir v. United States*, 310 F.2d 149, 154-55 (8th Cir. 1962)); *Hyland v. Smollok*, 349 A.2d 541, 543 (N.J. 1975) ("[I]t is our view that the [state] Attorney General . . . as well as

other high-level government officials, should not be deposed, absent a showing of first-hand knowledge or direct involvement in the events giving rise to an action, or absent a showing that such deposition is essential to prevent injustice.") (citing *Wirtz v. Local 30, Int'l Union of Operating Eng'rs*, 34 F.R.D. 13 (S.D.N.Y. 1963)).

When a sufficiently high-ranking government official (such as the constitutional officers here) invokes the apex witness rule, the burden shifts to the party seeking to compel the official's testimony to establish that the testimony is necessary and essential, and will not unduly interfere with the official's duties:

> A party seeking the deposition of a high-ranking government official must show: (1) the official's testimony is necessary to obtain relevant information that is not available from another source; (2) the official has first-hand information that cannot reasonably be obtained from other sources; (3) the testimony is essential to the case at hand; (4) the deposition would not significantly interfere with the ability of the official to perform his government duties; and (5) the evidence sought is not available through less burdensome means or alternative sources.

Thomas v. Cate, 715 F. Supp. 2d 1012, 1049 (E.D. Cal. 2010), *order clarified*, No. 1:05CV01198LJOJMDHC, 2010 WL 797019 (E.D. Cal. Mar. 5, 2010).

Plaintiffs cannot establish an exception to the apex witness rule. Without question, the constitutional officers are high-ranking officials. They are three of Arkansas's highest-level executive officials: The Governor is Arkansas's chief executive; the Attorney General is the State's chief attorney and chief law enforcement officer; the Secretary of State is the chief election official (among other duties). They are members of the Board of Apportionment and oversee its staff. They are the quintessential government officials to whom the apex witness rule would apply.

Having established that the constitutional officers meets the high-ranking-official element of the apex witness rule, Plaintiffs are required to demonstrate that the constitutional officers' testimony is necessary to obtain relevant information that is not available from any other source.

As explained above, none of the Board members' testimony is relevant to Plaintiffs' claim because they do not allege purposeful discrimination. And in any case, Plaintiffs cannot show that there is any necessary information that is not available from Board staff members.

Nor can Plaintiffs demonstrate that the proposed hearing testimony would not significantly interfere with the constitutional officers' ability to perform their government duties. The interference would be substantial, given the conflicts noted above. Even if two of the three Board members were not travelling out of state on official business, it would be seriously disruptive for three of Arkansas's constitutional officers to be required to attend court and testify for an indeterminate length of time on less than two weeks' notice.

* * * *

Ultimately, if civil plaintiffs—like those here—are permitted to subpoena State constitutional officers without any attempt to obtain relevant information from lower-ranking officials or so much as a hint of conferral, then State business would grind to a halt. Those officers would be continuously subject to the kind of harassment that Plaintiffs' subpoenas represent, and those officers could never reliably schedule meetings, official travel, or other critical business. Thus, at a minimum, even if the constitutional officers' testimony might provide relevant evidence (and it clearly wouldn't), Plaintiffs must seek that evidence by a less burdensome means. Indeed, Plaintiffs' decision to subpoena Board staff illustrates they understand as much. The subpoenas should be quashed.

CONCLUSION

The Court should grant this Motion and quash the subpoenas directed to the Governor, Attorney General, and Secretary of State.

Respectfully submitted,

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