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 ELEVENTH-HOUR SUBPOENAS

Less than 24 hours before the preliminary-injunction hearing in this matter, Plaintiffs emailed counsel for Defendants attempting to arrange service for two additional testimonial subpoenas: one to Kevin Niehaus, who is the Director of Public Relations for Secretary Thurston, Ex. 1, the other to Andres Rhodes, Governor Hutchinson's in-house lawyer, Ex. 2. The subpoenas command the witnesses to appear to testify as early as 9:00 am on Wednesday, February 3, 2022—less than 48 hours after Plaintiffs sought to arrange service. Ex. 3.

Those subpoenas should be quashed. They are patently unreasonable under Rule 45. Moreover, any testimony by Rhodes would in all likelihood be subject to attorney-client privilege. If Plaintiffs considered testimony from these witnesses to be necessary, they wouldn't have waited till *less than* 24 hours before the start of the preliminary-injunction hearing to seek to serve them. Indeed, Plaintiffs' tardy subpoenas are nothing more than an attempt to sandbag Defendants' efforts to prepare for the preliminary-injunction hearing, and this Court should quash them.

Argument

I. The last-minute nature of the subpoenas is unreasonable and smacks of bad faith.

Plaintiffs attempted to serve the subpoenas at issue for the first time with less than 48 hours' notice, despite being aware of the witnesses' identities for some time. That short notice is unreasonable under Rule 45, and the Court should quash the subpoenas on that basis alone.

Rule 45 provides that the Court "must quash or modify a subpoena that . . . fails to allow a reasonable time to comply . . . or [] subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). The eleventh-hour subpoenas issued by Plaintiffs less than a day before the preliminary-injunction hearing do both.

As another court in this District has held in a case concerning a hearing on a motion for expedited injunctive relief, "[l]ess than 48-hours' notice is not a reasonable amount of time to comply with a subpoena to provide testimony." Order, DE 100 at 2, *Planned Parenthood Ark. & E. Okla.* v. *Jegley*, No. 4:15-cv-00784-KGB (E.D. Ark. June 7, 2018) (Baker, J.). Other courts in this Circuit agree. *See Grider v. Bowling*, No. 13-03102-CV-S-BP, 2016 WL 7654652, at *2 (W.D. Mo. Apr. 25, 2016) (holding that two business days—four calendar days total—was not a reasonable amount of time for a non-party to comply with a trial subpoena); *Basich v. Patenaude & Felix, APC*, No. 12-9013-MC-WFJG, 2012 WL 2886663, at *1 (W.D. Mo. July 13, 2012) ("[S]erving the deposition late in the evening of June 27, 2012, and expecting the witness to appear at 10:00 a.m. on June 29, 2012, was clearly unreasonable."); *Blair v. City of Omaha*, No. 8:07CV295, 2009 WL 3631070, at 7 (D. Neb. Oct. 26, 2009) ("[T]he subpoena did not provide . . . [a] reasonable time to comply, as it was delivered only two days before the . . . deposition date."). And so do many other courts. *See Akishev v. Kapustin*, No. CV 13-7152 (NLH/AMD), 2017 WL 11637308, at *5 (D.N.J. Mar. 9, 2017) (quashing subpoena served nine days prior to scheduled deposition); *Ike-Ezunagu v. Deco, Inc.*, No. RWT 09CV526, 2010 WL 4822511, at *2

(D. Md. Nov. 22, 2010) ("Requiring individuals to appear for depositions two to three days before Thanksgiving on—at most—eight days notice does not provide these individuals with 'reasonable time to comply' with the subpoenas and imposes on each an undue burden[.]"); *Fox v. Traverse City Area Pub. Schs. Bd. of Educ.*, No. 1:07-cv-956, 2009 WL 724001, at *1 (W.D. Mich. Mar. 10, 2009) ("Two business days, more or less, even with the intervening weekend, is not an adequate period of time to comply with a subpoena."). There is no serious argument that these subpoenas, which have not even been properly served yet, comport with Rule 45.

Moreover, there is no reason that Plaintiffs could not have issued these subpoenas earlier than the eve of the preliminary-injunction hearing. These State employees are not newly discovered witnesses. There has been no discovery or other intervening developments in this case which would have apprised Plaintiffs of new information regarding these witnesses' potential testimony. Whatever the calculus of Plaintiffs' decision to call these witnesses, it has been the same since they filed this lawsuit. At the very least, Plaintiffs could have issued subpoenas for these employees on January 14, when they subpoenaed seven other individuals. (*See* DE 59-1.) Yet they waited until January 31, less than 24 hours before the preliminary-injunction hearing was set to begin to even attempt service.

To excuse their delay tactics, Plaintiffs might attempt to argue that they issued these subpoenas as a result of the Court's decision to quash the constitutional-officer subpoenas. (DE 74.) That is no excuse. Defendants moved to quash the constitutional-officer subpoenas on January 21, 2022, and Plaintiffs' counsel were on notice before that—by January 19—that a motion to quash was forthcoming. (*See* DE 59-2 at 2.) If Plaintiffs thought that further witness testimony would be necessary in the event that the Court granted the motion to quash, they could have is-

sued any additional subpoenas at that time, or at the very least notified Defendants that they intended to serve subpoenas on other State officials. Instead, they waited until ten days after the motion to quash the constitutional-officer subpoenas was filed. There is no excuse for that delay.

Requiring Niehaus and Rhodes to appear and testify at the last minute is an undue burden both on the witnesses and on Defendants. Though they are not constitutional officers themselves, they are important State employees whose duties will suffer if required to cancel or rearrange their schedule to accommodate Plaintiffs' eleventh-hour decision to subpoena them. What's more, by serving these subpoenas less than 24 hours before the preliminary-injunction hearing, Plaintiffs have seriously strained, if not outright precluded, defense counsel's ability to prepare them for testifying this week. Given the fact that Plaintiffs could have issued these subpoenas over a week ago and deliberately decided not to, their decision smacks of bad faith and warrants the Court quashing these subpoenas.

II. Any testimony by Rhodes is likely protected by attorney-client privilege.

Apart from its unreasonable, last-minute, and likely bad-faith issuance, the subpoena to Rhodes should separately be quashed because much, if not all, of the testimony Plaintiffs might seek to elicit from him is barred by the attorney-client privilege. Rhodes serves as legal counsel to Governor Hutchinson and, unsurprisingly, his communications to the Governor are legal advice protected from disclosure. Indeed, if Rhodes can be compelled to testify, then Defendants reserve the right to subpoena and call Plaintiffs' local counsel, Gary Sullivan, to testify as to his work on the maps submitted to the Board and at issue as exemplars here.

Attorney-client privilege exists between Governor Hutchinson and his in-house legal counsel. The purpose of the attorney-client privilege is "'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *United States v. Jicarilla Apache Nation*, 564

U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "The objectives of the attorney-client privilege apply to governmental clients," and "[u]nless applicable law provides otherwise, the Government may invoke the attorney-client privilege in civil litigation to protect confidential communications between Government officials and Government attorneys." *Id.* at 169-70 (citing 1 Restatement (Third) of the Law Governing Lawyers 74, cmt. b (1998)).

Plaintiffs have not explained the purpose for which they wish to call Rhodes to testify. But they have previously noted that they intended to take the Governor's testimony at the preliminary-injunction hearing to "establish the constitutional officers' justification for the plan, the policy or policies underlying the plan, and whether these policies and justifications are tenuous." (DE 74 at 10.) To the extent that Rhodes may be aware of Governor Hutchinson's purpose, justifications, or internal deliberations regarding the Governor's decision to vote to adopt the House district maps, Rhodes would only know this because he provides legal counsel to the Governor. Plaintiffs explained during the hearing on the motion to quash the constitutional-officer subpoenas that they wished to question the Governor regarding the Board of Apportionment's efforts to comply with the Voting Rights Act. But any communications between Rhodes and Governor Hutchinson about this would be privileged legal advice.

If Plaintiffs wish to call Rhodes to elicit this sort of testimony because the subpoena issued to the Governor has been quashed, the Court should quash this subpoena as well because any such testimony would be privileged. If, on the other hand, Plaintiffs seek testimony separate from the matters they previously intended to question Governor Hutchinson on, the Court should still quash the subpoena because Plaintiffs have no excuse for issuing it at the eleventh hour.

CONCLUSION

The Court should grant this Motion and quash the subpoenas directed to Kevin Niehaus and Andres Rhodes.

Respectfully submitted,

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