

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND DIVISION**

American Civil Liberties Union of Ohio, et al.;)	
)	
Plaintiffs,)	
)	
v.)	Case No.: 1:08-cv-145
)	
Jennifer Brunner, et al.;)	
)	
Defendants.)	

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
MATTHEW DAMSCHRODER'S MOTION TO QUASH SUBPOENA**

Plaintiffs filed the instant action on Thursday, January 17, 2008. On Thursday, January 24, 2008, this Court set an expedited schedule for briefing and hearing Plaintiffs' request for a preliminary injunction barring Defendants from using a non-notice, centrally counted voting system in the March 4, 2008 primary election. Plaintiffs timely filed their Motion for Preliminary Injunction on Monday, January 28, 2008. Defendants are to file their replies on Monday, February 4, 2008. A hearing on the motion is set for Tuesday, February 5, 2008. As this Court and the Parties have all recognized, time is of the essence in this matter.

Plaintiffs believe that the testimony of Matthew Damschroder is necessary to their arguments in support of their Motion for Preliminary Injunction, filed with this Court on January 28, 2008. Plaintiffs' counsel made numerous attempts to seek a declaration from Mr. Damschroder in advance of filing the complaint in this case, in advance of filing the Motion for Preliminary Injunction, and, failing that, made similar attempts to contact Mr. Damschroder to make arrangements for him to testify at the upcoming hearing on February 5, 2008. *See* Declaration of Carrie L. Davis, Plaintiffs' Counsel, attached as Exhibit A. Throughout, Mr. Damschroder failed to respond to the requests of Plaintiffs' counsel. *Id.* Thus, Plaintiffs' counsel had no choice but to issue a subpoena to Mr. Damschroder. Even then, Plaintiffs' counsel tried to contact Mr. Damschroder to alert him that a subpoena was being issued and to make arrangements. *Id.* Once again, Mr. Damschroder did not respond to Plaintiffs' counsel. *Id.* Mr. Damschroder filed a motion to quash the subpoena on Saturday, February 2, 2008 at 8:06 p.m., less than 72 hours before the hearing. *Id.* Prior to filing a response opposing the motion to quash, Plaintiffs' counsel again attempted to settle the matter by contacting counsel for Mr. Damschroder to arrange for either his prompt declaration in time for the hearing or to accommodate his costs and schedule for the hearing. *Id.*

As Federal Rule of Civil Procedure 45(c)(1) instructs, Plaintiffs' counsel has taken all "reasonable steps to avoid imposing undue burden or expense on a person subject to [a] subpoena." Plaintiffs have made repeated and numerous attempts to seek needed testimony from Mr. Damschroder without inconveniencing him. Mr. Damschroder's failure to respond, and the prejudicial lateness in those instances that he did respond, if anything, unduly burdens Plaintiffs. Certainly Mr. Damschroder cannot be found to be unduly burdened when he is the reason that attempts to secure his testimony have dragged on so long.

Furthermore, the Federal Rules permit a non-party who resides more than 100 miles from the issuing court to be compelled to appear if the proceeding occurs within the state and issuing counsel assures he will be reasonably compensated. *See* Fed. R. Civ. P. 45(c)(3)(A)(ii) and Fed. R. Civ. P. 45(c)(3)(B)(iii) (explaining under what circumstances a subpoena may be quashed). Mr. Damschroder works in Franklin County, which his counsel acknowledges is just barely over 100 miles¹ and is still within the same state as this Court. Mr. Damschroder is not being hailed into a court in another state, nor a great distance away. Plaintiffs' counsel has attempted to reach both Mr. Damschroder and his counsel to make arrangements for his testimony, including providing reasonable compensation for his travel and time. Mr. Damschroder's ongoing failure to respond to attempts to reach him by Plaintiffs' counsel, and his attorney's weekend filing, once again, prejudice Plaintiffs more so than Mr. Damschroder. Plaintiffs' counsel has been and remains willing to work with Mr. Damschroder to accommodate his needs in terms of scheduling and compensation for what will be at most a few short hours of his time on the morning of Tuesday, February 5, 2008.

Plaintiffs' counsel have made numerous good faith attempts to secure Mr. Damschroder's necessary testimony in this matter, and he cannot blame Plaintiffs' counsel for his own tardiness or neglect to respond. Had he responded to the numerous requests for a declaration or attempts to arrange for his testimony, this Motion to Quash could have been avoided.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Mr. Damschroder's Motion to Quash and compel him to comply with the subpoena issued to him.

¹ See Exhibit 3, attached to Mr. Damschroder's Motion to Quash filed February 2, 2008.

Respectfully submitted,

/s/ Carrie L. Davis

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Counsel for Plaintiffs
CERTIFICATE OF SERVICE

I certify that on this 4th day of February, 2008, the foregoing was electronically filed with the Court's ECF system and served on counsel for the parties and movants through the Court's electronic filing system.

/s/ Carrie L. Davis
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