

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS

Plaintiff,

vs.

ERIC H. HOLDER, JR., in his official
Capacity as Attorney General of
the United States

Defendant.

Case No. 1:12-cv-00128
RMC-DST-RLW

MOTION FOR PROTECTIVE ORDER

The State of Texas hereby moves for a protective order to prevent the United States from deposing Representative Leo Berman. The United States served a Notice of Deposition on May 18, 2012 setting the oral deposition of Representative Leo Berman on June 5, 2012 in Austin, Texas. The State of Texas has advised the United States on several occasions that Representative Berman is undergoing chemotherapy treatment. Despite Representative Berman's medical condition, his lack of significant involvement with SB 14, and the State's exhaustive attempts to resolve this issue without involving the Court, the United States has contested the severity of Representative Berman's medical condition and demanded that he appear for deposition. In light of the severe burden that the United States would impose on Representative Berman and the lack of any demonstrated need for his

testimony in this case, Texas moves for entry of a protective order relieving Representative Berman of any obligation to comply with the Notice of Deposition.

A. Standard of Review

This Court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” FED. R. CIV. P. 26(c)(1). Indeed, the Court may issue an order forbidding the discovery altogether or specify the terms of the discovery, including the time and place in which the discovery will be conducted. FED. R. CIV. P. 26(c)(1)(A), (B). “In deciding whether or not to grant a protective order, courts typically weigh the burdensomeness to the moving party against the need for, and the relevance of, the information being sought.” *Tequila Centinela, S.A. de C.V. v. Bacardi & Co.*, 242 F.R.D. 1, 4 (D.D.C. 2007). Through this balancing, courts determine whether “good cause” exists for a protective order to issue. *See* FED. R. CIV. P. 26(c); *see also EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1411 (D.C. Cir. 1996).

B. Good Cause Exists to Issue a Protective Order Preventing the United States from Deposing Representative Berman.

Good cause exists to enter a protective order preventing the deposition of Representative Leo Berman because he is suffering from a serious medical condition, and the United States has not demonstrated any need for his testimony sufficient to outweigh the burden that a deposition would entail. On four occasions, counsel for the State of Texas has advised counsel for the

United States of Representative Berman's medical condition and the treatment it requires. The United States has responded by disputing the severity of Representative Berman's medical condition and renewing its demand to take his deposition along with approximately twenty other legislators and legislative staffers.

Representative Berman is currently undergoing chemotherapy treatment for Non-Hodgkin's Lymphoma. Representative Berman is 76 years old. He began his chemotherapy treatment after a three-week stay in the Intensive Care Unit in January 2012. He is scheduled to receive an additional round of chemotherapy during the week of June 5, 2012, the very same week Defendants have noticed his deposition.

Representative Berman's treatment spans a three-week cycle. Following the first week of that cycle, Representative Berman typically experiences significant ill effects from the chemotherapy treatment. During the second week, he is restricted from any public exposure due to a low white blood cell count. His current round of treatment has been delayed by two weeks due to continued low white blood cell counts.

Representative Berman has been hospitalized during the course of his treatment due to infections that would not heal because of his compromised immune system. Although Representative Berman's latest scans show that his cancer is in remission, he remains under the treatment of Dr. Tom

Gregory with the Tyler Cancer Center and has not been released from remaining treatments.

Despite its knowledge of Representative Berman's medical condition, the United States has continued to insist that he appear for deposition. On Friday, May 18, 2012, the United States unilaterally served a notice of deposition without so much as contacting the State to discuss Representative Berman's condition or schedule. (Exhibit "A" - Notice of Deposition).

During discussions with Texas, the United States has disputed the severity of Representative Berman's condition on the basis of unspecified media reports. On May 21, for example, counsel for the United States insisted that Representative Berman can appear for deposition because of news reports that he has been campaigning. Representative Berman has not attended any campaign events in the last four weeks. When he has attended events, it has been for short stretches of time, generally under two hours. All other campaign or work-related events have been handled by staff.

The United States has not demonstrated a compelling need for Representative Berman's deposition that outweighs the undue burden a deposition would place upon him under the circumstances. It has not identified any activity by Representative Berman in connection with SB 14, nor can it. Instead, the United States contends that his testimony is necessary because of his involvement with a bill that the Legislature considered but did not enact in 2007. The relevance of his testimony is

tangential, at best, to the legal and factual issues before the Court, and it cannot outweigh the severe burden that sitting for a deposition would entail.

The United States Defendants' demand to subject Representative Berman to cross-examination by Defendant's counsel in a deposition, under these circumstances, is oppressive, unduly burdensome and unreasonable. Accordingly, good cause exists to enter a protective order to prevent the United States from subjecting Representative Berman to a deposition.

CONCLUSION

For the reasons stated herein, the Motion for Protective Order should be granted.

Respectfully submitted.

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/s/ Patrick K. Sweeten
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CERTIFICATE OF CONFERENCE

I hereby certify that Texas and the United States conferred by telephone about the notice of Representative Berman's deposition on May 21, 2012. The State's motion is opposed.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

CERTIFICATE OF SERVICE

I certify that on May 21, 2012, I served the following via CM/ECF or email on the following counsel of record:

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Defendant.

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MOTION FOR PROTECTIVE ORDER

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)
STATE OF TEXAS,)
)
Plaintiff,)
)
v.)
)
ERIC H. HOLDER, JR., in his official capacity as)
Attorney General of the United States,)
)
Defendant.)
)
ERIC KENNIE, <i>et al.</i> ,)
)
Defendant-Intervenors,)
)
TEXAS STATE CONFERENCE OF NAACP)
BRANCHES, <i>et al.</i> ,)
)
Defendant-Intervenors,	CASE NO. 1:12-CV-00128)
	(RMC-DST-RLW))
	Three-Judge Court)
)
TEXAS LEAGUE OF YOUNG VOTERS)
EDUCATION FUND, <i>et al.</i> ,)
)
Defendant-Intervenors,)
)
TEXAS LEGISLATIVE BLACK CAUCUS, <i>et</i>)
<i>al.</i> ,)
)
Defendant-Intervenors,)
)
)
VICTORIA RODRIGUEZ, <i>et al.</i> ,)
)
Defendant-Intervenors.)
<hr/>)

NOTICE OF DEPOSITION

To: COUNSEL OF RECORD

Please take notice that pursuant to Rule 30 of the Federal Rules of Civil Procedure, counsel for Attorney General Eric H. Holder, Jr., Defendant in the above-styled and numbered cause of action, will take the deposition of **Representative Leo Berman** upon oral examination on **Tuesday, June 5, 2012, beginning at 9:30 a.m.**, and continuing thereafter as needed, at the United States Attorney's Office, 816 Congress Avenue, Suite 1000, Austin, Texas 78701; Phone: (512) 916-5858. This deposition shall be recorded by stenographic means and shall take place before a notary public or other person authorized by law to administer oaths. The Attorney General may also videotape the deposition noticed above.

You are invited to attend and examine the witness.

Date: May 18, 2012

RONALD C. MACHEN, JR.
United States Attorney
District of Columbia

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Elizabeth S. Westfall
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Attachment A

DEFINITIONS AND INSTRUCTIONS

1. “The State,” “Texas,” or “Plaintiff” means Plaintiff State of Texas and any of its agents, representatives, employees, and any person acting or purporting to act on its behalf.
2. “S.B. 14” means 2011 Texas General Laws Chapter 123, which amends the Texas Transportation Code relating to the issuance of election identification certificates, and which amends the Texas Election Code relating to procedures for implementing the photographic voter identification requirements.
3. “Legislator” means an elected member of the Texas House of Representatives or the Texas State Senate, including employees, staff, interns, representatives, designees, agents, or any persons acting or purporting to act on behalf of the Texas House of Representatives or the Texas State Senate, any committee thereof, or any elected member of the Texas House of Representatives or the Texas State Senate.
4. “Person,” unless otherwise specified, shall mean and include natural persons, corporations, firms, partnerships, proprietorships, associations, trusts, estates, government bodies, government agencies and commissions, and any other organization or entity. Whenever reference is made to a person, it includes any and all of such person’s predecessors in office or position, past or present principals, employees, agents, attorneys, consultants, contractors, and other representatives.
5. “Document” is defined to be synonymous in meaning and scope as the term “document” is used under Federal Rule of Civil Procedure 34 and the phrase “writings and recordings” is defined in Federal Rule of Evidence 1001, and includes, but is not limited to, any computer discs, tapes, printouts and emails, and databases, and any handwritten, typewritten,

printed, electronically-recorded, taped, graphic, machine-readable, or other material, of whatever nature and in whatever form, including all non-identical copies and drafts thereof, all copies bearing any notation or mark not found on the original, and all deleted or erased documents that may be retrieved from hard drives, floppy disks, flash drives, electronic back-up files, or any other back-up system.

6. “Communication” means any transmission of information by oral, graphic, written, pictorial, electronic, or other perceptible means, including by document, or later memorialized in a document, including email, text messages, memoranda of conversations, correspondence, data processing, pictures, or recordings. Communications include, but are not limited to, transmissions between legislators, between legislators and their staff, between legislators and state executive agencies, between legislators and the Texas Legislative Council, and between legislative staff. All communications produced shall include documents sufficient to identify all email addresses, telephone numbers, pager or blackberry numbers, or other personal identifying characteristic of any form of electronic communication used by any party with respect to all communications responsive to the above requests.

7. “Database” means any data sets, reports, programs, and files accessible by computer that contain data that can be processed and/or sorted using standard spreadsheet or database software, including but not limited to Oracle SQL, Microsoft Access, Microsoft Excel, Lotus 1-2-3, Quattro Pro, SAS, STATA, and SPSS.

8. Please note that you are required to produce any document in your custody, possession, or control that is responsive to the below requests, regardless of whether it was produced on official or personal equipment.

9. If any document requested was at one time in existence, but has been lost, discarded, destroyed, or transferred to others, please identify the following information with respect to each such document: its title, date, author(s), sender(s), recipient(s), subject matter, the circumstances under which it has become unavailable, and, if known, its current location and custodian.

10. If production of any document referred to in this request is refused based on the assertion of a claim or privilege, with respect to each such document; (1) identify the document by date, name and title of author, name(s) of recipient(s), title or references, and a description of the document without revealing information for which the privilege is claimed; (b) state the privilege(s) pursuant to which production is refused; and (c) in the case of any document concerning any meeting or conversation, state the date and subject matter of such meeting or conversation, and identify the persons who attended the meeting or participated in the conversation.

11. The terms “and,” “or,” and “and/or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Request all responses that might otherwise be construed to be outside that scope.

DOCUMENTS

- (1) All documents and communications, including but not limited to those among and between your staff, other members of the Texas Legislature, the Texas Legislative Council, and other Texas state executive offices and agencies, concerning any or all reasons, justifications, rationales, interests, or purposes in enacting S.B.14.
- (2) All documents and communications, including but not limited to those among and between your staff, other members of the Texas Legislature, the Texas Legislative Council, and other Texas state executive offices and agencies, concerning the sources, history, and drafting of S.B. 14.
- (3) All documents and communications, including but not limited to those among and between your staff, other members of the Texas Legislature, the Texas Legislative

Council, and other Texas state executive offices and agencies, concerning the introduction, consideration, and passage of S.B. 14.

- (4) All documents and communications, including but not limited to those among and between your staff, other members of the Texas Legislature, the Texas Legislative Council, and other Texas state executive offices and agencies, relating to the implementation of S.B. 14.
- (5) All documents and communications, including but not limited to those among and between your staff, other members of the Texas Legislature, the Texas Legislative Council, and other Texas state executive offices and agencies, relating to any calculations, reports, audits, estimates, projections, assessments or other analyses of the effect that S.B. 14 will impose upon minority voters.
- (6) All documents and communications between you or your office and members of the public, private organizations, and governmental entities related to S.B. 14, or S.B. 362 (81st Legislature), H.B. 218 (80th Legislature), or H.B. 1706 (79th legislature).
- (7) All documents produced in response to any requests received pursuant to Texas Public Information Act, Texas Government Code chapter 552, concerning S.B. 14 or S.B. 362 (81st Legislature), H.B. 218 (80th Legislature), H.B. 1706 (79th legislature), or photo voter identification.
- (8) All public statements you or your staff have made about S.B. 14 or S.B. 362 (81st Legislature), H.B. 218 (80th Legislature), H.B. 1706 (79th legislature), or photo voter identification.
- (9) All documents and communications relating to all actions that a person who is a registered voter, but does not have the requisite identification, must take in order to obtain the documentation necessary to cast a valid ballot pursuant to S.B. 14.
- (10) All documents and communications, including but not limited to those among and between your staff, other members of the Texas Legislature, the Texas Legislative Council, and other Texas state executive offices and agencies, related to any and all alternatives to S.B. 14 or amendments to S.B. 14 that were presented to, or considered, assessed, or reviewed by any legislator during the drafting or consideration of S.B. 14.
- (11) All documents and communications concerning civil or criminal allegations, investigations, warnings, enforcement actions, complaints, lawsuits, prosecutions, settlements, plea agreements, citations, fines, or other actions by or on behalf of Texas against any person relating to (a) in-person voter impersonation or other in-person voter fraud that occurred in the State of Texas from January 1, 2002, to the present and (b) instances of voting in Texas by persons who are not citizens of the United States from January 1, 2002, to the present.

- (12) All documents and communications, including but not limited to those among and between your staff, other members of the Texas Legislature, the Texas Legislative Council, and other Texas state executive offices and agencies, that you considered or relied on in determining how to vote, in committee and on the floor of the legislature as applicable, on S.B. 14.

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Defendant.

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ORDER

The State of Texas has moved to for a protective order to prevent the United States from taking the oral deposition of Representative Leo Berman. Having considered the Motion, the Court is of the opinion that good cause exists, and the Motion should be GRANTED.

It is therefore **ORDERED** that the State of Texas's Motion for Protective Order is **GRANTED**; and it is

FURTHER ORDERED that the United States shall not take the oral deposition of Representative Leo Berman.

Date:

UNITED STATES DISTRICT JUDGE