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**UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING**

Anne Marie Guzzo and Bonnie Robinson;)
Ivan Williams and Charles Killion;)
Brie Barth and Shelly Montgomery;)
Carl Oleson and Rob Johnston; and)
Wyoming Equality,)

Plaintiffs,)

v.)

Civil No. 14-CV-200-SWS

Matthew H. Mead, in his official capacity as)
the Governor of Wyoming; Dean Fausset, in)
his official capacity as Director of the)
Wyoming Department of Administration and)
Information; Dave Urquidez, in his official)
Capacity as Administrator of the State of)
Wyoming Human Resources Division; and)
Debra K. Lathrop, in her official capacity)
as Laramie County Clerk,)

Defendants.)

GOVERNOR MEAD'S MOTION TO QUASH SUBPOENA

Defendant, Governor Matthew H. Mead, through the Office of the Attorney General, hereby moves to quash the Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action, served on Governor Mead's Deputy Chief of Staff by Plaintiffs on October 9, 2014. In support of this motion, Governor Mead states as follows:

1. On October 7, 2014, Plaintiffs initiated this case by filing their Complaint for Declaratory and Injunctive Relief, alleging that the State of Wyoming unlawfully denies same sex couples the right to marry. Compl. at ¶ 1. The following day, Plaintiffs filed a motion for a preliminary injunction and temporary restraining order barring the Defendants from enforcing Wyo. Stat. Ann. § 20-1-101 and requiring them to issue or permit the issuance of marriage licenses to same sex couples. Mot. for Prelim. Inj. at 9-10. On October 9, 2014, the Court set Plaintiffs' motion for preliminary injunction for hearing on October 16, 2014, at 10:00 a.m., in Casper, Wyoming. Despite regular communications between the parties both before and after the filing of this suit, counsel for Governor Mead was not advised that Plaintiffs would seek to compel the Governor to testify at the hearing.

2. On the evening of October 9, 2014, five minutes before the scheduled start of a debate between gubernatorial candidates, two unidentified individuals approached Governor Mead's staff and security detail on the campus of Casper College. Mead Aff. at ¶ 2. These individuals attempted to serve Governor Mead with a Subpoena to Appear and Testify at a Hearing or Trial in a Civil Action commanding Governor Mead to appear at the hearing of Plaintiffs' motion for preliminary injunction. *Id.* Governor Mead's Deputy Chief of Staff received the subpoena on his behalf, and a copy of the subpoena is

attached hereto as Exhibit A.¹ *Id.* At no time prior to service of the subpoena did Plaintiffs approach counsel for Governor Mead to inquire whether they would accept service of the subpoena on his behalf.²

3. Under Federal Rule of Civil Procedure 45, on timely motion a court “must quash or modify a subpoena” that either “fails to allow a reasonable time to comply” or “subjects a person to an undue burden.” Fed. R. Civ. P. 45(d)(3)(A)(i) and (iii). This subpoena should be quashed for both reasons.

4. First, the subpoena fails to give Governor Mead a reasonable time to comply. “Although Rule 45 does not define ‘reasonable time,’ many courts have found that anything less than fourteen days from the date of service is not reasonable.” *SEC v. Art Intellect, Inc.*, 2012 WL 776244, at *3 fn.43 (D. Utah March 7, 2012) (listing cases); *Tri Investments, Inc. v. Aiken Cost Consultants*, 2011 WL 5330295, at *2 (W.D.N.C. November 7, 2011) (citing cases).

5. This subpoena only gives Governor Mead seven total and five working days notice of the hearing. Ex. A. For most witnesses five working days notice does not provide enough time to rearrange their professional and personal schedules without

¹ Governor Mead does not assert that service of the subpoena was defective because it was accepted by the Deputy Chief of Staff rather than served on the Governor personally. *See* Fed. R. Civ. P. 45 (b)(1). However, the subpoena was not accompanied by the required witness fee and mileage allowance. *Id.*

² Concerned that service upon the Deputy Chief of Staff was defective, upon the suggestion of counsel for Governor Mead, Plaintiffs eventually requested, and counsel for Governor Mead did accept service of the subpoena in the late afternoon on October 10, 2014.

imposing a hardship on them and the people around them. This is even more true for the Governor of a state and the citizens who have made their way onto his busy schedule. In fact, Governor Mead has multiple preexisting commitments that make it nearly impossible for him to attend the hearing. Mead Aff. at ¶ 3. On the night before the hearing Governor Mead will be in Cheyenne for a long scheduled Industry Roundtable Reception and Dinner with many attendees who are traveling from out of state for the event. *Id.* The following day, in addition to a host of other meetings and duties, he is scheduled to travel from Cheyenne to Riverton for a gubernatorial debate. *Id.* These debates are scheduled long in advance and cannot be rescheduled. *Id.* Governor Mead cannot attend the hearing as commanded by the subpoena without significantly disrupting the plans of a host of different individuals and potentially missing the debate. *Id.*

6. Accordingly, at a minimum, the subpoena should be quashed for failing to allow Governor Mead a reasonable time to comply. Moreover, and more importantly, the subpoena should be quashed because it imposes an undue burden on Governor Mead to require his testimony at a hearing where he has no personal knowledge of any of the facts likely to be at issue. Mead Aff. at ¶ 4.

7. In evaluating a motion to quash a subpoena, the district court may consider “whether (i) the subpoena was issued primarily for purposes of harassment, (ii) there are other viable means to obtain the same evidence, and (iii) to what extent the information sought is relevant, nonprivileged, and crucial to the moving party's case.” *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55. 66 (1st Cir.2003). The Court may quash or modify a subpoena that is unreasonable on the basis of “annoyance, embarrassment,

oppression, or undue burden or expense or seeks privileged or otherwise protected information.” *Meacham v. Church*, 2010 WL 1576711, at *2 (D. Utah April 19, 2010). The Court also considers whether the information “is necessary and available from any other source.” *Id.* (quoting 9A Fed. Prac. & Proc. Civ. § 2463.1).

8. These same considerations are at issue when a party has subpoenaed a government employee to testify. When a government employee is subpoenaed, the court must “determine whether it would be an undue burden for the government to produce [the employee] and to weigh that burden against the Plaintiff’s need for the testimony.” *Solomon v. Nassau County*, 274 F.R.D. 455, 458 (E.D.N.Y. 2011). “[] Department heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is **necessary and relevant and unavailable from a lesser ranking officer.**” *Halderman v. Pennhurst State Sch. & Hosp.*, 96 F.R.D. 60, 64 (E.D. Pa. 1982) (citing *Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771, 794 n. 33 (E.D.N.Y.1978) (emphasis added); *United States v. Northside Realty Assoc.*, 324 F. Supp. 287, 293 (N.D. Ga. 1971)). “Because [h]igh ranking government officials have greater duties and time constraints than other witnesses ... [they] should not, **absent extraordinary circumstances**, be called to testify regarding their reasons for taking official actions.” *In re U.S.*, 197 F.3d 310, 313 (8th Cir. 1999) (citations and internal quotations omitted) (emphasis added).

9. In this case, Governor Mead has no necessary or relevant information to offer on any of the four factors the Court must consider at the hearing on the motion for preliminary injunction. Neither Governor Mead, nor any member of his staff, are

responsible for issuing marriage licenses in Wyoming. Mead Aff. at ¶ 4; Wyo. Stat. Ann. § 20-1-103 (marriage licenses obtained from Wyoming County Clerks). The Governor does not oversee, nor does he have any control over the County Clerks across the State of Wyoming who do issue marriage licenses. *Id.* Similarly, he has no personal knowledge or control over the determination of eligibility for any benefits provided by the State of Wyoming to married couples. *Id.* These determinations are made by other individuals within the executive branch of government. *Id.* Finally, because information related to his decisions with regard the defense of Wyoming statutes in this and other cases is privileged, Governor Mead does not have any information that would assist the Court in its resolution of the motion for preliminary injunction. *Id.*

10. Moreover, there are no extraordinary circumstances that would justify compelling Governor Mead to testify at this hearing. Instead, this case is analogous to *Babin v. Breaux*, 2012 WL 83672 (M.D. La. January 11, 2012), in which the plaintiffs sought to compel the deposition testimony of Louisiana Governor Bobby Jindal. In his motion to quash, Governor Jindal explained that he had no personal knowledge of the specific claims at issue, that neither he nor his staff were responsible for approving the decisions at issue, and that these decisions were made by other officials. *Id.* at *1. The plaintiffs argued that Governor Jindal had knowledge of the political motivations behind the decisions, but the court noted that they failed to show his personal involvement in the process leading to the decisions by other officials, and granted the Governor's motion to quash. *Id.* at *2-3.

11. The same reasoning holds true in this case. Governor Mead does not make the decision to grant or deny marriage licenses in Wyoming, does not have any authority over the individuals who make these decisions, and he does not determine who is or is not eligible for any particular state benefit. As a result, he has no facts to offer the Court on any of the four factors at issue in these preliminary injunction proceedings. Accordingly, it would be an undue burden on him to testify in these proceedings, and the subpoena should be quashed.

12. Moreover, the Court can infer from the Governor's lack of personal knowledge and the manner and timing of service that the subpoena was issued primarily for the purposes of harassment and annoyance. The Attorney General's Office routinely accepts service of process for the State, its officers, and agencies, and most certainly would have done so in this case, had it been given the opportunity. There is simply no need for and no excuse for approaching the Governor immediately before a debate without first seeking to secure an acceptance of service from counsel. Similarly, there is no legitimate reason for attempting to elicit the testimony of the Governor in this matter, particularly where doing so would disrupt his ability to participate in a gubernatorial debate.

13. In conformity with U.S.D.C.L.R. 7.1 counsel for Governor Mead conferred with counsel for the Plaintiffs about this motion on October 10-11, 2014, but the parties were unable to resolve their dispute. Plaintiffs did offer to attempt to arrange either a video deposition or a video conference to allow Governor Mead to testify at the hearing, but that offer is neither reasonable nor appropriate. Neither suggestion cures the untimely

notice or addresses the fact that Governor Mead's schedule is already full. More importantly, even if the notice had not been untimely, Governor Mead still has no factual information to offer at the hearing and this subpoena appears calculated merely to harass and annoy the Governor right before an important debate.

WHEREFORE Governor Mead requests that the Court quash the subpoena commanding his attendance at the hearing on Plaintiffs' Motion for Preliminary Injunction.

Dated this 13th day of October, 2014.

OFFICE OF THE ATTORNEY GENERAL

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I certify that on this 13th day of October, 2014, I electronically filed the foregoing with the CM/ECF system which sent notice to the following:

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/s/ James C. Kaste

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