IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

PAMELA MOSES,	)	
	)	
Plaintiff,	)	**Case No. CT-1579-19**
	)	**Division I**
v.	)	
	)	**Judge Felicia Corbin-Johnson**
MARK GOINS, TRE HARGETT, and JONATHAN SKRMETTI, in their official capacities,	)	**Judge Suzanne Cooke**
	)	**Judge Barry Tidwell**
	)	
Defendants.	)	

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS TO QUASH PLAINTIFF'S SUBPOENAS DIRECTED TO NON-PARTY TENNESSEE DEPARTMENT OF CORRECTION AND TO NON-PARTY OFFICE OF LEGAL SERVICES AND FOR PROTECTIVE ORDERS[1]

Defendants appear to be engaged in a multifaceted strategy to deny Plaintiff the data and other information she needs to bolster her constitutional claims challenging Tennessee's felony disenfranchisement regime. In response to Plaintiff's discovery requests, Defendants have produced a strikingly meager number of documents and have refused even to explain the searches they supposedly conducted. Defendants have also represented that they do not have key information that Plaintiff requested—including race/ethnicity data for disenfranchised persons and legislative history for disenfranchisement statutes—forcing Plaintiff to seek this data from third parties. But now that Plaintiff has served subpoenas on the Tennessee Department of Correction ("TDOC") and the Office of Legal Services ("OLS"), third parties that Plaintiff reasonably believes to have the information that Defendants claim not to possess, Defendants move to quash

[1] Plaintiff has conferred with Defendants about filing a single opposition brief to Defendants' two pending motions to quash, which advance identical legal arguments. Defendants have indicated that they do not oppose Plaintiff filing this combined opposition brief.

those subpoenas and take the position that Plaintiff should not be permitted to obtain this data from TDOC, OLS, or anyone else. Not only that, Defendants are acutely aware that TDOC has much, if not all, of the information Plaintiff seeks, as TDOC recently produced it in another litigation where two of the three Defendants in this case are also parties. Accordingly, Defendants' position—in addition to resting upon a misreading of the Panel's October 11, 2023 Order—is fundamentally unfair and should be rejected.

The Panel should deny Defendants' motions in full. As an initial matter, Defendants lack standing to challenge these third-party subpoenas. Moreover, Defendants' motions fail on the merits as they rest upon the mistaken premise that the Panel's October 11, 2023 Order concerning supplemental discovery requests ***to Defendants*** limits Plaintiff's ability to serve ***third-party*** subpoenas. The Panel's Order, which was confined to limiting the scope of supplemental discovery to Defendants themselves, does not provide grounds to quash or modify the third-party subpoenas.

Even if the Panel were to find that the Order set limits on third-party discovery (and it did not), the Panel should decline to exercise its discretion to quash or modify the subpoenas because Plaintiff has been operating based on a good-faith interpretation of the Order; Defendants have not suggested that the third-party subpoenas impose any prejudice to, or undue burden on, them; and Plaintiff requested information—that she previously represented to the Panel she was lacking—from the parties whom Plaintiff reasonably believes to have the information.[2]

[2] On December 18, 2023, the Office of the Tennessee Attorney General, in its capacity as the legal representative of TDOC, served Plaintiff with written objections to the third-party subpoena subject to this motion. TDOC agreed to meet and confer with Plaintiff to attempt to resolve the issues cited in TDOC's objections and to discuss the potential production of documents. On January 8, 2024, Plaintiff and TDOC conferred about TDOC's objections and discussed how narrowing the scope of the requests and providing TDOC with increased specificity about desired documents could potentially resolve TDOC's objections and lead to the production of documents. Plaintiff has subsequently attempted to continue the meet and confer process with TDOC while Defendants' motion remains pending. However, on February 12, 2024, TDOC informed Plaintiff

BACKGROUND

The TDOC subpoena (attached as **Exhibit A**) largely requests demographic data for the population supervised by TDOC, for the purpose of supporting Plaintiff's equal protection claim should the data reveal that black Tennesseans are disparately impacted by the permanent disenfranchisement statutes at issue. *See* July 19, 2023 Order at 20-21 (explaining that "[s]tatistical proof may be used to prove the existence of a discriminatory purpose"). Moreover, the TDOC subpoena requests documents identifying Tennessee residents with felony convictions and additional information such as analysis of the effects of permanent disenfranchisement, legislative history for the permanent disenfranchisement statutes, and TDOC's functions relating to voting rights. It appears that much of the information sought was produced by TDOC in 2022 in ongoing litigation regarding the process for the restoration of voting rights in the United States District Court for the Middle District of Tennessee.[3] For example, an expert report filed on the docket in that case explains that "a text file produced by TDOC to Plaintiffs' counsel … contains 439,566 case records of state felony convictions in Tennessee" and "[e]ach case record contains identification numbers, the convicted individual's name, address, birthdate, race, sex, supervision status, case identifiers, offense data (such as severity, counts, and a crime description), and sentence data (such as punishment type, location, start dates, and end dates)." *See* Expert Declaration and Report of Dr. Traci Burch, *Tennessee Conf. of the NAACP v. Lee*, No. 3:20-cv-01039 (M.D. Tenn. Oct. 10, 2023), ECF No. 185-6, at PageID#11 (attached as **Exhibit B**).

The OLS subpoena (attached as **Exhibit C**) largely requests legislative history for a series of statutes related to the disenfranchisement of convicted felons, including the one under which

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that they will not produce any documents, or participate in a further meet and confer with Plaintiff, until after Defendants' Motion to Quash is resolved.

[3] *See Tennessee Conf. of the NAACP v. Lee*, No. 3:20-cv-01039 (M.D. Tenn.).

Plaintiff was convicted, which is highly relevant to Plaintiff's race-based equal protection claim. *See* July 19, 2023, Order at 23 (discussing the identification of discriminatory intent). In addition, the OLS subpoena requests, among other things, communications discussing people's ineligibility to vote by virtue of conviction of a felony and analysis considered by the General Assembly to evaluate the impact of voting eligibility and/or ineligibility on offender outcomes, recidivism, and/or public safety, which are justifications Defendants may advance for the permanent disenfranchisement of certain convicted felons. OLS Subpoena (**Ex. C**) at 6 (Request No. 14).

All the information requested in each subpoena could reasonably support one or more of Plaintiff's surviving claims and/or lead to the discovery of further relevant information.

ARGUMENT

I. Defendants Lack Standing to Challenge Plaintiff's Third-Party Subpoenas

The Panel should deny Defendants' motions because Defendants do not have standing to challenge Plaintiff's third-party subpoenas served on TDOC, a separate state agency, and OLS, a staff office within a separate branch of government.

Under controlling Tennessee Supreme Court precedent, "[a] person who does not have a legally protectable interest in subpoenaed materials has no standing to challenge either the form of a subpoena issued to a third party or the manner in which the subpoena was issued." *State v. Harrison*, 270 S.W.3d 21, 28 (Tenn. 2008). Only "[a] person who has a personal right, privilege, or proprietary interest in materials subject to a third-party subpoena has standing to challenge the subpoena." *Id.* at 28-29 (holding that criminal defendant had standing to challenge prosecution's subpoena to clinical psychologist because defendant "has a legitimate personal interest in the

report and records of the clinical psychologist he retained to ascertain whether he is competent to stand trial and whether he could viably assert an insanity defense").[4]

Here, the Defendants—the Coordinator of Elections, the Secretary of State, and the Attorney General and Reporter—do not have any personal right, privilege, or proprietary interest in the documents and data sought from TDOC or OLS. Defendants have not asserted that they have any type of legally protectable interest in the subpoenaed materials. Nor could they. They have already represented that they do not possess the requested materials. And during meet-and-confer discussions, Defendants have said they are not even certain what materials TDOC and OLS possess. That Defendants are represented by the Office of the Attorney General and Reporter, which also represents TDOC and OLS, does not give Defendants carte blanche to challenge Plaintiff's third-party subpoenas to TDOC and OLS without identifying any legally protectable interest in the subpoenaed materials. Defendants plainly have no such interest.

Accordingly, the Panel should deny Defendants' motions due to their lack of standing to challenge Plaintiff's third-party subpoenas to TDOC and OLS.

II. The Panel's October 11, 2023, Order Concerning Party Discovery Does Not Limit Plaintiff's Ability to Serve Third-Party Subpoenas

Beyond the lack of standing, Defendants' motions fail on the merits because the Panel's October 11, 2023 Order does not provide grounds to quash or modify the TDOC and OLS subpoenas.

At the October 5, 2023 case management conference, Plaintiff expressed a desire to submit a proposed new schedule reserving time for further discovery. The Panel asked Plaintiff what type of discovery was being sought, and Plaintiff explained: (1) that some of the materials being sought

[4] "Although the *Harrison* court was examining a judicial subpoena issued under the terms of Code section 40-17-123," there is "no reason that the court's analysis is inapplicable" to other forms of third-party subpoenas. *State v. Johnson*, 538 S.W.3d 32, 51 (Tenn. Crim. App. 2017).

were responsive to Plaintiff's original discovery requests and (2) that, depending on what documents and data Defendants *did* have, Plaintiff would plan to issue third-party subpoenas. Plaintiff also made an oral motion for leave to promulgate "targeted" supplemental discovery requests to Defendants to the extent that the Panel believed that written discovery had closed (notwithstanding the scheduling order having been vacated).

Plaintiff understood the Panel's direction to be: (1) the Panel would decide whether Plaintiff could issue additional discovery requests to Defendants but that (2) in the meantime, Plaintiff could and should pursue the meet and confer process with Defendants regarding the prior discovery requests ***and*** feel free to serve whatever *third-party* subpoenas Plaintiff believed was necessary. Based on this understanding, Plaintiff has properly proceeded on all three tracks in compliance with the Panel's direction: Plaintiff has continued the meet and confer process with respect to Plaintiff's prior discovery requests; Plaintiff served two third-party subpoenas; and Plaintiff served limited supplemental discovery requests on Defendants within thirty days of the October 11, 2023, Order permitting the same.

As Defendants acknowledge, the limits set out in the October 11 Order apply only to discovery ***to Defendants***, as confirmed by the statement that "*Defendants* are given an additional thirty days to respond to the discovery requests." Order at 1 (emphasis added). But Defendants argue that the Order implicitly forecloses *any* third-party subpoenas by failing to mention them. *See* TDOC Mot. at 6; OLS Mot. at 5. That is incorrect; the October 11 Order does not restrict the use of third-party subpoenas.

In an attempt to transform the deadline for further *party* discovery into a complete bar on *third-party* subpoenas, Defendants refer to the Order's deadline as the discovery "cutoff," explain that third-party subpoenas under Rule 45 are a form of discovery device, and reason that the

"cutoff" thus precludes Plaintiff from serving *any* third-party subpoenas. *See* TDOC Mot. at 4-5; OLS Mot. at 4-5. But this erroneous characterization of the Order's deadline ignores the broader context. The Scheduling Order dated September 20, 2022, features numerous expired deadlines relating not only to discovery, but also to dispositive motions and trial. It is therefore beyond dispute that a revised scheduling order will be needed (and, indeed, the Parties filed a joint motion to enter an amended scheduling order on February 1, 2024). At the hearing on Defendants' motion to revise the Panel's July 19, 2023 order and to permit an interlocutory appeal, Plaintiff urged the Panel to deny Defendants' motion and provide the parties with a deadline to submit either a joint scheduling proposal or competing proposals. Defendants may very well oppose a scheduling proposal from Plaintiff that provides for additional time for third-party subpoenas seeking documents and depositions. However, Defendants' motions are premised on the assumption that the deadline in the Panel's October 11 Order operates as a complete "cutoff" on third-party discovery, which is simply incorrect.

In sum, the Panel's October 11 Order limited the substance and timing of further discovery to Defendants but it did not bar or otherwise restrict Plaintiff's ability to serve third-party subpoenas. Defendants' motions to quash or modify the TDOC and OLS subpoenas thus fail on the merits.

III. Even if Third-Party Discovery Were Somehow Restricted, the Panel Should Decline to Exercise Its Discretion to Quash or Modify the Third-Party Subpoenas

Even if the Panel's October 11 Order applied to third-party subpoenas (and it does not), the Panel should decline to exercise its discretion to quash or modify the TDOC and OLS subpoenas.

Defendants have not alleged that either the TDOC subpoena or the OLS subpoena imposes any prejudice to, or unreasonable burden on, them. Nor can they. These subpoenas were not

directed to Defendants and response thereto would not involve Defendants searching for or producing any documents (as Defendants have repeatedly stated that they do not have such information within their possession, custody, or control).[5]

Defendants also admit that "the issue of whether the Statute is facially unconstitutional is *important and may potentially impact thousands of Tennesseans of all races.*" Defs.' Mot. To Revise and to Permit Interlocutory Appeal at 12 (emphasis added). Because Defendants have represented that they do not have much of the information requested in the subpoenas, the only way Plaintiff can obtain the information necessary to fully develop her constitutional claims in this important case is if the Panel denies Defendants' motions. This dispute concerning third-party discovery does not involve an instance of a litigant sending out a barrage of third-party subpoenas to non-parties to test which document requests might "stick." Rather, based on a good-faith interpretation of the Panel's Order, Plaintiff has served only two third-party subpoenas for the production of documentary evidence after carefully considering the specific information necessary to fully develop her claims and the non-parties whom she reasonably believes to possess that information. For example, one request that Defendants balk at, discussed below, is essentially identical to a request in *Tennessee Conf. of the NAACP* that resulted in TDOC producing a dataset with case records of felony convictions.[6] Thus, even if the Panel finds the October 11 Order

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[5] Candidly, Plaintiff believes that there is a genuine question as to whether many—or all—of these documents are within the custody and/or control of Defendants (even if not in their direct possession), but for the sake of efficient use of the Panel's and the Parties' time and resources, Plaintiff decided to try to simply obtain the documents via subpoena rather than engage in lengthy motions practice over the "possession, custody, and/or control" issue at this time.

[6] The only difference between the two requests is replacing the word "or" with "and" and changing the date from May 18, 1981, to May 17, 1981. *Compare* Expert Declaration and Report of Dr. Traci Burch (**Ex. B**), at PageID#20 (stating that certain data was produced by TDOC in response to a request for "documents, including databases, lists, tables, or other records, sufficient to show all individuals who have been supervised by the Tennessee Department of Corrections since May 18, 1981." including certain biographical and case-related information); *with* TDOC

governs third-party discovery, the Panel should decline to exercise its discretion to quash the subpoenas.

If the Panel holds the October 11 Order governs third-party discovery and declines to quash the third-party subpoenas for the reasons discussed above, the Panel should also decline to exercise its discretion to grant Defendants' alternative request for the substantial modification of the subpoenas. *See* TDOC Mot. at 6; OLS Mot. at 6. As described above, (i) Plaintiff served the subpoenas based on the good-faith understanding of the Panel's October 11 Order, (ii) Defendants did not allege that the scope of the subpoenas imposed any prejudice to, or burden on, them, and (iii) the information is important for Plaintiff to fully develop her constitutional claims. In addition, Defendants notably have not asserted that the information requested is irrelevant to Plaintiff's claims. These facts all weigh against the Panel granting Defendants' alternative request for relief.

Moreover, Defendants' assertion that the document requests substantially exceed the scope of the limited topics listed in the Panel's Order (*i.e.*, race/ethnicity in conviction data, voting pattern data, and legislative history) is grossly overstated.[7] For instance, Defendants claim Plaintiff's request for "[a]ll documents, including databases, lists, table, and other records, sufficient to show all individuals who have been supervised by TDOC since May 17, 1981" substantially "exceed[s]" the limits listed in the Order. *See* TDOC Mot. at 6. But Defendants misleadingly omit the remainder of that same document request, which called for documents

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Subpoena (**Ex. A**) at p. 5-6 ("All documents, including databases, lists, tables, or other records, sufficient to show all individuals who have been supervised by TDOC since May 17, 1981, including but not limited to each such person's:" certain biographical and case-related information").

[7] To be clear, Plaintiff's primary position is that the subject matter limitations contained in the Panel's October 11 Order do not apply to third-party discovery. However, in the event that the Panel holds they were intended to limit the scope of permissible third-party discovery, Plaintiff believes it is imperative to correct Defendants' mischaracterization of the document requests.

sufficient to show, among other things, those offenders' "[r]ace and ethnicity" and "[r]elevant offense and conviction." TDOC Subpoena (**Ex. A**) at p. 5-6.[8] In other words, this document request squarely fits within the first topic listed in the Panel's October 11 Order.

Furthermore, some of the other document requests cited by Defendants as beyond the scope (*see* TDOC Mot. at 6; OLS Mot. at 6), such as documents regarding the "ineligibility to register and/or vote by virtue of a conviction of a felony" and "documents reflecting any and all efforts by [TDOC] to notify, educate, or inform Tennessee residents with a felony conviction about voting rights," could reasonably lead to the production of contextual information regarding the topics listed in the Panel's Order. *See* TDOC Mot. at 6; OLS Mot. at 6.[9]

In sum, the facts underlying this dispute do not weigh in favor of the Panel exercising its discretion to quash or modify either the TDOC or OLS subpoena.

CONCLUSION

For the foregoing reasons, the Panel should deny: (1) Defendants' Motion to Quash Plaintiff's Subpoena Directed to Non-Party Tennessee Department of Correction and for a Protective Order; and (2) Defendants' Motion to Quash Plaintiff's Subpoena Directed to Non-Party Office of Legal Services and for a Protective Order.

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[8] This dataset was produced by the TDOC in *Tennessee Conference of the NCAAP*. *See* Expert Declaration and Report of Dr. Traci Burch (**Ex. B**), at PageID#11 (stating that the 439,566 case records of state felony convictions—where over 300,000 are after May 17, 1981—each contains "identification numbers, the convicted individual's name, address, birthdate, race, sex, supervision status, case identifiers, offense data (such as severity, counts, and a crime description), and sentence data (such as punishment type, location, start dates, and end dates)").

[9] Again, too, at least some of this was already produced by TDOC in *Tennessee Conf. of the NAACP*. For example, in that case TDOC produced (i) a spreadsheet containing 51,011 entries that included information about what, if any, information an individual was given about voter registration when discharged from probation, and (ii) TDOC's policies on educating individuals about their voting rights. *See* Expert Declaration and Report of Dr. Traci Burch (**Ex. B**), at PageID#24-26.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served via email and the Panel's electronic filing system on February 21, 2024, as follows:

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