

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN

EMANI LOVE, et al.,

Plaintiffs,

v

RUTH JOHNSON,

Defendant.

CASE NO. 2:15-cv-11834

HON. NANCY EDMUNDS

MAG. ELIZABETH A. STAFFORD

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AMERICAN CIVIL LIBERTIES  
UNION FUND OF MICHIGAN  
Jay D. Kaplan (P38197)  
Daniel S. Korobkin (P72842)  
Michael J. Steinberg (P43085)  
Attorneys for Plaintiffs  
2966 Woodward Avenue  
Detroit, MI 48201  
(313) 578-6812

Erik A. Grill (P64713)  
Kevin Himebaugh (P53374)  
Jeanmarie Miller (P44446)  
Denise C. Barton (P41535)  
James E. Long (P53251)  
Assistant Attorneys General  
Attorneys for SOM Defendant Johnson  
Michigan Department of Attorney General  
Civil Litigation, Employment &  
Elections Division  
P.O. Box 30736  
Lansing, MI 48909  
(517) 373-6434

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AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
John A. Knight  
Attorney for Plaintiffs  
180 North Michigan Avenue, Suite 2300  
Chicago, IL 60606  
(312) 201-9740

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PROSKAUER ROSE LLP  
Steven R. Gilford  
Michael F. Derksen  
Jacki L. Anderson  
Attorneys for Plaintiffs  
70 West Madison, Suite 3800  
Chicago, IL 60602  
(312) 962-3550

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**DEFENDANT SECRETARY OF STATE RUTH JOHNSON'S REPLY TO  
PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR  
PROTECTIVE ORDER**

Plaintiffs' Response acknowledges that the standard for taking the deposition of high ranking elected officials is whether they have some personal knowledge about the matter and the party seeking the deposition makes a showing that the information cannot be obtained elsewhere. See e.g. *Jackson v. City of Detroit*, Case No. 05-74236, 2007 U.S. Dist. LEXIS 55730 (August 1, 2007)(unpublished, copy attached to Defendant's earlier brief as Exhibit C). However, the arguments of the Response fail to satisfy or meaningfully address this standard.

The Secretary of State has sought a protective order on the grounds that she has no personal knowledge of the development of the challenged 2011 policy, and that other lower level employees were capable of providing such information. In response, Plaintiffs have focused entirely on Secretary of State Ruth Johnson's 2010 campaign for office, and whether campaign promises might potentially have influenced the subsequent policy. However, Plaintiffs acknowledge that they have now deposed every witness identified as having been involved in the 2011 policy, and "none of them admitted to knowing about Defendant Johnson's campaign statements." (R. 54, Pl.'s Response, ID# 533). Thus, Plaintiffs seek to take the deposition of a high ranking elected official in order to question her alleged about political campaign promises, even though every witness actually involved in making the policy has stated that they were unaware of such promises. It stands to

reason that if the people responsible for creating the policy were unaware of the alleged promises, then such promises were not a factor in the development of the policy.

In fact, the deposition of Michael Wartella made clear that the policy originated below the Secretary herself. Mr. Wartella testified that he sets policy for the Customer Services Administration based on the Michigan Vehicle Code, and that he is the “final word” on those policies. (Exhibit A, Wartella Deposition, p 15 ln 12-18). He also testified that he had no contact with the Campaign for Michigan Families, and is unaware of any public positions that this group has taken. (Exhibit A, p 17 ln 2-7). Mr. Wartella also testified about how the 2011 policy came about, and that it originated with him:

Q. And this was the change to what we've called the Driver's License Policy in capital letters. Do you understand what I'm talking about?

A. Yes.

Q. So this is the policy that required an amended birth certificate showing the new gender on it. Is that right?

A. That's correct.

Q. How did that change come about?

A. **That change came about -- by me --** that we were trying to take the medical information out of the branch office transaction. We wanted a legal document that showed that a sex change had occurred. We were trying to also protect the privacy of customers so they wouldn't have to provide medical information at the counter and we were trying to simplify, for staff, that it was a legal document that could be used for any

time we needed to make a correction to the sex designation on a driver's license.

Q. What was the inspiration for doing this?

A. It was to essentially have the same standard that was allowed for Michigan birth certificates under state law that somebody that completed surgery could get their birth certificate changed.

Q. Well, that law had been around for a while; right?

A. Yes.

Q. So why in March of 2011 did you decide to make it -- to make the change?

A. Well, essentially we were keeping still the same policy as far as surgery had to be completed, but it was to try to make it more standard and not have medical information at the counter that a customer would have provided. They would have to provide a legal document that showed that a change had occurred.

(Exhibit A, p 24 ln 3—p 25 ln 11).

Plaintiffs also suggest that the Secretary must have personal knowledge because Michael Wartella had a meeting with her prior to the approval of the already-drafted policy. (R. 54, ID# 531). Again, the policy was, at that time, already written and there were no changes to it following the meeting. Mr. Wartella described this meeting during his deposition, and he testified that the Secretary of State only asked him what the policy was and did not tell him what to do. (Exhibit A, p 28 ln 9—p 29 ln 25). This meeting, then, had no influence on the development of the policy. Even if it had, the second part of the standard—

whether the information can be obtained elsewhere—is not satisfied, since Mr. Wartella can—and did—testify about the meeting and what took place.

In short, the Plaintiffs seek to mount a “fishing expedition” and ask the Secretary of State only about her political campaign **before** becoming Secretary of State, and whether that campaign influenced her in approving a policy drafted by lower-level employees. As a general proposition, if the mere specter of a political motivation underlying a policy were sufficient to justify deposing a high-ranking official, then allegations of influence could *always* be made and allowing such depositions would be the norm rather than the exception. See *Jackson v. City of Detroit*, *supra*; *Jameson v. Oakland County*, No. 10-10366, 2011 U.S. Dist. LEXIS 6312 (E.D. Mich. Jan. 24, 2011); *United States of America v. Poindexter*, 732 F.Supp. 142, 143 (D.D.C. 1990); *Fitzpatrick v. Secretary of State*, 176 Mich. App. 615, 440 N.W.2d 45 (1989), *lv den* 433 Mich. 877 (1989). But more specifically in this case, the subjects Plaintiffs claim to seek through the Secretary’s deposition appear absolutely unconnected to the claims raised in the Complaint.

Plaintiffs’ Complaint consists of five counts brought under 42 U.S.C. 1983:

1. Violation of Right to Privacy;
2. Violation of the First Amendment;
3. Violation of Equal Protection;
4. Violation of Right to Interstate Travel; and

5. Violation of Liberty Interest in Refusing Unwanted Medical Treatment.

Furthermore, this Court has previously indicated that the Privacy claim is likely to be determinative. However, neither the Privacy claim nor the other claims depend upon whether the Secretary of State had any political motivations for approving the policy. Rather, the issues center on the language and requirements of the policy and whether the Plaintiffs can comply with them. Plaintiffs have failed to show how the Secretary's deposition about her political campaign will make their claims more or less likely to prevail. Simply put, the Secretary's motivations have no bearing on the constitutionality of the challenged policy. If the policy were unconstitutional, then the Secretary of State's subjective *good* intentions would not rescue it, and a constitutional policy would not be rendered unconstitutional because of allegations of a political motivation.

Because the people who developed the policy were unaware of any alleged political promises, and because the existence of such promises would not make any of the Plaintiffs' claims more or less likely, questions about the Secretary's political campaign are completely irrelevant. The Plaintiffs have failed to show that the Secretary of State has personal or unique knowledge about the development of the 2011 policy. The only apparent motive for taking her deposition is to have the Secretary of State answer—under oath—questions about state politics that could then be used to embarrass or annoy her about her political

or personal opinions. Fed. R. Civ. Proc. 26(c)(1). Moreover, any arguable benefit gained by allowing Plaintiffs to satisfy their open curiosity is vastly outweighed by the burden upon the Secretary in sitting for a deposition. Fed. R. Civ. Proc. 26(b)(1).

Plaintiffs' Response relies upon inapt comparisons to cases presenting special circumstances not present in this case. Plaintiffs refer to *Hadix v. Caruso*, 2007 U.S. Dist. LEXIS 48955 (2007), but neglect to observe that the Court in *Hadix* expressly recognized the "exceptional circumstances surrounding this litigation." *Hadix* at \*4. That case concerned the closure of a prison facility, and the Court found that this action was something that the Director would likely have had "direct and unique knowledge on the subject." *Id.* Plaintiffs have failed to establish that Secretary Johnson has any direct knowledge about the development of this policy that could not be obtained through other witnesses. Instead, they purport that the Secretary has knowledge of her political campaign. However, Plaintiffs have offered no evidence that the campaign played any role in the crafting of the policy.

Similarly, Plaintiffs' discussion of *Turner v. City of Detroit*, 2012 U.S. Dist. LEXIS 146616 (2012) is incomplete and overlooks the Court's recognition of the general rule disfavoring depositions of top executive officials. *Turner* at \*5-6. The Court notes that the rule has limits and that depositions can be taken "where

the official has first-hand knowledge related to the claim being litigated.” *Turner* at \*6. Even there, however, the Court expressly notes that such discovery, “is permitted only where it is shown that other persons cannot provide the necessary information.” *Id.* Plaintiffs have not met that burden here.

The Plaintiffs’ reliance on *State ex rel. Summit County Republic Party Executive Committee v. Brunner*, 883 N.E.2d 452 (Ohio 2008) is likewise flawed, because the litigation in that case involved an appointment decision by the Secretary and not a lower-level employee in the office. *Brunner* at 453. Here, the policy was drafted and implemented by lower-level employees, each of whom have already been deposed by the Plaintiffs. These depositions have failed to demonstrate any personal involvement of the Secretary, or the likelihood that she has any unique personal knowledge about the 2011 policy.

### **CONCLUSION AND RELIEF REQUESTED**

For these reasons, and the reasons stated in the earlier brief, Defendant Ruth Johnson respectfully requests that this Honorable Court issue a protective order under Fed. R. Civ. P. 26(c) prohibiting the deposition of the Secretary of State, together with any other relief the Court determines to be appropriate under the circumstances.

Respectfully submitted,

Bill Schuette  
Attorney General

/s/Erik A. Grill  
Erik A. Grill (P64713)  
Denise C. Barton (P41535)  
Kevin Himebaugh (P53374)  
Jeanmarie Miller (P44446)  
Assistant Attorneys General  
Attorneys for Defendant  
P. O. Box 30736  
Lansing, Michigan 48909  
(517) 373-6434  
[grille@michigan.gov](mailto:grille@michigan.gov)  
P64713

Dated: April 7, 2016

### **CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2016, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/Erik A. Grill  
Erik A. Grill (P64713)  
Assistant Attorneys General  
Attorneys for Defendant  
P. O. Box 30736  
Lansing, Michigan 48909  
(517) 373-6434  
[grille@michigan.gov](mailto:grille@michigan.gov)  
P64713

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CASE NO. 2:15-cv-11834

HON. NANCY EDMUNDS

MAG. ELIZABETH A. STAFFORD

**INDEX OF EXHIBIT**

Exhibit A            Michael Wartella deposition transcript pages

# EXHIBIT A

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 EMANI LOVE, et al.

5 Plaintiffs,

6 vs.

Case No. 15-cv-11834  
Hon. Nancy G. Edmunds

7 RUTH JOHNSON, in her official capacity  
8 as the Secretary of State of Michigan,

9 Defendant.

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10 The 30(b)(6) Deposition of Defendant, through its  
11 representative, **MICHAEL WARTELLA**, taken by the Plaintiffs,  
12 pursuant to Notice, before Elizabeth A. Tubbert, RPR,  
13 (CSR-4248), a Notary Public within and for the County of  
14 Oakland, (acting in Ingham County), State of Michigan, at 525  
15 W. Ottawa Street, 5th Floor, Lansing, Michigan, on Thursday,  
16 March 31, 2016.

17 APPEARANCES:

18 AMERICAN CIVIL LIBERTIES UNION FOUNDATION

19 BY: JOHN A. KNIGHT, Esq.  
20 180 N. Michigan Avenue, Suite 2300  
Chicago, Illinois 60606  
(312) 201-9740

21 and

22 PROSKAUER ROSE LLP  
23 BY: JACKI L. ANDERSON, Esq.  
24 Three First National Plaza  
70 West Madison, Suite 3800  
Chicago, Illinois 60602  
(312) 962-3550

25 Appearing on behalf of the Plaintiffs

1 Q Brine DeBano reported to Ms. Land -- Terry Land?

2 A Yes.

3 Q Am I right that Senyko started at the Secretary of  
4 State's office when Ms. Johnson was elected?

5 A Yes.

6 Q Did he have a role in the campaign?

7 A I don't know.

8 Q Did you work on the Johnson campaign?

9 A No, I did not.

10 Q Have you worked on any campaigns?

11 A No.

12 Q Tell me about your role in setting policy at the  
13 department in your current job.

14 A Well, I set policy for the Customer Services  
15 Administration based on the Michigan Vehicle Code.

16 Q Are you the final word on all policies?

17 A For operations in the Customer Services  
18 Administration, yes.

19 Q Do people outside the Customer Services Administration  
20 office address changes and policy?

21 A We have residents of Michigan suggest every day  
22 changes on vehicle and registration -- any policy.

23 Q I'm sorry. Vehicles and administration (sic)?

24 A Just in general, people send us their advice on how  
25 things are done.

1 A I'm not aware of anybody else suggesting a change.

2 Q What about the Campaign for Michigan Families?

3 A I have not had any contact with Campaign for Michigan  
4 Families.

5 Q Are you aware of the public positions they've taken  
6 about changing sex designations on licenses?

7 A No, I'm not.

8 (A document was marked 30(b)(6) Exhibit 2  
9 by the reporter.)

10 Q Mr. Wartella, have you seen 30(b)(6) Exhibit 2?

11 A Yes, I have.

12 Q Is this the document you reviewed with Ms. Densmore,  
13 Ms. Ueberroth on Tuesday?

14 A Yes.

15 Q This is your signature on page 6?

16 A Yes, it is.

17 Q Are these accurate, these answers? I mean, you signed  
18 them before they were given to us.

19 A They were accurate as of that date, but we have a  
20 change.

21 Q Are you talking about your change in policy?

22 A Yes.

23 Q Other than that --

24 A Other than that, yes.

25 Q -- these are accurate?

1 18, 2011 change.

2 A Yes.

3 Q And this was the change to what we've called the  
4 Driver's License Policy in capital letters. Do you  
5 understand what I'm talking about?

6 A Yes.

7 Q So this is the policy that required an amended birth  
8 certificate showing the new gender on it. Is that  
9 right?

10 A That's correct.

11 Q How did that change come about?

12 A That change came about -- by me -- that we were trying  
13 to take the medical information out of the branch  
14 office transaction. We wanted a legal document that  
15 showed that a sex change had occurred. We were trying  
16 to also protect the privacy of customers so they  
17 wouldn't have to provide medical information at the  
18 counter and we were trying to simplify, for staff,  
19 that it was a legal document that could be used for  
20 any time we needed to make a correction to the sex  
21 designation on a driver's license.

22 Q What was the inspiration for doing this?

23 A It was to essentially have the same standard that was  
24 allowed for Michigan birth certificates under state  
25 law that somebody that completed surgery could get

1 their birth certificate changed.

2 Q Well, that law had been around for a while; right?

3 A Yes.

4 Q So why in March of 2011 did you decide to make it --  
5 to make the change?

6 A Well, essentially we were keeping still the same  
7 policy as far as surgery had to be completed, but it  
8 was to try to make it more standard and not have  
9 medical information at the counter that a customer  
10 would have provided. They would have to provide a  
11 legal document that showed that a change had occurred.

12 Q Did you consider at that point that not everyone who  
13 is a resident of Michigan is born in Michigan?

14 A Yes.

15 Q And were you aware of the fact that would make it  
16 impossible for some people to change the sex  
17 designation on their license?

18 A I was not aware that it was impossible. Many states  
19 have an amended birth certificate process. I think  
20 one state was brought to my attention -- I think it  
21 was Ohio -- and we felt that they would have to deal  
22 with the officials from their state they were born in.

23 Q I'm sorry. I don't understand.

24 A Well, they would have to go back to Ohio and get that  
25 changed.

1 Michigan law.

2 Q Okay. I hear that but, again, that doesn't explain  
3 why in March of 2011.

4 A I've answered the question.

5 Q Who else did you talk to about this change in policy  
6 in 2011?

7 A I talked to Secretary of State Ruth Johnson and Grace  
8 Ueberroth.

9 Q When was your conversation with Ms. Johnson?

10 A It was in 2011. I don't know the date.

11 Q Was it -- so I guess we had a date for a policy in  
12 March 11, 2011. I'm sorry. March 18, 2011. So was  
13 it before that or -- because that was when the actual  
14 change took place, is March 18; is that right?

15 A Yes, it was before then.

16 Q Was it a week before? A month before? Actually, can  
17 you recall exactly when Ms. Johnson took office? I  
18 haven't looked up when.

19 A January.

20 Q Because this was just when she was taking office;  
21 right?

22 A January 1.

23 Q January 1st of 2011 she took office.

24 Okay. So was it a month before March 18?  
25 Two months? Right after she took office?

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CERTIFICATE OF NOTARY PUBLIC

STATE OF MICHIGAN )  
                          )       SS.  
COUNTY OF OAKLAND )

I, Elizabeth A. Tubbert, do hereby certify that the witness whose attached testimony was taken before me in the above-entitled matter, was by me first duly sworn to testify to the truth, the whole truth; that the testimony contained herein was by me reduced to writing in the presence of the witness by means of stenography; afterward transcribed; and that this is the true and complete transcript of the testimony given by the witness.

I further certify I am not connected by blood or marriage with any of the parties, their attorneys or agents; and that I am not interested, directly or indirectly, in the matter of controversy.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal.

\_\_\_\_\_  
Elizabeth A. Tubbert, CSR-4248  
Notary Public, Oakland County, Michigan  
My Commission Expires: October 25, 2017