IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

EDEN ROGERS, and BRANDY WELCH,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX AZAR, in his official capacity as Secretary of United States Department of Health and Human Services, ADMINISTRATION FOR CHILDREN AND FAMILIES, LYNN JOHNSON, in her official capacity as Assistant Secretary of Administration for Children and Families, HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina, MICHAEL LEACH, in his official capacity as State Director of the South Carolina Department of Social Services, and SCOTT LEKAN, in his official capacity as Principal Deputy Assistant Secretary of Administration for Children and Families,

Defendants.

Civil Action No.: 6:19-cv-01567-JD

THE OFFICE OF THE GOVERNOR'S CONSOLIDATED MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENAS

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NON-WAIVER OF SOVEREIGN IMMUNITY

The Office of the Governor–Executive Control of State ("Office" or "Office of the Governor"), by and through the undersigned counsel, hereby notes its special, limited appearance solely for purposes of moving to quash Plaintiffs' subpoenas and obtain a protective order related to additional subpoenas on grounds of state sovereign immunity. Neither this Motion nor any preceding or subsequent appearance, pleading, document, writing, objection, or conduct should be construed to constitute a waiver of any rights, protections, or immunities, including, without limitation, sovereign immunity or other matters under the South Carolina Constitution, the United States Constitution, or related law, which the Office expressly reserves. The Office submits additional arguments in support of the present Motion only to enable the Court to avoid the constitutional problems inherent in Plaintiffs' subpoenas, and such arguments are not to be viewed or construed as a waiver of sovereign immunity. *See Strawser v. Atkins*, 290 F.3d 720, 729-30 (4th Cir. 2002).

MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENAS

Pursuant to Rule 45(d)(3) and Rule 26(c) of the Federal Rules of Civil Procedure, the Office of the Governor, a non-party to the above-captioned matter, hereby moves the Court to quash subpoenas issued by Plaintiffs requiring deposition testimony from two of the Office's employees. The Office further moves the Court to issue a protective order preventing Plaintiffs from issuing additional subpoenas against the Office or its employees. Plaintiffs' subpoenas are barred by state sovereign immunity, which, absent waiver or abrogation, protects a State from the intrusion of the federal judiciary into state affairs. In the alternative, the subpoenas should be quashed and a protective order issued because the deponents are high-ranking government officials, and Plaintiffs have not shown the extraordinary circumstances necessary to depose such officials. Moreover,

these depositions would constitute an undue burden, as no testimony from the Office's staff is necessary for Plaintiffs' case, and preparing for and undergoing depositions would waste limited staff time and resources, as well as intrude on privileged (and legally irrelevant) executive decision-making. Finally, in any event, the subpoenas were not validly served "on the named person" under Rule 45.

For the foregoing reasons, as well as those detailed further in the accompanying memorandum in support, the Office of the Governor submits that the Court should grant the present Motion and enter an order quashing the subpoenas issued by Plaintiffs, as well as an appropriate protective order. Should the Court grant this Motion or provide other similar relief, the Office respectfully requests that the Court consider taxing the Office's costs to Plaintiffs or imposing other appropriate sanctions against Plaintiffs' counsel to cover the expenses associated with defending against Plaintiffs' substantively and procedurally deficient non-party discovery demands.

Respectfully submitted,

/s/ Thomas A. Limehouse, Jr.

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April 29, 2021
Columbia, South Carolina

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Defendants.

Civil Action No.: 6:19-cv-01567-JD

THE OFFICE OF THE GOVERNOR'S MEMORANDUM IN SUPPORT OF CONSOLIDATED MOTION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENAS

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The Office of the Governor–Executive Control of State ("Office" or "Office of the Governor"), by and through the undersigned counsel, hereby notes its special, limited appearance solely for purposes of moving to quash Plaintiffs' subpoenas and obtain a protective order related to additional subpoenas on grounds of state sovereign immunity. Neither this Motion nor any preceding or subsequent appearance, pleading, document, writing, objection, or conduct should be construed to constitute a waiver of any rights, protections, or immunities, including, without limitation, sovereign immunity or other matters under the South Carolina Constitution, the United States Constitution, or related law, which the Office expressly reserves. The Office submits additional arguments in support of the present Motion only to enable the Court to avoid the constitutional problems inherent in Plaintiffs' subpoenas, and such arguments are not to be viewed or construed as a waiver of sovereign immunity. *See Strawser v. Atkins*, 290 F.3d 720, 729-30 (4th Cir. 2002).

INTRODUCTION

Even though Plaintiffs did not name the Office of the Governor as a party to this action, they have now issued multiple subpoenas purporting to require deposition testimony from the Office's employees and have stated that they will also issue a subpoena to compel testimony from one or more of the Office's employees as a Rule 30(b)(6) witness. Plaintiffs' subpoenas suffer from numerous substantive and procedural deficiencies, each of which independently warrant the Court exercising its authority and discretion to end Plaintiffs' discovery expedition as to the Office.

As a threshold matter, Plaintiffs' issued and anticipated subpoenas are barred by state sovereign immunity, which, absent waiver or abrogation, protects a State from the intrusion of the federal judiciary into state affairs. The Fourth Circuit has squarely held that non-party federal

agencies are protected by sovereign immunity from subpoenas like these, and there is no material distinction between federal and state sovereign immunity in this context. Plaintiffs seek to use the Court's contempt power to coerce a non-party state agency to appear and give testimony. Such coercion is barred just as surely as a separate action against the state agency, for the federal courts lack jurisdiction in both instances.

Even putting aside sovereign immunity, the Court should quash these subpoenas and issue an appropriate protective order for three additional reasons. First, Plaintiffs demand testimony from high-ranking government officials, but they do not show the requisite extraordinary circumstances to justify such a demand. Indeed, Plaintiffs do not even explain what testimony the Office, as a non-party, could give that would be relevant to their claims, much less that they are unable to obtain any relevant information elsewhere.

Second and relatedly, the subpoenas would be an undue burden on the Office and its employees. Any perceived benefit of the demanded depositions would be negligible, and the costs would be great, to include diverting important staff time and resources—particularly during a State of Emergency and ongoing legislative session—and intruding upon the privileged and legally irrelevant executive decision-making. Courts are especially reluctant to subject non-parties like the Office to subpoenas like those issued by Plaintiffs, and here, Plaintiffs cannot satisfy the demanding analysis required under Rule 45.

Third, the subpoenas were not validly served in any event. It is well-established that by the text of Rule 45, personal service on the named person is required. But the two subpoenas issued were not personally served, and instead delivered by the U.S. Postal Service to an unknown employee in the Office's mailroom.

Because of these obvious deficiencies, if the Court grants this Motion or provides the Office other similar relief, the Office respectfully requests that the Court consider taxing the Office's costs to Plaintiffs or imposing other appropriate sanctions against Plaintiffs' counsel to cover the expenses associated with defending against Plaintiffs' baseless non-party discovery demands.

STATEMENT OF THE CASE

Plaintiffs filed this lawsuit against Governor Henry McMaster, in his official capacity as Governor of the State of South Carolina, along with numerous other state and federal defendants. Compl., ECF No. 1, ¶ 14. Plaintiffs allege that their inability to serve as foster parents through one particular private child-placing agency ("CPA") violated the First Amendment's Establishment Clause and the Fourteenth Amendment's Equal Protection Clause. The named Defendants filed motions to dismiss, and the Court held that Plaintiffs had stated plausible claims under the Establishment Clause test articulated in *Lemon v. Kurtzman* and under the Equal Protection Clause for alleged discrimination based on sexual orientation. *Rogers v. U.S. Dep't of Health & Hum. Servs.*, 466 F. Supp. 3d 625, 646 (D.S.C. 2020) (ECF No. 81). Notwithstanding that for decades the Supreme Court has refused to apply the *Lemon* test—most recently in a case reversing the Fourth Circuit[1]—the Court held that there were disputes of fact under *Lemon* as to whether Defendants' actions had "a secular purpose," "conveyed a message endorsing religion," or "had the primary effect of advancing religion." *Id.* at 645–47. As for equal protection, the Court agreed with Defendants that "that their actions treat all religions equally by allowing any religiously-affiliated CPA to apply its own religious criteria to select prospective foster parents." *Id.* at 650. But the Court did not dismiss the sexual orientation-discrimination component of

1. *See Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

Plaintiffs' claim, holding that fact questions remained as to the "legitimate purpose[s] for Defendants' actions." *Id.* at 652.

For the past year, discovery has been ongoing. The reflects that Governor McMaster has produced 843 pages of documents in response to Plaintiffs' Requests for Production, as well as responses to Interrogatories and Requests for Admissions. ECF No. 138, at 4. Nonetheless, on March 4, 2021, Plaintiffs' counsel informed counsel for Governor McMaster that they intended to notice the deposition of a Rule 30(b)(6) witness from the Office of the Governor, as well as the depositions of two employees of the Office. *See* ECF No. 138-4 (Letter from P. Barbur to M. Coleman (March 4, 2021)).

Counsel for Governor McMaster responded and informed Plaintiffs' counsel that Governor McMaster could not produce witnesses from the Office of the Governor because neither the Office of the Governor nor its employees were named as defendants in this suit. *See* ECF No. 138-6 (Letter from M. Coleman to P. Barbur (Mar. 23, 2021)). Plaintiffs' counsel responded, stating that if the Governor was unable to produce a Rule 30(b)(6) witness and individual witnesses from the Office of the Governor, Plaintiffs intended to issue subpoenas for all of them. *See* ECF No. 138-7 (Letter from P. Barbur to M. Coleman (April 2, 2021)).

On April 12, 2021, Plaintiffs' counsel sent subpoenas via certified mail, directed to the "Office of the Governor of the State of South Carolina," purporting to command deposition testimony from two individual employees in just two weeks' time, on April 29 and 30. Exhibit A (B. Symmes, L. LeMoine Subpoenas (April 12, 2021)). The Office's mail room first received the subpoenas on April 15, 2021. Exhibit B (U.S. Postal Service Tracking Information). The subpoenas demanded the appearance of the Office's Deputy Chief of Staff, Leigh LeMoine, and Communications Director, Brian Symmes. On April 19, 2021, Plaintiffs' counsel first contacted

counsel for the Office and advised that Plaintiffs intended to issue a Rule 45 subpoena for a Rule 30(b)(6) deposition of the Office itself. ECF No. 138-8 (Letter from P. Barbur to T. Limehouse (April 19, 2021)). The Office's counsel responded, explaining that any subpoena "directed to the Office would be both substantively improper and procedurally improper." Exhibit C (Letter from T. Limehouse to P. Barbur (April 20, 2021)). The letter also explained the Office's objections to the two Rule 45 subpoenas already issued against the Office's employees. *See id.*

Pursuant to Rule 7.02 of the Local Civil Rules (D.S.C.) and Rule 26(c)(1) of the Federal Rules of Civil Procedure, the undersigned counsel certifies that the Office's counsel subsequently conferred with Plaintiffs' counsel in an effort to resolve this dispute prior to filing the present Motion, but Plaintiffs continue to insist that they may subpoena and require deposition testimony from high-ranking employees of a state agency that is not a defendant to this action. Accordingly, because of the subpoenas recently directed to the Office's employees and the threatened subpoena to the Office itself, the Office submits this consolidated Motion seeking an appropriate protective order and an order quashing the aforementioned subpoenas.

LEGAL STANDARD

The Court has broad discretion in addressing disputes related to the course and scope of discovery. *See Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2015 WL 5781383, at *2 (D.S.C. Sept. 30, 2015) ("The scope and conduct of discovery are within the sound discretion of the district court." (quoting *Columbus–Am. Discovery Grp. v. Atl. Mut. Ins. Co*., 56 F.3d 556, 568 n.16 (4th Cir. 1995))); *see Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc*., 334 F.3d 390, 402 (4th Cir. 2003) (quoting *Mylan Labs, Inc. v. Akzo, N.V*., 2 F.3d 56, 64 (4th Cir. 2003)). At bottom, "'discovery, like all matters of procedure, has ultimate and necessary boundaries.'" *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507

(1947)). In enforcing reasonable boundaries and parameters, "[d]istrict courts are afforded broad discretion with respect to discovery generally, and motions to quash subpoenas specifically." *Cook v. Howard*, 484 F. App'x 805, 812 (4th Cir. 2012) (per curiam).

Pursuant to Rule 45(d) of the Federal Rules of Civil Procedure, which governs non-party subpoenas, "[a] party or attorney responsible for issuing and serving a subpoena *must* take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and the court "*must* quash or modify a subpoena that," *inter alia*, "requires disclosure of privileged or other protected matter, if no exception or waiver applies" *or* "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(1), (3) (emphasis added). "The determination of undue burden is within the discretion of the district court." *Harrison v. Kennedy*, No. 3:18-CV-0057-RMG, 2019 WL 3712187, at *2 (D.S.C. Aug. 7, 2019). "A subpoena that seeks information irrelevant to the case is a per se undue burden." *Id.*

Under Rule 26, which governs discovery generally, "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). Finally, a court may issue a protective order "to protect a person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Such orders may prescribe, among other measures, "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." *Layman v. Junior Players Golf Academy, Inc.*, 314 F.R.D. 379, 381 (D.S.C. 2016) (quoting Fed. R. Civ. P. 26(c)(1)(A), (c)(1)(D)).

The propriety of entering a protective order is committed to the sound discretion of the trial court, which has wide latitude in managing discovery and affording relief where appropriate. *See Fonner v. Fairfax Cty.*, 415 F.3d 325, 330, 331 (4th Cir. 2005) (citing *M&M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 163 (4th Cir. 1992)); *see also U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) (stating that district courts are afforded "substantial discretion . . . in managing discovery"); *Hill Holiday Connors Cosmopulos, Inc. v. Greenfield*, No. C/A 608CV-03980-GRA, 2010 WL 547179, at *2 (D.S.C. Feb. 9, 2010) ("The Fourth Circuit has clearly delineated its position regarding a district court's ability to implement and enforce discovery parameters. '[A] district court has wide latitude in controlling discovery and . . . its rulings will not be overturned absent a clear abuse of discretion.' Further, '[t]he latitude given the district court extends as well to the manner in which it orders the course and scope of discovery.' (quoting *Ardrey v. United Parcel Serv.*, 798 F.2d 679, 682 (4th Cir. 1986))).

ARGUMENT

I. The subpoenas are barred by state sovereign immunity.

State sovereign immunity "prevent[s] the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). "The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 258 (2011). "This immunity extends to arms of the State, including state agencies." *Brown v. Lieutenant Governor's Off. on Aging*, 697 F. Supp. 2d 632, 635 (D.S.C. 2010) (cleaned up). The Office of the Governor is a state agency, and therefore, both the Office and its employees are protected by state sovereign immunity. Neither the Office nor these employees are parties to this litigation. Yet Plaintiffs propose to exert

the coercive power of this Court on the Office. However, that unnecessary effort is barred by the fundamental precepts and principles of sovereign immunity.

Under Fourth Circuit law, "if the non-party recipient of a subpoena is a government agency, principles of sovereign immunity apply." *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir. 1999). As the Fourth Circuit has explained, "the nature of the subpoena proceeding against a [government] employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the [government]." *Boron Oil Co. v. Downie*, 873 F.2d 67, 70–71 (4th Cir. 1989). "[S]uch a proceeding interferes with the public administration and compels the [government] agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function"—even where the subpoena proceedings "are technically against the federal employee and not against the sovereign." *Id.* at 71. Any such proceedings therefore "fall within the protection of sovereign immunity." *Id.*; *accord EPA v. Gen. Elec. Co.*, 197 F.3d 592, 597 (2d Cir. 1999) (holding that "the enforcement of this subpoena duces tecum issued" to a federal agency "would compel the [agency] to act and therefore is barred by sovereign immunity"); 9A Wright & Miller, *Federal Practice & Procedure* § 2463.2 (3d ed. 2020) ("A subpoena served on a nonparty federal agency is considered an action against the United States and subject to sovereign immunity.").

These precedents dealt with non-party subpoenas to federal agencies, and the Fourth Circuit has not specifically "addressed whether a subpoena issued against a nonparty state agency . . . runs afoul of that state's sovereign immunity." *Va. Dep't of Corr. v. Jordan*, 921 F.3d 180, 188 (4th Cir. 2019). But the rule must be the same. Federal and state sovereign immunity are two sides of the same coin. Both derive from the same incorporated common-law rule that "'no suit or action can be brought against the king, even in civil matters, because no court can have

jurisdiction over him.'" *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (quoting 1 W. Blackstone, *Commentaries on the Laws of England* 235 (1765)); *accord Brown v. Sec'y of Army*, 78 F.3d 645, 649–50 (D.C. Cir. 1996); *The Federalist* No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (sovereign immunity "is the general sense and the general practice of mankind"). As John Marshall explained the rule, "'[i]t is not rational to suppose that the sovereign power should be dragged before a court.'" *Hyatt*, 139 S. Ct. at 1498. Because the same doctrine of sovereign immunity protects federal and state governments in this context, it would make no sense to forbid non-party subpoenas of federal agencies and their employees but permit such subpoenas for state agencies and their employees.

Moreover, courts routinely bar non-party subpoenas under the related doctrine of tribal sovereign immunity. *See, e.g.*, *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012) (holding that "a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity"); *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014) (same); *United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992) (holding that the "district court was correct in quashing the subpoena" issued to the non-party Quinault Indian Nation because it had not waived its tribal sovereign immunity); *Catskill Dev., LLC v. Park Place Ent. Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002) (holding that tribal "sovereign immunity applied to non-party subpoenas in civil litigation"); *Dillon v. BMO Harris Bank*, No. 16-MC-5-CVE-TLW, 2016 WL 447502, at *2–3 (N.D. Okla. Feb. 4, 2016) (collecting cases). Tribal sovereign immunity has the same basis and general principles as federal and state sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *Lewis v. Clarke*, 137 S. Ct. 1285, 1291–92 (2017) (applying the "general

principles" of federal and state sovereign immunity to the context of tribal sovereign immunity because "[t]he protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity").[2] Thus, once again, it makes no sense to apply a different rule in the parallel context of state sovereign immunity.

Consistent with judicial treatment of parallel federal and tribal sovereign immunity, some courts have applied this logical understanding of state sovereign immunity and barred non-party subpoenas of state agencies. *E.g.*, *Est. of Gonzalez v. Hickman*, 466 F. Supp. 2d 1226, 1229 (E.D. Cal. 2006); *accord Bonnet*, 741 F.3d at 1161 ("[T]he Eleventh Amendment may well shield a state agency from discovery in federal court."). But others have disregarded state sovereign immunity and subjected non-party state agencies to subpoenas. Those courts have generally committed one of three errors. First, some courts fixate on the Eleventh Amendment's text, particularly its use of the word "suit." *E.g.*, *Arista Recs. LLC v. Does 1-14*, No. 7:08-cv-00205, 2008 WL 5350246, at *4 (W.D. Va. Dec. 22, 2008) ("a discovery request where the state entity is not sued is not 'a suit' under the Eleventh Amendment"). But state "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself," and "it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Alden v. Maine*, 527 U.S. 706, 728–29 (1999); *id.* at 713 ("the sovereign immunity of the States neither derives from nor is limited by

2. If anything, tribal sovereign immunity may be weaker. *See Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy."); *Montana v. United States*, 450 U.S. 544, 563 (1981) ("[T]hrough their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty."); *Bonnet*, 741 F.3d at 1160–61 ("[T]ribal immunity is more limited than the immunity afforded to the states under the Eleventh Amendment.").

the terms of the Eleventh Amendment"). "To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism [the Supreme Court has] rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*." *Id.* at 730; *accord Stewart v. North Carolina*, 393 F.3d 484, 488 (4th Cir. 2005) ("The purpose of the Eleventh Amendment was to overrule *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), not to define the contours of state sovereign immunity generally."); *Alden*, 527 U.S. at 727 ("[T]he Court has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment."); *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991) (similar).

As the cited and other cases involving federal agencies make clear, the coercive power of the courts infringes on sovereign immunity regardless of whether the mechanism is a lawsuit or subpoenas on pain of contempt. State sovereign immunity "restricts the judicial power under Article III." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 72–73 (1996); *accord Calderon v. Ashmus*, 523 U.S. 740, 745 n.2 (1998) (explaining that "the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power"). Thus, it is "well established that sovereign immunity bars not just lawsuits filed in courts of law, but rather all proceedings against a non-consenting sovereign." *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165, 170 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002). As the Supreme Court recently summarized, the Founders understood that the foundational principles of sovereign immunity "prevented States from being amenable to process in any court without their consent." *Hyatt*, 139 S. Ct. at 1493. Indeed, "[t]he very object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the insistence of

private parties." *Ex parte Ayers*, 123 U.S. 443, 505 (1887); *Alden*, 527 U.S. at 717 ("It is not in the power of individuals to call any state into court.").

Subpoena such as those directed to the Office by Plaintiffs are issued under color of the authority and jurisdiction of the court in which such matter is pending. *See* 9A Wright & Miller, *Federal Practice & Procedure* § 2451 (3d ed. 2020) ("A 'subpoena' is a mandate lawfully issued in the name of the court"). The "subpoena power of a court cannot be more extensive than its jurisdiction." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950) ("The judicial subpoena power not only is subject to specific constitutional limitations . . . but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution."). Accordingly, a subpoena is limited in its authority and jurisdiction to the same extent as the federal court issuing such a subpoena. Because this Court would not have jurisdiction over the Office of the Governor as a party to the case, it cannot have jurisdiction over the Office to issue or enforce the subpoenas at issue.

Thus, intrusive discovery on pain of federal court contempt is no more permissible than other exercises of federal jurisdiction over a non-consenting State. The Supreme Court has recognized as much, explaining that "the value to the States of" state sovereign immunity, "like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice." *Puerto Rico*, 506 U.S. at 145. That is because "the central benefits of" such immunities are "avoiding the costs and general consequences of subjecting public officials to the risks of *discovery and trial*." *Id.* at 143–44 (emphasis added) (internal quotation marks omitted). Because sovereign immunity provides "an immunity from suit rather than a mere defense to liability," "it is effectively lost if a case is erroneously permitted to

go to trial." *Id.* at 144 (cleaned up). Again, this holding and other Supreme Court precedent are inconsistent with any understanding of state sovereign immunity that would permit intrusive non-party discovery via subpoena. Discovery is no less costly, time-consuming, burdensome, intrusive, and disruptive when the entity is not named as a defendant. As the Eighth Circuit put it, third-party subpoenas like these "command a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming. The potential for severe interference with government functions is apparent." *Alltel*, 675 F.3d at 1103.

For these and other reasons, even if focus is placed on the word "suit," "courts interpret the term 'suit' broadly to include more than just an actual suit instituted against the" sovereign. *United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 931 (10th Cir. 1996). For example, "the United States' immunity from 'suit' extends not only to all types of injunctive process and relief, but also to judicial process." *Id.* (citations omitted). "Thus, the term 'suit' embodies the broad principle that the government is not subject to 'legal proceedings, at law or in equity' or 'judicial process' without its consent." *Id.* (quoting *Belknap v. Schild*, 161 U.S. 10, 16 (1896)). Unsurprisingly, from the early days of the Republic, courts applied sovereign immunity to bar even judicial processes that were not formal, independent lawsuits. *See, e.g.*, *Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 21 (1846) (disbursing agent of government not subject to writ of attachment sought by creditors of seaman serving on the frigate Constitution); *Hyatt*, 139 S. Ct. at 1494 (describing similar application of state sovereign immunity).

"Interpreting the term 'suit' broadly comports with the core notion of sovereign immunity that in the absence of governmental consent, the courts lack jurisdiction to 'restrain the government from acting, or to compel it to act.'" *Murdock*, 81 F.3d at 931 (quoting *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 704 (1949)). This interpretation has been applied in the context

of non-party subpoenas, since "'suit' includes 'judicial process'" and a subpoena "is a form of judicial process." *Bonnet*, 741 F.3d at 1160. In short, "compelled disclosure . . . is the functional equivalent of a 'suit'" when it comes to "common law sovereign immunity." *Alltel*, 675 F.3d at 1104.

The second error some courts have made is focusing on the federalism aspect of state sovereign immunity. *E.g.*, *Charleston Waterkeeper v. Frontier Logistics, LP*, 488 F. Supp. 3d 240, 251 (D.S.C. 2020) ("The principle that underlies the doctrine of state sovereign immunity is federalism, which . . . is not undermined when a federal court enforces a subpoena against a state agency."), *appeal sub nom. S.C. State Ports Auth. v. Charleston Waterkeeper*, No. 20-2103, Dkt. No. 30 (4th Cir. Apr. 9, 2021) (suspending all proceedings on appeal pending district court's ruling on joint motion for entry of a consent order dismissing the underlying case based upon settlement). But as established above, sovereign immunity is not primarily a federalism doctrine; it is a fundamental principle of sovereignty, for the States had preexisting sovereignty, whichthey never ceded to the federal government. *See Stewart*, 393 F.3d at 488 ("[S]tate sovereign immunity was not created by the Eleventh Amendment, but rather predated it."). To be sure, state sovereign immunity can promote federalism, but federalism neither motivates nor limits the doctrine. Instead, "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities," including that states should not "be summoned as defendants to answer the complaints of private persons." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (internal quotation marks omitted); *see Puerto Rico*, 506 U.S. at 146 (explaining that "its ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated"). This fundamental interest in sovereignty is undermined no less (and perhaps more) where a *federal* court is exercising coercive power over a

state agency. Indeed, because state sovereign immunity is an "essential component of our constitutional structure," the Supreme Court has held that "Congress may abrogate the States' constitutionally secured immunity from suit" even "in federal court only by making its intention unmistakably clear in the language of the statute." *Seminole Tribe*, 517 U.S. at 56 (internal quotation marks). Thus, intrusions onto state sovereign immunity in federal court are barred just as surely as intrusions onto federal sovereign immunity.

A third error committed by some courts is focusing on the fact that "nonparty discovery subpoenas . . . will not result in a judgment or relief of any kind requiring financial payment from the state." *United States v. Univ. of Massachusetts, Worcester*, 167 F. Supp. 3d 221, 225 (D. Mass. 2016). But state sovereign immunity "does not exist solely in order to prevent federal-court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe*, 517 U.S. at 58 (cleaned up); *id.* (explaining that "the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred"). And as the Fourth Circuit has already held in the federal sovereign immunity context, "the nature of the subpoena proceeding . . . is inherently that of an action against the [sovereign] because such a proceeding interferes with the public administration and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to exercise its public function." *Boron Oil*, 873 F.2d at 70-71 (cleaned up); *accord Alltel*, 675 F.3d at 1103. Likewise, there can be no doubt that non-party subpoenas issued to state employees by private litigants on pain of federal court contempt "interfere with the public administration" and would "compel" the state to act in certain ways. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotation marks omitted); *cf. Lytle v. Griffith*, 240 F.3d 404, 415 (4th Cir. 2001) (Wilkinson, J., dissenting) ("Subjecting

governors gratuitously to the threat of citations for contempt is an unwarranted federal interference with the administration of state government.").

For the same reasons, any subpoena for a Rule 30(b)(6) deposition issued by Plaintiffs—pursuant to this Court's authority and premised upon its jurisdiction—and directed to the Office of the Governor would also be barred by state sovereign immunity. *See, e.g.*, *Sarkar v. McCallin*, No. 07-cv-02704, 2009 WL 2762731, at *11 (D. Colo. Aug. 26, 2009) ("Plaintiff has provided no legal authority to show that a government entity protected by Eleventh Amendment immunity is required to respond to a 30(b)(6) notice of deposition" where the named defendants were government officials "in their official capacity."); *Sarkar v. McCallin*, 636 F.3d 572, 577 (10th Cir. 2011) (affirming the district court and explaining that where "Defendants [a]re sued in their official capacity as representatives of a state agency," that agency cannot "be deposed as the real party in interest under Rule 30(b)(6)").

Because state sovereign immunity deprives this Court of any jurisdiction over the Office of the Governor, the Court should quash the subpoenas issued to employees of that Office. Likewise, the Court should issue a protective order against any future subpoena seeking a Rule 30(b)(6) deposition of the Office. Though the Court need not proceed further, it has discretion to rule for the Office on other grounds to avoid having to "decide a constitutional question, particularly a complicated constitutional question." *Strawser v. Atkins*, 290 F.3d 720, 730 (4th Cir. 2002). But the Office reiterates that by making the alternative arguments that follow, it does not waive its sovereign immunity. *See id.* at 729.

II. Plaintiffs have not shown the extraordinary circumstances necessary to depose high-ranking executive officials.

Plaintiffs' efforts to depose top-ranking officials in the Office of the Governor are also barred by the "apex doctrine." *See, e.g.*, *Cross by & Through Steele v. XPO Express, Inc.*, No. CV

4:15-2480-BHH, 2017 WL 10544634, at *1 n.1 (D.S.C. May 8, 2017) (noting "various district courts in this Circuit have applied the Apex doctrine in resolving discovery issues" and collecting cases). Under this doctrine, "[i]t is well established that high-ranking government officials may not be deposed or called to testify about their reasons for taking official actions absent 'extraordinary circumstances.'" *In re McCarthy*, 636 F. App'x 142, 143 (4th Cir. 2015). The apex doctrine "recognizes that depositions of high-level officers severely burdens those officers and the entities they represent, and that adversaries might use this severe burden to their unfair advantage." *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 696 (D.N.M. 2019); *see In re United States*, 985 F.2d 510, 512 (11th Cir. 1993). Moreover, it reflects the rule that the federal judiciary "is not authorized to probe the mental processes of an executive or administrative officer." *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991) (cleaned up).

As the Fourth Circuit has explained, "absent extraordinary circumstances, a government decision-maker will not be compelled to testify about his mental processes in reaching a decision, including the manner and extent of his study of the record and his consultations with subordinates." *Id.* at 211. Thus, "there is a presumption against deposing high-ranking government officials." *United States v. Newman*, No. 19-1868, 2021 WL 1026019, at *3 (D.D.C. Mar. 17, 2021) (cleaned up). A plaintiff who seeks to depose such an official must show that the deposition would not impose a "hardship" on the official as well as "exceptional circumstances," such as some "unique personal knowledge of the matter" or an inability to obtain the information "through an alternative discovery method." *Tierra Blanca*, 329 F.R.D. at 696; *see also Newman*, 2021 WL 1026019, at *3; *Little v. JB Pritzker for Governor*, No. 18-6954, 2020 WL 868528, at *1 (N.D. Ill. Feb. 21,

2020); *Cross by and Through Steele v. XPO Express, Inc*., No. 4:16-1254, 2017 WL 10544634 (D.S.C. May 8, 2017).

For example, in *Timpson v. Haley*, another Court in this District held that "prior to allowing Plaintiffs to take the oral deposition" of U.N. Ambassador Nikki Haley, a "high-ranking public official[]," the plaintiffs had to "make a threshold showing that" her testimony would be relevant and proportional to the needs of the case, and that "the burden or expense of the proposed discovery" would not "outweigh[] its likely benefit." No. 6:16-cv-1174, ECF No. 170, at 7 (D.S.C. Mar. 21, 2018) (Coggins, J.) (cleaned up). That showing was required even though Ambassador Haley was a party to the action. Other courts have likewise quashed subpoenas in similar circumstances. *See, e.g.*, *Estate of Latoya Nicole Valentine v. State of South Carolina*, No. 3:18-00895-JFA, ECF No. 196 (D.S.C. Dec. 23, 2020) (Anderson, Joseph, J.) (quashing attempt to depose Governors McMaster and Haley, noting in part that the relevant information could be "obtained from some other source that is more convenient, less burdensome," and "could have been obtained in a myriad of other ways," *id.* at 8-9).

Here, Plaintiffs seek to depose the Governor's Deputy Chief of Staff, Communications Director, and some other unidentified but presumably high-ranking official in the Office of the Governor—all non-parties—about their decision-making processes or the decision-making process of the Governor. These officials qualify as high-ranking officials protected by the apex doctrine. *See, e.g.*, *Low v. Whitman*, 207 F.R.D. 9, 12 (D.D.C. 2002) ("[T]he title Deputy Chief of Staff indicates that [the person] is obviously not far from the Chief of Staff in terms of seniority."); *Newman*, 2021 WL 1026019, at *3, *5 (noting the doctrine encompasses "Assistants to the President" and applying it as well to the Deputy White House Counsel and Deputy Assistant to the President); *Jackson-Lipscomb v. City of New York*, No. 17-cv-10093, 2019 WL 6139443, at

*4 (S.D.N.Y. Oct. 7, 2019) (applying doctrine to "executive deputy commissioner" of the New York City Human Resources Administration and Department of Social Services); *Warshauer v. Chao*, No. 4:06-cv-0103-HLM, 2007 WL 9724338, at *1 (N.D. Ga. Oct. 22, 2007) (applying doctrine to the Deputy Assistant Secretary for Labor Management Programs and the Deputy Director of the Office of Labor Management Standards). Although the depositions Plaintiffs seek would impose an undue burden on the Office's employees under ordinary circumstances—and particularly when the General Assembly is in session—South Carolina is currently in a State of Emergency and subject to a presidentially declared major disaster declaration related to the 2019 Novel Coronavirus ("COVID-19"). *See* Executive Order No. 2021-20 (Apr. 22, 2021). By virtue of their high-ranking positions in the Office, these employees have significant duties and obligations in connection with the State's response to the ongoing and evolving public health emergency. Accordingly, sitting for depositions would constitute an unnecessary and undue hardship on these officials and impede both regular and emergency government operations and affairs.

Even though these subpoena recipients are high-ranking officials, Plaintiffs have made no effort to show the extraordinary circumstances necessary to justify their depositions. Plaintiffs have not explained what matters they need further discovery on as to these deponents, much less why that information cannot be obtained elsewhere. As for the Rule 30(b)(6) topics that Plaintiffs have proposed, *see* ECF No. 138-8, most of the relevant information appears to be readily obtainable (or has already been obtained) elsewhere, and the topics otherwise intrude on the executive decision-making processes. As discussed in more detail below, this protected sphere of decision-making is not discoverable, and it is, in any event, irrelevant to Plaintiffs' remaining claims. Thus, Plaintiffs' subpoenas are barred by the apex doctrine, and the Court should enter an

order quashing the subpoenas recently issued by Plaintiffs and protecting the Office and its high-ranking employees and officials from further discovery efforts.

III. The demanded depositions are an undue burden.

Under Rule 45(d)(3)(A), the court "*must* quash or modify a subpoena that . . . subjects a person to undue burden" or "requires disclosure of privileged or other protected matter" (emphasis added). The subpoenas here and any Rule 30(b)(6) deposition would subject the Office to an undue burden and likely also require disclosure of information protected by the deliberative process privilege. As noted, Plaintiffs have not explained how the Office of the Governor deponents have additional information relevant to Plaintiffs case that is either not already known or not able to be discovered through other available, and less intrusive, means. And they certainly cannot show that any purported benefits from these depositions outweigh the substantial costs imposed on the Office and its efforts to serve the people of South Carolina.

"All civil discovery, whether sought from parties or nonparties, is limited in scope by Rule 26(b)(1) in two fundamental ways." *Virginia Dep't of Corr. v. Jordan*, 921 F.3d 180, 188 (4th Cir.), *cert. denied*, 140 S. Ct. 672 (2019). The matter sought must be relevant, and "discovery must also be proportional to the needs of the case." *Id.* (cleaned up). "Proportionality requires courts to consider, among other things, whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* (cleaned up). "[T]he party seeking discovery has the burden to establish its relevancy and proportionality." *Accolla v. Speedway, LLC*, No. 0:17-cv-01972, 2017 WL 5523040, at *2 (D.S.C. Nov. 17, 2017). And Rule 26(b)(2) of the Federal Rules of Civil Procedure states that "the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less

burdensome, or less expensive." *E.g.*, *U.S. Equal Employment Opportunity Comm'n v. Akebono Brake Corp.*, No. 3:16-3545, 2018 WL 1365796, at *2 (D.S.C. Mar. 16, 2018).

"When discovery is sought from nonparties, however, its scope must be limited even more." *Jordan*, 921 F.3d at 189. "Nonparties are strangers to the litigation, and since they have no dog in the fight," they "should not be drawn into the parties' dispute without some good reason, even if they have information that falls within the scope of party discovery." *Id.* "A more demanding variant of the proportionality analysis therefore applies when determining whether, under Rule 45, a subpoena issued against a nonparty 'subjects a person to undue burden' and must be quashed or modified." *Id.* "[C]ourts must give the recipient's nonparty status special weight, leading to an even more demanding and sensitive inquiry than the one governing discovery generally." *Id.* (cleaned up). "The information sought must likely (not just theoretically) have marginal benefit in litigating important issues," and "the requesting party should be able to explain why it cannot obtain the same information, or comparable information that would also satisfy its needs, from one of the parties to the litigation." *Id.* "On the burden side," the Court should consider whether the subpoena "may impose a burden by invading privacy or confidentiality interests," and also consider the interests not just "of the recipient of the subpoena, as well as others who might be affected." *Id.* at 189–90.

Beginning with "with the asserted need for the information," *id.* at 190, Plaintiffs have not explained what information they could elicit from the demanded fact witnesses that would likely add significant, if any, value to their claims. Nor could any deposition testimony from any other Office of the Governor employee materially assist Plaintiffs' case. Plaintiffs have not explained why the Office, a non-party, "is a better source of information than" the actual parties. *Jordan*, 921 F.3d at 191. It seems clear that Plaintiffs are merely seeking the sort of "freewheeling nonparty

discovery" that is impermissible under the Federal Rules of Civil Procedure. *Id.*; *Harrison v. Kennedy*, No. 3:18-cv-0057, 2019 WL 3712187, at *2 (D.S.C. Aug. 7, 2019) ("A subpoena that seeks information irrelevant to the case is a per se undue burden."). No testimony is likely to be elicited that bears in any way on the purported disputes of fact under *Lemon*: whether the defendants' actions had a secular purpose, conveyed a message endorsing religion, or had the primary effect of advancing religion. Likewise, the Governor—who is a named Defendant and naturally in a better position than the Office to provide evidence regarding the legitimate purposes of his actions—has already specifically memorialized the legitimate purposes underlying his actions in the very documents Plaintiffs appear to challenge in this lawsuit. *See, e.g.*, Gov. McMaster Ltr. to Acting Assistant Secretary Wagner, at 2 (Feb. 27, 2018) (ECF No. 138-1) ("[T]he new regulatory subsections effectively require CPAs to abandon their religious beliefs or forgo the available public licensure and funding, which violates the constitutional rights of faith-based organizations."); *id*. ("A regulation used to limit the free exercise of faith-based providers violates the Religious Freedom Restoration Act."); *id*. ("In *Trinity Lutheran Church of Columbia, Inc. v. Cromer*, the Supreme Court held that the state policy of denying a 'qualified religious entity a public benefit solely because of its religious character . . . goes too far' and violates the Establishment Clause."); Executive Order No. 2018-12, at 1 (Mar. 13, 2018) (ECF No. 138-2)[3] ("[G]overnment at any level should not and shall not penalize religious activity by denying any person or organization an equal share of the rights, benefits, and privileges enjoyed by other individuals or organizations solely on account of one's religious identity and sincerely held

3. The Court can take judicial notice of the Governor's Executive Orders. *See Heyward v. Long*, 178 S.C. 351, ___, 183 S.E. 145, 152 (1935); *see also Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.*, 440 F. Supp. 3d 520, 524 n.2 (D.S.C. 2020) ("The court takes judicial notice of the executive orders as matters of public record.").

beliefs."); *id*. ("[F]aith-based organizations may retain their religious character and participate in government programs, provided that public funds are not used to directly subsidize or support religious worship activities."); *id*. ("[T]he foregoing rights are guaranteed by, *inter alia*, the First Amendment to the United States Constitution and article I, section 2 of the South Carolina Constitution, both of which provide that there shall be no laws prohibiting the free exercise of religion, abridging the freedom of speech, or inhibiting the corresponding right to associate with others."); *id*. ("[T]he rights of faith-based organizations to exercise religious beliefs while participating in government are also protected by the South Carolina Religious Freedom Act of 1999"). The legitimate government purposes or intentions underlying the challenged actions are by no means a mystery and can be readily identified from, and within, the four corners of the challenged documents. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (holding there was no Establishment Clause violation under *Lemon* when "it is clear from the face of the statute that the AFLA was motivated primarily, if not entirely, by a legitimate secular purpose"); *Ehlers-Renzi v. Connelly School of the Holy Child, Inc*., 224 F.3d 283, 288 (4th Cir. 2000) ("This secular purpose prong presents a 'fairly low hurdle,' [] which may be cleared by finding 'a plausible secular purpose' on the face of the regulation." (citations omitted)).

Not only do the subpoenas have no potential benefit, the Office of the Governor and its personnel would be greatly burdened by Plaintiffs' fishing expedition. These subpoenas would force high-ranking Office personnel to stop their public services and instead prepare for a pointless deposition. Even greater injury would result for any Rule 30(b)(6) witness, who would have to undertake significantly more preparation and could potentially be compelled to testify at trial. *See Jordan*, 921 F.3d at 193–94. Plaintiffs' discovery efforts would impose a substantial burden on the Office's employees under ordinary circumstances; however, as noted above, the extent of these

employees' obligations are even more significant in the midst of a legislative session and the State's response to COVID-19.

Moreover, "confidentiality concerns" "represent cognizable burdens under Rule 45." *Id.* at 192. Here, it is difficult to understand Plaintiffs' curious discovery crusade and demand for non-party testimony except as an attempt to obtain indirectly what they cannot obtain directly—namely, information about the Governor's privileged and protected decision-making process. *Cf. J.R. v. Walgreens Boots All., Inc.*, No. 2:19-cv-00446-DCN, 2020 WL 3620025, at *4 n.2 (D.S.C. July 2, 2020) ("In local parlance, this strategy would be called 'sandbagging.'"). But such information is both legally irrelevant and protected by the deliberative process privilege. *See Crosby v. United States*, C/A No.: 3:07-3668-JFA, 2009 WL 10678825, at *2 (D.S.C. Mar. 24, 2009) (Anderson, Joseph, J.). Most often, this privilege "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). However, it also protects the "mental processes" of a government official involved in making a governmental decision. *Franklin*, 922 F.2d at 211; *EEOC v. BMW Mfg. Co., LLC*, C.A. No. 7:13-1583-HMH, 2015 WL 5449086, at *2 (D.S.C. 2015). The purposes behind the privilege include to encourage free-ranging discussion of alternatives; prevent confusion that might result from the premature release of such nonbinding deliberations; and insulate against the chilling effect likely were officials to be judged not on the basis of their final decisions, but "for matters they considered before making up their minds." *City of Virginia Beach, Va. v. U.S. Dep't of Commerce*, 995 F.2d 1247, 1252–53 (4th Cir. 1993). Stated differently, the privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item

of discovery and front page news." *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 372 (4th Cir. 2009).

Here, absent some other explanation, Plaintiffs appear to seek information pertaining to the Governor's protected executive decision-making process. However, the relevant documents and letters in this case speak for themselves, and permitting depositions of the Governor's advisers about the decisions and actions at issue would only chill executive decision-making without providing any relevant evidence as to Plaintiffs' legal claims. As the Governor has explained, "[s]uch a situation would discourage free and robust internal discussion of the various alternatives available in any situation requiring gubernatorial action and would create a chilling effect on open and candid discussion between and among the Governor and his advisors." ECF No. 138, at 18. Plaintiffs cannot get around the bar on "prob[ing] the mental processes of" the Governor by requiring testimony about that same issue from his advisers. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (citation omitted). Such testimony is, as the Fourth Circuit has explained, "clearly improper and inadmissible." *Franklin*, 922 F.2d at 211.

In sum, "[n]onparties faced with civil discovery requests deserve special solicitude." *Jordan*, 921 F.3d at 194. "They should not be drawn into the parties' dispute unless the need to include them outweighs the burdens of doing so, considering their nonparty status." *Id.* But Plaintiffs have shown no benefit whatsoever to dragging the Office into this action, and they certainly have not shown that the substantial burdens associated with their proposed course of conduct outweigh these benefits. Accordingly, because "subpoena[s] that seek[] information irrelevant to the case is a per se undue burden," the Court should grant the present Motion and cut short Plaintiffs' unnecessary non-party discovery crusade. *Harrison v. Kennedy*, No. 3:18-CV-

0057-RMG, 2019 WL 3712187, at *2 (D.S.C. Aug. 7, 2019); *see id.* ("The determination of undue burden is within the discretion of the district court.").

IV. The subpoenas were not validly served on the named person under Rule 45.

Apart from their substantive infirmities, the subpoenas already issued are defective. Under Rule 45(b)(1) of the Federal Rules of Civil Procedure, "[s]erving a subpoena requires delivering a copy to the named person." But the subpoenas purportedly issued here were not personally delivered "to the named person." Instead, Plaintiffs gave them to the U.S. Postal Service, who evidently delivered them to a mailroom employee in the Office of the Governor. *See* Exhibit B. "The longstanding interpretation of Rule 45 has been that personal service of subpoenas is required." 9A Wright & Miller, *Federal Practice & Procedure* § 2454 (3d ed. 2020) (collecting cases); *see, e.g.*, *U.S. Bank Nat'l Ass'n as Tr. for CSMC Mortg.-backed Pass-through Certificates v. Dernier*, No. 16-cv-230, 2020 WL 3881412, at *3 (D. Vt. July 9, 2020) (certified mail insufficient); *CMI Roadbuilding, Inc. v. Dritto Techs., Inc.*, No. 20-02911, 2020 WL 5571743, at *2 (D.N.J. Sept. 17, 2020) ("[S]ervice of a subpoena by mail and, by extension, Federal Express, does not comport with the personal service requirement of Rule 45(b)(1)."); *Robertson v. Dennis*, 330 F.3d 696, 704 (5th Cir. 2003) ("[T]he rule indicates that proper service requires not only personal delivery of the subpoena, but also tendering of the witness fee and a reasonable mileage allowance.").

Thus, certified mail is not sufficient. That is especially true where, as here, the recipient of that mail was not "the named person" at whom the subpoena was directed. Even if certified mail would otherwise be permissible, the subpoena must be "deliver[ed]" "to the named person." Fed. R. Civ. P. 45(b)(1). Here, the subpoenas were not delivered to the named persons, but apparently to a mailroom employee. This service does not satisfy the plain text of Rule 45. *Cf. Klockner Namasco Holdings Corp. v. Daily Access.Com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga.

2002) ("[S]ervice on Burkart's wife at their residence did not satisfy the requirements of Rule 45 because Burkart himself was not personally served.").

V. Sanctions are appropriate.

Each "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). Because improper and unduly burdensome subpoenas are issued under the color of judicial authority, the Court, for its part, "must enforce this duty and impose an appropriate sanction—which may include . . . reasonable attorney's fees—on a party or attorney who fails to comply." *Id.* "Rule 45 focuses on the burden imposed on the recipient of the subpoena" and so "long as the duty to avoid imposing an undue burden is violated, it is of no consequence that the party or attorney who served the subpoena acted in good faith." *Georgia-Pac. LLC v. Am. Int'l Specialty Lines Ins. Co.*, 278 F.R.D. 187, 190 (S.D. Ohio 2010); *see also In re: Mod. Plastics Corp.*, 890 F.3d 244, 251 (6th Cir. 2018) (rejecting "a bad-faith requirement").

Since 1991, an attorney has been permitted to issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice. *See* Fed. R. Civ. P. 45(a)(3). "With the expanded power of the parties' attorneys to issue subpoenas, the liability of an attorney for misusing Rule 45 has been enlarged accordingly." 9A Wright & Miller, *Federal Practice & Procedure* § 2463 (3d ed. 2020). The attorney has duties "to avoid imposing undue burden or expense on the party subject to the subpoena," and the Court has "a correlative duty to enforce those duties and impose appropriate sanctions for the misuse of a subpoena," including for "the cost of attorneys' fees owed as a result of a breach" of these duties. *Id.* (collecting cases).

Here, if the Court agrees that the subpoenas and threatened subpoena should be quashed, then Plaintiffs' counsel should be responsible for the attorneys' fees and any other damages associated with their baseless demands on the Office, a non-party to the litigation. "When a

subpoena should not have been issued, literally everything done in response to it constitutes 'undue burden or expense' within the meaning" of Rule 45(d)(1). *Hallamore Corp. v. Capco Steel Corp.*, 259 F.R.D. 76, 81 (D. Del. 2009) (cleaned up); *see, e.g.*, *Molefi v. Oppenheimer Tr.*, No. 03-5631, 2007 WL 538547, at *3 (E.D.N.Y. Feb. 15, 2007) (noting an "undue burden exists by the mere fact that Mr. Ntsebeza, a non-party, had to, and did, expend time and money contesting a patently frivolous and procedurally flawed subpoena"); *CareToLive v. von Eschenbach*, No. 2:07-cv-729, 2008 WL 552431, at *3 (S.D. Ohio Feb. 26, 2008); *Huntair, Inc. v. Climatecraft, Inc.*, 254 F.R.D. 677, 680 (N.D. Okla. 2008). Sanctions are also warranted for the Office's efforts in obtaining a protective order against an inevitable third subpoena. *See* Fed. R. Civ. P. 26(c)(3); Fed. R. Civ. P. 37(a)(5)(B).

For the foregoing reasons, should the Court grant the present Motion and quash the subpoenas and issue a protective order, the Office respectfully requests that the Court consider taxing the Office's corresponding costs against Plaintiffs and imposing appropriate sanctions, whether in the form of reasonable attorneys' fees and expenses or otherwise. In the event the Court reaches this issue, the Office further requests a reasonable time and opportunity to submit an itemized list of fees and costs incurred in connection with defending against Plaintiffs' issued and anticipated subpoenas.

CONCLUSION

For the foregoing reasons, the Office respectfully asserts that the Court should grant the instant Motion and enter an order quashing Plaintiffs' recently issued subpoenas and an appropriate protective order with respect to any additional subpoenas that Plaintiffs may direct to the Office or its employees.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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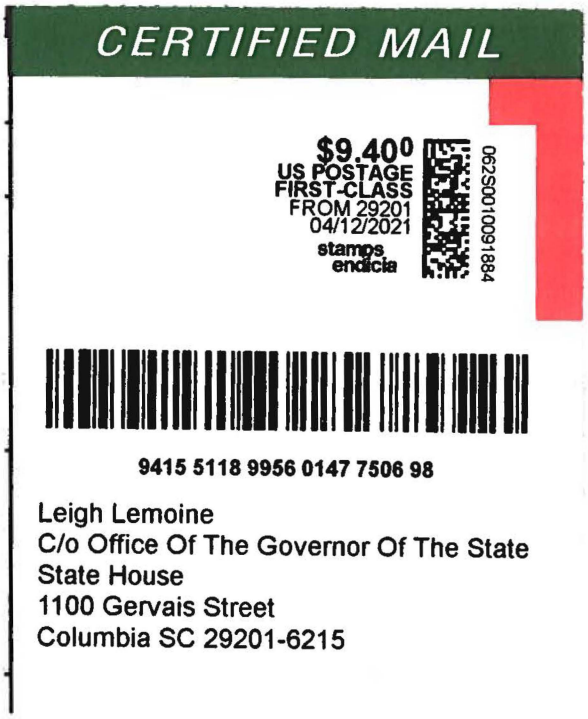
April 29, 2021
Columbia, South Carolina

EXHIBIT A

CERTIFIED MAIL



BURNETTE SHUTT MCDANIEL
Moving law forward.

BURNETTE SHUTT & MCDANIEL, PA
912 Lady Street | PO Box 1929 | Columbia, SC 29202
O: 803.850.0912 F: 803:904.7910
burnetteshutt.law

Nekki Shutt - Partner
P: 803.904.7912
F: 803.904.7910
nshutt@burnetteshutt.law
Certified Specialist in Employment and Labor Law by the South Carolina Supreme Court

April 12, 2021

VIA CERTIFIED MAIL, RETURN-RECEIPT REQUESTED
TRACKING NO.: 9415 5118 9956 0147 7506 98
Leigh Lemoine
c/o: Office of the Governor of the
State of South Carolina
State House
1100 Gervais Street
Columbia, SC 29201

RE: Eden Rogers and Brandy Welch vs. U.S. Dept. of Health and Human Services; Alex Azar, in his official capacity as Secretary of the U.S. Dept. of Health and Human Services; Admin. for Children and Families; Lynn Johnson, in her official capacity as Assistant Secretary of the Admin. for Children and Families; Scott Lekan, in his official capacity as Principal Deputy Assistant Secretary of the Admin. for Children and Families; Henry McMaster, in his official capacity as Governor of the State of South Carolina; and Michael Leach, in his official capacity as State Director of the South Carolina Dept. of Social Services
Civil Action No.: 6-19-cv-01567-JD
Our File No.: 3781.005

Dear Ms. Lemoine:

We represent Plaintiffs in the above-referenced matter currently pending in the United States District Court for the District of South Carolina, Greenville Division. Pursuant to Rule 45 of the Federal Rules of Civil Procedure, enclosed please find a Subpoena requiring your remote presence to be deposed. You will also find a Certificate of Service, indicating the service of same upon all counsel of record.

You will note that this Subpoena is for your remote personal appearance to be deposed remotely on **April 29, 2021** at **9:00 A.M.** via Zoom or alternative remote means.

I am also enclosing a check from this law firm in the amount of $40.00 to compensate you for your deposition witness fee, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

By copy of this letter, I am advising counsel for Defendants that your presence to be deposed has been requested. Should you have any questions or concerns regarding the enclosed subpoena, please do not hesitate to let me know.

With kind regards, I am

Sincerely,

Nekki Shutt

NS:trj
Enclosures
cc: Clients (w/ encls.) (via email only)
ACLU of South Carolina (w/ encls.) (via email only)
Cravath, Swaine & Moore, LLP (w/ encls.) (via email only)
M. Malissa Burnette, Esq. (w/ encls.) (via email only)
Peter M. McCoy, Jr., Esq. (w/ encls.) (via email only)
Joseph H. Hunt, Esq. (w/ encls.) (via email only)
Christie V. Newman, Esq. (w/ encls.) (via email only)
James R. Powers, Esq. (w/ encls.) (via email only)
Miles E. Coleman, Esq. (w/ encls.) (via email only)
Jay T. Thompson, Esq. (w/ encls.) (via email only)
Robert D. Cook, Esq. (w/ encls.) (via email only)
William H. Davidson, Esq. (w/ encls.) (via email only)
Kenneth P. Woodington, Esq. (w/ encls.) (via email only)

AO 88A (Rev. 12/20) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Rogers, et al. *Plaintiff* v. United States Department of Health and Human Services, et al. *Defendant*	)	Civil Action No. 6:19-cv-01567-JD

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Leigh Lemoine

(Name of person to whom this subpoena is directed)

☑ Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters:

Place: To be conducted remotely via a videoconferencing platform	Date and Time: 04/29/2021 9:00 am

The deposition will be recorded by this method: Stenographically and by video

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: April 12, 2021

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Eden Rogers and Brandy Welch, who issues or requests this subpoena, are:

Nekki Shutt, Burnette Shutt McDaniel, 912 Lady St., 2nd Floor, Columbia, SC 29202, nshutt@burnetteshutt.law, 803-850-0912

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 6:19-cv-01567-JD

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____ on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

EDEN ROGERS and BRANDY WELCH, Plaintiffs, vs. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX AZAR, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ADMINISTRATION FOR CHILDREN AND FAMILIES; LYNN JOHNSON, in her official capacity as Assistant Secretary of the ADMINISTRATION FOR CHILDREN AND FAMILIES; SCOTT LEKAN, in his official capacity as Principal Deputy Assistant Secretary of the ADMINISTRATION FOR CHILDREN AND FAMILIES; HENRY MCMASTER, in his official capacity as Governor of the STATE OF SOUTH CAROLINA; and, MICHAEL LEACH, in his official capacity as State Director of the SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, Defendants.	Civil Action No.: 6:19-cv-01567-JD **CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the following as indicated herein below, by emailing and by mailing a copy of same on the date below by email and by First Class U.S. Mail, postage pre-paid, addressed to the following:

DOCUMENT SERVED: DEPOSITION SUBPOENA TO LEIGH LEMOINE

PARTIES SERVED:

Peter M. McCoy, Jr., Esq.
Joseph H. Hunt, Esq.
Christie V. Newman, Esq.
Christopher A. Bates, Esq.
Michelle Bennett, Esq.
UNITED STATES ATTORNEY OFFICE
1441 Main Street, Suite 500
Columbia, South Carolina 29201
Christie.Newman@usdoj.gov

ATTORNEYS FOR FEDERAL DEFENDANTS

James R. Powers, Esq.
Trial Attorney
Federal Programs Branch
U.S. Department of Justice,
Civil Division
1100 L. Street, NW
Washington, DC 20005
james.r.powers@usdoj.gov

ATTORNEY FOR FEDERAL DEFENDANTS

Miles E. Coleman, Esq.
NELSON MULLINS RILEY & SCARBOROUGH, LLP
2 W. Washington Street, 4th Floor
Greenville, South Carolina 29601
miles.coleman@nelsonmullins.com

ATTORNEY FOR DEFENDANT HENRY MCMASTER

Jay T. Thompson, Esq.
NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201
jay.thompson@nelsonmullins.com

ATTORENY FOR DEFENDANT HENRY MCMASTER

Robert D. Cook, Esq.
South Carolina Solicitor General
OFFICE OF THE ATTORNEY GENERAL
Post Office Box 11549
Columbia, South Carolina 29211
bcook@scag.gov

ATTORNEYS FOR DEFENDANT HENRY MCMASTER

William H. Davidson, II, Esq.
Kenneth P. Woodington, Esq.
DAVIDSON, WREN & DEMASTERS, PA
Post Office Box 8568
Columbia, South Carolina 29202
wdavidson@dml.law.com
kwoodington@dml.law.com

ATTORNEYS FOR DEFENDANT MICHAEL LEACH

Tammie Jackson, Legal Assistant
BURNETTE SHUTT & MCDANIEL, PA

April 12, 2021

Columbia, South Carolina

CERTIFIED MAIL

CERTIFIED MAIL

$9.40
US POSTAGE
FIRST-CLASS
FROM 29201
04/12/2021
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062S0010091884

9415 5118 9956 0147 7967 02

Brian Symmes
State House
C/o Office Of The Governor Of The State
1100 Gervais Street
Columbia SC 29201-6215

BURNETTE SHUTT MCDANIEL
Moving law forward.

BURNETTE SHUTT & MCDANIEL, PA
912 Lady Street | PO Box 1929 | Columbia, SC 29202
O: 803.850.0912 F: 803:904.7910
burnetteshutt.law

Nekki Shutt - Partner
P: 803.904.7912
F: 803.904.7910
nshutt@burnetteshutt.law
Certified Specialist in Employment and Labor Law by the South Carolina Supreme Court

April 12, 2021

VIA CERTIFIED MAIL, RETURN-RECEIPT REQUESTED
TRACKING NO.: 9415 5118 9956 0147 7967 02
Brian Symmes
c/o: Office of the Governor of the
State of South Carolina
State House
1100 Gervais Street
Columbia, SC 29201

RE: Eden Rogers and Brandy Welch vs. U.S. Dept. of Health and Human Services; Alex Azar, in his official capacity as Secretary of the U.S. Dept. of Health and Human Services; Admin. for Children and Families; Lynn Johnson, in her official capacity as Assistant Secretary of the Admin. for Children and Families; Scott Lekan, in his official capacity as Principal Deputy Assistant Secretary of the Admin. for Children and Families; Henry McMaster, in his official capacity as Governor of the State of South Carolina; and Michael Leach, in his official capacity as State Director of the South Carolina Dept. of Social Services
Civil Action No.: 6-19-cv-01567-JD
Our File No.: 3781.005

Dear Mr. Symmes:

We represent Plaintiffs in the above-referenced matter currently pending in the United States District Court for the District of South Carolina, Greenville Division. Pursuant to Rule 45 of the Federal Rules of Civil Procedure, enclosed please find a Subpoena requiring your remote presence to be deposed. You will also find a Certificate of Service, indicating the service of same upon all counsel of record.

You will note that this Subpoena is for your remote personal appearance to be deposed remotely on **April 30, 2021** at **9:00 A.M.** via Zoom or alternative remote means.

I am also enclosing a check from this law firm in the amount of $40.00 to compensate you for your deposition witness fee, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

By copy of this letter, I am advising counsel for Defendants that your presence to be deposed has been requested. Should you have any questions or concerns regarding the enclosed subpoena, please do not hesitate to let me know.

With kind regards, I am

Sincerely,

Nekki Shutt

NS:trj
Enclosures
cc: Clients (w/ encls.) (via email only)
ACLU of South Carolina (w/ encls.) (via email only)
Cravath, Swaine & Moore, LLP (w/ encls.) (via email only)
M. Malissa Burnette, Esq. (w/ encls.) (via email only)
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AO 88A (Rev. 12/20) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Rogers, et al.
Plaintiff
v.
United States Department of Health and Human Services, et al.
Defendant

Civil Action No. 6:19-cv-01567-JD

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Brian Symmes

(Name of person to whom this subpoena is directed)

☑ Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must promptly confer in good faith with the party serving this subpoena about the following matters, or those set forth in an attachment, and you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about these matters:

Place: To be conducted remotely via a videoconferencing platform	Date and Time: 04/30/2021 9:00 am

The deposition will be recorded by this method: Stenographically and by video

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: April 12, 2021

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Eden Rogers and Brandy Welch, who issues or requests this subpoena, are:

Nekki Shutt, Burnette Shutt McDaniel, 912 Lady St., 2nd Floor, Columbia, SC 29202, nshutt@burnetteshutt.law, 803-850-0912

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 6:19-cv-01567-JD

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named individual as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

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(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

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(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

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(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

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(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

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(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

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(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

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(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

EDEN ROGERS and BRANDY WELCH, Plaintiffs, vs. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ALEX AZAR, in his official capacity as Secretary of the UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ADMINISTRATION FOR CHILDREN AND FAMILIES; LYNN JOHNSON, in her official capacity as Assistant Secretary of the ADMINISTRATION FOR CHILDREN AND FAMILIES; SCOTT LEKAN, in his official capacity as Principal Deputy Assistant Secretary of the ADMINISTRATION FOR CHILDREN AND FAMILIES; HENRY MCMASTER, in his official capacity as Governor of the STATE OF SOUTH CAROLINA; and, MICHAEL LEACH, in his official capacity as State Director of the SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, Defendants.	Civil Action No.: 6:19-cv-01567-JD **CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the following as indicated herein below, by emailing and by mailing a copy of same on the date below by email and by First Class U.S. Mail, postage pre-paid, addressed to the following:

DOCUMENT SERVED: DEPOSITION SUBPOENA TO BRIAN SYMMES

PARTIES SERVED:

Peter M. McCoy, Jr., Esq.
Joseph H. Hunt, Esq.
Christie V. Newman, Esq.
Christopher A. Bates, Esq.
Michelle Bennett, Esq.
UNITED STATES ATTORNEY OFFICE
1441 Main Street, Suite 500
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April 12, 2021

Columbia, South Carolina

EXHIBIT B

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EXHIBIT C

HENRY MCMASTER
GOVERNOR

THOMAS A. LIMEHOUSE, JR.
CHIEF LEGAL COUNSEL
OFFICE OF THE GOVERNOR

April 20, 2021

VIA EMAIL ONLY
Peter T. Barbur, Esquire
Cravath, Swaine & Moore LLP
825 Eighth Avenue
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pbarbur@cravath.com

RE: *Eden Rogers et al. v. U.S. Department of Health & Human Services et al.*
Civil Action No.: 6:19-cv-01567-JD (D.S.C.)

Dear Mr. Barbur:

The Office of the Governor ("Office") is in receipt of your April 19, 2021 letter on behalf of Plaintiffs in the above-referenced matter, as well as the separate letters and accompanying subpoenas dated April 12, 2021, which Plaintiffs' local counsel recently addressed to two of the Office's employees. Please allow this correspondence to serve as the Office's consolidated response to the aforementioned communications from Plaintiffs' counsel and to memorialize and briefly address, *seriatim*, the Office's preliminary objections to the discovery-related matters raised therein.

First, according to your April 19, 2021 letter, Plaintiffs "are planning to serve a Rule 45 subpoena for a 30(b)(6) deposition of the Office of the Governor" and you would like schedule a time "to meet and confer regarding the 30(b)(6) topics, and to discuss suitable deposition dates." As a threshold matter, based on a review of your recent letter, as well as the seventeen proposed deposition topics, it appears that any such subpoena directed to the Office would be both substantively inappropriate and procedurally improper. Moreover, Plaintiffs' proposed 30(b)(6) deposition of the Office would impose an undue, and unnecessary, burden on the Office and would otherwise exceed the scope of discovery permitted by Rule 26(b) of the Federal Rules of Civil Procedure. Accordingly, I would be glad to arrange a mutually convenient time to meet and confer regarding this matter, and to the extent necessary, the Office's potential motion to, *inter alia*, quash any such subpoena. To this end, I am currently available on the following dates and times in the near term:

Wednesday, April 21, 2021 (10:45 a.m.–12:15 p.m.)
Thursday, April 22, 2021 (1:00 p.m.–3:00 p.m.)
Friday, April 23, 2021 (1:30 p.m.–2:30 p.m.)
Monday, April 26, 2021 (12:00 p.m.–4:00 p.m.)

Please advise whether one or more of these options will work with your schedule, and I will be glad to arrange a conference call.

Second, as for the Office's receipt late last week of the aforementioned correspondence and accompanying subpoenas addressed to two of its employees by Plaintiffs' local counsel, this letter will confirm that the employees named therein are not available on the identified dates. Further, the Office objects to any such discovery efforts on several independent grounds. Absent a withdrawal of these subpoenas, the Office intends to ask the Court to quash the same, enter an appropriate protective order, or both. Therefore, I would welcome the opportunity to discuss this matter with you and to confer regarding the Office's anticipated motions in accordance with Rule 7.02 of the Local Civil Rules (D.S.C.).

Given that the issues associated with—and the Office's objections to—Plaintiffs' efforts to depose two of the Office's employees naturally overlap with Plaintiffs' stated intentions to depose one or more representatives of the Office pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, I suggest that we meet and confer regarding these matters in a comprehensive and collaborative manner. In the event we are unable to resolve these matters without Court involvement after conferring in good faith, I would similarly suggest presenting the issues and objections to the Court for a decision in a consolidated manner to avoid duplicative motions practice, promote efficiency, and minimize the resulting burden on the Court.

I look forward to hearing from you regarding your availability and to discussing these matters further at a mutually convenient time. Should you have any questions or concerns in the interim, please do not hesitate to contact me.

Very truly yours,

Thomas A. Limehouse, Jr.
Chief Legal Counsel

cc: Nekki Shutt, Esquire (*via email only*)
M. Malissa Burnette, Esquire (*via email only*)
Miles E. Coleman, Esquire (*via email only*)
Jay T. Thompson, Esquire (*via email only*)
Robert D. Cook, Esquire (*via email only*)
William H. Davidson, II, Esquire (*via email only*)
Kenneth P. Woodington, Esquire (*via email only*)