

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, NICOLE §  
DIMETMAN, VICTOR HOLMES, and §  
MARK PHARISS, §  
*Plaintiffs,* §

v. §

CIVIL ACTION NO.  
5:13-CV-982-OLG

GREG ABBOTT, in his official capacity as §  
Governor of the State of Texas, KEN §  
PAXTON, in his official capacity as Texas §  
Attorney General, GERARD RICKHOFF, §  
in his official capacity as Bexar County §  
Clerk, and KIRK COLE, in his official §  
capacity as Interim Commissioner of the §  
Texas Department of State Health Services §  
*Defendants.* §

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**EMERGENCY MOTION TO RESCIND OR, IN THE ALTERNATIVE, TO QUASH  
THE COURT’S AUGUST 5 ORDER COMPELLING THE ATTENDANCE OF THE  
INTERIM COMMISSIONER OF THE DEPARTMENT OF STATE HEALTH SERVICES AND  
THE ATTORNEY GENERAL OF THE STATE OF TEXAS AT THE AUGUST 12 HEARING**

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This Court should rescind or quash the Court's August 5 order requiring the attendance of Interim Commissioner of the Texas Department of State Health Services Kirk Cole and Attorney General Ken Paxton. Under well-established precedent, a high-ranking government official should not be compelled to personally appear and testify absent extraordinary circumstances, which are present only when a high-ranking official has personal knowledge of information that is essential to a case and that evidence cannot be obtained from another source. The attendance of the Interim Commissioner and the Attorney General at the August 12 hearing does not meet this demanding standard. While these officials are informed of the events that are the subject of the Court's August 5 order, other individuals at their respective agencies have been intimately involved in the details of responding to Stone-Hoskins' request and developing a policy regarding the issuance of death certificates in the wake of the *Obergefell* decision. The relevant evidence responsive to the Court's August 5 order is therefore available from alternative witnesses who have more superior knowledge than the Interim Commissioner and the Attorney General. Defendants intend to produce Barbara Klein, Deputy General Counsel at the Department of State Health Services, and Brantley Starr, Deputy Attorney General for Legal Counsel at the Office of the Attorney General, to testify at the August 12 hearing if necessary. See Exhibit A, Declaration of Brantley Starr; Exhibit B, Declaration of Barbara Klein.

Given the importance of the issues implicated by the August 5 order, Defendants respectfully request a decision on their motion to quash by 3:00 p.m. on

Monday, August 10. It is necessary that Defendants make this exceptional request in order to preserve the option of seeking appellate relief before the hearing on August 12. For the reasons stated below, the Court should grant the motion.

**ARGUMENT AND AUTHORITIES**

A. The Legal Standard.

It is a well-settled principle that high-ranking government officials cannot be compelled to personally appear and testify in judicial proceedings absent extraordinary circumstances, which exist only when those officials can provide essential testimony that cannot be obtained from other witnesses. *See, e.g., In re Office of Inspector Gen.*, 933 F.2d 276, 278 (5th Cir. 1991) (per curiam) (top executive department officials “should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions” (internal quotation marks omitted)). Indeed, the Fifth Circuit and other appellate courts have consistently issued writs of mandamus to prevent the compulsion of testimony by high-ranking governmental officials. *In re FDIC*, 58 F.3d 1055, 1062-63 (5th Cir. 1995) (granting mandamus to quash testimony of three members of the Board of Directors of the FDIC); *In re United States (Reno & Holder)*, 197 F.3d 310, 316 (8th Cir. 1999) (granting mandamus to quash testimony by Attorney General and Deputy Attorney General); *In re United States (Kessler)*, 985 F.2d 510, 513 (11th Cir. 1993) (per curiam) (recognizing mandamus as appropriate mechanism for executive official to challenge subpoena rather than being forced to disobey court order); *see also In re SEC*, 374 F.3d 184, 187-88 (2d Cir. 2004) (granting mandamus to quash testimony from two

SEC lawyers); accord *In re United States (Jackson)*, 624 F.3d 1368, 1377 (11th Cir. 2010). Because “[h]igh ranking government officials have greater duties and time constraints than other witnesses . . . [they] ‘should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.’” *In re United States (Kessler)*, 985 F.2d at 512 (quoting *Simplex Time Recorder Co. v. Sec’y of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985)). If other persons can provide the information sought, testimony cannot be required from a high-ranking official. *Id.* at 512-13. Extraordinary circumstances must therefore exist before the testimony is sought from a high-ranking government official. *In re Office of Inspector Gen.*, 933 F.2d at 278; see also *In re FDIC*, 58 F.3d at 1062 (“We think it will be the rarest of cases . . . in which exceptional circumstances can be shown where the testimony is available from an alternate witness.”).

There are sound reasons for imposing such a heavy burden. As the Fifth Circuit explained in *In re FDIC*:

“[T]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.” [*In re Office of the Inspector Gen.*, 933 F.2d 276, 278 (5th Cir. 1991) (per curiam)] (quoting *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C.Cir.1985)). “High ranking government officials have greater duties and time constraints than other witnesses.” *In re United States*, 985 F.2d 510, 512 (11th Cir.) (per curiam), cert. denied, 510 U.S. 989, 114 S.Ct. 545, 126 L.Ed.2d 447 (1993). “[T]he Supreme Court has indicated that the practice of calling high officials as witnesses should be discouraged.” *Id.* (citing *United States v. Morgan*, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941)).

58 F.3d at 1060 (first and third alterations in original).

Furthermore, requiring high-level governmental officers to testify regarding their official actions and thought processes threatens to disrupt the separation of powers between the judicial and executive branches. *See id.* n.7 (noting “serious repercussions for the relationship between two coequal branches of government” (quoting *In re United States (Kessler)*, 985 F.2d at 513)); *see also Morgan*, 313 U.S. at 422 (Secretary of Agriculture should not have been compelled to testify at trial, as “it was not the function of the court to probe the mental processes of the Secretary” (internal quotation marks omitted)); *In re Att’y Gen. of U.S.*, 596 F.2d 58, 64 (2d Cir. 1979) (“[A] contempt sanction imposed on the Attorney General in his official capacity has greater public importance, with separation of power overtones, and warrants more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant.”).

B. No Extraordinary Circumstances Exist That Require the Interim Commissioner and the Attorney General to Appear at the August 12 Hearing.

The “settled rule” in the Fifth Circuit is that “exceptional circumstances” must exist before a district court can compel high-level governmental officers to personally appear and testify at a legal proceeding. *In re FDIC*, 58 F.3d at 1060 (quoting *In re Office of Inspector Gen.*, 933 F.2d at 278); *accord In re United States (Jackson)*, 624 F.3d at 1373; *see supra* Part A. That standard is not satisfied here. This requires the movant to make a “strong showing.” *In re FDIC*, 58 F.3d at 1061. As a threshold matter, courts cannot compel high-level officers to personally appear unless they have personal knowledge regarding the subject matter in question and possession of that information is “essential” to the case. *In re United States (Reno & Holder)*, 197 F.3d

at 314; *Alexander v. FBI*, 186 F.R.D. 1, 4 (D.D.C. 1998). And even if a high-level official has such essential personal knowledge, the movant still must demonstrate that the requested information is not obtainable from another source. *See In re FDIC*, 58 F.3d at 1062.

*In re United States (Jackson)* is instructive in analyzing this case. There, the Eleventh Circuit held that the district court abused its discretion by compelling the Environmental Protection Agency's Administrator to appear at a hearing to determine whether agency officials should be held in contempt for failing to comply with court orders regarding pollution of the Everglades. 624 F.3d at 1377. The Eleventh Circuit reasoned that the Administrator lacked primary responsibility for the subject matter at issue and the requested information could be provided by other, lower-ranking officers. *Id.* at 1373. The district court's order thus represented a "serious encroachment on the separation of powers." *Id.* at 1374.

So too here. The Court's order compels the appearance of two high-level state officials, based on Stone-Hoskins' contempt motion that generally asserts (the incorrect proposition) that they should be held in contempt of court because they "continue to refuse to recognize same-sex marriages." Doc. 104 at 6. It cannot be disputed that the Interim Commissioner and the Attorney General are high-level officials whose appearance cannot be required absent a showing of exceptional circumstances. *See Morgan*, 313 U.S. at 422 (explaining that the Secretary of Agriculture "should never have been subject to [deposition]"); *In re United States*

(*Reno & Holder*), 197 F.3d at 314-16 (granting mandamus to prevent compelled testimony by the Attorney General and the Deputy Attorney General).

There is no record, or even an articulation, of extraordinary circumstances that could warrant compelling the Interim Commissioner and the Attorney General to testify. The order does not indicate that these individuals possess any personal knowledge or information—let alone *essential* information—relating to the precise issue here: the State’s amendment of death certificates following entry of this Court’s July 7 order. Nor has it been established that the information sought can only be obtained from the named Defendants. Indeed, it is virtually impossible to establish extraordinary circumstances, particularly when Defendants have identified that Barbara Klein, Deputy General Counsel at the Department of State Health Services, and Brantley Starr, Deputy Attorney General for Legal Counsel at the Office of the Attorney General, will be available to testify if necessary. While both the Commissioner and the Attorney General have been apprised of the events surrounding the death certificate issue, other officials at the Office of the Attorney General and the Department of State Health Services had far greater involvement and responsibility with the activities that led to the Court’s August 5 order.<sup>1</sup> See Exhibit A, Declaration of Brantley Starr; Exhibit B, Declaration of Barbara Klein.

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<sup>1</sup> Although Defendants intend to produce other officials at the August 12 hearing, many aspects of the internal discussions at the Department of State Health Services and the external discussions the Department had with the Office of the Attorney General were privileged communications. By producing these individuals, Defendants reserve the right to assert the attorney-client and/or work product privileges as to the substance of those discussions.

Finally, no exceptional circumstances can be established under the factual record of this case that would warrant the compulsion of high-ranking officials when Stone-Hoskins has already obtained precisely what he sought through his (procedurally improper) intervention: his spouse's amended death certificate. Accordingly, Interim Commissioner Cole and Attorney General Paxton should be excused from attending and testifying at the August 12 hearing, because neither has unique personal knowledge that is unavailable from other sources.

C. The Relevant Evidence Is Available from Other Witnesses.

In the event this Court does not cancel its August 12 hearing as requested in the pending motion for reconsideration, Defendants intend to bring the following witnesses to the hearing:

- Barbara Klein, Deputy General Counsel for the Department of State Health Services, who has superior factual knowledge in the Department's internal discussions and external discussions with the Office of the Attorney General surrounding the issuance of the death certificate.
- Brantley Starr, Deputy Attorney General for Legal Counsel at the Office of the Attorney General, who is the primary person at the Office of the Attorney General who communicated with the Department of State Health Services and coordinated the Office of the Attorney General's research and consultation regarding the impact of *Obergefell* on the Department's forms and applications.

These two representatives have superior knowledge of the relevant topics the Court may wish to address at the August 12 hearing by virtue of their positions and involvement in the events in question. Accordingly, no extraordinary circumstances exist to justify compelling the Interim Commissioner or the Attorney General to

attend or give testimony on August 12. *See In re FDIC*, 58 F.3d at 1062 (“We think it will be the rarest of cases . . . in which exceptional circumstances can be shown where the testimony is available from an alternate witness”).

**CONCLUSION**

For the reasons stated above, the Court should grant Defendants’ motion and excuse the attendance of Interim Commissioner Cole and Attorney General Paxton at the August 12 hearing.

Respectfully submitted,

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***ATTORNEYS FOR STATE  
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**CERTIFICATE OF SERVICE**

I certify that on August 10, 2015, I served all parties a copy of the foregoing document via the Court's ECF service.

/s/ William T. Deane  
WILLIAM T. DEANE

**CERTIFICATE OF CONFERENCE**

I certify that on August 9, 2015, counsel for the State Defendants attempted to confer with counsel for the Intervenor, but could not reach him to determine his position on this motion. As a result, this Court should treat this motion as opposed.

/s/ William T. Deane  
WILLIAM T. DEANE