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The Honorable Ronald B. Leighton

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

DANIEL MITCHELL, *et al.*,

Plaintiffs,

v.

CHARLES ATKINS, in his official capacity as
the Sheriff of Clark County, *et al.*,

Defendants,

and

SAFE SCHOOLS SAFE COMMUNITIES,

*Intervenor-
Defendant.*

NO. 3:19-cv-5106

DEFENDANT
TERESA BERNTSEN’S REPLY
IN SUPPORT OF HER
MOTION FOR PROTECTIVE
ORDER

1 **I. INTRODUCTION**

2 Plaintiffs' Opposition makes clear that they seek for Director Berntsen to designate a
 3 representative from the Department of Licensing (DOL) to testify as a cross between a *de facto*
 4 firearms expert and a pseudo-lawyer defending the Director's legal positions. An agency is not
 5 required to develop internal expertise in, as Plaintiffs' proposed deposition would require, "the
 6 prevalence and use of . . . banned firearms in Washington," "the behavior of the owners or those
 7 firearms," Dkt. 58 at 9, or the state interests underlying citizen-led initiatives. Nor is DOL required
 8 to disclose its attorneys' legal opinions or the legislative facts underlying them. For those reasons,
 9 a protective order is necessary to quash a burdensome and improper deposition.

10 **II. ARGUMENT IN REPLY**

11 **A. The Director Is Not Required to Designate a Representative on Topics Unrelated to
 12 DOL's Organizational Mission and of Which It Has No Knowledge**

13 DOL's limited role with respect to semiautomatic assault rifles (SARs or assault rifles) is
 14 to process records of their purchase or sale. Plaintiffs evidently believe that this narrow
 15 recordkeeping responsibility requires DOL not only "educate itself on the statute" sufficient to do
 16 its job, but also "to justify its continuing enforcement, and to defend the constitutionality of the
 17 law." Dkt. 58 at 10. Plaintiffs are mistaken. DOL is responsible for enforcing I-1639's
 18 recordkeeping requirements; the Attorney General is responsible for defending the law. *See* RCW
 19 43.10.040. A state agency must educate itself sufficiently to enforce the statute, which here means
 20 knowing the relevant recordkeeping and licensing requirements. Dkt. 55, ¶¶ 5, 8. DOL has done
 21 so, and Plaintiffs have not sought any discovery concerning those requirements.

22 An agency is certainly not expected in discovery to craft purely legal arguments and
 23 marshal legislative facts to support them, and Plaintiffs cite no authority to the contrary. Plaintiffs
 24 also incorrectly suggest that the Director has not cited cases where courts precluded Rule 30(b)(6)
 25 depositions seeking testimony on matters not "known or reasonably available to the
 26 organization." *See, e.g., CRST Expedited, Inc. v. Swift Transp. Co. of Ariz.*, No. 17-CV-25-CJW-
 KEM, 2019 WL 2714508, at *4 (N.D. Iowa Mar. 6, 2019) (granting motion for protective order

1 as to Rule 30(b)(6) topic); *St. Jude Med., Inc. v. Access Closure, Inc.*, No. 08-CV-4101, 2010 WL
2 11484395, at *1 (W.D. Ark. Oct. 12, 2010) (denying in part motion to compel Rule 30(b)(6)
3 deposition testimony regarding subjects outside entity’s knowledge and which it thus had “no
4 obligation to designate a corporate witness” to address). A protective order quashing the
5 deposition notice is warranted here for the same reason that it seeks testimony on subjects that are
6 simply not “known or reasonably available to the organization.” Fed. R. Civ. P. 30(b)(6). Because
7 Plaintiffs’ proposed topics are outside DOL’s realm of knowledge, the agency’s “obligations
8 under Rule 30(b)(6) obviously cease,” including the obligation to participate in a deposition on
9 those topics. *See, e.g., Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995).

10 That the information sought is both unknown and unavailable to DOL is clear from
11 Plaintiffs’ own description of the testimony they hope to elicit. They demand that DOL designate
12 a witness “prepared to testify” regarding (i) “the number of Washington residents who own
13 firearms subject to the bans,” (ii) “what crimes have been committed by those owners” (iii) “non-
14 criminal uses of the firearms,” and (iv) “any facts the Department has supporting a contention that
15 the banned firearms are most useful for military service.” Dkt. 58 at 5. Though such facts
16 indisputably fall far outside DOL’s mission and no one within it has relevant knowledge of such
17 facts, Plaintiffs contend that they are entitled to have a DOL representative educate herself on the
18 topics, simply because Plaintiffs consider them important to the case. Moreover, if DOL fails to
19 “make [an] investigation” into matters outside its expertise, Plaintiffs claim it would invite
20 exclusion of any such evidence later in the case, even if in the form of legislative facts or expert
21 testimony. *See* Dkt. 58 at 6. Thus, while Plaintiffs argue that the agency “cannot unilaterally
22 decide that Plaintiffs must litigate their challenge in the same manner,” it is in fact the other way
23 around: Plaintiffs seek to force the agency to become an expert in facts that Plaintiffs believe
24 necessary to prove their case. *See* Dkt. 58 at 10. While Plaintiffs are free to present evidence on
25 those issues, the Rule 30(b)(6) device does not permit them to compel DOL to act as their research
26 assistant on subjects outside the agency’s knowledge and far afield from its expertise.

1 To be clear, if DOL had information on the proposed subjects, the Director agrees it would
2 be discoverable. *See* Mot. at 9. But, as explained in the Motion, DOL has no such information.
3 Mot. at 6–7. While DOL may rely on other materials common in litigation, such as legislative
4 facts and expert testimony, there is nothing nefarious in the Director stating that DOL lacks
5 relevant adjudicative facts, while acknowledging that this could conceivably change. *See* Dkt. 58
6 at 5. The Director made a good faith inquiry into whether DOL has or could reasonably obtain
7 the information sought in the Rule 30(b)(6) deposition notice, and determined conclusively that
8 it does not. That should be the end of the matter under the plain language of the rule.

9 **B. The Deposition Notice Improperly Seeks Lay Testimony on Legal Conclusions**

10 Plaintiffs deny that the deposition topics call for legal conclusions, Dkt. 58 at 10, but the
11 Notice itself belies their position. Each of the first five topics directly quotes from legal concepts
12 articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Compare* Dkt. 54, Ex. C
13 (seeking testimony on whether assault rifles are (1) “in common use,” (2) “typically possessed by
14 law-abiding citizens,” (3) “used for lawful purposes,” (4) “dangerous and unusual,” and (5) “most
15 useful in military service”), *with Heller*, 554 U.S. at 624–27 (discussing same concepts). The
16 deposition topics’ legal thrust is further evident from Plaintiffs’ admission that DOL cannot
17 address them without legal counsel and advice. Dkt. 58 at 14. In the parties’ Rule 26(c)(1)
18 conference, Plaintiffs’ counsel even suggested that the Director appoint outside counsel as DOL’s
19 designee to defend the agency’s legal positions. Second Decl. of Zachary P. Jones in Support of
20 Mot. for Protective Order (2d Jones Decl.) ¶ 4. Plaintiffs appear to envision their proposed Rule
21 30(b)(6) deposition as a sort of oral argument by proxy, in which defense counsel briefs an agency
22 representative on legal concepts and legislative facts, which the representative would then attempt
23 to regurgitate in sworn testimony. Such arguments are matters for attorneys, not witnesses, and
24 their place is at a summary judgment hearing, not a Rule 30(b)(6) deposition.

25 None of the cases on which Plaintiffs rely suggest otherwise. Plaintiffs’ out-of-context
26 quotation of *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), is misleading: the case

1 does not stand for the proposition that entities must testify about their “position” on questions of
2 law; rather, “[t]he corporation must provide its interpretation of documents and events” *within its*
3 *knowledge*. Here, Plaintiffs’ topics do not seek the agency’s “subjective beliefs and opinions”
4 about facts within its knowledge. *See id.* at 361. And, to the extent Plaintiffs are entitled to learn
5 Defendants’ “contentions” regarding legal positions, they have already received this information:
6 DOL denied each of Plaintiffs’ Requests for Admission, which track the deposition topics, except
7 for Request No. 3, which it admitted in part and denied in part. Dkt. 58-1, Ex. B.

8 Plaintiffs’ other cases are inapposite. In *Spring Communications Co. v. Theglobe.com,*
9 *Inc.*, 236 F.R.D. 524 (D. Kan. 2006), the deposition sought information about a patent that was
10 originally within the knowledge of the corporation as a whole: indeed, it was within the
11 knowledge of a non-attorney employee, but that employee died. *Id.* at 526, 529. Likewise, *SEC*
12 *v. Kramer*, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011), is off point because the facts sought
13 there were adjudicative in nature. Here, as explained below, *infra* section II.C, the deposition
14 notice is directed toward discovery of legislative facts. In the normal course of constitutional
15 litigation, such legislative facts are gathered by attorneys in the same way as case law to forward
16 their arguments. Accordingly, they are protected by the work product doctrine, which applies to
17 facts that “inherently reveal the attorney’s mental impressions.” *See, e.g., Onwuka v. Fed. Express*
18 *Corp.*, 178 F.R.D. 508, 513 (D. Minn. 1997). Plaintiffs are not entitled to such protected
19 information, whether by Rule 30(b)(6) deposition or otherwise.

20 **C. Legislative Facts Are Not a Proper Subject of Discovery**

21 Plaintiffs misconstrue Defendants’ arguments on legislative facts. It is not that
22 Defendants believe the Civil Rules and adjudicative fact discovery do not apply to this case. But
23 Plaintiffs are incorrect that such fact discovery should extend to the legislative facts that
24 Defendants’ attorneys have researched to support their eventual legal arguments. Plaintiffs cite
25 no case in support of their position and ignore the majority of Defendants’ contrary authority.

26

1 This case is a constitutional challenge to a law enacted through the initiative process. The
2 legal analysis will involve assessing the public interests the law advances and competing
3 constitutional rights, if any, at play. In the initiative context, there are no hearings or legislative
4 record that leads up to the people’s decision to pass the law. Thus, unlike normal two-party
5 litigation, there is no single body of case-specific facts that will determine the constitutionality
6 of I-1639. Accordingly, Defendants plan to defend the law by relying on publicly available
7 material that their attorneys have gathered and analyzed, such as crime statistics maintained by
8 the federal government and articles published in academic journals. This material, like all
9 legislative facts used to defend the constitutionality of laws, is not in one party’s specific
10 knowledge as the facts of a case, but rather is publicly available and of general provenance and
11 application. *See* Fed. R. Evid. 201(a), advisory committee’s note.

12 Plaintiffs’ failure to appreciate this distinction underlies their unavailing objections to the
13 Motion. First, Plaintiffs are wrong that the rules of evidence apply to legislative facts. Courts
14 have unequivocally and repeatedly held otherwise. *See, e.g., Wiesmueller v. Kosobucki*, 547 F.3d
15 740, 742 (7th Cir. 2008) (“legislative facts . . . lie outside the domain of rules of evidence”);¹
16 Dkt. 56 at 4–6. Second, Plaintiffs’ related contention that the rules of procedure apply to
17 legislative facts was considered and rejected by the Southern District of New York in *Windsor*
18 *v. United States*. 833 F. Supp. 2d 394 (S.D.N.Y. 2012), *aff’d*, 570 U.S. 744 (2013). In *Windsor*,
19 the plaintiff argued that the intervenor-defendant’s citation to legislative facts, including “articles
20 and book excerpts,” was improper because such material must be disclosed under the Federal
21 Rules of Civil Procedure. Dkt. 57 at 14-15 (Ex. D). The intervenor-defendant responded that the
22 challenged materials “go to issues of legislative fact, and thus are not subject to the evidentiary
23 and procedural rules.” *Id.* at 9. The District Court agreed and denied the plaintiff’s motion. *Id.*,
24 Ex. F; *see also Charlton Mem’l Hosp. v. Sullivan*, 816 F. Supp. 50, 53 (D. Mass. 1993) (“Rules

25 ¹ Plaintiffs are incorrect that *Wiesmueller* has no application here. In that case, plaintiffs moved to strike the fact
26 section of a brief because it cited to “policies of other states relating to qualifications to practice law, accounts of
the history of qualifications for the bar, and data on bar exam results,” and other legislative facts not present “in
the record compiled in summary judgment or trial proceedings.” 547 F.3d at 742. The court denied the request.

1 of evidence and procedure . . . may thus be inapplicable because they are designed for
 2 determining ‘adjudicative’ rather than ‘premise’ facts.”). This makes sense. The civil discovery
 3 rules and evidence rules are complementary: discovery is designed to uncover particular
 4 adjudicative facts of a case for use as evidence at trial.

5 But “[l]egislative facts are quite different.” Fed. R. Evid. 201(a), advisory committee’s
 6 note. Contrary to Plaintiffs’ suggestion, they are often raised by counsel for the first time in
 7 briefs (much like case law or statutes) or even *sua sponte* by the court, all without any prior
 8 notice or disclosure by the parties. *See id.*; Dkt. 56 at 5–6. If the rule were otherwise, then the
 9 constitutionality of laws could be decided by the ability of specific defendants to gather
 10 particular fact or expert testimony. *See, e.g., Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8
 11 (5th Cir. 1983) (plurality opinion) (“identical conduct [should not] be constitutionally protected
 12 in one jurisdiction and illegal in another” based on different expert testimony).²

13 Finally, Plaintiffs’ own discovery responses contradict the assertion that they are
 14 interested in “localized” facts. The Director served various discovery requests on Plaintiffs
 15 seeking information in Plaintiffs’ sole possession, including information on assault rifle sales
 16 made by the Dealer Plaintiffs. 2d Jones Decl., Exs A, B. Plaintiffs’ responded to these “localized”
 17 discovery requests by objecting that they were “not relevant to any party’s claim or defense” and
 18 refusing to provide responsive material. *E.g., id.*, Ex. A at 4. Plaintiffs cannot assert such
 19 “localized” factual discovery is relevant only when it is directed at DOL.

20 III. CONCLUSION

21 For the foregoing reasons, the Director respectfully requests that the Court grant its
 22 motion for a protective order and quash the Rule 30(b)(6) deposition noticed by Plaintiffs.
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25 ² Plaintiffs are mistaken that Federal Rule of Evidence 201 has no bearing on disclosure obligations. As the 1972
 26 advisory committee’s note instructs, it is “inappropriate” to impose on legislative facts “any limitation in the form
 of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to
 hear and be heard and exchanging briefs, and any requirement of formal findings at any level.”

RESPECTFULLY SUBMITTED this 1st day of November 2019.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the United States, that on this date I electronically mailed the foregoing document upon the following:

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