IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JASON GONZALES, Plaintiff, v. MICHAEL J. MADIGAN, FRIENDS OF MICHAEL J. MADIGAN, 13TH WARD DEMOCRATIC ORGANIZATION, PRISONER REVIEW BOARD, SHAW DECREMER, SILVANA TABARES, RAY HANANIA, JOE BARBOSA, and GRASIELA RODRIGUEZ, Defendants.	)	Case No. 16 C 7915 Judge Matthew J. Kennelly

PLAINTIFF'S MOTION TO QUASH DEPOSITIONS

NOW COMES Plaintiff, JASON GONZALES, by and through his counsel, and, pursuant to Federal Rules of Civil Procedure 26(c) and 45(d)(3)(iv) moves to quash the depositions of Governor Bruce Rauner, Dennis Mursashko, Michael Zolnierowicz, Richard Goldberg, Austin Berg, Kristina Rasmussen, John Tillman, Blair Hull, James Nicholas Ayers, Jim Durkin, Joe Woodward, Chip Englander, Jeffrey Phillips, Denise Panici, Vanessa Simonvic, and Steve Greznia. In support of this Motion Plaintiff states as follows:

Defendants have issued subpoenas, or stated an intention to do so, to the above-named deponents all of whom have nothing to do with Defendants' conduct, though some (not all) were contributors to Plaintiff's campaign in 2016. Defendants have not contested that the proposed deponents have no knowledge Defendants' alleged activities. Defendants have asserted in chambers that the deponents are being called to support a purported defense that Mr. Gonzales was a Republican political "plant." The list, however, also contains several Republican Party or

conservative office holders and activists including the current Governor, the Hon. Bruce Rauner. The riders of a series of subpoenas *duces tecum* subpoenas issued to the deponents seek production concerning a film strongly critical of Speaker Madigan entitled "Madigan: Power, Privilege, Politics" which was released in October 2016. It appears that Speaker Madigan is not interested in what the witnesses know about this case but seeks instead to engage in political intelligence about the film's origin, perhaps even to obtain evidence for the ongoing Illinois general election campaign of November 2018 or even a future suit. Defendants' subpoenas are an improper use of this Court's subpoena power of this Court to engage in political intelligence.

The Defendants have never put their vague contentions into an affirmative defense filed with the Court. Notwithstanding the text of F.R.Civ.P 8(c) that parties "shall set forth" any "matter constituting an avoidance or affirmative defense" when "pleading to a preceding pleading," the law of his Circuit is quite permissive of late filing of affirmative defenses. See, *e.g., DeValk Lincoln Mercury, Inc. v. Ford Motor Co.,* 811 F.2d 326, 334 (7th Cir.1987); *Lewis v. Hermann,* 775 F. Supp. 1137 (N.D.Ill.1991). Accordingly, fear of a denial of a Rule 15(a) motion cannot be the reason for the failure to file.

Upon review of the law, a more concrete rationale for failing to file becomes apparent: any such defense will be subject to a strongly founded Motion to Strike. Under Seventh Circuit "justification" as casually asserted by Defendants in chambers is not a defense to a claim under Section 1983. As this Motion will demonstrate, Defendants have neither the procedural nor substantive foundation for their foray into irrelevance.

I. DEFENDANTS MUST BE REQUIRED TO PLEAD A DEFENSE OF "JUSTIFICATION."

In discussions in chambers with counsel and the Court, with the Court, defense counsel has made vague references to "justification," an apparent argument that even if

the Defendants did what is alleged, their violation of the constitutional rights of the Plaintiff was somehow "justified" on ground that he was a "Republican plant."

"Justification," however, is an affirmative defense in a Section 1983 action that must be pleaded. *Gustafson v. Jones*, 117 F.3d 1015 (7th Cir. 1997). Accordingly, Defendants cannot be permitted to engage in casual assertions in chambers to create an affirmative defense.

In *Gustafson,* Milwaukee Police Department personnel asserted retaliation in employment against them for speaking publicly about their concerns over the deployment of police personnel in the city. The city filed for judgment on the pleadings, arguing that the plaintiff has failed to demonstrate that public employees had a First Amendment right against the public employers right to suppress such speech or take adverse action based upon it. Noting that a plaintiff could hardly anticipate and then frame a complaint to avoid every possible contention the City might raise against a 1983 claim, the Court of Appeals ruled:

> Thus, purely as a matter of good pleading practice, we think it preferable to leave to the defendant the burden of raising justification as an affirmative defense.

117 F.3d at 1019.

Similarly, Mr. Gonzales need only allege that some person, acting under color of state or territorial law, deprived him of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L.Ed.2d 572 (1980). He does not have a duty to allege bad faith, or to otherwise anticipate in his pleading whatever affirmative matter the defense chooses to raise.

Gustafson, is no anomaly. Justification is recognized as an affirmative defense in, for example, antitrust cases, *United States v. Borden Co.,* 370 U.S. 460, 467, 82 S. Ct. 1309, 1313, 8 L.Ed.2d 627 (1962) and cases under the Fair Labor Standards Act, *Mitchell v. Jefferson County Board of Education*, 936 F.2d 539 (11th Cir. 1991). Defendants should be compelled to plead their unusual "defense" prior to engaging in discovery upon it.

II. UNDER FEDERAL LAW, DEFENDANTS' CLAIMED "POLITICAL PLANT" JUSTIFICATION IS NO DEFENSE TO PLAINTFF'S CLAIM FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS.

The reason why Defendants have attempted to slide their "defense" into the case without pleading becomes plain upon review of the law applicable to Section 1983 claims. Defendants' claimed "defense" is not a defense at all and cannot be successfully pleaded.

Defendants' claim that their "intent" was only to defeat a "plant," is no defense under law first because Defendants specifically intended the result that constituted a deprivation, *i.e.,* the existence of two sham candidates on the ballot.

> A less easily recognizable though no less clear-cut violation of 42 U.S.C. 1983 occurs where there is no "specific intent" to violate a constitutional right but where the *act* itself and its *result* were intended under color of law sans improper motive. Though ulterior motive is absent, the acts will "be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. In such a case the elements of the offense are a violated constitutional right, a conscious act, an intended result and a result that should have been contemplated under the common law tort doctrine of foreseeability. Good faith or proper motive is no defense.

Jenkins v. Meyers, 338 F. Supp. 383, 388-9 (N.D.Ill 1972)(citations omitted). As noted in *Jenkins*, "good faith" is limited to the defendant could not be held responsible for the natural consequences of his actions. 338 F. Supp. at 389. That principle is certainly not true of Defendants, who specifically intended a result harmful to Plaintiff's electoral chances and then achieved it.

Stunningly, Defendants' asserted "defense" is simply a claim of some sort of overarching right to supersede state election law and affect the outcome of a primary election by unlawful acts under the purported banner of "doing good for the party." But Illinois law has specific legal requirements for candidates, none of which authorize Defendants' actions. States have a major role to play in structuring and monitoring the election process, including requiring parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is

resolved in a democratic fashion. *California Democratic Party v. Jones*, 530 U.S. 567, 572, 120 S. Ct. 2402, 2406–07 (2000). Further, "[i]n order to prevent 'party raiding' . . . a State may require party registration a reasonable period of time before a primary election." *Rosario v. Rockefeller,* 410 U.S. 752, 93 S. Ct. 1245, 36 L.Ed.2d 1 (1973). What has never been permitted, however, is for private individuals to assume the effective mantle of the state in order to take private action to manipulate the outcome of a primary election by unlawful means, by whatever motive. See, *Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973).

Under Illinois law a candidate for State Representative need only be over 21 years of age, be a United States citizen and be a resident of the district for two years preceding the election and a registered voter. Illinois Constitution, Article IV, Section 2(c). Section 8-8 of the Illinois Election Code sets out the filing requirements. Nothing in those qualifications create any requirement of state party registration, voter history or "loyalty." 5 ILCS 5/8-8 (2016). For a candidate to be on the primary ballot, Section 8-8 requires only that that the candidate file proper papers and obtain a specified number of valid signatures on nomination petitions from registered voters of the district. 10 ILCS 5/8-8(2016). Thus, for Mr. Gonzales there were no requirements of party affiliation, prior voting or party registration to run in the 2016 Democratic Primary for State Representative. Thus, even if the Defendants' allegation of "plant" were true, Gonzales' candidacy was completely legal.

As a result of Defendant Madigan's lengthy tenure as Speaker of the Illinois House of Representatives and its trappings of power as alleged in the current Complaint, he has had for decades a unique ability to establish party identification requirements of a candidate the proper way, by legislation changing the open provisions of Section 8-8. He has not done so, but now

proclaims his "justification" in going around the law to engage in the unlawful practice of running sham candidates. Justification cannot be based upon illegal acts.

Given that Plaintiff's candidacy met the requirements of the law, the Defendants cannot claim "justification" in becoming a law unto themselves. Defendants had every opportunity to assert their position that Gonzales was a "plant" the right way, before the public in an election campaign. Instead, they claim a defense based upon taking unlawful acts to subvert the electoral process. Such cannot be the basis of a "defense."

Put bluntly, if the constitutional rights of a candidate in a public election can be trampled simply based on the political opinion and calculation of a powerful opponent claiming to act to "protect his party" with the result being achieved by unlawful actions, then this state and country are in a fair amount of trouble. Defendants have no legally tenable claim of "justification" to plead.

III. DEFENDANTS' PROPOSED DEPOSITIONS ARE A WASTE OF RESOURCES FOR POLITICAL INTELLIGENCE IN AN ELECTION SEASON.

Defendants' failure to plead their actual defense improperly allows them to engage in an investigation not of Plaintiff's claims, but of those who participated in the film "Madigan: Power Privilege Politics." For example, Defendants make no averment in the Answer to the Amended Complaint about the film project, much less that Plaintiff had any role whatsoever in it. Defendant Madigan apparently just wants to know who was involved in making the film, using the subpoena power of this Court to obtain testimony from those he thinks had a role. That is not a proper use of this Court's powers.

These concerns are magnified when one of the proposed deponents is the sitting Governor, a strong political opponent of Speaker Madigan with the deposition being taking in a heated election season, when there is not one allegation before the Court about the Governor. Until Mr.

Madigan makes specific allegations linking Gonzales to the film, allegations that will be subject to Rule 11, he should have no ability to depose witnesses for his own separate political purposes.

Finally, Plaintiff and his attorneys should not be put to the expense and loss of time while Defendants engage in their unfounded political witch hunt.

WHEREFORE, Plaintiff, JASON GONZALES, respectfully requests that this Honorable Court enter the following relief:

1. An order quashing all subpoenas and request for deposition of the following persons without leave of Court

   A. Governor Bruce Rauner,

   B. Dennis Mursashko,

   C. Michael Zolnierowicz,

   D. Richard Goldberg,

   E. Austin Berg,

   F. Kristina Rasmussen,

   G. John Tillman,

   H. Blair Hull,

   I. James Nicholas Ayers,

   J. Jim Durkin,

   K. Joe Woodward,

   L. Chip Englander,

   M. Jeffrey Phillips,

   N. Denise Panici,

   O. Vanessa Simonvic, and,

P. Steve Greznia, and,

such other and further relief and this Honorable Court deems appropriate in the premises.

Respectfully submitted,

JASON GONZALES

By: /s/ Stephen F. Boulton

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