

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-00609-PAB-MEH

THE INDEPENDENCE INSTITUTE,  
JON CALDARA,  
DENNIS POLHILL,  
JESSICA CORRY,  
MASON TVERT,  
RUSSELL HAAS,  
DOUGLAS CAMPBELL,  
LOUIS SCHROEDER,  
SCOTT LAMM,  
DANIEL KENNEDY, and  
ALBIE HURST,

Plaintiffs,

v.

SCOTT GESSLER, in his official capacity as Colorado Secretary of State,

Defendant.

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**ORDER**

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**Michael E. Hegarty, United States Magistrate Judge.**

Before the Court is Defendant Secretary's Motion to Strike Michael Gambrell as a Witness for Plaintiffs [filed August 22, 2011; docket #235]. The motion is referred to this Court for adjudication. The matter is briefed to the extent necessitated by the Court. For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's Motion.

Plaintiffs challenge the constitutionality of Colorado House Bill 09-1326, which places certain restrictions on "the ability of citizens to circulate petitions which would result in initiatives appearing on the ballot in the general elections." Second Amended Complaint, 1-2, docket #47. This motion concerns Michael Gambrell, who Plaintiffs list as a may-call trial witness in this case.

Mr. Gambrell cannot be located at the moment. Defendant has not had an opportunity to depose Mr. Gambrell for this reason. Defendant thus requests that Mr. Gambrell be precluded from testifying at trial in the event he is found and is willing to come to Colorado to participate in the trial scheduled for May 14, 2012. Plaintiffs oppose the requested relief. Plaintiffs do not dispute that Defendant should be permitted to depose Mr. Gambrell before he testifies and suggest that such deposition can be arranged prior to trial if Mr. Gambrell in fact testifies.

I agree with Plaintiffs' position for the most part. Trials should be about the truth, and if Mr. Gambrell has relevant information, his testimony is needed. On the other hand, we do not engage in trials by surprise. Therefore, as a condition to Mr. Gambrell being permitted to testify, he will be required to submit himself for a deposition at Plaintiffs' cost, at least three business days prior to his trial appearance. If that deposition can occur in Colorado, the cost will be limited to court reporter fees and other actual costs (no attorney's fees), including the cost of any expedited transcription necessitated by the timing of the deposition in relation to the trial. If the deposition must occur outside Colorado, Defendant will be entitled to its actual travel costs as well as some reasonable attorney's fees to compensate for the time incurred in traveling out of state.

Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant Secretary's Motion to Strike Michael Gambrell as a Witness for Plaintiffs [filed August 22, 2011; docket #235].

SO ORDERED and entered at Denver, Colorado, this 29<sup>th</sup> day of September, 2011.

BY THE COURT:

A handwritten signature in black ink that reads "Michael E. Hegarty". The signature is written in a cursive, flowing style.

Michael E. Hegarty  
United States Magistrate Judge