

BRIAN M. BARNARD USB #0215  
UTAH LEGAL CLINIC  
Cooperating Attorney for Utah Civil Rights  
& Liberties Foundation, Inc.  
214 East Fifth South Street  
Salt Lake City, Utah 84111-3204  
Telephone: (801) 328-9531  
[ulcr2d2c3po@utahlegalclinic.com](mailto:ulcr2d2c3po@utahlegalclinic.com)

**ATTORNEY FOR PLAINTIFFS**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

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**AMERICAN ATHEISTS, INC.**, a Texas :  
non-profit corporation; **R. ANDREWS,** :  
**S. CLARK** and **M. RIVERS,** :  
 :  
Plaintiffs, :

Case No. 02:05-CV-00994 DS

vs. :  
 :  
**COLONEL SCOTT T. DUNCAN,** :  
Superintendent, Utah Highway Patrol; :  
**JOHN NJORD,** Executive Director, :  
Utah Department of Transportation; :  
**D'ARCY PIGNANELLI,** Executive Director, :  
Department of Administrative Services; and, :  
**F. KEITH STEPAN,** Director :  
Division of Facilities Construction and Management :  
Department of Administrative Services, :  
 :  
Defendants. :

**DECLARATION OF**  
**BRIAN M. BARNARD**  
**IN OPPOSITION TO**  
**INTERVENER'S MOTION**  
**FOR PROTECTIVE ORDER**  
(Doc. # 38)

(Judge David Sam)

**UTAH STATE HIGHWAY PATROL** :  
**ASSOCIATION,** a Utah non-profit :  
corporation, :  
 :  
Defendant/Intervener. :

PLAINTIFFS, by and through counsel, SUBMIT the following **DECLARATION OF BRIAN M. BARNARD** in opposition to the motion of intervener, Utah Highway Patrol Association (“UHPA”) for a protective order to prevent the deposition of Ellen Johnson for American Atheists, Inc. Doc. # 38.

1. Plaintiffs and the State Defendants jointly agreed and then noticed Johnson’s deposition for May 10, 2006.<sup>1</sup>
2. Plaintiffs’ counsel wrote two (2) letters (02/17/2006 & 03/29/2006) to defendant/intervener’s counsel Frank Mylar informing him of Johnson’s availability in Utah around May 11, 2006. Attached Exhibit “A” & “B.” Defendant/intervener’s counsel did not respond to either letter.
3. On or about April 12, 2006, plaintiffs’ counsel initiated the call and spoke by telephone with defendant/intervener’s counsel, Frank Mylar and again informed him of Johnson availability. Defendant/intervener’s counsel indicated he would consider that information and be in touch.
4. Defendant/intervener responded by letter the next day indicating that he believed the deposition to be “premature” because of the pending motions.
5. Defendant/Intervener has offer no alternatives to taking Johnson’s deposition at this time while she is in Utah and is available. Alternatives would include to depose her at the

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<sup>1</sup> Without explanation the State Defendants have recently withdrawn their notice of deposition.

corporate offices in New Jersey, to depose her by phone, for defendant/intervener to pay her transportation and accommodations for a return visit, to secure discovery from her by written interrogatories, etc.

6. In a telephone conversation between Barnard and Babione on April 27, 2006 at ~6:30 pm, Babione asked that the deposition notice be withdrawn or the deposition cancelled. Barnard explained why the deposition was noticed up and that Johnson would be in Salt Lake City on another matter on May 11<sup>th</sup>. Barnard explained that she was the only national officer of American Atheists who had any knowledge of the lawsuit. He explained that she lived in New Jersey where the offices of American Atheists are.
7. Barnard asked if Babione would be willing to pay her travel expenses to come to Utah some other time for a deposition. Babione quickly said “no.” Barnard never said that was a condition of postponing the deposition.
8. Barnard explained that plaintiffs did not want Johnson to have to come back in the future. Babione’s response was to the effect “That is part of the burden that comes when one brings a lawsuit in a distance jurisdiction. Just like when we have to defend cases in distance jurisdictions.”
9. Barnard inquired if Babione thought a seven (7) hour deposition of Johnson would be necessary or planned. Babione said he did not know.
10. Barnard asked what knowledge Johnson might have regarding intervener’s or Utah’s affirmative defenses. Babione said he did not know.

11. When asked in general what information Babione might want from American Atheists through Johnson as President, Babione said he did not know.
12. Babione strongly stated that all intervener's affirmative defenses were meritorious and viable and he did not feel that the Court would strike or dismiss any of them. Barnard responded in that case the pending motions would not affect the limited discovery of deposing Johnson.
13. Barnard told Babione that Mylar had been given notice of Johnson's availability in two (2) letters. Exhibit "A" and "B" attached. He informed Babione that Mylar had never responded to either and that Mylar had never said counsel was not available on May 10<sup>th</sup>.
14. Closing the conversation Barnard said given the information Babione provided and since no alternatives were suggested and since Johnson was going to be in town on May 10<sup>th</sup>, that it still made sense to take her deposition then.

Dated this 5<sup>th</sup> day of MAY 2006.

s/ BRIAN M. BARNARD  
Declarant

#### DECLARATION

BRIAN M. BARNARD, pursuant to 28 U.S.C. § 1746, under the pains and penalties of perjury declares the foregoing to be true and accurate.

Dated this 5<sup>th</sup> day of MAY 2006.

s/ BRIAN M. BARNARD  
Declarant

# **EXHIBITS**

LETTER TO MYLAR, FEBRUARY 17, 2006

LETTER TO MYLAR, MARCH 29, 2006