IN THE CIRCUIT COURT OF McLEAN COUNTY, ILLINOIS

STATE OF ILLINOIS, *Plaintiff,* v. STEVEN LAZAROFF, *Defendant.* ILLINOIS STATE UNIVERSITY and ANDREW MORGAN, *Subpoena Respondents.*	)	No. 2024CM000368 FILED 7/18/2024 2:09 PM DONALD R. EVERHART, JR. CLERK OF THE CIRCUIT COURT MCLEAN COUNTY, ILLINOIS

OPPOSITION TO MOTION TO QUASH SUBPOENAS

Subpoena Respondents Illinois State University and Andrew Morgan move to quash the subpoenas issued to them by citing to case law in *civil* cases and applying the standard for subpoenas in *civil* cases. Based on that inapposite case law, they argue that the subpoenas should be quashed because they are the defendants in a separate civil matter. That argument, whilst factually true in that a separate civil matter is indeed pending, is legally meritless.

> The use of subpoenas or "to have compulsory process for obtaining witnesses in his favor" (*subpoenas ad testificandum*) in "all criminal prosecutions" is guaranteed by the sixth amendment to the Federal Constitution, and applicable to State criminal proceedings. (*Washington v. Texas* (1967), 388 U.S. 14, 23, 18 L.Ed.2d 1019, 1025, 87 S.Ct. 1920, 1925; U.S. Const., amend. VI.) This guarantee encompasses the production of documentary evidence by *subpoenas duces tecum.*

People ex Rel. Fisher v. Carey, 77 Ill. 2d 259, 265 (Ill. 1979). *See also People v. Malibu*, 2013 Ill. App. 3d 120961, 4 (Ill. App. Ct. 2013) ("In criminal cases the right to subpoena witnesses is guaranteed by the sixth amendment of the United States Constitution."). "An accused's rights to compulsory process and to fundamental fairness are abridged when the court denies him the

opportunity to secure the appearance at trial of witnesses 'whose testimony would have been relevant and material to the defense.'" *United States v. Verkuilen*, 690 F.2d 648, 659 (7th Cir. 1982) "To justify the issuance of a subpoena, the issuing party must show that (1) the materials sought are evidentiary and relevant, (2) the materials are not otherwise reasonably procurable by the exercise of due diligence prior to trial, (3) the requesting party cannot prepare for trial without such production and the failure to obtain the materials may tend to unreasonably delay trial, and (4) the subpoena was issued in good faith and not as a 'fishing expedition.'" *People v. Jones*, 2023 Ill. App. 221311, 13 (Ill. App. Ct. 2023). Each of these factors are met here.

First, the documents in question are undoubtedly relevant. Notably, Illinois State University and Dr. Morgan *are* the Defendant's accusers in this matter: the alleged conduct occurred at the ISU campus, it was ISU which called the police and reported the alleged conduct, and as such ISU's own records regarding this event and similar events are both relevant and probative.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."" *People v. Jones*, 2023 Ill. App. 221311, 13-14 (Ill. App. Ct. 2023). This clearly encompasses the material sought in these subpoenas. Defendant's defense – for which a Rule 19 Notice has already been filed – is and will be that Hovey Hall, the location of the alleged conduct for which Defendant here is charged – is either a traditional or designated public forum and therefore charges of criminal acts related to protesting there fail an as-applied constitutional challenge. "Traditional public forums are places with a long history of being devoted to assembly and debate, such as public streets and parks. Designated public forums are locations or channels of communication that the government opens up for use by the public for expressive

activity." *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011). Hovey Hall fits both criteria, and Defendant requires Subpoena Respondent's records to prove as such.

Importantly, the Appellate Court has held that it is entirely proper to subpoena a third party which holds relevant evidence in advance of filing a motion. *People v. Jones*, 2023 Ill. App. 221311, 14 (Ill. App. Ct. 2023) ("It appears that defendant Jones subpoenaed ShotSpotter primarily in anticipation of filing a motion to suppress the traffic stop that led to his arrest and the evidence against him.").

In fact, *Jones* is dispositive here. Defendant need not rely on the State's witnesses and evidence to prepare a defense. Instead, it is entirely proper to go to the source of that evidence itself.

> ShotSpotter also argues that defendant Jones can obtain the information he seeks by "cross examining the officers who relied upon ShotSpotter." . . . Even if the officers are knowledgeable about ShotSpotter's reliability, defendant Jones need not rely on the testimony of adverse police witnesses to discover information about ShotSpotter's reliability. The sixth amendment (U.S. Const., amend. VI) allows him to subpoena that information for himself. And, as explained above, defendant Jones should be allowed to prepare to rebut any police testimony that ShotSpotter is highly accurate and often leads to illegal firearms.

Id. at 18-19. The same logic is true here: Defendant is entitled to see the records of their accuser rather than simply cross examining the State's witnesses.

The second and third factors are also met. Defendant intends to show that Subpoena Respondents allowed pro-Israel protesters unfettered access to facilities including Hovey Hall, whilst barring pro-Palestine protesters such as Defendant from the same locations for the same conduct. Defendant further intends to show that Dr. Morgan personally made statements in support of pro-Israel protesters publicly and on social media and published video of the arrest of Defendant on social media to buttress his pro-Israel reputation.

Because Hovey Hall is a designated or traditional public forum, these actions make any charges brought against one set of protesters but not another *for the same conduct* but solely on the basis unconstitutional under *Cox v. Louisiana*, 379 U.S. 536, 546 (1965). "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity [for free speech] is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."" *Cox v. Louisiana*, 379 U.S. 536, 552 (1965).

After all, "once a university creates a forum, it must "justify its discriminations and exclusions under applicable constitutional norms[.]" *Orin v. Barclay*, 272 F.3d 1207, 1215 (9th Cir. 2001) (citing *Widmar v. Vincent*, 454 U.S. 263 (1981)). For instance, in *Spartacus, Etc. v. Board of Trustees of Illinois*, 502 F. Supp. 789, 800 (N.D. Ill. 1980), the court concluded that the student union was a public forum subject to First Amendment protections. Federal courts have also noted that "university spaces made available for uses typical of public fora" transform university spaces into designated public fora. *Helms v. Zubaty*, 495 F.3d 252, 256 (6th Cir. 2007). In *Widmar*, "the Court found that public university meeting places constitute designated public fora." *Kreimer v. Bu. of Police for Town of Morris*, 958 F.2d 1242, 1257 (3d Cir. 1992).

Hovey Hall has a long history of being the site of protests and First Amendment activity. For example, in October 2022, a protest in and around Hovey Hall entitled the "March for Queer Rights" protested homophobia on ISU's campus. In April 2022, AFSCME Local 1110 members marched through Hovey Hall for hours in a protest against ISU administration for better wages. In March 2021, the ISU Graduate Workers Union held a protest against ISU administration in and around Hovey Hall for better wages and working conditions. In 2019, Hovey Hall was the site of a protest against anti-Black racism. In 1970, protests in and around Hovey Hall were part of the infamous "flagpole standoff" over racial integration at ISU. In fact, the ISU's central

administration building has long been a public forum for protests and marches of all kinds, even before it was named "Hovey Hall". In 1919, students marched for women's suffrage in and around what was then the college's central administration building. All of these instances were the subject of local news coverage, but that coverage itself would not be sufficient to show whether Subpoena Respondent called the police on any of those protesters. Defendant requires Subpoena Respondent's *own records* to show this history and establish that Defendant's election to have *these particular protesters* removed was based solely on the content of the speech. This goes to the very heart of the Defendant's defense, and Defendant cannot show that Hovey Hall is a public forum or that Subpoena Respondents engaged in content-based speech restrictions without the records from Subpoena Respondents themselves.

Nor can Subpoena Respondent argue that this is a fishing expedition. First, this Court will review any records received for relevance and privilege as required by law prior to disclosing them to Defendant and the State. The Defendant is not required to wait for the completion of discovery in *either* this action *or* the civil action before receiving these documents. *See People v. Shukovsky*, 128 Ill. 2d 210, 222 (Ill. 1988) ("the defendant was not required to proceed by way of discovery before obtaining a subpoena *duces tecum*. A subpoena is a judicial compulsory process assured by the sixth amendment to the Constitution of the United States, and is applicable in 'all criminal prosecutions.'"). And these documents are not for the purpose of discovery in the civil case, contrary to Subpoena Respondent's baseless *ipse dixit* assertion: they are for purposes of bringing a motion to dismiss challenging the constitutionality of charging Defendant with trespass in a public forum based solely on the content of the message in question when Subpoena Respondent allowed other protesters to engage in the same alleged conduct without consequence.

Nor can Subpoena Respondents claim any prejudice will result to them. If their concern is that these documents would be used against them in the civil matter, Defendant would be entitled to these documents in that case in discovery *anyway*. Moreover, given the Subpoena Respondents are essentially the complaining witnesses in this case, quashing these subpoenas would be tantamount to denial of Defendant's right to effective cross examination as set forth in *Davis v. Alaska*, 415 U.S. 308, 315 (1974). At the very least, the disparate treatment of different groups of protesters by Subpoena Respondent is *exactly* the sort of bias evidence which the Supreme Court in *Davis* held was protected by the Sixth Amendment. *Id.* at 318. *See also People v. Pizzo*, 2022 Ill. App. 2d 210073, 30 (Ill. App. Ct. 2022) ("A defendant may cross-examine a witness on any permissible matter which affects the witness's credibility, and is entitled to explore a witness's biases, interests, or motives").

The Defendant's Sixth Amendment constitutionally protected interest in confronting the complaining witnesses and having records sufficient to present a defense both before and at trial clearly outweigh Subpoena Respondent's concern that it might lose a civil lawsuit because of the contents of the records produced. As such, the motion to quash should be denied.

Respectfully Submitted,

STEVEN LAZAROFF

/s/ Sheryl Weikal
By their counsel

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