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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Wesley W. Harris, *et al.*,

Plaintiffs,

vs.

Arizona Independent Redistricting Commission, *et al.*,

Defendants.

No.: 2:12-CV-00894-ROS-NVW-RRC

REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

(Assigned to three-judge panel)

The Commission and Commissioners in their official capacities (collectively "the Commission") hereby reply to Plaintiffs' Response Opposing Motion for Protective Order (Doc. 94). The Court should grant the protective order because Plaintiffs fail to distinguish the precedent confirming that the privilege is absolute in this context. But even if the privilege is qualified, Plaintiffs cannot overcome it because the contemporaneous public record is more than sufficient to determine whether there was improper motive. Indeed, Plaintiffs' proposed discovery would have an extreme chilling effect on the Commission and other legislative bodies.

I. An Absolute Legislative Privilege Bars Plaintiffs' Discovery Requests.

As unpaid volunteers, the Commissioners have spent hundreds of hours discharging their duties on the record in an open and transparent manner. They knew serving would involve a substantial commitment of volunteer time, but they could not

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have anticipated being subject to the burden of compulsory evidentiary process, as the Arizona Court of Appeals held in 2003 that the Commissioners are legislators who enjoy an absolute legislative privilege grounded in the Arizona Constitution and federal common law. *Ariz. Indep. Redistricting Comm'n v. Fields* (*Legislative Immunity Opinion*), 206 Ariz. 130, 139 ¶ 24, 75 P.3d 1088, 1097 (App. 2003).

Similarly, the Ninth Circuit and other federal courts apply an absolute privilege in the civil context. Without the privilege, there would be little to protect these and future Commission members from "wars of attrition" and other actions corrosive to representative democracy that the courts should guard against. *See E.E.O.C. v. Wash. Suburban Sanitary Comm'n* (*Wash. Suburban II*), 631 F.3d 174, 181, 185 (4th Cir. 2011) (legislative privilege is absolute in the civil context and "reinforces representative democracy, fostering public decisionmaking by public servants for the right reasons").

A. Plaintiffs fail to distinguish the Ninth Circuit's decision in *Jeff D. II* applying an absolute legislative privilege in a civil case.

In *Jeff D. v. Otter* (*Jeff D. II*), the Ninth Circuit applied privilege to shield a legislative budget analyst from being deposed in a federal constitutional civil rights case. 643 F.3d 278, 289-90 (9th Cir. 2011). The Court's analysis began and ended with the determination that the aide was functioning in a legislative capacity. *Id.*[1] Plaintiffs have not cited one Ninth Circuit case to support their argument that the privilege is qualified and instead rely on decisions from the U.S. District Court in New York. In light of controlling Ninth Circuit law on point, Plaintiffs' arguments fail.

Moreover, as noted in the Motion, the Fourth Circuit recently affirmed the rule that legislative privilege should be absolute in the civil context. *Wash. Suburban II*, 631 F.3d at 180-81; *see also Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 295, 297 & n.12 (D. Md. 1992). Plaintiffs downplay *Marylanders* based on

[1] Plaintiffs' argue that this case never decided whether the privilege is absolute versus qualified (Dkt. 94 at 7:20-8:24). Although the court did not use the term "absolute" when upholding the privilege, the authority it cited did. *Jeff D. II*, 643 F.3d at 289-90. And the court did not engage in the factor balancing analysis associated with a qualified privilege. Therefore, the only logical interpretation is that the court was applying absolute privilege.

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the district court opinion in *Washington Suburban*, but disregard the fact that on appeal of that very case, the Fourth Circuit clearly signaled that the privilege is absolute. *See* 631 F.3d at 181 ("Consequently, if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply."); *see also Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (noting that privilege is law of the circuit and precludes compelling testimony of board members).

B. Legislative Privilege Should Track Legislative Immunity.

The privilege should also be absolute for the same reasons that legislative immunity is absolute. (*See* Dkt. 85 at 5-6 (collecting cases).) Although Plaintiffs acknowledge that public business would grind to a halt without legislative immunity (Dkt. 94 at 7:3-19), they nevertheless argue that compulsory discovery about legislators' motives for votes would not chill the deliberative process. (*Id.* at 7:8-19) This distinction makes no sense. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983) (applying privilege to *former* Congressman, even in the absence of potential personal liability). Subjecting a legislator to compulsory evidentiary process poses the same costs and distractions as subjecting a legislator to suit for official actions. After all, immunity is more "than a mere defense to liability"; it includes "an entitlement not to stand trial *or face the other burdens of litigation*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (describing purpose of § 1983 immunity) (emphasis added). It is likely for this reason that the most relevant opinion on the subject held, in applying privilege to the Commissioners, that legislative immunity "functions as a testimonial and evidentiary privilege." *Legislative Immunity Opinion*, 206 Ariz. at 37 ¶ 17, 75 P.3d at 1075.

C. State Privilege Law Applies to the Extent Plaintiffs are Permitted to Maintain Claims where State Law Provides the Rule of Decision.

Plaintiffs' argument regarding judicial estoppel (Dkt. 94 at 5 n.3) is misplaced because the motion for protective order and motions regarding the state-law issues are being heard together, and the Court will have to decide them. If the Court permits the state-law issues to go forward, then it must decide whether state law controls the

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privilege. Plaintiffs concede it does under Rule 501. (Dkt. 94 at 5 n.3.). If, however, the Court grants the Commission's Motion for Judgment on the Pleadings (Dkt. 66) and/or Motion for *Pullman* Abstention (Dkt. 76), and thus defers the interpretation of the Arizona Constitution to the Arizona courts, then federal law, and not state law, will govern the issue of privilege. But until the Court rules, Arizona law governs the issue of legislative privilege as it applies to the Commission, and the Arizona Court of Appeals has held that this privilege is absolute.

II. If Privilege is Qualified, Plaintiffs Have Not Made the Necessary Showing.

Even if the Court holds that the privilege is qualified, it should grant the Commission's motion because (1) this case is not one of the rare and "extraordinary instances" alluded to in *Arlington Heights*; (2) Plaintiffs cannot show the factors for overcoming privilege, most significantly why this case cannot be decided on the extensive public record of the Commission's actions; and (3) the out-of-circuit magistrate order Plaintiffs rely on is factually distinguishable and currently on appeal.

A. At Most, Testimony by Legislators is Called for Only in Rare and Extraordinary Instances, Determined Based on Competent Evidence.

Despite Plaintiffs' argument that "absolute privilege cannot be squared with" *Arlington Heights* (Dkt. 94 at 6:15), that case suggests, at most, that to the extent the privilege can be pierced, it can only happen in rare and extraordinary situations. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). The Court never explicitly allowed depositions in that case (nor has it ever addressed whether state legislative privilege is absolute or qualified). Instead, in discussing evidence in the context of a race-based discriminatory intent case, it stated that there *might be* "extraordinary instances" where a legislators' testimony is called for, citing the landmark decision of *United States v. Nixon*, 418 U.S. 683 (1974), as one such example.[2] But even

[2] At best, the Court's language shows it was reluctant to completely close the door to such testimony, but there is nothing to suggest it intended to open it as widely as requested by Plaintiffs. *See Texas v. Holder*, (Dkt. 85-1, Ex. D) at 4 ("This Court has already found that the state legislative privilege is not abrogated in all [Voting Rights Act] actions . . . ."). In fact, during its review of the district court's record in *Arlington*

(continued...)

then, such testimony will "frequently" be barred. *Id.* Therefore, if *Arlington Heights* applies, it stands for the idea that legislative privilege should rarely, if ever, be abrogated.

The Supreme Court has also stated that "[t]he privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 54-55 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)). Therefore, if this Court concludes that the privilege is qualified, Plaintiffs must show that privilege is overcome based upon more than "a conclusion of the pleader." Indeed, Plaintiffs concede that the determination of privilege must be based on "competent evidence." (Dkt. 94 at 2:26-3:4.) Within this framework, Plaintiffs have failed to overcome even a qualified privilege.

B. The Factors for Overcoming Qualified Privilege are not Established.

1. The relevance of much of the discovery is limited, and Plaintiffs have not shown need.

Plaintiffs argue that discriminatory intent is the critical issue in the case (Dkt. 94 at 9:15-16), but fail to show why the evidence they seek to discover is relevant or likely to lead to such evidence, let alone critical enough to support piercing the privilege. Moreover, Plaintiffs have not shown why the public record is not sufficient to try this case. (*See* Dkt. 94 at 9:23-13:13.) The Commission painstakingly developed the legislative map in public session, holding hundreds of hours of business meetings and public hearings. (Dkt. 85 at 11-12.)

As support, Plaintiffs point to communications between Commissioners, between Commissioners and third parties, and with the mapping consultant. (Dkt. 94 at 11:3-22.) Notwithstanding the fact that all of these communications are permitted, Plaintiffs fail to

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(...continued)
Heights, the Court referred to one board member's trial testimony and the district court's decision to forbid the questioning of board members about their motivation at the time they cast their votes. *Arlington Heights*, 429 U.S. at 270 n.20. There is no indication that legislative privilege was invoked in that case, and despite the Court's earlier reference to "extraordinary instances" where a legislator might be called to testify, the Court held the district court did not abuse its discretion in forbidding any questions about the board members' motives. *Id.* Plaintiffs' argument is thus inconsistent with this case.

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explain how discovery into them will provide critical information. Moreover, whether applying absolute or qualified privilege, courts in this circuit have precluded identical discovery. *Miller*, 709 F.2d at 530-31; *see also Jeff D. II*, 643 F.3d at 289-90; *Kay v. City of Ranchos Palos Verdes*, No. 02-cv-3992, 2003 WL 25294710, at *21 (C.D. Cal. 2003). Plaintiffs would abrogate legislative privilege simply because the Commissioners spoke to others about their work. Plaintiffs' cite no case to support their position.

The fact that the information Plaintiffs seek through discovery is not critical is underscored by the open and transparent manner in which the Commission adjusted the map from grid to final in public sessions. Plaintiffs have not provided competent evidence that the population deviations cannot be evaluated based on the public record. A three-judge panel in this circuit specifically prohibited inquiring into the motives of legislators who claimed privilege in a redistricting case. *Cano v. Davis*, 193 F. Supp. 2d 1177, 1180-81 (C.D. Cal. 2002).

Plaintiffs also cite contemporaneous statements from Commissioners Stertz and Freeman indicating their belief that certain changes were made to the map with the purpose of packing Republican voters into LD 11 to make LD 8 more competitive for Democrats. (Dkt. 94 at 12:8-13:13.) Plaintiffs therefore want to ask the Commissioners to explain their motives after the fact, even though the Commission held extensive on-the-record discussion concerning these issues. But Courts routinely hold that contemporaneous and pre-passage legislative history is far more persuasive than a legislator's after-the-fact statements. *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 549-50 (1999) (in discriminatory intent case, finding expert affidavit to be "more important" than such after-the-fact testimony); *see also Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471, 1475 (9th Cir. 1987) (giving no weight to former legislator's statements regarding legislative intent after bill's passage); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981) (giving some weight to legislator's statement made contemporaneously with bill's passage but no weight to statement coming one year later).

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The contemporaneous record and corresponding change orders regarding LD 8 and LD 11 are sufficient to explain the Commission's motive.

Finally, Plaintiffs fail to show the relevance of communications about the selection of the mapping consultant. (Dkt. 94 at 11:22-12:3.) Indeed, this is the fourth suit where partisan opponents of the Commission have made the same allegations and thus appear to be waging the kind of well-orchestrated "war of attrition" rejected by the courts.[3] *See Wash. Suburban II*, 631 F.3d at 181.

Plaintiffs' argue that there is a need for discovery because the population deviations are purportedly based on a "clear pattern, *unexplainable on grounds other than* [*improper motive*]." (Dkt. 94 at 3:16-26 (citing *Arlington Heights*, 429 U.S. at 266) (emphasis added).) But Plaintiffs largely ignore the Commission's public record in reaching this conclusion. Both parties have experts. The Commission's expert, Dr. Bruce Cain, has reviewed the map and public record and concludes that the population deviations result from a good-faith effort to comply with the Voting Rights Act and secure preclearance. (Ex. A (Cain 1/15/2013 Opening Expert Report.) Plaintiffs' expert obviously disagrees. (Dkt. 44 at 27.) The contemporaneous record and the expert analysis are more than enough for the Court to decide this case. *See Hunt*, 526 U.S. at 549-50.

2. Plaintiffs have not shown "seriousness."

Multiple facts show a lack of "seriousness." The size of the population deviations must be considered in determining seriousness (*see id.* at 3:12-14 (citing *Brown v. Thomson*, 462 U.S. 835, 845-46 (1983)), and Plaintiffs admit that the population deviations at issue here are less than ten percent and thus minor. Also, *Arlington Heights* involved an allegation of racial discrimination in violation of the Fourteenth Amendment. *Id*. at 258. The Court has held that strict scrutiny, which applies to racial classifications, does not apply to partisan motives. *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001).

[3] The Governor's removal was overturned, *AIRC v. Brewer*, 229 Ariz. 347, 275 P.3d 1267 (2012), and the Attorney General's investigation was shut down for lack of reasonable cause, *State v. Mathis*, 2012 WL 6134868, at *20 ¶ 87 (Ariz. App. Dec. 11, 2012).

Therefore, by definition, a case based on impermissible racial motive invites more probing judicial review than one alleging impermissible political motive. And the cases Plaintiffs cite all allege claims involving racial bias in addition to improper population deviation.[4]

3. The role of the government is limited.

Plaintiffs do not dispute that the Government's role is more limited because this case involves a citizen's commission. (*See* Dkt. 94 at 14:15-21.)

4. Plaintiffs have not shown an absence of a chilling effect.

Plaintiffs' argument that there is likely no chilling effect because this case involves a citizen commission rather than the Legislature (Dkt. 94 at 14:23-16:10) is contradicted by cases discussing immunity for local officials. "[T]he time and energy required to defend against a lawsuit are *of particular concern* at the local level, *where the part-time citizen-legislator remains commonplace*." *Bogan*, 523 U.S. at 52 (emphasis added); *see also Kay*, 2003 WL 25294710, at *4, 14, 21 (concluding legislative privilege barred questions at depositions regarding nonpublic discussions between members of the city planning commission). "The public must be able to make its electoral selection from a wealth of qualified candidates, not simply the few undeterred or unaffected by the threat of financial liability . . . ." *Wash. Suburban II*, 631 F.3d at 185.

These policies apply with equal force to the Commissioners. They are not full-time legislators, but citizens who volunteer hundreds of hours of their time. The fact that the Arizona Constitution calls for volunteers and places limits on their prior political experience, shows that suits like Plaintiffs' would deter the exact candidates desired for the Commission from applying to serve. Moreover, there is no guarantee that if Commissioners are subjected to depositions in this case, that their testimony will not be used to spawn future litigation, which may seek to impose liability. Indeed, given that

[4] *See Favors v. Cuomo*, 285 F.R.D 187, 195 (E.D.N.Y. 2012); *Baldus v. Brennan*, No. 11-cv-562, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8 2011); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, No. 11-cv-5065, 2011 WL 4837508, at *1 (N.D. Ill. Oct. 12, 2011); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 352 (S.D.N.Y. 2004).

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Plaintiffs' disclosure statement lists twelve categories of information that are irrelevant to the actual map adjustments (Dkt. 85 at 2 & n.1), it is difficult to see how this suit is not being used as a vehicle to obtain the discovery that the Commission's partisan critics have long sought but failed to acquire elsewhere. *See, e.g.*, *Mathis*, 2012 WL 6134868, at *1 ¶ 2 (Attorney General's investigation was shut down for lack of reasonable cause).

In addition, many of the cases that find qualified privilege involve document requests and not depositions, which pose greater costs and distractions for legislators. *E.g. Comm. for a Fair and Balanced Map*, 2011 WL 4837508, at *3; *Rodriguez v. Pataki*, 280 F. Supp. 89, 96 (S.D.N.Y. 2003); *Favors*, 285 F.R.D. at 195.

Finally, Plaintiffs mock the Commissioners for not subjecting themselves to questioning on "what they did and why they did it." (Dkt. 94 at 16: 3-8.) Plaintiffs' argument is refuted by the *Legislative Immunity Opinion*, which held the Commissioners enjoy an absolute legislative privilege. 206 Ariz. at 130 ¶ 24, 75 P.3d 1088, 1097. And the court rejected the argument that the privilege should not apply because the Commissioners are appointed rather than elected. *Id*. at 129 ¶ 20, 75 P.3d at 1096. In the last redistricting cycle, despite numerous federal and state lawsuits, no challenger was permitted to depose a Commissioner. *See, e.g.*, *id.* at 126 ¶ 7, 75 P.3d at 1093. This Commission should be treated no differently.

C. *Favors v. Cuomo* is Distinguishable.

Favors v. Cuomo, 285 F.R.D. 187 (E.D.N.Y. 2012), the case primarily relied on by Plaintiffs, is an opinion by a magistrate judge that is currently on appeal to the three-judge panel. (Ex. C.) Indeed, the magistrate denied the request for protective order without prejudice and is currently conducting an *in camera* review of the documents at issue. *Favors*, 285 F.R.D. at 202. Moreover, unlike this case, the *Favors* order did not involve requests to depose any legislator but only requests to respond to interrogatories and compelled disclosure of documents. *See id.* at 225.

Favors is also unpersuasive because it concerns the development of a redistricting plan under circumstances not even remotely close to this case. That case involves a

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1 challenge to the redistricting plans adopted by the New York State Senate and Assembly.
2 Although a legislative task force was created to assist in the map drawing, unlike the
3 Commission, it did not deliberate with the same degree of openness that is required of the
4 Commission. In fact, it is undisputed that the 2012 Senate Plan in *Favors* was developed
5 exclusively within the Senate Majority redistricting office and that the task force staff
6 members worked exclusively for the Senate Majority. *Id.* at 204. Thus, because *Favors*
7 is not final and factually distinguishable from this case, its is of little help.

8 **III. <u>Plaintiffs' Waiver Argument is Nonsensical.</u>**

9 Plaintiffs argue that by defending the map as based on permissible motives, the
10 Commission has opened the door to depositions of Commissioners. (Dkt. 94 at 4:11-15.)
11 But the Commission has not offered "advice of counsel" or any evidence from
12 Commissioners outside of those made in the legislative history. Plaintiffs' authority
13 (Dkt. 94 at 17:3-11 (citing 285 F.R.D. at 199)) is discussing attorney-client privilege, and
14 does not carry over to not legislative privilege; otherwise, legislative privilege would
15 almost always be waived. *See Arlington Heights*, 429 U.S. at 268 (listing statements in
16 the legislative history as a separate category of evidence from testimony from
17 legislators).[5] Plaintiffs cite Judge Clifton out of context. The remainder of his statement
18 makes clear where the line should be drawn: "And in this case, if the commissioners
19 cannot be asked about their thought process, then they won't be allowed *to testify* about
20 their motivation." (Dkt. 86 12-19-12 Hr'g Tr. at 35:13-15 (emphasis added).)

21 **IV. <u>The Privilege Covers All of Plaintiffs' Relevant Discovery Requests.</u>**

22 Rather than backing down from the obviously overbroad discovery requests,
23 Plaintiffs simply cite the recent Arizona Court of Appeals opinion regarding whether the
24 Commission's hiring of a mapping consultant is a "legislative" versus "administrative"
25 activity. *Mathis*, 2012 WL 6134868, at *18 ¶ 76. However, all of the relevant discovery
26 here involves the actual map-drawing process, which is clearly legislative. (Dkt. 85 at
27

28 [5] Also, this argument is contrary to the Ninth Circuit's use of legislative intent in statutory interpretation. *See* Part II(B)(1), *supra*.

1 14-16.) In any case, deliberative process protects discovery into non-legislative
2 activities. *See, e.g.*, *Kay*, 2003 WL 25294710, at *22 (limiting inquiry, on deliberative
3 process grounds, into non-legislative activities).

4 **CONCLUSION**

5 For the foregoing reasons, the Commission respectfully requests that the Court
6 grant the requested protective order.

7 RESPECTFULLY SUBMITTED this 15th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/Brunn W. Roysden III