IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

SHANNON PEREZ, et al., *Plaintiffs*, - and - EDDIE BERNICE JOHNSON, et al., - and - TEXAS STATE CONFERENCE OF NAACP BRANCHES, et al., *Plaintiff Intervenors*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), *Plaintiffs*, - and - HONORABLE HENRY CUELLAR, et al., *Plaintiff Intervenors*, v. STATE OF TEXAS, et al., *Defendants*	)	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]

TEXAS LATINO REDISTRICTING TASK FORCE, et al., *Plaintiffs*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]

MARAGARITA v. QUESADA, et al., *Plaintiffs*, v. RICK PERRY, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS, *Plaintiff*, v. STATE OF TEXAS, et al., *Defendants*,	)	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]

EDDIE RODRIGUEZ, et al., *Plaintiff*, v.	)	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR [Consolidated case]

STATE OF TEXAS, et al.,

Defendants.

TEXAS LATINO REDISTRICTING TASK FORCE PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO MODIFY THE COURT'S LEGISLATIVE PRIVELEGE ORDER DATED AUGUST 1, 2011

Defendants State of Texas, *et al*. seek modification of this Court's Order (Dkt. 102) in which the Court established procedures for assertion of legislative privilege. *See* Dkt. 930. The Task Force Plaintiffs oppose this motion because it presents no new arguments or authority and only re-urges the State's initial failed motion. This Court properly construed the limited scope of the legislative privilege available to state legislators and no new developments, including a discovery order in the U.S. District Court for the District of Columbia, support the State's request.

ARGUMENT

I. The Court Previously and Properly Settled the Issue of Legislative Privilege and no Problems Have Arisen Under the Court's Order.

In its latest filing, Texas rehashes much of its initial motion for a protective order which it filed in July 2011. *Compare* Dkt. 62 *with* Dkt. 930. The Court ruled on this motion and denied the broad protections requested by Defendants. Dkt. 102.

A. The State's Re-urged Motion Reiterates Previous Unsuccessful Arguments

In its latest filing, Texas argues again that a common law legislative privilege protects state legislators from testifying about legislative acts. The State further argues that this protection should lead the Court to grant witnesses the broad authority to refuse to answer questions or produce documents concerning intent or motivation behind legislative acts; mental

impressions of pending legislation and proposed amendments; thought processes; investigative efforts; and communications about pending legislation. Dkt. 930 at 9-10. Defendants' initial motion requested equally broad relief -- a protective order proscribing "discovery on the issue of individual legislators' motives or purposes." Dkt. 62 at 2, 7. In support of its re-urged motion, Texas cites many of the same cases for the existence of a broad, "unqualified" speech and debate-based privilege against testimony. *Compare* Dkt. 930 at n.2 *with* Dkt. 62 at 4.

Texas makes no argument that the Court's existing order regarding legislative privilege has failed or created problems in this litigation. On the contrary, the Court's privilege order worked smoothly. Texas filed no motions to seal deposition testimony following an assertion of legislative privilege by one of its witnesses. The Plaintiffs filed no motions to compel testimony that Texas claimed was legislatively privileged.[1]

Texas has argued strenuously that the current phase of the case, which involves resolving claims of discrimination with respect to the 2011 and 2013 redistricting plans, is one litigation that should not be bifurcated or subject to different procedures. See e.g., Dkt. 905 (Defendants' Opposition to Plaintiffs' Motion for Bifurcation). Texas urged the Court to establish a unified process to guide the case in order to conduct the litigation in a "timely and organized manner." *See* Dkt. 924 (Defendants' Scheduling Order Advisory). Having secured a unified process for the resolution of claims, Texas may not now argue that the Court should adopt two completely different procedures to deal with legislative privilege.[2]

[1] Texas filed several motions seeking to file sealed documents and the Court granted those motions. *See* Dkt. 166. A motion by NAACP and Congresspersons Plaintiffs to unseal the documents was later withdrawn. *See* Dkt. 286.

[2] This is especially true in light of the fact that Texas fails to identify any legislative witnesses who may claim privilege with respect to 2013 redistricting plans and instead only states that the "different members" who acted on the 2013 redistricting plans "have not yet had a chance to invoke or waive legislative privilege." Dkt. 930 at 11.

If anything, the State's re-urged motion is premature. In 2011, this Court concluded that the State's initial broad assertion of privilege was premature. Dkt. 102 at n.1 *citing Florida Association of Rehabilitation Facilities, Inc. v. State of Florida*, 164 F.R.D. 257,260 (N.D. Fla. 1995) (question as to whether privilege applied was not ripe when witnesses had not appeared and asserted privilege in the context of specific questions).[3]

It is well settled that a witness whose testimony is subpoenaed cannot simply refuse to appear altogether on grounds of privilege, but rather must appear, testify, and invoke the privilege in response to particular questions. *Florida Association of Rehabilitation Facilities, Inc.*, 164 F.R.D. at 260 *citing In Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1518 (11th Cir.), *cert. denied sub nom. Hastings v. Godbold*, 476 U.S. 1112, 106 S.Ct. 1965 (1986).

The Court's conclusion that Texas' initial assertion of privilege was premature implies a preference for careful consideration of specific requests rather than a rushed, broad application of the privilege. The Court's current, appropriate approach allows a witness to invoke legislative privilege and permits plaintiffs to move subsequent to the deposition to use that testimony at trial. This procedure is efficient for two reasons: first, because the parties need not return and take a second deposition if the testimony is deemed non-privileged; second, because the Court is spared having to resolve motions to compel testimony filed by plaintiffs who cannot determine whether the testimony being withheld is privileged or not. The Court's approach is also limited in the sense that it will be employed only when a witness claims a legislative privilege. Thus far, no legislative witnesses have claimed privilege with respect to the 2013 redistricting plans. Texas has not indicated whether any 2013 witnesses will claim legislative privilege.

[3] Contrary to the suggestion by Texas, the Court did not base its ruling on the existence of a time constraint posed by upcoming depositions. *See* Dkt. 930 at 10.

II. The Court's Cautious Approach to Legislative Privilege Is Appropriate With Regard to This Reassertion of Privilege

In its order, the Court emphasized the "limited and qualified" nature of the legislative privilege. Dkt. 102 *citing In re Grand Jury*, 821 F.2d 946, 957-58 (3rd Cir. 1987). The Court properly concluded that broader protections, like the ones Texas seeks here, would be inappropriate. Dkt. 102 at 5.

In response to the State's latest motion, the Task Force Plaintiffs incorporate by reference the arguments and authorities set out in their Response to Defendants' Motion for Protective Order. *See* Dkt. 88.

A. Texas again misconstrues the nature of the legislative privilege

Texas' broad reassertion of privilege still does not meet the federal common law standard. In evaluating the State's request, the Court is guided by the well-established principle that testimonial privileges should be construed narrowly, *e.g.*, *Elkins v. United States,* 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting), and subject to the "reason and experience" of the courts, FED. R. EVID. 501. "[T]hese exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon,* 418 U.S. 683, 710 (1974) (noting that courts have been historically "cautious" about granting testimonial privileges). The legislative privilege is particularly qualified. *In reGrand Jury,* 821 F.2d 946, 957 (3d Cir.1987) ("[A]ny such privilege must be qualified, not absolute . . . . "); *Rodriquez,* 280 F. Supp. 2d at 95 (comparing legislative immunity with legislative privilege and noting that legislative privilege is "not absolute"); *Fla. Ass'n of Rehab.Facilities, Inc. v. State of Fla. Dep't of Health & Rehabilitative Servs.*, 164 F.R.D. 257, 267 (N.D. Fla. 1995) (noting the existence of a "qualified state legislative

evidentiary privilege"). Granting the State's request for a broad protective order would contravene the very nature of a qualified legislative privilege.

The Court properly concluded that:

> The Court cannot provide blanket protection to every person who may choose to assert the privilege during the discovery process. Instead, the parties should proceed with depositions and the deponents must appear and testify even if it appears likely that the privilege may be invoked in response to certain questions. The deponents may invoke the privilege in response to particular questions, but the deponent must then answer the question subject to the privilege. Those portions of the deposition transcript may then be sealed and submitted to the Court for in camera review, along with a motion to compel, if the party taking the deposition wishes to use the testimony in these proceedings.

Dkt. 102 at 5-6.

Texas may be able to claim privilege with regard to particular elicited testimony or to requested documents, but the privilege should not serve to bar discovery in the manner sought by Texas.[4]

B. Courts can Properly Narrow the Scope of Legislative Privilege in Cases Involving Claims of Invidious Intent

Courts have found that the state legislative privilege must yield when balanced with important federal interests. *See Baldus v. Members of the Wis. Gov't Accountability Bd.*, No. 11-cv-562, 2011 WL 6122542 (E.D. Wis. 2011) (concluding that the legislative privilege yielded to important interests of the Voting Rights Act) (unpublished); *see also U. S. v. Gillock*, 445 U.S. 360, 361 (1980). Task Force Plaintiffs, in their fourth amended complaint, emphasized the role

[4] Undermining the State's assertion that the legislative privilege for state officials is broad in scope, the cases cited by Texas in its latest motion applied the legislative privilege in a limited manner, *e.g.* to protect specific witnesses or documents. *See Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (limiting testimonial privilege to legislators who would not testify at trial); *2BD Associates Ltd. P'ship v. Cnty. Comm'rs for Queen Anne's Cnty.*, 896 F. Supp. 528, 531, 535 (D. Md. 1995) (limiting testimonial privilege to certain areas of inquiry and denying testimonial privilege to staffer who served coordinating role among legislators); *Suhre v. Bd. of Comm'rs*, 894 F. Supp. 927, 930 (W.D.N.C. 1995) *rev'd sub nom. Suhre v. Haywood Cnty.*, 131 F.3d 1083 (4th Cir. 1997) (did not address testimonial privilege).

of intentional discrimination in Texas' redistricting plans. *See* Dkt. 891 (Task Force Fourth Amended Complaint) (complaint addresses use of race as a "predominant factor" in redistricting at ¶¶ 37, 41, 42, 53, 56, and elsewhere). The testimony of legislators and legislative staff, even when related to the legislative process, should be allowed in light of these important interests and their particular importance to Task Force Plaintiffs' claims.

III. The D.C. District Court Struck a Similar Balance With Respect to Legislative Privilege in the Texas Redistricting Case

In its motion, Texas cites a discovery order issued by the D.C. district court in the Texas voter identification case *Texas v. Holder*. Dkt. 930 at 9 *citing* Order at 1-2, *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) *vacated and remanded*, 133 S. Ct. 2886 (2013) (No. 12-128), ECF No. 84. Texas neither explains how the issues in that case are similar to the issues here nor explains how this Court is bound by the decision of the *Holder* district court. *See Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") *quoting* 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed.2011).

The *Holder* district court explained that its decision was specific to the case and circumstances at hand. Order on Motions to Compel at 4 n.2, Dkt. 167 (explaining that the panel was "determining where to draw the contours of the legislative privilege in this case"). The *Holder* district court further explained that because the testimonial privilege afforded state legislators rests on federal law, "there may be additional circumstances where 'reason and experience,' Fed R. Evid. 501, dictate a narrower privilege for state legislators than that enjoyed

by federal legislators" and observed that the balance struck by the panel "may be distinguishable in other circumstances." *Id*. at 4.[5]

If this Court is inclined to look at the decisions of the D.C. district court with respect to legislative privilege, the more relevant case is *Texas v. U.S.*—the redistricting preclearance case. *See Texas v. United States*, 887 F. Supp. 2d 133, 210 (D.D.C. 2012) *vacated and remanded*, 133 S. Ct. 2885 (U.S. 2013) (No. 11-1303). In that case, the D.C. district court adopted the same approach as this Court. With respect to documents that Texas claimed were legislatively privileged, the D.C. district court ordered Texas to produce those documents under seal for review by all parties. *See* Minute Order, *Texas v. U.S.*, 887 F. Supp. 2d 133 (December 30, 2011). With respect to testimony, the D.C. district court concluded that legislative privilege had been waived as to all elected officials who were deposed and all elected officials who were mentioned in the depositions of others:

> Mr. Mattox informed the Court in the Western District of Texas that these Senators and other legislators mentioned in deposition testimony were informed and made no objections; therefore, any privilege covering conversations, emails and other documents between or among one or more of them, between or among one or more of them and the map-drawers, and between or among one or more of them and the Texas Legislative Council, has been waived. . . Mr. Maddox's broad waiver of privilege for all legislators named in depositions in the Section 2 proceeding was without limit. It was not limited to the Section 2 case, much less general VRA litigation involving the Texas Plans, even if such a limited waiver were possible.

Memorandum Opinion on Privilege Claims, Dkt.128 at 12 n.7 and at 13.

[5] The *Holder* district court was also careful to recognize that *Texas v. Holder* was a section 5 preclearance case, which "imposes 'substantial federalism costs,'" and explained that legislative privilege might be more narrowly drawn in other cases. *Id*. at 4 n.2 ("As such, the applicable contours of the state legislative privilege may be drawn differently in a Section 5 case than in other contexts.")

The D.C. district court concluded that Texas could not invoke a broad privilege to protect its witnesses from having to testify about the redistricting process:

> Texas asserts a broad legislative privilege that would, if adopted, shield almost everything that any Texas State Legislator or his staff ever does. Texas cites no State law — statute or caselaw — that recognizes the privilege it claims here in federal court, which is at least passing strange if such a privilege actually exists and is recognized within the State. Texas cannot claim a privilege here that its own courts do not recognize.
>
> At this juncture, the Court need not determine whether the State legislative privilege applies.

Id. at 17.

CONCLUSION

Task Force Plaintiffs respectfully request that the Court deny Texas' motion to modify the August 11, 2011 Order.

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Respectfully submitted,

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Certificate of Service

The undersigned counsel hereby certifies that she has electronically submitted a true and correct copy of the above and foregoing via the Court's electronic filing system on the 3rd day of December, 2013. The undersigned counsel hereby certifies that she caused a true and correct copy of the above and foregoing to be emailed and/or sent by facsimile to the persons listed below by the close of the next business day.

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