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

SHANNON PEREZ, *et al.*, Plaintiffs, and UNITED STATES of AMERICA, Plaintiff-Intervenor, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-360 (OLG-JES-XR) Three-Judge Court [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-361 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*, Plaintiffs, v. RICK PERRY, Defendant.	Civil Action No. 5:11-cv-490 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

MARGARITA V. QUESADA, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-592 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-615 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
EDDIE RODRIGUEZ, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-635 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

THE UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO MODIFY THE COURT'S AUGUST 1, 2011 ORDER CONCERNING LEGISLATIVE PRIVILEGE

Defendants' proposed modification of the August 1, 2011 Order governing assertions of legislative privilege is unwarranted. In 2011, Defendants sought a blanket protective order based on legislative privilege that would insulate witnesses from testifying, and this Court rightly rejected that request. *See* Order (ECF No. 102) ("August 1 Order"). The Court explained that even if a deponent invoked the privilege, "it may be waived and/or the Court may find that it should not be enforced" because the evidence may not be available from other sources. *Id*. at 5. This Court concluded that although federal common law recognizes "an evidentiary and testimonial privilege" for state legislators, any such privilege is "limited and qualified." *Id.* (citing *In re Grand Jury*, 821 F.2d 946, 957-58 (3d Cir. 1987)). Instead, the Court ordered legislators to proceed with depositions, required a legislator to invoke the privilege in response to specific questions, required the legislator to answer such questions, but then allowed portions of the transcript to be sealed and submitted to the Court for *in camera* review if the deposing party wanted to use particular testimony. *See id*. at 5-6.

The Court's refusal to grant a broad or absolute legislative privilege struck a careful balance between relevant considerations. The Court's procedures allowed important testimony to be heard, respected the important federal interest in the enforcement of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and served the public good by revealing the truth about statewide redistricting. *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012) (three-judge court). Although the August 1 Order protected each legislator's opportunity to maintain a claim of legislative privilege, none did. Thus, there was no actual need for a broad protective order. Defendants' motion should be denied.

I. NO STATE LEGISLATOR HAS ASSERTED A LEGISLATIVE PRIVILEGE CONCERNING THE 2011 REDISTRICTING PROCESS.

With regard to the 2011 redistricting process, the State has not established that a live controversy exists that would warrant modification of the August 1 Order. Each legislator identified in the State's initial disclosures was deposed, named in another deposition, or testified at trial, as were nearly all of the additional legislators in Defendants' amended disclosures. *See* Def. Initial Disclosures (Ex. 1); Def. 1st Am. Disclosures (Ex. 2). Counsel for Defendants has represented to the Court that they have contacted every legislator who was identified during 2011 depositions and that no such legislator has maintained a claim for legislative privilege. *See* Trial Tr. at 901:7-21 (Sept. 9, 2011) (Ex. 3). Nor did any legislator invoke privilege at trial. In this case, ten state legislators and legislative aides have testified, and Defendants called five of them. Similarly, in related proceedings in the U.S. District Court for the District of Columbia, fourteen state legislators and legislative aides testified, and Defendants called six of them.

Nonetheless, the State now requests that this Court alter procedures governing state legislative privilege for "legislative witnesses who have not yet waived the privilege regarding claims against the 2011 redistricting plans." Mot. to Modify at 2 (ECF No. 930). However, the State has not shown that any such witness now intends to assert the privilege. Defendants have now named one previously unmentioned legislator in its amended disclosures (Representative JM Lozano), but Defendants have not explained what specific knowledge this legislator may have, why he was not previously identified, or—most importantly—whether he intends to assert a privilege. As the court found in its August 1 Order, "the assertion of privilege is premature." August 1 Order at 5.

II. THE EXISTING FRAMEWORK APPROPRIATELY WEIGHS THE IMPORTANT FEDERAL INTEREST IN ENFORCING SECTION 2.

Section 2 of the Voting Rights Act establishes a federal policy to uncover and eradicate racial discrimination in voting, particularly intentional discrimination, and the public maintains a vital interest in discovery of the truth concerning the rules of our democracy. Moreover, the evidence held by Texas legislators is likely to be both uniquely probative and unavailable from any other source. In the balance, Defendants present only generalized concerns regarding the "dignity and autonomy of legislative bodies" and a chilling effect on legislative communications. Mot. to Modify at 8-9. The Court's August 1 Order appropriately addresses those concerns.

A. The United States Maintains a Vital Interest in Enforcement of Section 2 of the Voting Rights Act.

"[W]here important federal interests are at stake," the interests underpinning any state legislative privilege must yield. *United States v. Gillock*, 445 U.S. 360, 373 (1980). Section 2 of the Voting Rights Act "seeks to protect the core values of [the Fourteenth and Fifteenth] amendments through a remedial scheme." *Jones v. City of Lubbock*, 727 F.2d 364, 373-74 (5th Cir. 1984). Where Congress has placed "government intent" at the heart of a cause of action, the plaintiff "has a compelling interest in discovery of evidence of such intent," and uninhibited deposition testimony of officeholders is appropriate. *Jones v. City of College Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006); *see also United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989). In order to resolve Section 2 intent claims, courts have routinely relied on the testimony of legislators and their aides. *See, e.g., Brooks v. Miller*, 158 F.3d 1230, 1236 (11th Cir. 1998); *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1314-18 (C.D. Cal. 1990), *aff'd*, 918 F.2d 763, 768 (9th Cir. 1990).

This litigation demonstrates the compelling nature of such evidence, as testimony and documents provided by legislative witnesses have exposed the discriminatory intent underlying the 2011 redistricting plans for the Texas Congressional delegation and the Texas House of Representatives. Relying on this critical evidence, the U.S. District Court for the District of Columbia concluded that the Congressional plan "was motivated, at least in part, by discriminatory intent," *Texas v. United States*, 887 F. Supp. 2d 133, 161 & n.32 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2885 (2013), and this Court found that the State of Texas "may have focused on race to an impermissible degree" when crafting the House plan, Op. at 6 (ECF No. 690).

B. Defendants Have Failed to Justify a Change to the Court's Order Concerning Legislative Privilege.

Defendants raise a number of arguments in favor of modifying the Court's order, but only two are new: the claim that there have been "further developments in the law regarding legislative privilege" and the availability of additional time to conduct discovery. Neither contention justifies changing the Court's August 1 Order.

Since entry of the August 1 Order, decisions in statewide redistricting litigation under Section 2 have struck a similar balance or have given even lesser weight to legislative privilege claims. In *Baldus v. Members of the Wisconsin Government Accountability Board*, a three-judge court unanimously rejected a legislative privilege claim because "the truth here—regardless of whether the Court ultimately finds the redistricting plan unconstitutional—is extremely important to the public, whose political rights stand significantly affected by the efforts of the Legislature. On the other hand, no public good suffers by the denial of privilege in this case." 843 F. Supp. 2d at 959. In *Favors v. Cuomo*, the court rejected a claim of absolute legislative

privilege against disclosure of documents or any information concerning legislators or their staffs and found that the relevant factors, including the probative value of the evidence sought, the lack of alternative sources for the information, the seriousness of the claim, and the role of the government in the litigation, "generally support overcoming the privilege." 285 F.R.D. 187, 217-20 (E.D.N.Y. 2012). Although *Favors* found that any chilling effect in future redistricting proceedings would be minimal, the court had a concern about a chilling effect more broadly and permitted *in camera* review of documents to "make the contextual investigation necessary to weigh the claim of privilege against the need for disclosure." *Id.* at 220-21. No similar review of deposition testimony is possible unless legislative witnesses first answer the question posed. Thus, these decisions both support leaving in place the Court's August 1 Order.

Defendants incorrectly suggest that two orders in *Texas v. Holder*, No. 1:12-cv-128 (D.D.C.) support their claim of an absolute legislative privilege. *See* Mot. to Modify at 6-7 (citing Order at 11, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. June 5, 2012) (three-judge court) (ECF No. 167)); *id.* at 9-10 (citing Order at 1-2, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. Apr. 20, 2012) (ECF No. 84) ("April 20 Order")). In *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2886 (2013), the State sought preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, of its photographic voter identification statute, SB 14. The State sought a blanket protective order barring depositions of state legislators, and—as in this case—the *Holder* Court denied the State's request. *See* April 20 Order at 2-3 (requiring legislators to invoke the privilege "in response to specific requests for depositions or to justify withholding the production of specific communications" but not defining the scope of the privilege). The United States then deposed several legislators, who uniformly invoked a broad state legislative privilege on the advice of the Office of the Texas Attorney

General. The United States moved to compel both testimony and documents, and in a series of unpublished orders, the court compelled some testimony and the production of some documents, while upholding a narrower version of the claimed privilege.[1]

The Section 5 context in which *Holder* struck a balance is different than the Section 2 context in this case. In its decision on the merits of the State's claim, the *Holder* Court explained that federalism concerns regarding the application of Section 5 only to those jurisdictions identified in Section 4(b) had "influenced [its] resolution of several discovery disputes." *Texas v. Holder*, 888 F. Supp. 2d at 119 (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)); *see also id.* at 119 (explaining that legislative discovery could exacerbate federalism concerns); Order at 4-7, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. May 28, 2012 (three-judge court) (ECF No. 154) ("Whether the legislative privilege applies . . . is a very close call. Given the constitutional concerns raised by the Supreme Court in *Northwest Austin*, however, we are obliged to apply [Section 5 of the] Voting Rights Act in a manner that minimizes 'federal intrusion into sensitive areas of state and local policymaking' and will therefore interpret the privilege in this context to cover such a communication.'" (quoting *Nw. Austin*, 557 U.S. at 202)). Similar concerns do not arise for an intent claim under Section 2 of the Voting Rights Act because Section 2—which is a nationwide prohibition against discrimination in voting on the basis of race—presents no countervailing constitutional considerations. Thus, there is no basis to apply the balance struck in *Texas v. Holder* to this case.

[1] *See* Order, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. May 17, 2012) (three-judge court) (ECF No. 122) (compelling testimony); Order at 4, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. May 17, 2012) (three-judge court) (ECF No. 128) (compelling document production); Order at 4-7, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. May 28, 2012 (three-judge court) (ECF No. 154) (compelling partial document production); Order at 4-11, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. June 5, 2012) (three-judge court) (ECF No. 167) (compelling partial document production).

Defendants also argue that because there is more time to conduct the remaining depositions than there had been between the August 1 Order and the 2011 trial, the Court should order a round of briefing to consider legislative privilege alleged by each witness before the remainder of each deposition can go forward. The parties agreed that depositions could begin on January 15, 2014, and there will be only four months before the May 14, 2014, discovery deadline. Defendants' approach would waste resources and require expedited briefing to afford sufficient time to reopen depositions. Given that the general balance leans heavily towards disclosure, the Court's existing procedures are more appropriate than reopening depositions following privilege litigation.

Defendants also recycle earlier arguments, including the claim that state legislators cannot be compelled to testify absent "extraordinary circumstances." Mot. to Modify at 4-5 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 & n.18 (1977)); *see also* Motion for Protective Order at 5 (ECF 62) (same). No compulsion is at issue, however, because the State has called legislators and legislative aides to testify in support of the 2011 redistricting plans, and those witnesses have waived claims of legislative privilege. *See* Mem. Op. at 12-13, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Jan. 2, 2012) (ECF 128) (Ex. 4). In addition, Defendants' First Amended Disclosures name over a dozen legislators and aides, nearly all of the State's potential lay witnesses. *See* Def. 1st Am. Disclosures. Thus, imposition of a broad legislative privilege would not prevent legislators from being "called to the stand at trial to testify concerning the purpose of the official action." *Arlington Heights*, 429 U.S. at 268. Rather, it would allow legislators to testify concerning public statements while precluding effective cross-examination. *See Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001) ("[T]he privilege they propose would enable them to seek discovery, but not respond to it; take

depositions, but not be deposed; and testify at trial, but not be cross-examined. In short, they assert a privilege that does not exist.").

Defendants' motion also erroneously conflates state legislators' absolute immunity from civil suit and a testimonial privilege that, where it exists, is qualified. *See* Mot. to Modify at 4-5. The Supreme Court has interpreted 42 U.S.C. §§ 1983 and 1985(3) not to eliminate a common law immunity from civil liability for legislative acts. *See Tenney v. Brandhove*, 341 U.S. 367, 375-76 (1951); *see also Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719 (1980). Legislative immunity and legislative privilege are different and often confused concepts that rely on different common law considerations. *Compare Tenny*, 341 U.S. at 375-76 (requiring a clear legislative statement to override common law legislative immunity), *with Gillock*, 445 U.S. at 373 (requiring only a strong federal interest to trump any common law state legislative privilege). Thus, absolute privilege need not flow from absolute immunity. *See, e.g., Manzi v. Dicarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997); *see also Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 763 (S.D. Tex. 2011). The State's reliance on broad language in *Tenney*, *Consumers Union*, and *Bogan*—decisions concerning only immunity—is unfounded.

Similarly, Defendants' incorrectly argue that the procedures used to protect the attorney-client privilege should be used to protect legislative privilege. *See* Mot. to Modify at 7. The attorney-client privilege is absolute, unlike the qualified state legislative privilege at issue here. Because the Court has established that deposition testimony may be placed under seal in order to preserve a privilege pending a motion to compel, *see* Order at 5-6, an instruction to a deponent

not to answer is not "necessary to preserve a privilege" and is therefore unnecessary under Federal Rule of Civil Procedure 30(c)(2).[2]

III. CONCLUSION

The important federal interest in enforcing Section 2 of the Voting Rights Act requires a careful examination of all relevant evidence in this case. In this case, no legislator has maintained an assertion of legislative privilege, and the assertion of the privilege remains "premature." If an assertion of legislative privilege is made in an upcoming deposition, the procedures set in place by the Court in the August 1 Order recognize the importance of legislative evidence in this case while providing Defendants with an opportunity to protect any materials that they can establish raise specific and valid concerns. The motion seeking to modify the Court's August 1 Order should be denied.

[2] Contrary to Defendants' claim, conducting a complete deposition under seal will not render a legislator's claim meaningless. Mot to Modify at 8. Placement of privileged materials under seal is an adequate means to preserve the interests that underlie even an absolute evidentiary privilege. *Cf. SEC v. Bilzerian*, 127 F. Supp. 2d 232, 234 (D.D.C. 2000) (permitting filing of fee application under seal as adequate means "to protect the attorney-client or other applicable privileges and to preserve the confidentiality of attorney work product").

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