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

SHANNON PEREZ, et al.	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.
	)	11-CA-360-OLG-JES-XR
v.	)	[Lead case]
	)	
STATE OF TEXAS, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO MODIFY THE COURT'S LEGISLATIVE PRIVILEGE ORDER DATED AUGUST 1, 2011

Plaintiffs misconstrue the nature of the relief Defendants seek in their motion to modify. Defendants' motion does not seek a protective order, nor does it seek to prevent legislative witnesses from sitting for depositions. Defendants simply want to ensure that legislative witnesses are able to assert legislative privilege when appropriate and, if there is a dispute whether the information sought is privileged, obtain a ruling from the Court *before* divulging privileged information rather than after it has been disclosed. By compelling disclosure of all privileged information, the existing order effects a blanket abrogation of the legislative privilege. Defendants seek only to preserve legislators' ability to assert their well-established privilege in a normal manner, that is, without being put to the untenable choice of disclosing privileged information or violating a court order.[1]

[1] Plaintiffs suggest that legislative privilege should not be invoked in the same manner as the attorney-client privilege because it is a "qualified" privilege. *See* United States' Response in Opposition to Defendants' Motion to Modify (ECF No. 948) at 8; Task Force Plaintiffs' Response in Opposition to Defendants' Motion to Modify (ECF No. 941) at 6-7. But the notion that a state

This Court should grant Defendants' motion to modify because the Court's order of August 1, 2011, effectively abrogates legislative privilege before it has been asserted. Although legislative witnesses are permitted to object based on the privilege, they must reveal privileged information. Such an intrusion into the legislative process is unwarranted.

Plaintiffs maintain that the existing procedures are necessary because they will promote efficiency and serve the federal interest in enforcing Section 2 of the Voting Rights Act. Neither of these interests supports a sweeping abrogation of the privilege. Allowing counsel and their clients to compel disclosure of privileged information before any motion to compel has been filed and ruled on by the Court defeats the purpose of the privilege, which is to protect a legislator's thought process and subjective motivation from disclosure. And notably absent from the responses is any particularized effort to justify the intrusion into matters that are at the core of legislative privilege. A generalized interest in enforcing federal law does not warrant the wholesale abrogation of state officials' legislative privilege. Accordingly, this Court should grant Defendants' motion to modify the procedures used to invoke legislative privilege.

ARGUMENT

A. Defendants Do Not Seek A Blanket Protective Order From the Court.

Plaintiffs' responses reflect a misunderstanding of the Defendants' request. Unlike the relief sought in their first motion for protection in 2011, Defendants do

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legislator's privilege is not absolute means that there may be certain circumstances when the privilege will yield to the need for disclosure. *See, e.g., United States v. Gillock*, 445 U.S. 360 (1980). The qualified nature of the privilege has no bearing on the manner in which a legislator can invoke the privilege in a deposition.

not seek a protective order of any kind, much less one that would prevent legislators from testifying or sitting for depositions. *Cf.* Defendants' Motion for Protective Order (ECF No. 62). The Court found Defendants' initial motion for protection to be premature because no question seeking privileged information had been posed. *See* Order Denying Motion for Protective Order (ECF No. 102) at 5. The instant motion does not seek to bar Plaintiffs from asking questions in future depositions that may implicate the legislative privilege. Defendants intend to produce legislative witnesses for depositions and allow them to testify on all non-privileged matters. If a witness wishes to invoke the legislative privilege, however, Defendants intend to preserve his or her privilege by instructing the witness not to answer questions that call for the disclosure of privileged information. *See* FED. R. CIV. P. 30(c)(2).

Plaintiffs are wrong to suggest that the relief sought by Defendants will somehow prevent the examination of specific claims of privilege. The Task Force Plaintiffs, for example, urge "careful consideration of specific requests rather than a rushed, broad application of the privilege." Task Force Plaintiffs' Response in Opposition to Defendants' Motion to Modify (ECF No. 941) at 5. This is exactly what the Defendants are asking for—a chance for the Court to determine whether a deposition question seeks privileged information *before* that information is disclosed. By insisting on a broad abrogation of the privilege before depositions begin, it is Plaintiffs who would prevent the careful consideration of specific questions of privilege.

Plaintiffs are also wrong to suggest that Defendants' motion asks the Court to "grant" a privilege. Defendants do not ask the Court to grant any privilege, nor

do they seek to expand or define the scope of the legislative privilege before discovery begins. The contours of the legislative privilege are defined by law. *See, e.g., Gravel v. United States*, 408 U.S. 606, 615-16 (1972). If information is privileged, it should be protected from disclosure regardless of its substance or availability from other sources—this is why *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252 (1977), says that legislator testimony will frequently be "barred" by the privilege. *Id.* at 268; *see also Cano v. Davis*, 193 F. Supp. 2d 1177, 1181 (C.D. Cal. 2002) (concluding, in a redistricting case, that "to the extent invoked by members of the California legislature, the privilege protects both against disclosure and against use"); *cf. Brown & Williamson Tobacco Co. v. Williams*, 62 F.3d 408, 419-21 (D.C. Cir. 1995) (rejecting the argument that the Speech or Debate Clause provides immunity from use but not from disclosure).[2] Granting Defendants' motion will not change the scope of the privilege in any way.

Compelling all witnesses to reveal privileged information, on the other hand, unquestionably changes the scope of the legislative privilege. Plaintiffs' insistence on unconventional procedures that force witnesses to reveal privileged information (or defy a court order) reflects an effort to invade the privilege by defeating its very purpose. This cannot be justified under *Arlington Heights*, which acknowledges the

[2] The United States' reliance on the Third Circuit's decision in *Powell v. Ridge* is misplaced. *See* United States' Opposition to Defendants' Motion to Modify (ECF No. 948) at 7-8 (citing *Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001)). Unlike the legislators in *Powell*, the legislative witnesses in this case have not voluntarily intervened as parties to the litigation, nor have they conceded that the privilege they wish to invoke will function as a sword and a shield. *Cf. Powell*, 247 F.3d at 525 ("As we noted at the outset, and *as the Legislative Leaders conceded at oral argument*, the 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.") (emphasis added); *see also id.* ("Unlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants.").

longstanding unwillingness of federal and state courts to inquire into the motivations and thought processes of individual legislators—even when legislative purpose is directly at issue. *See* 429 U.S. at 268 n.18. Courts may discern legislative purpose from publicly available evidence, records of legislative proceedings, and common sense. But requiring legislators to submit to cross-examination by their political opponents without affording them the opportunity to obtain privilege rulings prior to the disclosure of potentially privileged information runs counter to the Supreme Court's admonition that even when an "extraordinary instance[]" requires state legislators to testify, their testimony "frequently will be barred by privilege." *Id*. at 268.

Defendants' request to restore normal procedures for the assertion of privilege is not premature. While Plaintiffs repeatedly insist that no witness has appeared for deposition or asserted legislative privilege, they do not explain why this fact supports a prospective abrogation of a well-established privilege. The fact that no witness has asserted the privilege is a reason *not* to order all witnesses to disclose privileged information before any request has been made. If anything is premature, it is a blanket order compelling all witnesses to choose between forfeiting a privilege or violating a court order.

In requesting modification of the existing order, the Defendants seek only to postpone rulings on privilege until the privilege is asserted. The extent to which the parties may invoke legislative privilege must be resolved before depositions begin so that the parties will know whether witnesses will be allowed to preserve

the legislative privilege by refusing to disclose privileged information. This issue is ripe for the Court's consideration.

B. Plaintiffs Cannot Justify The Continued Use of Procedures That Abrogate The Legislative Privilege.

Plaintiffs make little effort to dispute the fact that the existing discovery order denies legislators the full protection of the legislative privilege. Plaintiffs contend that because the order has failed to create problems in this litigation and the procedures have neither "proven unwieldy or unworkable," the procedures must be sufficient. Joint Plaintiffs' Response to Defendants' Motion to Modify (ECF No. 943) at 3; *see also* Task Force Plaintiffs' Response in Opposition to Defendants' Motion to Modify (ECF No. 941) at 4; United States' Opposition to Defendants' Motion to Modify (ECF No. 948) at 2. That legislators who testified in the 2011 trial did not invoke legislative privilege does not mean that the extraordinary process established by the existing order is appropriate in the current circumstances.

Forcing legislators and their staff to reveal privileged communications and mental impressions on pain of violating a court order undermines the legislative privilege. Under the existing procedure, legislators and their staff must divulge privileged information to over a dozen different attorneys representing numerous individuals and organizations. Once that information is disclosed during a deposition, too many individuals have access to the information to believe that it remains protected from disclosure in any meaningful sense. Requiring plaintiffs to submit deposition testimony for *in camera* review before introducing it at trial—essentially a motion in limine—does not offset the harm of compelling disclosure of

privileged information. Whether or not the Court decides that the testimony itself may come into evidence, the parties benefit from privileged information that was improperly obtained. It is critical in a case like this one—where some of the parties receiving the privileged information are political opponents of the legislators being required to testify—to have a process that serves to protect the privilege. It cannot be the case that all a legislator needs to do is file a lawsuit in order to uncover the privileged communications and thought processes of the legislators who voted the opposite way.

This is why the procedures used by the D.C. Court in *Texas v. Holder* should be adopted here. The Task Force Plaintiffs argue that this case holds no persuasive value because it involved claims under Section 5 of the Voting Rights relating to the state's voter identification law. *See* Task Force Plaintiffs' Response in Opposition to Defendants' Motion to Modify (ECF No. 941) at 8-9. But the fact that the claims in *Texas v. Holder* are different than the ones presented here are of little significance to the issues implicated in this motion. *Texas v. Holder* represents the most recent pronouncement by a court regarding the process that should be used to determine claims of legislative privilege. *See* Order at 1-2, *Texas v. Holder*, No. 12-167-RMC-DST-RLW (D.D.C. April 20, 2012), ECF No. 84. This Court should employ the same procedures because allowing legislative witnesses to refrain from answering questions that would seek privileged information is the only way to safeguard the communications and mental impressions the privilege exists to protect.[3]

[3] The Task Force Plaintiffs' reliance on the discovery order issued in the redistricting preclearance case, *Texas v. United States*, 11-1303-RMC-TBG-BAH (D.D.C.), relating to legislative privilege is entirely misplaced. *See* Task Force Plaintiffs' Response in Opposition to Defendants'

C. No Legislators Have Waived The Privilege With Respect To The 2013 Redistricting Bills.

The modification requested by Defendants is not inconsistent with the unified process this Court has adopted to govern the litigation in this case. Discovery related to the 2011 redistricting plans has followed the procedures set forth in the Court's August 1, 2011 order, and Defendants do not seek to modify those procedures with respect to any witness who has already testified or waived the privilege with respect to the 2011 redistricting plans. *See, e.g., Florida v. U.S.*, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012) ("A legislator who agrees to testify of course may be deposed; by voluntarily testifying, the legislator waives any legislative privilege on the subjects that will be addressed in the testimony."). Defendants request only that this Court not force witnesses to reveal privileged information without waiving privilege or obtaining a ruling from the Court.

Contrary to MALC's suggestion, a legislator's waiver of privilege regarding the 2011 redistricting plans does not constitute a waiver of privilege with respect to the 2013 legislative session. *Cf.* MALC's Response to Defendants' Motion to Modify (ECF No. 939) at 2. When a witness waives a privilege, the waiver extends only to communications relating to the same subject matter. *Cf. S.E.C. v. Microtune, Inc.*,

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Motion to Modify (ECF No. 941) at 9. The D.C. Court adopted the same procedures relating to the invocation of legislative privilege as set forth in this Court's order at the insistence of the State of Texas. *See* Plaintiffs' Brief Regarding the Applicability of Attorney-Client Privilege, Work Product Privilege, Legislative Privilege, and Statutory Privilege at 11, *Texas v. United States*, 11-1303-RMC-TBG-BAH (D.D.C Dec. 28, 2011), ECF No. 122. The D.C. Court never expressed an opinion on whether the use of such procedures was an appropriate means to protect testimony that was subject to the legislative privilege. *See* Order at 3, *Texas v. United States*, 11-1303-RMC-TBG-BAH (D.D.C Jan. 2, 2012), ECF No. 128 ("Taking its cue from the District Court for the Western District of Texas, which has a Section 2 VRA case before it, the Court will not decide whether a State legislative privilege exists and follows into federal court, since Texas will provide all relevant documents under seal."). Further, because this discovery order is inconsistent with the D.C. Court's later order in the voter identification preclearance case, it has no persuasive value.

258 F.R.D. 310, 317 (N.D. Tex. 2009) (citing *SEC v. Brady*, 238 F.R.D. 429, 441 (N.D. Tex. 2006)) (noting that "[w]hen a party waives the attorney-client privilege, it waives the privilege as to all communications that pertain to the same subject matter of the waived communication."). Questions about the 2011 redistricting plans do not address the same subject matter as questions about the 2013 redistricting plans, which were passed two years later by a different Legislature. A legislator's waiver of privilege in 2011 cannot reasonably be construed as a prospective waiver of privilege with respect to the future legislative business of a yet-to-be-convened 2013 legislative session, and it should not prevent the assertion of privilege with respect to the 2013 redistricting plans.

D. Plaintiffs Have Failed To Identify A Specific Federal Interest To Justify Overriding the Legislative Privilege or Imposing Procedures That Do Not Protect The Privilege.

The Task Force Plaintiffs and the United States contend that the federal interest in enforcing Section 2 of the Voting Rights Act overcomes any legislative privilege. It is true that legislative privilege will not apply in all federal-court proceedings. In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court held that a state legislator cannot invoke legislative privilege when he is being prosecuted in federal court for violating a federal criminal statute. But *Gillock* was careful to limit its holding to the context of federal criminal prosecutions and rejected the claim of legislative privilege only after conducting a balancing test and concluding that the federal government's interest in enforcing its *criminal* statutes was sufficiently strong to categorically preclude any assertion of state legislative privilege. *See id.* at 373. The protections of legislative privilege remain applicable

in civil litigation alleging discriminatory purpose, as *Arlington Heights* and numerous other court decisions make clear. *See, e.g., Florida v. U.S.*, 886 F. Supp. at 1304 (recognizing the legislative privilege in a Voting Rights Act case); *see also Comm. for a Fair and Balanced Map v. Illinois State Bd. of Elections*, No. 11-5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 94-104 (S.D.N.Y. 2003); *Cano*, 193 F. Supp. 2d at 1179-80.

Further, it cannot be the case that every litigated Section 2 case under the Voting Rights Act constitutes an "extraordinary instance" warranting a need to "intru[de] into the workings of the state legislature." *Arlington Heights*, 429 U.S. at 268 n.18. A generalized interest in enforcing federal law does not authorize the wholesale abrogation of state officials' legislative privilege.

CONCLUSION

For the reasons stated above, the Court should grant Defendants' motion to modify the order dated August 1, 2011 regarding legislative privilege.

Dated: December 13, 2013

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