IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

THE CHRISTIAN MINISTERIAL ALLIANCE, ET AL. **PLAINTIFFS**

vs. **NO. 4:23-CV-471-DPM-DRS-JM**

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF ARKANSAS **DEFENDANT**

JOINT REPORT ON DISCOVERY DISPUTE

Pursuant to the Court's final scheduling order (ECF No. 41), Senator Jane English, former Senator Jason Rapert, and former Representative Nelda Speaks (collectively, "the Legislators") and Plaintiffs respectfully submit this joint report on a pending discovery dispute.

NATURE OF DISPUTE

The Legislators are current and former members of the General Assembly. Plaintiffs seek the depositions of all three Legislators. After multiple meet-and-confers, the parties need the court's guidance. The Legislators maintain that legislative privilege shields them from deposition. Plaintiffs disagree.

I. THE LEGISLATORS' POSITION

The Legislators believe the present dispute involves a straightforward question of law: Does legislative privilege, as recently interpreted by the Eighth Circuit in *In re North Dakota Legislative Assembly*, 70 F.4th 460 (8th Cir. 2023) ("*North Dakota*"), prohibit Plaintiffs from obtaining the Legislators' testimony? It does. As in *North Dakota* , Plaintiffs here "seek documents and testimony. . . concerning acts undertaken with respect to the enactment of redistricting legislation." *Id.* at 463-64. Because these "acts were undertaken within the sphere of legitimate legislative activity," they "are therefore privileged from inquiry." *Id.* at 464.

A. The Discovery Plaintiffs Seek Involves Work by the Legislators "Within the Sphere of Legitimate Legislative Activity."

Voters elected Sen. English, Sen. Rapert, and Rep. Speaks to serve in the 2021 regular session of the General Assembly. Sen. English represented parts of Pulaski County in Senate District 13. Sen. Rapert represented Senate District 35, which includes parts of Faulkner and Perry Counties. Rep. Speaks was elected from House District 100 in north-central Arkansas. During the session, Sen. English and Rep. Speaks filed as lead sponsors Senate Bill 743 and House Bill 1982, respectively. These two pieces of legislation were ultimately reconciled during the lawmaking process into Act 1114 and Act 1116, which redrew Arkansas's congressional districts.

In this litigation, Plaintiffs first served a subpoena *duces tecum* on the Bureau of Legislative Research (BLR), the nonpartisan legislative service agency dedicated to serving the members and staff of the General Assembly. Plaintiffs' subpoena sought virtually all documents related to the redistricting process, including both discoverable items *and* documents protected by legislative privilege (*i.e.*, draft legislation, communications between BLR personnel and members of the General Assembly). BLR produced the non-privileged documents, and as permitted by Rule 45(d)(2)(B) of the Federal Rules of Civil Procedure, BLR served objections and a twenty-eight-page privilege log.

After receiving these documents, Plaintiffs indicated a desire to depose the Legislators, all three of whom were involved in the redistricting process, either as sponsors of the ultimately passed maps or, in Sen. Rapert's case, as the chair of the Senate State Agencies and Governmental Affairs Committee from which the legislation originated. As part of the meet-and-confer process, the Legislators repeatedly raised concern that the Eighth Circuit's holding in *North Dakota* prevented Plaintiffs from obtaining their depositions. The Legislators also invited Plaintiffs to

provide other case law or to identify "particular areas of inquiry that [they] believe are not protected by legislative privilege" so that the Legislators could reassess their position if necessary.

In response, Plaintiffs provided subpoenas. Each contains an exhibit, which, according to Plaintiffs' counsel, serves as "an outline of the areas [Plaintiffs] expect to cover in [their] depositions of the [L]egislators." *See* Ex. 1, Email from Chris Hollinger to Graham Talley, June 8, 2024, at 1. These proposed areas of inquiry plainly involve legislative activity. Plaintiffs seek, *inter alia*,

- "all" documents and testimony "related to the Legislative Redistricting Process in connection with the 2021 Congressional redistricting which [the Legislator] received from any Person";
- "all" documents and testimony regarding "population, political, and racial data, which [the Legislator] provided to any Legislator or other Legislative Employee at a public meeting of the House State Agencies and Governmental Affairs Committee or at a public meeting of the Arkansas General Assembly"; and
- "all" documents and testimony concerning "the political composition of Pulaski County which You shared with any Third Party prior to the enactment of Act 1116 of the Arkansas General Assembly."

Ex. 2, Sub. Sen. Jane English, June 6, 2024 ("English Sub."), at 9-11.

B. Legislative Privilege Prohibits Plaintiffs from Obtaining the Discovery Sought from the Legislators.

Rule 45(d)(3)(A)(iii) requires the court to quash or modify a subpoena which seeks the "disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(d)(3)(A)(iii). Here, legislative privilege applies; the Legislators conducted their redistricting work while "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). So long as the Legislators acted in that sphere, the privilege serves as an "absolute bar to interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975). Moreover, the privilege protects not only "inquiry into acts that occur in the regular course

of the legislative process," but also requested discovery as to "the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972).

The Legislators acknowledge that courts across the country grapple with the application of privilege to claims made by state legislators. But the Eighth Circuit law is clear—"the privilege is an 'absolute bar,'" so long as the Legislators acted "in the sphere of legitimate legislative activity." *North Dakota*, 70 F.4th at 463 (quoting *Eastland*, 421 U.S. at 503). This conclusion was reached on a virtually indistinguishable set of facts. The plaintiffs in *North Dakota* sought "documents and testimony from legislators and an aide concerning acts undertaken with respect to the enactment of redistricting legislation in North Dakota." *Id.* at 463-64. The district court compelled disclosure. Noting that the redistricting-related discovery sought by the plaintiffs involved acts taken withing the protected sphere, the Eighth Circuit ruled that the district court reached its conclusion "based on a mistaken conception of the legislative privilege," as legislative "privilege is not designed merely to protect the confidentiality of deliberations within a legislative body; it protects the functioning of the legislature more broadly." *Id.* at 464. The court therefore quashed the subpoenas.

The Legislators ask that this court follow the Eighth Circuit precedent. *See Georgia State Conf. of NAACP v. State*, 269 F. Supp. 3d 1266, 1278 (N.D. Ga. 2017) (concluding, despite the "oddity in federal jurisprudence," that a three-judge panel is bound by Circuit precedent). *North Dakota* is largely indistinguishable from the present case. Plaintiffs raise similar claims of race-based gerrymandering. They seek the same discovery—documents and testimony from the elected representatives who engaged in the map-making process. An absolute privilege therefore applies in this Circuit on these facts. Other federal courts of appeal agree, having similarly refused to qualify or condition the common law legislative privilege in recently decided civil cases. *See, e.g.*,

La Union Del Pueblo Entero v. Abbott, 68 F.4th 228, 239–40 (5th Cir. 2023) ("[A] state legislator's common-law absolute immunity from civil actions precludes the compelled discovery of documents pertaining to the state legislative process that Plaintiffs seek here."); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021) ("[This] argument suggests a broad exception overriding the important comity considerations that undergird the assertion of a legislative privilege by state lawmakers."); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (holding that unsubstantiated "claims of racial gerrymandering," though "serious," "fall[] short of justifying the 'substantial intrusion' into the legislative process" of a discovery request (citation omitted)). The privilege therefore applies, and the Legislators have not waived it. *See North Dakota*, 70 F.4th at 465 (noting that offering testimony at an injunction hearing may waive the privilege, but the Legislators here have never testified in this or any other litigation involving the 2021 redistricting process).

While Plaintiffs claim, *infra*, that they seek testimony on matters wholly outside "the sphere of legitimate legislative activity," the subpoenas served on the Legislators plainly demonstrate otherwise. The subpoenas seek everything "related to Legislative Redistricting Process," including "any Proposed Congressional Redistricting Maps," information exchanged with any "other Legislator or other Legislative Employee," and all materials shared with third parties concerning the political and racial composition of Pulaski County. *See* Ex. 2, English Sub., at 9-11. The Legislators understand Plaintiffs' desire to thread a proverbial needle, but the subpoenas at issue are materially indistinguishable from *North Dakota*, in which the plaintiffs sought the same "documents and testimony from legislators . . . concerning acts undertaken with respect to the enactment of redistricting legislation." *North Dakota*, 70 F.4th at 463-64. By arguing here that some non-privileged item may be swept up by an order quashing the subpoenas,

Plaintiffs functionally ask this Court to adopt the view articulated in the *North Dakota* dissent. *See id.* at 466 (Kelly, J., dissenting) ("An order quashing the subpoenas here is likely to prohibit the discovery of at least some nonprivileged materials relevant to the pending litigation. That result sweeps too broadly.").

Plaintiffs' desire to craft some exception for documents involving non-legislative third parties also fails. The *North Dakota* court considered and rejected this same argument, holding, "Communications with constituents, advocacy groups, and others outside the legislature are a legitimate aspect of legislative activity. The use of compulsory evidentiary process against legislators and their aides to gather evidence about this legislative activity is thus barred by the legislative privilege." *Id.* at 464. The Fifth Circuit has since reached the same conclusion in a voting-rights case, noting that "[t]he legislative privilege 'covers all aspects of the legislative process'" and "communications 'outside the legislature' such as 'private communications with advocacy groups' is "part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider." *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310, 321-22 (5th Cir. 2024) (cleaned up).

Because legislative "privilege is an 'absolute bar to interference,'" *North Dakota*, 70 F.4th at 463, the court should quash the subpoenas.

II. PLAINTIFFS' POSITION

Plaintiffs seek to depose a narrow subset of key legislators involved in drafting and advocating for the redistricting bill at the heart of this litigation. The Legislators claim that *In re North Dakota Legislative Assembly* ("*North Dakota*") has imposed an absolute legislative privilege, barring any discovery from them and presumably other legislators as well. It is not. Rather, consistent with established federal common law, *North Dakota* continues to recognize that

Plaintiffs may inquire into: (i) information outside the "sphere of legitimate legislative activity;" (ii) subject matter as to which legislators have waived their privilege; and (iii) information within the "sphere of legitimate legislative activity," where, as here, "important federal interests are at stake."

A. Plaintiffs Seek Information Outside the "Sphere of Legitimate Legislative Activity"

Plaintiffs seek to depose the Legislators on matters that do not implicate legislative privilege at all, even under the Legislators' unduly broad interpretation of *North Dakota*.

Legislative privilege applies only "where legislators or their aides are 'acting in the sphere of legitimate legislative activity.'" *N. Dakota*, 70 F.4th at 463 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). The "sphere of legitimate legislative activity" is a longstanding term of art that *North Dakota* adopted from the caselaw involving whether legislators could be held liable for their actions (i.e., legislative immunity) and in that sense had a "legislative privilege" to do certain things. That body of caselaw holds that activities which are neither "essential to the deliberations of the [legislature]" nor "part of the deliberative process" are outside the scope of protected legislative activity. *See Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979); *United States v. Brewster*, 408 U.S. 501, 512 (1972) (explaining that activities which are "political in nature rather than legislative" are not protected from scrutiny).

Broad dissemination of information to the public is a classic example of non-privileged activity. For example, "'news letters' to constituents, news releases, and speeches delivered outside [of the legislature]" fall outside the legislative sphere. *Brewster*, 408 U.S. at 512. These activities are "primarily means of informing those outside the legislative forum" and "represent the views and will of a single Member." *Hutchinson*, 443 U.S. at 133. Thus, the Supreme Court has held, "[i]t does not disparage either their value or their importance to hold that they are not

entitled to [] protection." *Id.* Thus, while "[c]ommunications with constituents, advocacy groups, and others outside the legislature are a legitimate aspect of legislative activity," as stated in *North Dakota*, 70 F4th at 464, that does not mean ***all*** such communications are protected. To interpret *North Dakota* otherwise would contradict the caselaw that *North Dakota* relied on to define the "sphere of legitimate legislative activity."

Similarly, documents containing only "factually based information used in the decision-making process or disseminated to legislators or committees, such as committee reports and minutes of meetings," are not the kind of documents that are "pre-decisional, deliberative [or] reflect the subjective intent of the legislators." *Doe v. Nebraska*, 788 F. Supp. 2d 975, 984-85 (D. Neb. 2011). Thus, such documents also are not "an integral part of the deliberative and communicative process, *Gravel v. United States*, 408 U.S. 606, 625 (1972), and inquiries related to these documents should not be barred by privilege.

Other information relevant to proving discriminatory intent under the *Arlington Heights* framework does not implicate legislative privilege. *Cf. Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977). As one example, deposition inquiry into typical legislative procedure or particular procedural history—such as questions about processes for transparency around bills—could reveal "departures from the normal procedural sequence," *id.* at 267, without delving into individual lawmakers' motivations.

Plaintiffs' discovery seeks many topics of information from the Legislators that fall within these and other nonprivileged spheres. Those include, without limitation, (i) public statements, such as social media posts and television and radio interviews, Legislators made with respect to the 2021 congressional redistricting, (ii) public statements, such as social media posts and television and radio interviews, Legislators made with respect to the political or racial composition

of Pulaski County, (iii) factual information available to Legislators at public legislative sessions and committee hearings; and (iv) the documents and communications relating to the 2021 congressional redistricting which the Legislators received from or provided to others after the deliberations concluded. *See, e.g.,* Ex. 2, at 6-11. Plaintiffs also seek to depose the Legislators on topics such as their general knowledge of polling and elections featuring Black candidates within the Second Congressional District, their general knowledge of the racial demographics of Arkansas, and the information and training on redistricting which Legislators received prior to commencement of the 2021 congressional redistricting process. These areas of inquiry do not intrude upon "legislative activity" and thus do not implicate legislative privilege. And the mere possibility that a deposition may "wander into impermissible terrain is not sufficient reason to halt [an otherwise] permissible inquiry." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 183 (4th Cir. 2011).

B. The Legislators Have Waived Legislative Privilege As To Certain Topics

Plaintiffs are also entitled to seek discovery regarding information as to which legislative privilege has been waived, even under the Legislators' unduly broad interpretation of the privilege. *See N. Dakota*, 70 F.4th at 464 (only "[a]bsent a waiver of the privilege" should subpoenas be quashed based on legislative privilege). Legislative privilege can be waived by individual legislators. *See ACORN v. Cnty. Of Nassau*, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007). Waiver "need not be 'explicit and unequivocal,'" it may occur "when purportedly privileged communications are shared with outsiders." *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012) (citations omitted). Legislators waive privilege by, among other things, "publicly reveal[ing] documents related to internal deliberations." *Id.* at 212.

Senator Rapert, for example, has publicly described (i) his recollection of the redistricting deliberations, (ii) his role in the redistricting; (iii) the factors he considered in drawing maps, and (iv) the demographic data he received from the Arkansas Bureau of Legislative research when evaluating redistricting proposals. *See* Ex. 3, at 1; Ex. 4, at 7; Ex. 5, at 21-25. He cannot now claim that Plaintiffs are barred from seeking discovery as to the very information he chose to publicly disclose.

C. Even If State Legislative Privilege Applies, It Yields Where Important Federal Interests Are at Stake

Finally, as to information that is arguably within "the scope of legitimate legislative activity" and even absent waiver, Plaintiffs' need for the information overcomes the privilege as to the remaining categories of evidence they seek. Unlike the privilege afforded to members of Congress, state legislative privilege yields where "important federal interests are at stake," *U.S. v. Gillock*, 445 U.S. 360, 373 (1980), and nothing in the language of *North Dakota* or its reasoning alters that principle—nor could it. Indeed, the *North Dakota* decision acknowledges the "potential for 'extraordinary instances' in which testimony might be compelled from a legislator about legitimate legislative acts." 70 F.4th at 464-65 (quoting *Vill. of Arlington Heights,* 429 U.S. at 268). While the court in *North Dakota* did not find such an instance, the claims in that case "[did] not even turn on legislative intent." *Id.* at 465.

This case is different: the constitutional claims in this case implicate precisely the types of federal interests that overcome state legislative privilege. Where, as here, legislative intent is directly at issue in a case involving legislative redistricting, this panel should recognize an "extraordinary instance" that warrants overcoming legislative privilege. *See, e.g., Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015) (explaining that such circumstances exist "[i]n redistricting cases, where the natural corrective mechanisms built into

our republican system of government offer little check upon the very real threat of 'legislative self-entrenchment'") (citation omitted); *see also S.C. State Conf. of NAACP v. Alexander*, 2022 WL 2452319, at *5 (D.S.C. July 5, 2022) (compelling depositions of legislators in racial gerrymandering case). To hold otherwise would create a "judicial . . . limitation that handicaps proof of the relevant facts" and thereby give legislators free rein to discriminate in redistricting. *Gillock*, 445 U.S. at 374. In making this determination, the Court should consider the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *See Rodriguez* v Pataki, 280 F.Supp.2d 89, 101 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003) (citation omitted). Here, each factor weighs in favor of disclosure: (i) the information sought is directly relevant to proving Plaintiffs' claims; (ii) Plaintiffs have been unable to obtain the information through other sources, including through subpoenas to the Arkansas Bureau of Legislative Research; (iii) Plaintiffs' claims involve fundamental constitutional rights; (iv) the decisionmaking process by key legislators is at the core of Plaintiffs' claims; and (v) Plaintiffs' access to the requested set of materials will have a minimal future chilling effect on the Arkansas Legislature.

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