IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., et al.,

Plaintiffs,

v. Case No. 2022 CA 000666

CORD BYRD, in his official capacity as Florida Secretary of State, et al.,

Defendants.
_____/

REPLY IN SUPPORT OF MOTION TO QUASH & FOR PROTECTION FROM SUBPOENA DUCES TECUM FOR DEPOSITION

Plaintiffs concede in their response in opposition that they "are not seeking a deposition of Governor DeSantis at this time" and that the Governor is therefore entitled to an order quashing his deposition. Resp. 29. The focus then is on the legislative and executive privileges as applied to the Governor's Office and, more specifically, his deputy chief of staff, Mr. Kelly.

I. Legislative Privilege Protects Mr. Kelly.

Legislative privilege plainly covers Mr. Kelly because, after all, Mr. Kelly drew portions of the Enacted Map. Plaintiffs' arguments to the contrary are unpersuasive.

First, Plaintiffs confuse *process* with *power*. The legislative privilege protects the legislative *process*, *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015), wherein the legislative branch exercises legislative *power* and the executive branch exercises executive *power*. Mot.3-5. The Governor has been consistent in making this distinction here and in other cases. *See* Brief of Ron DeSantis at 4, *Advisory Opinion to the Governor*, No. SC22-139 (Fla. Feb. 7, 2022) ("The Florida Constitution thus gives to the Governor the *executive* power in the *legislative sphere*, and that *executive* power includes the veto." (emphasis added)).

Mr. Kelly acted within the legislative process. Thus, the legislative privilege protects him and his communications in support of the Enacted Map.

Second, Plaintiffs baldly contend that "legislative privilege cannot be invoked by the executive branch." Resp.13. But they fail to cite any case that says so. They also fail to meaningfully distinguish a case that holds to the contrary, *In re Hubbard*. Resp.15. Plaintiffs make much hay that the legislative privilege in *In re Hubbard* was grounded in federal common law. *Id.* That misses the point. Mr. Kelly is arguing, as *In re Hubbard* held, that legislative privilege protects "the legislative process itself, and therefore covers both governors' and legislators'"—as well as their staffs'—"actions in the proposal, formulation, and passage of legislation." 803 F.3d at 1308. That's true regardless of whether the privilege is grounded in the federal common law, the Florida Constitution, or Florida common law. *Cf. League of Women Voters of Fla., Inc. v. Lee*, Case No. 4:21-cv-186-MW, 2021 WL 5283949, 340 F.R.D. 446, 455 (N.D. Fla. Nov. 4, 2021) (Walker, C.J.) ("In short, as the Eleventh Circuit has explained, 'inquiry into the motivation' behind a state legislative enactment 'strikes at the heart of the legislative privilege.'" (quoting *In re Hubbard*, 803 F.3d at 1310)).

Third, Plaintiffs' descriptions of *Apportionment IV* miss a key component of the decision: before elected officials and their staffs can be subject to discovery, a threshold showing needs to be made that communications between the elected branches and partisan and political organizations reveal efforts to violate article III, section 20(a) of the Florida Constitution. Mot.6-7. Otherwise, "*anyone* could simply file a complaint and, without more, proceed to depose Florida's Governor, as well as his staff, and members of the Florida Legislature whenever new districts are established." Mot.6.

Plaintiffs' response fails to even mention that key component of *Apportionment IV*. Nor can they satisfy it. As the third-party legislators state in their motion for protective order, "Plaintiffs here have not even sought—much less obtained—any third-party discovery such as the deposition testimony of 'numerous third-party witnesses as to their involvement in the redistricting process' or

documents revealing 'a secret effort by state legislators involved in the apportionment process to favor Republicans and incumbents' in violation of the Florida Constitution. In fact, *no* depositions have been held in this case. At this early stage of the litigation, the parties have commenced only the initial exchange of written discovery requests and responses." Leg. Mot. for Prot. Order.6 (quoting *Apportionment IV*, 132 So. 3d at 141) (emphasis in the original).[1]

Fourth, Plaintiffs argue that the legislative privilege doesn't protect communications with third parties. This misses the point. It doesn't matter whether the information was shared with third parties because "the maintenance of confidentiality is not the fundamental concern of the legislative privilege." *League of Women Voters*, 340 F.R.D. at 454 (cleaned up) (collecting cases). "Instead, the privilege serves to prevent parties from harassing legislators—or the Governor—for actions those legislators take in their legislative capacity." *Id.* In other words, Plaintiffs can't embark on a legislative (or executive) branch fishing expedition to seek communications with third parties. That would defeat the whole purpose of legislative privilege: ensuring that the elected branches of government, without vexatious interference, can perform their functions within the legislative process. Mot.3-5. Plaintiffs must first look elsewhere. If they believe that third parties influenced the process, then, as in *Apportionment IV*, they should first look to third parties for the information they seek.

Finally, Mr. Kelly knows that this Court cannot overrule *Apportionment IV*. But to the extent that this Court relies on the case to reject his arguments, he is preserving this argument for appeal.

---

[1] Plaintiffs attempt to substitute evidence with conjecture in their response. They refer to "audio captured" at a "statewide summit," but provide no such audio. Resp.10. They launch *ad hominem* attacks on an experienced map drawer, Adam Foltz, hired as an expert witness, and a legislative witness, Robert Popper, for whom one of the three major compactness measures is named. Resp.7, 18. And they take issue with Mr. Kelly's public testimony, Resp.9, which they remain free to do at trial through their own witnesses. At base, the material that Plaintiffs cite makes clear that the State's political branches have been open and transparent in their reasons for adopting the map at issue here. Plaintiffs have yet to provide any evidence to the contrary.

II. The Executive Privilege Protects Mr. Kelly.

Mr. Kelly drew portions of the Enacted Map, and because he participated in the last decennial redistricting cycle, he served as the executive branch's lead during this cycle. The executive privilege thus protects Mr. Kelly. Plaintiffs' arguments to the contrary miss the mark.

First, just because the state judiciary hasn't had any occasion to recognize executive privilege in Florida doesn't mean that the privilege doesn't exist. As explained in Mr. Kelly's motion, and as recognized in *Apportionment IV*, privileges protecting the elected branches of government are grounded in the Florida Constitution's text and structure. Mot.3-5, 8-9; *see also* art. II, § 3, Fla. Const.; art. IV, § 1, Fla. Const. Though state courts haven't had an opportunity to recognize executive privilege, the Florida Constitution still contemplates the existence of such a privilege.

Second, Plaintiffs contend that, should this Court recognize executive privilege, the privilege should protect some functions—approving and vetoing bills, requesting advisory opinions—and not other functions—drawing redistricting plans, lobbying for legislative outcomes. Resp.23. Mr. Kelly agrees: the first two should be protected under executive privilege, and the latter two should be protected under legislative privilege. After all, the latter two functions are part of the legislative process as *In re Hubbard* recognized.

Third, Mr. Kelly isn't arguing for an absolute executive privilege. Federal executive privilege, for instance, doesn't prevent disclosure of privileged information in criminal prosecutions. *United States v. Nixon*, 418 U.S. 683, 706-13 (1974). Instead, Mr. Kelly is advocating for an executive privilege, like legislative privilege, that ensures executive branch officials can deliberate and perform their duties without fear of vexatious interference. Here, the logic of the dissents in *Apportionment IV* is most helpful.

Finally, under the reasoning of *Apportionment IV*, in the redistricting context, Plaintiffs were required, but failed, to establish a threshold showing that elected officials and third-party consultants

were violating article III, section 20(a). Should this Court disagree with this argument, or if this Court engages in an *Apportionment IV* balancing approach, Mr. Kelly preserves for appeal that *Apportionment IV* should be partially overruled.

* * *

For the foregoing reasons, and those in the motion filed on September 9, 2022, this Court should grant the motion to quash and for protection from subpoenas duces tecum.

Dated: October 17, 2022

Respectfully Submitted,

Bradley R. McVay (FBN 79034)
Brad.mcvay@dos.myflorida.com
Ashley Davis (FBN 48032)
Ashley.davis@dos.myflorida.com
Stephanie.buse@dos.myflorida.com
FLORIDA DEPARTMENT OF STATE
R.A. Gray Building
500 S. Bronough St.
Tallahassee, FL 32399
(850) 245-6536

/s/ Mohammad O. Jazil
Mohammad O. Jazil (FBN 72556)
mjazil@holtzmanvogel.com
Gary V. Perko (FBN 855898)
gperko@holtzmanvogel.com
Michael Beato (FBN 1017715)
mbeato@holtzmanvogel.com
zbennington@holtzmanvogel.com
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK PLLC
119 S. Monroe St. Suite 500
Tallahassee, FL 32301
(850) 270-5938
Counsel for the Governor and J. Alex Kelly

CERTIFICATE OF SERVICE

I certify that the a true and correct copy of the foregoing was served on all parties of record through the Florida Courts E-Filing Portal on October 17, 2022.

/s/ Mohammad O. Jazil
Mohammad O. Jazil