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,

Case No. 2022-CA-000666

v.

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

Defendants.
_____/

ORDER ON GOVERNOR AND J. ALEX KELLY'S MOTION TO QUASH & FOR PROTECTION FROM SUBPOENAS DUCES TECUM FOR DEPOSITION

This case came on for hearing on October 20, 2022, on a motion to quash and for protective order filed on behalf of Governor Ron DeSantis and deputy chief of staff J. Alex Kelly, both non-parties who have been noticed by Plaintiffs for subpoena duces tecum for videotaped depositions. Upon consideration of the Motion, responses, replies, and the presentations by counsel, the Court hereby finds as follows:

In this case, Plaintiffs bring constitutional challenges to the congressional district map passed by the Legislature as Senate Bill 2-C on April 21, 2022, and signed by the Governor on April 22, 2022. Ch. 2022-265, Laws of Fla. As part of their discovery, Plaintiffs are seeking to depose the Governor[1] and Mr. Kelly to gain insight into the drawing of the congressional

[1] The Plaintiffs acknowledge that the subpoena to the Governor is only to receive documents and that the Governor has properly raised the apex doctrine. At the hearing, Plaintiffs indicated they will not go forward to enforce the subpoena against the Governor. Plaintiffs further acknowledge the information they seek can be discovered through Mr. Kelly. Accordingly, the Court will only address the subpoena as it relates to Mr. Kelly and the Executive Office of the Governor.

district map. Mr. Kelly seeks an order quashing the subpoena and for a protective order preventing his deposition in this case under the legislative privilege[2], the executive privilege[3], and attorney-client privilege and attorney work-product.[4]

Legislative Privilege

In *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013) (*"Apportionment IV"*), the Florida Supreme Court "decide[d] for the first time that Florida should recognize a legislative privilege founded on the constitutional principle of separation of powers" in a case arising from last decade's redistricting. The Court found the privilege exists but is "not absolute and may yield to a compelling, competing interest." *Id.* at 143. The Court also found that the "compelling interest in [that] case [was] ensuring compliance with article III, section 20(a), which specifically outlaws improper legislative 'intent' in the congressional reapportionment process." *Id.* at 147. It also held that the case presented "a compelling competing interest against application of an absolute legislative privilege." *Id.* at 150. Finally, the trial court's balancing approach that the "legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions...

[2] *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013) ("*Apportionment IV*"). The parties agreed at the hearing that this Court is bound by the majority ruling in *Apportionment IV* (to the extent that it may apply in this case), and that the language used in the Governor and Mr. J. Alex Kelly's motion and argument regarding any alleged errors in that opinion are solely to preserve the issue for appeal.

[3] The Governor and Mr. Kelly note that an executive privilege has "not yet been specifically recognized in Florida." Mot. to Quash & for Protection from Subpoenas Duces Tecum for Dep. at 8.

[4] The request for protection under the attorney-client privilege and work-product doctrines is not specifically noted in the motion but is cited in Attachment 2 to the motion in response to each item.

revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify…concerning any other information or communications pertaining to the…reapportionment process" was adopted by the Court. *Id.* at 154.

In this case, Plaintiffs have alleged that the Governor (through his staff) drew the congressional district map that was ultimately enacted into law. *Compl. at ¶ 74-76. See also,* Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 4 & 6. They have alleged that the map violates the Fair Districts Amendment. *See,* Fla. Const. art III sect. 20. Accordingly, they seek to depose Mr. Kelly about the reapportionment map-drawing process as was done under *Apportionment IV*. Mr. Kelly, as a staff member to Governor Ron DeSantis, has claimed that the Governor is acting in a legislative capacity in the passage of Senate Bill 2-C[5]. Specifically, he cites *In re: Hubbard*, 803 F. 3d 1298, 1308 (11th Cir. 2015) for the principle that governors (and their staff members) are protected by legislative privilege "in the proposal, formulation, and passage of legislation."

One of the authorities relied upon in *Hubbard* is *Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003). In that case, the circuit court recognized the governor's legislative immunity for "signing a bill into law." The actions in this case go much further than just signing Senate Bill 2-C into law. The actions extend to allegedly drafting the maps at issue in this case. Accordingly, this case is more akin to that of another case cited by

[5] This Court also notes that the Governor has advanced to the Florida Supreme Court the position that his duties in this case are executive in nature. *See*, Pl.'s Opp'n to Third Parties' Mot. for Protective Order Ex. 7 at 2. This Court will address that position under the executive privilege section of this Order.

Hubbard, the case of *Baraka v. McGreevey*, 481 F. 3d 187 (3rd Cir. 2007). In that case, the petitioner brought suit against the governor of New Jersey and another executive branch official for "advocat[ing] and orchestrat[ing] the legislation that abolished the position of poet laureate." *Id.* at 197. The petitioner "contend[ed] legislative immunity does not apply because they are not legislators and because these are political, not legislative, activities." *Id.* at 196. The Court found that the actions "are properly characterized as legislative," *id.* at 197, citing a provision in the New Jersey Const. art V sect. 1. The New Jersey provision is almost identical to the provision in Fla. Const. art IV sect. 1. Accordingly, this Court finds the actions of the Governor and Mr. Kelly are legislative and are properly covered under the legislative privilege.

This Court, having found the actions of the Governor and Mr. Kelly to fall under the scope of the legislative privilege recognized in *Apportionment IV*, 132 So. 3d at 138, must next determine whether the purpose of the privilege is outweighed by a compelling, competing interest. The Court, in *Apportionment IV,* has already found that the "compelling interest in [that] case [was] ensuring compliance with article III, section 20(a), which specifically outlaws improper legislative 'intent' in the congressional reapportionment process." *Id.* at 147. It also held that the case presented "a compelling competing interest against application of an absolute legislative privilege." *Id.* at 150. This case is no different. In fact, Mr. Kelly submitted the proposed map in this case, (Pl.'s Opp'n to Third-Parties' Mot.

for Protective Order Ex. 4.) and presented it to the Senate. Pl.'s Opp'n to Mot. to Quash Dep. of Legislators and Staff Ex. 10. Mr. Kelly's map submission differed from that of others in that he was not required to submit the name of every person and group or organization he collaborated with on his map (*see,* Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 4.) as was required by the Senate. *See,* Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 6. Oddly, Mr. Kelly was allowed to submit his map without this information despite earlier admonition by Committee Chairman, Senator Rodrigues, against this very practice by a staff attorney at the ACLU. *See,* Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 5. Therefore, this Court must conduct a balancing approach to fashion a relief. *Apportionment IV*, 132 So. 3d at 143. While this Court has great concerns about allowing Plaintiffs to intrude into the internal processes of a separate co-equal branch of government, the binding precedent of *Apportionment IV* provides little relief to Mr. Kelly other than protection from revealing his thoughts or impressions or the thoughts or impressions shared with the Governor by staff.[6]

Executive Privilege

Mr. Kelly argues that he should be protected from subpoena under an executive privilege that has not been specifically recognized in Florida. This Court need not determine if such a privilege exists, because the actions

[6] The Court notes that *Apportionment IV* allows legislators to be questioned regarding the reapportionment process despite recognition of a legislative privilege. This Court, in fashioning relief in this case, attempts to set "objective rules that can be applied without the suggestion that the coordinate branch's privilege is subject to diminishment or abrogation through the unfettered discretion of judges." *Apportionment IV*, 132 So. 3d at 160 (Canady, J., dissenting).

taken by Mr. Kelly and the Governor in this case were not executive actions. As noted above, the actions were legislative.

Mr. Kelly, in arguing the legislative nature of the governor's actions properly cited to *State ex rel. Boyd v. Deal*, 24 Fla. 293, 4 So. 899 (Fla 1888). The Court specifically noted that the Governor's "participation in the making of laws…is expressly provided for as an exception to the general prohibition of the…constitution against any person properly belonging to one department of the government exercising power appertaining to another department." *Id.* at 307. However, the Court's holding was further explained in its citation to its own correspondence with the Governor in an opinion, *In re Executive Communication Concerning Powers of Legislature,* 23 Fla 297 (Fla. 1887). In that opinion, Chief Justice McWhorter informed the Governor,

> Hon. Edward A. Perry, governor of the State of Florida-Sir: Your communication was received to-day, and has been considered by us. The question asked by you involves the construction of section 13, art. 4, of the constitution. The section is as follows: 'The governor may at any time require the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties, and the justices shall render such opinion in writing.' Unlike the constitutions of some of the other states of the Union, which authorize the governor, or either branch of the legislature, to require to opinion of the justices of the supreme court, our constitution restricts such right to the governor alone. It further restricts the right of the governor to require such opinions on questions 'affecting his executive powers and duties.' Is the opinion you desire one relating to your 'executive powers and duties?' The exact legal meaning of the word 'executive' has been many times authoritatively fixed and defined. It means a duty appertaining to the execution of the laws as they exist. It would follow that the law must be enacted according to all the terms prescribed by the constitution, before the duty of executing it can exist. *Any duty imposed by the constitution on the governor with reference to a bill, before it becomes*

> *a law, is not an executive duty. The enactment of laws is a legislative duty, and, when your excellency is required by the constitution to do any act which is an essential prerequisite thereto, such act is legislative, and is performed by you as a part of the lawmaking power, and not as the law-executing power.* We are of the opinion that the question affects a legislative duty imposed by the constitution; and, believing that a compliance on our part with your request is unauthorized by the constitution, we, with great respect for your excellency, beg to be excused from expressing opinions on the question submitted.
>
> Very respectfully,
>
> 'GEO. G. McWHORTER, Chief Justice. *Id* at 298 (emphasis added).

As noted by the Chief Justice, the Governor's executive duties relating to legislation arise after the enactment of the legislation. While Florida's Constitution has been amended since Chief Justice McWhorter's opinion, the operative provisions remain virtually unchanged. Therefore, the opinion still controls. *See,* Fla. Const. art. IV, sect. 9 (1885) and Fla. Const. art. IV, sect. 1(e). Accordingly, the actions in this case cannot be deemed executive actions but instead, legislative. The executive privilege, if one exists, would provide no relief in this case.

Attorney Work-Product and Attorney-Client Privilege

Governor DeSantis and the Executive Office of the Governor have asserted that some of the documents that are to be produced under the subpoena duces tecum are subject to attorney-client privilege and the attorney work-product doctrine. Mot. to Quash & for Protection from Subpoenas Duces Tecum for Dep. Ex. 2. The parties agreed at the hearing that to the extent the Court were to require production of documents, those subject to a privilege claim would require *in camera* inspection. *See, e.g., Hett v. Barron-Lunde,* 290 So.3d 565, 573 (Fla. 2nd DCA 2020).

Non-Privileged Document Objections

The Executive Office of the Governor has objected to the scope of the discovery sought by Plaintiffs. As to Instruction E of the subpoena duces tecum, the Court finds that the period relevant to this case begins on the date requested on the subpoena and ends on April 22, 2022, the day that Governor DeSantis signed Senate Bill 2-C into law. Any alleged intent on the part of drafters is complete once the legislation is enacted. As to Instruction H, non-parties are not required to submit a privilege log. Fla. R. Civ. P. 1.280(b)(6).

Relief

This Court finds the balancing test applied in *Apportionment IV* not to be directly applicable in this case. In *Apportionment IV,* "the challengers uncovered communications between the Legislature and partisan political organizations and political consultants" and the use of that information in map-drawing. 132 So. 3d at 141. In this case, based on the affidavits already submitted, the information regarding redistricting and map-drawing came from the Governor's office. Therefore, drawing the line between "thoughts or impressions of [the Governor and his staff]" and "`objective' information and communications" within the Executive Office of the Governor is unnecessary and does not strike the proper balance between the privilege and the compelling competing interest. The appropriate line in this case is where the doors to the Governor's Office meet the Legislative Chambers and the outside world. Accordingly, Mr. Kelly may be questioned

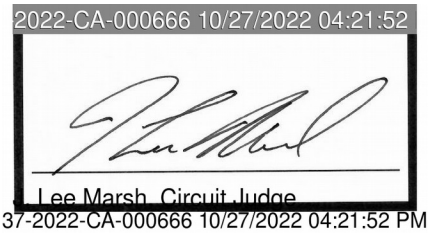
regarding any matter already part of the public record and information received from anyone not part of the Governor's Office. He may not be questioned as to information internal to the Governor's Office that is not already public record (e.g., the thoughts or opinions of staff or those of the Governor). He shall produce the requested documents, subject to the attorney-client privilege and attorney work-product provisions below. The executive privilege objection is overruled.

The Court having found that the legislative privilege applies, and that Mr. Kelly has properly raised the attorney-client privilege and attorney work-product doctrine, this Court must view the materials *in camera* to determine the applicability of each privilege claim. Accordingly, Mr. Kelly and the Executive Office of the Governor shall segregate all responsive materials in which they claim a legislative privilege and contain information which is solely internal to the Governor's Office or materials in which they claim an attorney-client privilege or attorney-work product protection. Those materials are to be submitted to this Court's Judicial Chambers, under seal, for *in camera* inspection **within 30 days** of the date of this order. Mr. Kelly and the Executive Office of the Governor shall prepare an index of each item, Bates stamp the documents, categorize each into groups (legislative privilege, attorney-client privilege, attorney work-product), and highlight in yellow highlighter the alleged privileged/work-product portions. Data files or other digital media submitted need not be highlighted if not feasible. Mr. Kelly and the Executive Office of the Governor may submit affidavits, also for

in camera inspection under seal, in support of the attorney-client privilege and attorney work-product claims. Responsive documents in which there is no claim of privilege or that privilege is not recognized by this order (e.g. materials containing information to/from outside the Governor's Office) must be produced as part of the subpoena duces tecum.

For the foregoing reasons, the Motion To Quash & For Protection From Subpoenas Duces Tecum For Deposition is **GRANTED in part and DENIED in part, and deferred in part pending *in camera review*.** The motion for protective order as to Mr. Kelly and the Executive Office of the Governor is granted to the extent that he may not be questioned as to information internal to the Governor's Office that is not already public record (e.g., the thoughts or opinions of staff or those of the Governor). The motion is denied in that he may be questioned regarding any matter already part of the public record and information received from anyone not part of the Governor's Office. This includes the identity of or sources of information outside of the groups identified in this paragraph. Deposition attorney-client privilege objections shall be made in accordance with Fla. R. Civ. P. 1.310 (c). The motion is denied to the extent that Mr. Kelly and the Executive Office of the Governor seek protection of legislative privileged material that does not contain internal communication. The motion is deferred pending *in camera* review as to attorney-client privilege, attorney work-product, and legislative privilege containing internal communication claims.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this Thursday, October 27, 2022.



J. LEE MARSH
CIRCUIT JUDGE

Copies furnished to:

All Counsel of Record