IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

COMMON CAUSE FLORIDA, et al.,

Plaintiffs,

v. **Case No. 4:22-cv-109-AW-MAF**

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

Defendant.

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ORDER GRANTING MOTIONS TO QUASH AND EXTENDING DISCOVERY PERIOD

Plaintiffs sought depositions of several nonparties: eight current and former Florida legislators (the "Legislators"), Florida's Governor, his Deputy Chief of Staff, and his General Counsel (the "Executives"). The Legislators and Executives moved to quash, ECF Nos. 126, 128, 137, 140, and Plaintiffs responded, ECF Nos. 134, 138, 142. The court then held a hearing on the motions, during which Plaintiffs offered to submit their proposed deposition questions for the court's review. ECF No. 148 at 24-25. The court determined that Plaintiffs' doing so would be useful, ECF No. 150, and Plaintiffs filed notices outlining proposed deposition topics, ECF Nos. 153-155. Having carefully considered the parties' legal arguments and the record, the court now grants the motions to quash.[1]

[1] Plaintiffs have withdrawn their request to depose the Governor, so the Executives' motion is moot as to him.

First, as to the Deputy Chief of Staff (J. Alex Kelly), the Executives do not oppose a deposition altogether; they request only that it be limited in scope in the same way the state court limited it in a separate redistricting lawsuit. They also ask that the deposition be consolidated with the state-case deposition, to avoid additional burden on Mr. Kelly. The issue as to the remaining witnesses is whether the legislative privilege should preclude the depositions altogether.

The court "must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(d)(3)(A)(iii). The movants bear the burden of showing that the privilege applies. *See In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987). We conclude the movants have shown that the legislative privilege applies, that none of the specifically identified proposed topics are beyond the privilege's scope, and that the subpoenas therefore should be quashed. We do not reach the alternative argument based on the apex doctrine.

State-official legislative privilege "has deep roots in federal common law." *In re Hubbard*, 803 F.3d 1298, 1307 (11th Cir. 2015) (citing *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)); *see also* Fed. R. Evid. 501. It precludes inquiry not only into "acts that occur in the regular course of the legislative process," but also "into the motivation for those acts." *In re Hubbard*, 803 F.3d at 1310 (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). Thus it "applies with full force against

requests for information about the motives for legislative votes and legislative enactments." *Id.* This is true even when—as in this case—there are allegations of improper or unlawful motives. *See Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege." (citing *Fletcher v. Peck*, 10 U.S. 87, 130 (1810)).[2]

Importantly, the privilege's principal purpose is not to protect legislators, but to protect "the legislative process itself." *In re Hubbard*, 803 F.3d at 1307-08; *see also Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012). Therefore, the privilege is not limited to legislators. Executive officials and staff may invoke legislative privilege as to their motives or actions "in the proposal, formulation, and passage of legislation." *In re Hubbard*, 803 F.3d at 1307-08; *see also Bagley v. Blagojevich*, 646 F.3d 378, 396-97 (7th Cir. 2011); *cf. Bogan v. Scott-*

[2] *Tenney* held that defendant legislators were immune from civil liability for their legislative acts, and Plaintiffs thus question *Tenney*'s usefulness here. ECF No. 134 at 8. But legislative immunity and privilege are "parallel concept[s]," and the privilege "exists to safeguard" the immunity. *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180-81 (4th Cir. 2011); *see also Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018). Moreover, the Supreme Court itself has recognized that *Tenney* is instructive on a legislator's evidentiary privilege. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 & n.18 (1977) (citing *Tenney* and noting that while some "extraordinary instances" might call for decisionmakers to testify about "purpose of the official action," that "even then such testimony frequently will be barred by privilege") (first citing *Tenney*, 341 U.S. 367; then citing *United States v. Nixon*, 418 U.S. 683, 705 (1974)); *see also In re Hubbard*, 803 F.3d at 1307 (citing *Tenney* and noting that "[t]he legislative privilege is important").

Harris, 523 U.S. 44, 54-55 (1998) (holding local executive officials could invoke immunity for actions that are "integral steps in the legislative process," such as disapproving or vetoing legislation). The privilege serves the additional purpose of shielding officials from the costs and distraction of discovery, enabling them to focus on their duties. *See In re Hubbard*, 803 F.3d at 1310 (citing *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011)).

Nonetheless, as all parties agree, state officials' legislative privilege is not absolute. "[A]lthough principles of comity command careful consideration, . . . where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *United States v. Gillock*, 445 U.S. 360, 373 (1980); *see also In re Hubbard*, 803 F.3d at 1311-12; *League of United Latin Am. Citizens v. Abbott*, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022).

I. THE LEGISLATORS

Plaintiffs "seek direct testimony" about the Legislators' subjective states-of-mind because "legislative motive . . . lies at the heart of the case." ECF No. 134 at 17-18. Plaintiffs argued in their consolidated response, for example, that they should be permitted to ask the Legislators about (1) a memo stating a special session would consider the Governor's proposed redistricting plan, rather than having legislative staff draw a new map; (2) a Legislator's statement that "external influences" motivated the enacted plan; (3) their "knowledge" of the plan's disparate impact and

whether they foresaw that impact; and (4) as to two Legislators specifically, "the reasons they supposedly believed the process and the map to be legitimate." *Id.* at 24-25. After the hearing, Plaintiffs offered to limit their questioning to "the central issue in the case: the circumstances surrounding the Legislature's remarkable flip-flop in April 2022." ECF No. 155 at 2-3.

All the proffered topics strike at the heart of legislative privilege. *Cf. In re Hubbard*, 803 F.3d at 1310-11 (reasoning similarly as to a First Amendment retaliation claim). The testimony Plaintiffs seek all relates to "[t]he drafting of the redistricting plan, thought processes, and decision making processes in voting on the redistricting plan." *Martinez v. Bush*, No. 1:02-cv-20244, ECF No. 321 at 3-4 (S.D. Fla. July 12, 2002) (three-judge court). The privilege thus "applies with full force" to Plaintiffs' intended discovery as Plaintiffs currently frame it. *In re Hubbard*, 803 F.3d at 1310.

Plaintiffs have not shown that this is the extraordinary case in which legislative privilege must yield to federal interests. Plaintiffs' claim is, essentially, that legislative privilege cannot stand up in the face of race-based-redistricting allegations. We certainly acknowledge that allegations of racial gerrymandering are serious matters. But the matter in *Village of Arlington Heights* was serious too. It "also involved an equal protection claim alleging racial discrimination—putting the government's intent directly at issue." *Lee v. City of Los Angeles*, 908 F.3d 1175,

1188 (9th Cir. 2018). In *Arlington Heights*, the Supreme Court "nonetheless suggested that such a claim was not, in and of itself, within the subset of 'extraordinary instances'" justifying compulsion of decisionmakers' testimony. *Id.* (citing *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977)); *see also Tenney*, 341 U.S. at 377; *cf. Florida v. United States*, 886 F. Supp. 2d at 1303-04 (reasoning similarly in a Voting Rights Act case). Thus Plaintiffs have not justified risking the "chilling effect the prospect of having to testify might impose on legislators when considering proposed legislation and discussing it." *Florida v. United States*, 886 F. Supp. 2d at 1303; *see also Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021) (assuming that legislative privilege might yield in civil suits brought by private parties, but concluding plaintiffs' "need for the discovery [was] simply too little to justify such a breach of comity"); *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 457-58 (N.D. Fla. 2021) (citing *Comm. For a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011)).[3]

[3] Plaintiffs ask us to analyze these competing interests under the multi-factor balancing test from *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003). While other district courts have applied those factors, no federal appellate court has adopted *Rodriguez*. In any event, even if we applied *Rodriguez*, we would reach the same result we reach here.

Separate from whether the privilege can be overcome, we recognize that certain inquiries may not implicate the legislative privilege in the first place. The legislative privilege certainly does not attach to all things within a Legislator's knowledge. *See League of United Latin Am. Citizens*, 2022 WL 2713263, at *1-2. But we need not explore the specific contours of the privilege because at the end of the day, Plaintiffs have not identified any specific nonprivileged topics of inquiry for the Legislators' depositions. Plaintiffs' supplemental filing outlined generalized topics, but the filing only confirmed that Plaintiffs wish to explore the Legislators' subjective considerations. ECF No. 155 at 2-3. Indeed, at no point did Plaintiffs argue that they seek nonprivileged testimony from the Legislators: their entire argument is the Legislators' privilege must yield under these circumstances. *See* ECF No. 134 at 7-31.

For these reasons, we decline to allow the requested depositions.[4]

[4] Two final points warrant mention. First, Plaintiffs correctly note that separation of powers, as between coequal branches of government, has no role here. ECF No. 134 at 9 (citing *Gillock*, 445 U.S. at 370). But comity "command[s] careful consideration," *Gillock*, 445 U.S. at 373, and it favors quashing the subpoenas here. *Cf. Florida v. United States*, 886 F. Supp. 2d at 1303 (considering "the respect due a coordinate branch of government"). It is only after determining that significant federal interests outweigh principles of comity, along with all other relevant factors, that comity must yield. *See Gillock*, 445 U.S. at 373. Second, Plaintiffs mention that the Governor seeks legislative depositions in the state litigation. *See* ECF No. 34 at 14. But that does not affect this analysis at all. The issue of those legislators' immunity (if they assert any) is not before this court. Any legislator wishing to testify may do so voluntarily.

II. THE EXECUTIVES

A. Mr. Newman

We next address the Executives' motion, beginning with General Counsel Newman. Mr. Newman moves to quash his deposition subpoena entirely because his "testimony would be predominantly privileged." ECF No. 128 at 4. He asserts legislative privilege and attorney-client privilege. *Id.* at 25-31.

Plaintiffs emphasize Mr. Newman "played a significant role" in the redistricting process on the Governor's behalf. ECF No. 134 at 39. They do not intend to ask Mr. Newman about any legal advice to the Governor (absent a waiver), *id.* at 42, so attorney-client privilege is a nonissue for now. Plaintiffs wish instead to ask Mr. Newman about the events leading up to the plan's enactment.

Specifically, Plaintiffs noted before the hearing that Mr. Newman (1) wrote a memo explaining why the Governor believed the Legislature's proposed plans were unconstitutional; (2) "directed his deputy to respond to press inquiries about the Governor's plan;" (3) "served as the point person" for hiring an expert who testified before the Legislature to support the Governor's position; (4) is familiar with how the expert was prepared for his legislative testimony; and (5) is familiar with "the mechanics of drawing the map proposed by the Governor and ultimately enacted." ECF No. 134 at 39-42. Plaintiffs confirmed after the hearing that they still want to ask Mr. Newman about "his efforts to convince the Florida legislature to support the

Governor's maps" and documents he drafted to inform the Governor's veto. ECF No. 154 at 1-2.

Those topics all relate to Mr. Newman's (and the Governor's) actions or thoughts "in the proposal, formulation, and passage of legislation." *In re Hubbard*, 803 F.3d at 1307-08. The memo, incorporated by reference into Plaintiffs' complaint, reflects a recommendation to the Governor about pending legislation to inform the Governor's choice to approve or veto it. ECF No. 131 ¶ 68; ECF No. 134-5 at 4. The memo itself is already in the public record; testimony about what motivated its drafting (e.g., Mr. Newman's thought process) is privileged. The same is true as to Mr. Newman's internal discussions in the Governor's office. And "the mechanics of drawing a map" is quintessentially legislative.

Inquiry on Topics (3) and (4), beyond what is already in the public record, would also be barred by privilege. "Whether an act is legislative turns on the nature of the act," not on formalities. *Bogan*, 523 U.S. at 54. Here, it is undisputed that the expert was retained to provide testimony regarding the Governor's legislative position. ECF No. 134 at 39. The expert's third-party status does not deprive those interactions of their legislative function. *Cf. Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (reasoning as to immunity that legislators meeting with third parties to discuss potential legislation is "a routine and legitimate part of the modern-day legislative process"); *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)

(similar). "[C]ommunications with third parties are subject to legislative privilege so long as those communications were part of the formulation of legislation." *League of Women Voters of Fla.*, 340 F.R.D. at 453-55.

We are again unconvinced that there are exceptional circumstances sufficient to compel Mr. Newman's deposition, *see id.* (concluding similar topics struck "directly at the heart of the privilege"), particularly considering that Plaintiffs will be able to depose Mr. Kelly (as discussed below). It is perhaps more likely that Mr. Newman possesses nonprivileged, discoverable information than the Legislators. But that conjecture is again not enough to justify a breach of comity or the risk of chilling open discussions between the Governor and those who inform the Governor's positions on legislation. Plaintiffs have identified no topic of inquiry that would plausibly discover any nonprivileged testimony.

B. Mr. Kelly

We now turn to Deputy Chief of Staff J. Alex Kelly. Plaintiffs want to ask Mr. Kelly "not only about his conversations with third parties" involved in the legislative process, "but also about the internal discussions at the Governor's office that resulted in the challenged maps." ECF No. 134 at 38. They point out that Mr. Kelly acknowledges he drew the Governor's proposed map, that he considered race when doing so, and that he provided legislative testimony in support of the enacted plan. *Id.* at 34.

Mr. Kelly has agreed to testify, subject to certain conditions. ECF No. 128 at 23-24. First, he asks that Plaintiffs here depose him at the same time plaintiffs in the state-court case depose him. Second, he asks that this court impose parameters set in the pending-state court challenge to Florida's congressional map. He argues that those parameters, derived from Florida's state-law legislative privilege, are consistent with its federal common-law corollary. *See* ECF No. 128-2.

Citing Florida law, *In re Hubbard*, and other federal authorities, the state court held that Mr. Kelly was entitled to assert state-law legislative privilege as to "his thoughts or impressions or the thoughts or impressions shared with the Governor by staff." *Id.* at 2-5. Beyond those subjects, the court held that the state-court plaintiffs could depose Mr. Kelly "regarding any matter part of the public record and information received from anyone not part of the Governor's office." *Id.* at 8-9.

Plaintiffs urge us to reject these limits. They say Mr. Kelly "attempt[s] to bootstrap the state court's ruling on state law into a limitation on Plaintiffs' rights under the Federal Rules here." ECF No. 134 at 37. The state-law legislative privilege and federal corollary are different, to be sure. Mr. Kelly's argument, though, is not that we should adopt the Florida court's state-law holding as one of federal law. It instead is that topics beyond those the state court is allowing (and that movants accede to here) are protected by the federal privilege.

Legislative privilege (of the federal common-law variety) "may be asserted or waived as [the bearer] so chooses." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 299 (D. Md. 1992). So here, based on the state-court conditions, Mr. Kelly is waiving the privilege insofar as it would entitle him to not appear for a deposition at all. He simply is not waiving more—and specifically not waiving the privilege as to his thoughts or impressions and those shared with the Governor. ECF No. 128-2 at 8-9. The federal common-law privilege plainly covers those topics, just as Florida law does.

Mr. Kelly's drafting of the redistricting plan and his internal discussions about the plan plainly relate to his actions or thoughts "in the proposal, formulation, and passage of legislation." *In re Hubbard*, 803 F.3d at 1308; *see also League of Women Voters of Fla.*, 340 F.R.D. at 453-55. And again, we are unpersuaded that exceptional circumstances exist to overcome it.

The court will thus allow Plaintiffs to depose Mr. Kelly, but only consistent with the parameters the state court set out. That means Plaintiffs may depose Mr. Kelly, but not question him about internal discussions at the Governor's office.

Second, as for Mr. Kelly's request that he only be subjected to one deposition rather than two, the court directs Plaintiffs to use their best efforts to coordinate his deposition with that in the state case. In our discretion, though, we allow up to five

hours of deposition time for this case, above and beyond whatever limit applies in the state case.

III. CONCLUSION

The Legislators' motions to quash (ECF Nos. 126, 137, 140) are GRANTED. The Executives' motion to quash (ECF No. 128) is DENIED as moot as to Governor DeSantis, GRANTED as to Mr. Newman, and GRANTED in part as to Mr. Kelly.

The clerk will terminate ECF No. 139.

The discovery period is extended to June 9, 2023.

SO ORDERED on May 25, 2023.

s/ *Allen Winsor*
United States District Judge
for the Three-Judge Court