IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TENNESSEE STATE CONFERENCE OF THE NAACP et al.,	)	
Plaintiffs,	)	No. 3:23-cv-00832
v.	)	JUDGE ELI RICHARDSON JUDGE ERIC E. MURPHY
WILLIAM B. LEE et al.,	)	JUDGE BENITA Y. PEARSON
Defendants.	)	MAGISTRATE JUDGE ALISTAIR E. NEWBERN

PLAINTIFFS' MOTION TO COMPEL
DOCUMENTS AND DEPOSITION TESTIMONY OF LEGISLATORS

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INTRODUCTION

Pursuant to Rule 45, Plaintiffs served document and deposition subpoenas on nine legislators and one staff member[1] (collectively, "the Legislators"). These individuals—all of whom held leadership positions during Tennessee's redistricting process or were actively involved in the work done by the legislature's redistricting committees—possess relevant information related to Plaintiffs' intentional discrimination and racial gerrymandering claims.[2] The document subpoenas and topics for deposition testimony are narrowly focused on basic factual questions related to the challenged redistricting plans, including which entities and/or individuals drew the state senate and the congressional maps, what software was used to draw the maps and the inputs and criteria utilized therein, and whether other proposals or draft maps were considered by the Tennessee Legislature. The subpoenas also seek information concerning communications between certain Legislators and third parties, such as their constituents and consultants, that touch on similarly relevant topics. This requested discovery is likely to shed light on the Tennessee Legislature's intent and motivation behind its decision to pass the districts that are the subject of this litigation.

The information sought by the subpoenas is fundamental to the parties' dispute. Plaintiffs not only need answers to these questions to better understand the redistricting process and prove their claims; without it, they simply have no way to test Defendants' affirmative contentions that the Tennessee Legislature's motives were purely partisan and therefore legally compliant. *See* Defs' Motion to Dismiss, Dkt. 43, p. 1 ("[T]he Republican-controlled General Assembly did what virtually all political bodies do . . . [i]t drew maps that maximized the electoral prospects of the

[1] The nine legislators subpoenaed thus far are Curtis Johnson, Dawn White, Gary Hicks, Jack Johnson, Kevin Vaughan, Pat Marsh, Patsy Hazlewood, Paul Rose, and William Lamberth and the staff member is Doug Himes.
[2] *Moore, et al. v. Lee, et al.*, No. 22-0287-IV (Tenn.).

majority party[.]"), p. 13 ("The challenged districts lawfully maximize Republican seats in Congress and the State Senate.").[3] To date, however, Defendants have not been able (or willing) to provide this information themselves and have informed Plaintiffs that the answers to their questions are not in their possession. Accordingly, the Legislators appear to represent the only source of discovery available to Plaintiffs.

Nevertheless, counsel for the Legislators, the same attorneys representing Defendants in this action, have taken the position that all relevant documents and information possessed by the Legislators are covered by the legislative privilege. The Legislators have also refused to produce a privilege log so that those claims may be challenged by Plaintiffs or, if appropriate, subjected to an *in camera* review. This broad invocation of the legislative privilege is unsupported under federal common law: contrary to the Legislators' position, the legislative privilege is qualified, not absolute, and may be overcome by a showing of necessity, including the inability to obtain the relevant materials from other sources, which is precisely the situation here.

Determining whether the privilege applies involves a flexible approach that balances the need for the information while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process. Courts in this Circuit have applied a five-factor balancing test in determining the scope of the privilege, and applying the balancing test here demonstrates that the factors weigh heavily in favor of targeted discovery of the Legislators who were involved in the redistricting process. The alternative being proposed by the Legislators and Defendants—that Plaintiffs receive essentially no discovery with respect to Tennessee's redistricting process

[3] Defendants here are Governor William B. Lee, Secretary of State Tre Hargett, Coordinator of Elections Mark Goins, and the members of the State Election Commission Donna Barrett, Judy Blackburn, Jimmy Eldgridge, Mike McDonald, Secondra Meadows, Bennie Smith, and Kent Younce.

and the legislature's intentions in adopting the maps it did—would severely prejudice Plaintiffs' ability to prove their case or rebut Defendants' affirmative representations.

Accordingly, Plaintiffs respectfully request that this Court order the Legislators to produce documents responsive to Plaintiffs' requests, produce a privilege log, and sit for targeted depositions.

FACTUAL BACKGROUND

A. Rule 45 Subpoenas to the Legislators

1. Legislator Document Subpoenas

In March 2024, Plaintiffs served on the Legislators document subpoenas that sought documents related to the origination or source of any redistricting proposal; drafts of the redistricting plans and the challenged districts and their development over time; the rationale for and background behind the plans' passage; academic articles or materials relied upon in formulating or passing the redistricting plans; and any communications between the Legislators and third parties relating to the redistricting plans and process. Ex. 1 (Rule 45 Doc. Subpoenas to Legislators).[4] On April 8, the Legislators asserted blanket legislative privilege objections to every single request and categorically refused to produce any responsive documents in the Legislators' possession.[5] Ex. 2 (Letter from Ryan N. Henry and Objs. to Subpoenas).

The parties met and conferred on April 10, during which counsel for the Legislators stated that they would have to confirm whether they were indeed asserting that all documents in the Legislators' possession were subject to the legislative privilege or whether Legislators would

[4] The document subpoenas for the nine Legislators were sent on March 20, and the subpoena for Mr. Himes was sent on March 28.

[5] *See, e.g.*, Ex. 2 (Letter from Ryan N. Henry and Objs. to Subpoenas) at 8, 9, 10, 13, 16 (asserting the legislative privilege over Plaintiffs' requests 1(h), 2(d), 2(e), 5, and 9. These requests generally sought academic materials on which the Legislators may have relied, correspondence with third-party consultants, constituents, and other non-privileged actors like lobbyists.).

consider agreeing to produce a narrowed set of documents that were relevant to this case and a privilege log. At Plaintiffs' request, the parties met and conferred again on April 12, and counsel for the Legislators confirmed their position that all documents were subject to the privilege and that they were refusing to produce a privilege log. Following that conferral, and in an effort to further narrow the potential discovery dispute, Plaintiffs emailed counsel on April 15 to clarify, among other things, whether the Legislators had conducted any search and review before invoking legislative privilege and whether the invocation of privilege would expand over third-party communications or documents already produced in a separate state court litigation. Ex. 3 (April 15, 2024, 1:24 PM Email). To date, counsel for the Legislators have not been willing or able to represent that they reviewed any documents in Legislators' possession in connection with the subpoenas served by Plaintiffs; instead, they reaffirmed their position that the Legislators "are asserting a privilege over all non-public and previously unproduced materials," which includes "communications with third parties." The only exception to that blanket invocation of the legislative privilege comprised a small number of third-party communications which were in the possession of the Secretary of State Defendants, were produced in the state court litigation, and were subsequently produced to Plaintiffs in this case by Defendants. Ex. 3 (April 15, 2024, 5:12 PM Email).

2. Legislator Deposition Subpoenas

On March 28, 2024, Plaintiffs' counsel initiated conversations regarding their intention to serve deposition notices on at least some of the Legislators, asking whether Defendants' counsel would accept service and whether any Legislators receiving deposition notices would agree to sit for a deposition. Ex. 4 (April 2, 2024 Email; April 8, 2024 Email). After Defendants' counsel confirmed that they would accept service and indicated they would object wholesale to any such notices, Plaintiffs sent them subpoenas directed to nine Legislators and one staffer—along with

specific topics informing the Legislators about the information about which Plaintiffs intended to inquire. Ex. 5 (Rule 45 Dep. Subpoenas to Legislators). The topics are narrow and include public statements made by the Legislators and the factual support for those statements relating to the redistricting; awareness and understanding of constituent submissions and testimony relating to the redistricting; communications and written correspondence between the Legislators and offices of the governor, lieutenant governor, secretary of state, and attorney general relating to the redistricting; any communications with third parties relating to the redistricting; the Legislators' understanding of the requirements of the Voting Rights Act, U.S. Constitution, and Tennessee Constitution relating to redistricting; their knowledge of traditional redistricting plans; and their knowledge and/or understanding of communities of interest in the areas covered by current Congressional Districts 5, 6, and 7 and State Senate Districts 29, 30, 31, 32, and 33. The deposition topics did not include any communications between the Legislators themselves or the Legislators and their staff. Ex. 5 (Rule 45 Dep. Subpoenas to Legislators).

B. Discovery from Defendants to Date

Since the inception of this litigation, Defendants have made three productions—on February 2, 2024, February 16, 2024, and April 5, 2024—totaling 866 documents.[6] Most of the documents provide no insight into the legislative process that led the Tennessee Legislature to pass the maps containing the challenged districts in this litigation. A majority of the documents are public meeting agendas, press releases or newsletters regarding the census data delay, or high-level meeting minutes. Of note, however, Defendants' productions did include a very small number of

[6] On November 14, 2023, the parties exchanged Rule 26 initial disclosures. Defendants' disclosures provided little substantive information. Of note, it did not name a single individual who may have discoverable information but reserved the right to supplement based on the Supreme Court's decision in *Alexander*. The disclosures justified this position by noting, "[t]he presumption of legislative good faith places the burden on Plaintiffs to prove their claims." Ex. 6 (Defs.' Initial Disclosures).

communications between the Legislators and certain third parties on the topic of redistricting, indicating that neither Defendants nor Legislators considered such communications to be covered by the legislative privilege. *See, e.g.*, Ex. 7, (DEFS_HARGETT-GOINS-0000482–84 at 82–83, emails from legislators to a reporter at *The Dickson Herald* regarding comments made about congressional redistricting plans); Ex. 8, (DEFS_HARGETT-GOINS-0000487, email from Kevin Vaughan to a reporter at *Axios* discussing redistricting process). Although Plaintiffs and Defendants are still attempting to reach agreement on an appropriate set of search terms, Defendants' repeated assertions that they played no role in the redistricting process necessarily mean that it is the Legislators who are in possession of documents going to the central issue of legislative intent and motivation underlying the redistricting process. (In an attempt to ascertain where they might obtain this necessary information, Plaintiffs served interrogatories on Defendants seeking the identities of those individuals who would possess it; Defendants, through their counsel, responded that they did not know). Ex. 9 (Defs.' Resps. & Objs.).

ARGUMENT

The Court should permit discovery of the Legislators in this case. Plaintiffs' discovery requests and proposed deposition topics encompass information which is central to this case and to which the legislative privilege does not apply or has been waived. Furthermore, even if the legislative privilege could be properly invoked as to some of the information called for by Plaintiffs' requests, the five-factor balancing test laid out in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003) still weighs in favor of disclosure. The documents and narrow testimony sought are relevant to Plaintiffs' claims; no other alternative sources possess the information that legislators possess here; the litigation involves serious constitutional claims under the Fourteenth and Fifteenth Amendments; the subpoenaed Legislators played a direct role in the development and passage of the challenged districts and the subpoenaed Legislators possess information that

would shed light on the motivations of the legislature as a whole; and any chilling effect on the Legislators by conducting limited discovery is outweighed by Plaintiffs' need to obtain this information.

The Court should also order the Legislators to produce a privilege log so that Plaintiffs may evaluate the Legislators' assertions of legislative, attorney-client, and work product privileges. Without a log, it would be impossible for Plaintiffs to determine the Legislators' reasons for invoking the privilege as to certain documents.

I. APPLICABLE LEGAL STANDARDS

If a person or party fails to produce documents sought under Rule 34, the party seeking discovery may move to compel the production of documents, Fed. R. Civ. P. 37(a)(3), "including an order compelling discovery from a nonparty." *McPherson v. Vignobles Sullivan, LLC*, 2022 WL 815061, at *2 (M.D. Tenn. Mar. 16, 2022) (citing Fed. R. Civ. P. 37(a)(1)). "An evasive or incomplete disclosure, answer, or response is considered a failure to disclose, answer, or respond." *Coats v. McDonough*, 2022 WL 801507, at *2 (M.D. Tenn. Mar. 15, 2022) (quoting Fed. R. Civ. P. 37(a)(4)) (internal quotation marks omitted).

Rule 26(b) defines the scope of discovery, including for subpoenas issued pursuant to Rule 45. *McPherson*, 2022 WL 815061, at *2. Rule 26(b) allows a party to obtain discovery concerning any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case; such matter need not be admissible to be discoverable. Fed. R. Civ. P. 26(b). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Fed. R. Evid. 401. Proportionality is determined based on "the importance of the issues at stake in the action, . . . the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R.

Civ. P. 26(b). The district court, within its sound discretion, may limit the scope of discovery. *McDonough*, 2022 WL 801507, at *2; Fed. R. Civ. P. 26(b)(2)(C)(iii).

For state legislators involved in federal question cases, legislative privilege protects state legislators and their legislative staff from compelled disclosure of documentary or testimonial evidence relating to actions taken within the scope of legitimate legislative activity. *Favors v. Cuomo*, 285 F.R.D. 187, 209 (E.D.N.Y. 2012) (citing *Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710, at *9–11 (C.D. Cal. Oct. 10, 2003) and *Rodriguez*, 280 F. Supp. 2d at 93–95). The privilege, however, is not absolute. *Id*.

State legislators are afforded only a qualified legislative privilege. *See Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015). The privilege may be set aside where important federal interests are at stake. *Id.* Federal courts routinely apply a qualified legislative privilege in cases involving constitutional challenges to state legislation in cases involving intent claims. *See, e.g.*, *S.C. State Conf. of NAACP v. McMaster*, 584 F. Supp. 3d 152 (D.S.C. 2022), *argued sub nom*, *Alexander v. S.C. State Conf. of NAACP* (U.S. Oct. 11, 2023) (No. 22-807); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 336–37 (E.D. Va. 2015); *N. C. State Conf. of NAACP v. McCrory*, 2014 WL 12526799, at *2 (M.D.N.C. Nov. 20, 2014) ("[L]egislative privilege is not absolute, but rather requires a flexible approach that considers the need for the information while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process."); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *7 (N.D. Ill, Oct. 12, 2011). Courts presiding over such cases have found that the qualified legislative privilege does not shield state legislators from producing at least some responsive records or deposition testimony. *E.g.*, *Nashville Student Org. Comm.*, 123 F. Supp. 3d at 969 (citations omitted).

Furthermore, Courts have generally held that, "like all evidentiary privileges," the legislative privilege "must be 'strictly construed' and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Nashville Student Org. Comm.*, 123 F. Supp. 3d at 969 (quoting *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7).

II. PLAINTIFFS ARE ENTITLED TO DISCOVERY FROM THE LEGISLATORS

Plaintiffs requested documents, a privilege log, and depositions from the Legislators, but the Legislators claimed that a blanket legislative privilege shields them from all discovery—regardless of what specifically has been requested. This blanket assertion of privilege is inappropriate. Plaintiffs' discovery requests seek documents and information to which the legislative privilege does not apply, such as third-party communications,[7] public records,[8] and public commentary.[9] The Court should compel the production of this information, particularly given that Defendants have already produced a limited subset of such information and thus implicitly recognized that it is not protected by the legislative privilege. Additionally, applying the five-factor balancing test, the Court should permit discovery of other, arguably privileged materials as Plaintiffs' claims involve issues of intent and motivation and necessarily require discovery into the direct statements of the Legislators.

[7] *See, e.g.*, Ex.1 (Rule 45 Doc. Subpoenas to Legislators) at 14 (requesting "all correspondence with constituents").
[8] *See, e.g.*, *id.* at 15 (requesting public notices about Redistricting Plan hearings and schedules).
[9] *See, e.g.*, *id.* at 14 (requesting social media posts containing public commentary about the redistricting process).

A. Legislative Privilege Does Not Apply to All of the Documents Requested by Plaintiffs.

Plaintiffs' requests encompass documents and information to which the legislative privilege does not apply which, therefore, must be produced regardless of whether the privilege should be overcome here. The Legislators' communications with third parties such as constituents, lobbyists, and consultants are not privileged. *See, e.g.*, *Plain Local Sch. Dist. Bd. of Educ. v. DeWine*, 464 F. Supp. 3d 915, 922 (S.D. Ohio 2020) (explaining that state legislators are entitled "to even less protection [than federal legislators] under the [legislative] privilege," which "underscores that its protection does not prevent disclosure of communications between Movants and third parties, such as constituents or lobbyists"); *Mich. State A. Philip Randolph Inst.*, 2018 WL 1465767, at *7 ("communications between legislators or their staff and any third party are not protected by the legislative privilege."); *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 ("noting that third-party groups "could not vote for or against the Redistricting Act, nor did they work for someone who could[,] [thus] the legislative privilege does not apply."). And to the extent the Legislators shared documents that would otherwise be privileged with third parties or the public at large, that privilege is waived. *Mich. State A. Philip Randolph Inst.*, 2018 WL 1465767, at *7.

The Legislators doubtless possess such non-privileged, third-party communications. Indeed, as previously detailed, a limited number of third-party communications involving some of the Legislators were produced in the state-court litigation and ultimately reproduced by Defendants in this case. *See supra* at 5–6. The Legislators should be required to search for and produce all other non-privileged, responsive communications with third parties, particularly given their

implicit recognition that such communications do not fall within the scope of the legislative privilege.

Similarly, at least one court in this circuit has held that "[f]act-based documents and communications" are not protected by legislative privilege. *See League of Women Voters Mich.*, 2018 WL 2335805, at *6. Accordingly, the Legislators should be required to produce responsive, fact-based information requested by Plaintiffs. *See, e.g.*, Ex. 1 (Rule 45 Doc. Subpoenas to Legislators) at 17–18 (requesting "[a]ll Documents Relating to enumerations or estimates by the U.S. Census Bureau or Tennessee Demographic Center related to population changes, race, ethnicity, language minority status, or United States Citizenship . . .").

Finally, "[d]ocuments and communications created after the date of enactment" are not covered by legislative privilege. *League of Women Voters Mich.*, 2018 WL 2335805, at *6; *see also Bethune-Hill*, 114 F. Supp. 3d at 343 ("The privilege only protects 'integral steps' in the legislative process and does not extend to commentary or analysis following the legislation's enactment."). Plaintiffs' requests extend beyond the date when the challenged redistricting plans were enacted. *See, e.g.*, Ex. 1 (Rule 45 Doc. Subpoenas to Legislators) at 11 ("Unless otherwise specified, all other document requests concern the period of time from January 1, 2021, to the present."). Thus, regardless of whether legislative privilege can be overcome in this case, the Legislators should nonetheless be required to search for and produce all non-privileged, post-enactment documents.

B. The Five-Factor Balancing Test Weighs in Favor of Disclosure of Documents and Deposition Testimony.

Federal courts in this Circuit use a five-factor balancing test to determine whether the legislative privilege should apply on a case-by-case basis. The factors considered are: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the

"seriousness" of the litigation and the issues involved; (4) the role of government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *See e.g.*, *Nashville Student Org. Comm.*, 123 F. Supp. 3d at 969 (citing *Rodriguez*, 280 F. Supp. 2d at 101); *League of Women Voters Mich.*, 2018 WL 2335805, at *2–4; *Mich. State A. Philip Randolph Inst.*, 2018 WL 1465767, at *5–6.

1. The First Factor Weighs in Favor of Disclosure as the Evidence Sought Is Relevant to Plaintiffs' Claims.

The documents and deposition testimony Plaintiffs seek are highly relevant to their claims. Here, intent—whether the Legislature intentionally discriminated when passing the challenged districts—is at the heart of the case. Plaintiffs bear the burden of proving the *Arlington Heights* factors—and, ultimately, that race was a motivating factor in the enactment of the challenged districts. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). In *Arlington Heights*, the Supreme Court outlined three categories of direct and circumstantial evidence courts should consider in *determining whether discriminatory intent existed* in cases involving the Equal Protection Clause of the Fourteenth Amendment: (1) the impact of the challenged action; (2) the historical background or sequence of events leading up to the action; and (3) the legislative history of the action. *Id.* at 264–68. The Court held that the legislative history of an action taken by lawmakers "may be highly relevant" to determine whether "invidious discriminatory purpose was a motivating factor" for the action, "especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 266–68.

Plaintiffs' initial burden of establishing relevance is easily met. Plaintiffs' claims concern the Tennessee Legislature's process, motivation, and involvement in the contested redistricting. Accordingly, documents relating to those issues as well as relating to race and related topics are

necessary for Plaintiffs to be able to prove the intent element of this litigation. *See S.C. State Conf. of NAACP*, 584 F. Supp. 3d at 163 (finding the evidence sought was "highly relevant to the intentional discrimination claims at the heart of the complaint, because the Legislature's decision making process itself is the case").

Proof of the legislature's motivation and intent, particularly vis-à-vis traditional redistricting principles and any partisanship defenses, is also relevant for Plaintiffs' racial gerrymandering claims. In cases involving racial gerrymandering, testimony from legislators has been highly probative to determining whether racial considerations predominated over traditional redistricting principles. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 919–20 (1995). In *Miller*, the Court relied on the statements of a legislative staffer who operated the redistricting software as well as on the admissions of various state officials to find that the legislature had designed the district at issue along racial lines, and race data was accessible to the mapdrawer at the precinct level. *Id.* at 918. Testimony from the mapdrawer and key legislators in *Cooper v. Harris* also demonstrated that the "State's mapmakers, in considering a specific congressional district, purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population" and "Senator Rucho and Representative Lewis were not coy in expressing that goal." 581 U.S. 285, 299 (2017). Similarly, the cartographer who drew the South Carolina congressional map in *South Carolina State Conference v. Alexander* provided testimony that he used the "least change" approach with respect to all the districts except the Charleston district, as to which he "admitted he abandoned his least change approach" and moved "over 30,000 African Americans in a single county from Congressional District No. 1 to Congressional District No. 6" to produce "the desired partisan tilt." 649 F. Supp. 3d 177, 188, 189–90 (D.S.C. 2023).

In fact, in the South Carolina case, the three-judge panel permitted discovery of state legislators and key staff members, noting as to the first factor that the "documents containing the opinions and subjective beliefs of legislators or their key advisors are relevant to the broader inquiry into legislative intent and the possibility of racially motivated decisions that were not adequately tailored to a compelling government interest." *S.C. State Conf. of NAACP*, 584 F. Supp. 3d at 163 (internal citation omitted). The court recognized that the plaintiffs' burden of persuasion underscored the importance of the requested materials, *i.e.*, "they [the plaintiffs] cannot be expected to make this showing in the dark." *Id.* at 164.

Plaintiffs have worked with Defendants to narrow the scope of their discovery requests to focus on the most relevant documents and would do so here as well so as to alleviate any burden on the Legislators. The same is true of deposition testimony. The topics for depositions are tailored to public statements made by or known to the Legislators in connection with the creation and passage of the redistricting plans, their communications about the redistricting plans with third parties outside the Legislature, including consultants, and the Legislators' awareness and knowledge of the legal requirements under federal and state law and the communities of interest in the challenged districts. All nine Legislators from whom discovery is sought were part of the redistricting committees in 2021 and made decisions with respect to passing the unlawful districts. Mr. Himes drew the state house map, which is not challenged in this litigation, but in the absence of any information on the map-drawers from Defendants, Mr. Himes will possess some knowledge as to which parties drew the state senate and congressional maps, how they balanced the traditional redistricting principles, and whether racial considerations predominated in achieving the Legislature's alleged partisan goals. *See, e.g.*, *Cooper v. Harris*, 581 U.S. at 291. This information is highly probative of the Legislature's motivation and therefore, is relevant to Plaintiffs' claims.

For these reasons, the first factor weighs in favor of disclosure of these documents.

2. The Second Factor Weighs in Favor of Disclosure Because, as Defendants Have Admitted, No Alternative Means Exist for Plaintiffs to Obtain Direct Evidence of the Legislature's Intent.

The second factor—availability of other evidence—highlights the importance of disclosure of documents and deposition testimony. Here, as in *South Carolina State Conference of NAACP*, no other evidence, including the evidence produced by Defendants thus far, "would be as probative of an unlawful legislative motive as potential direct or circumstantial evidence which could be obtained through the disclosure of the requested legislative materials" and the questioning of the Legislators at deposition. *S.C. State Conf. of NAACP*, 584 F. Supp. 3d at 164. In building their affirmative case, Plaintiffs will be relying on the analyses of their experts to develop circumstantial evidence of discriminatory purpose, but "while circumstantial evidence is valuable, it is not a substitute for the ability to depose a witness and obtain *direct* evidence of motive and intent, thus avoiding the potential ambiguity of circumstantial evidence." *Id.* (quoting *Benisek v. Lamone*, 241 F. Supp. 3d 566, 576 (D. Md. 2017)). The discovery sought here is likely the only way to obtain direct evidence of discriminatory intent as underscored by the lack of relevant evidence from Defendants' document productions and responses to interrogatories.[10] *See id*. at 164. Additionally, such discovery may very well shed important light on whether race was the predominant motivation behind the challenged redistricting.

The Legislators may contend that such evidence (such as public testimony and the text of the amendments and bills themselves) was publicly available. But the availability of this extremely limited subset of "other evidence does not render evidence regarding the Legislators' direct

[10] *See, e.g*., Ex. 9 (Defs.' Resps. & Objs) at 6, 34, 92–97 asserting that "Defendant[s]" did not implement the Tennessee Senate map or the congressional map for the 2022 primary and general elections," repeatedly averring to "[have] no knowledge responsive" to the interrogatories or being "not aware" of individuals with knowledge of the sought after information.

deliberations irrelevant 'given the practical reality that officials seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate' against a particular group." *League of Women Voters*, 2018 WL 2335805, at *5 (quoting *Bethune-Hill*, 114 F. Supp. 3d at 341). "In other words, the availability of alternate evidence will only supplement—not supplant—the evidence sought by the Plaintiffs." *Bethune-Hill*, 114 F. Supp. 3d at 341. Given that intent is a critical element of Plaintiffs' claims, the second factor weighs in favor of disclosure.

Finally, and critically, Defendants themselves have essentially admitted that the information sought by the subpoenas is not available from other sources. Specifically, their interrogatory responses aver under penalty of perjury that they do not possess such information and are unaware of any individuals or entities that do. Ex. 9 (Defs.' Resps. & Objs) at 6, 34, 92–97. Given those representations, Plaintiffs simply have no choice but to obtain the requested discovery from the Legislators themselves.

3. The Third Factor—Seriousness of the Litigation—Weighs in Favor of Disclosure.

It is beyond dispute that the Plaintiffs' claims involve significant issues of constitutional law. Plaintiffs' complaint includes detailed allegations of intent, including that Congressional District 5 (which for decades has included all of Nashville and Davidson County) was intentionally dismantled in order to splinter Black voters and other voters of color into three separate congressional districts, CD-5, 6, and 7. Compl. ¶¶ 112–13. As for Senate District 31, the complaint alleges that over the past decade the district grew to include a significant Black and Hispanic voter population that came close to electing a candidate of choice in 2018, but then found itself splintered after the 2021 redistricting process. Compl. ¶¶ 147–49.

The right to vote free from discrimination is indispensable to individual liberty and enshrined within our Constitution. "The erosion of that right takes aim at the very heart of our democracy." *S.C. State Conf. of NAACP*, 584 F. Supp. 3d at 165. At some juncture, state interests must give way "when they conflict with the constitutionally guaranteed fundamental right to vote free from racial discrimination." *Id.*

4. The Fourth Factor Weighs in Favor of Disclosure Because the Legislature Played a Direct Role in the Redistricting Process.

The fourth factor looks to the role of the legislature in effecting the alleged constitutional violations in the case. *Id.* at 165. This factor "looks beyond mere 'state action' and requires the court to consider whether 'the legislature—rather than the legislators—are the target of the remedy and legislative immunity is not under threat.'" *Id.* (quoting *Bethune-Hill*, 114 F. Supp. 3d at 341). It is undisputed that the Legislature enacted the district maps at issue. Plaintiffs are not targeting random individual legislators here but seek some insight into the process by obtaining relevant documents and testimony from the Legislators who were in leadership positions. The Legislators subpoenaed here are a narrowly tailored and carefully chosen group who held leadership positions on the various redistricting committees assembled in the state house and state senate.

5. The Fifth Factor—Potential Chilling Effect on the Legislators—Is Outweighed by Plaintiffs' Need for Discovery.

The privilege "guard[s] legislators from the burdens of compulsory process" and protects their independence. *S.C. State Conf. of NAACP*, 584 F. Supp. 3d at 165 (quoting *Bethune-Hill*, 114 F. Supp. 3d at 341). And courts in this Circuit have recognized that discovery into the legislative process likely would chill legislator communications to some extent, but that on balance, the plaintiffs' showing of need and important federal interests at stake counsel against applying a blanket legislative privilege. *League of Women Voters Mich.*, 2018 WL 2335805, at *5–6; *S.C. State Conf. of NAACP*, 584 F. Supp. 3d at 165 (noting "it is no doubt true that

conversations between and among legislators play a vital role in crafting the substance of legislation," and "the privilege exists to prevent such conversations from becoming chilled").

Although Plaintiffs acknowledge a Circuit split exists with respect to whether the balancing test applies, courts in the Sixth Circuit routinely apply the balancing test recognizing the importance of disclosure especially in intent cases, and this court should follow suit. *Nashville Student Org. Comm.*, 123 F. Supp. 3d at 969–70; *League of Women Voters*, 2018 WL 2335805, at *2–4; *Mich. State A. Philip Randolph Inst.*, 2018 WL 1465767, at *5–6; *Glowgower v. Bybee-Fields*, 2022 WL 4042412, at *9 (E.D. Ky. Sept. 2, 2022); *but see Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1343–44 (11th Cir. 2023); *LUPE v. Abbott*, 68 F.4th 228, 239–40 (5th Cir. 2023); *In re N.D. Legis. Assembly*, 70 F.4th 460, 465 (8th Cir. 2023); *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 88–89 (1st Cir. 2021).

Plaintiffs do not treat the Legislators' assertions of privilege lightly. However, as the caselaw in this Circuit clarifies, the privilege must bend in the face of reasonable and necessary discovery, particularly that aimed at vindicating the fundamental constitutional rights held by those legislators' constituents. Moreover, there are methods by which this Court can guard against unnecessary interference with the privilege, including filing the deposition transcripts under seal for *in camera* review. *See Nashville Student Org. Comm.*, 123 F. Supp. 3d at 971–72. Specifically, the Court may permit the Legislators' counsel to interpose objections to specific questions at the deposition on legislative privilege grounds, but require the deponent to answer the question, with the answer being sealed, subject to determination by the Court as to the validity of the objection at a future date.

C. Plaintiffs Are Entitled to a Privilege Log.

Courts in this Circuit routinely exercise their discretion to compel production of a privilege log to evaluate assertions of attorney-client privilege or work-product protection,[11] as well as to evaluate invocations of legislative privilege. *See, e.g.*, *Bybee-Fields*, 2022 WL 4042412, at *8 (holding that "[f]or the Court to respect … assertions of [legislative] privilege," the Chief Clerk of the Kentucky House of Representatives "must provide Plaintiffs' counsel and the Court with a sufficiently detailed privilege log") (internal citation omitted); *League of Women Voters*, 2018 WL 2335805, at *7 (ordering third-party legislative personnel and legislative bodies to produce certain relevant redistricting documents, but to create a privilege log for information withheld under the legislative privilege "that is unrelated to the introduction, consideration, or passage of the . . . Redistricting Legislation.").

There is no reason why the Legislators should be exempted from a requirement faced routinely by litigants seeking to shield otherwise responsive documents from discovery. Conversely, Plaintiffs would be severely prejudiced by such an exemption, which would make it impossible for them to evaluate and assess the Legislators' claims of privilege.

[11] *See Mark A. G'Francisco v. GoFit, LLC*, 2015 WL 247873 at *3 (M.D. Tenn. Jan. 20, 2015) (granting plaintiff's motion to compel defendants to produce a privilege log describing responsive information and documents withheld upon claims of privilege); *Jones v. ACE Cheer Co. LLC*, 2022 WL 969720, at *4 (W.D. Tenn. Mar. 30, 2022) (ordering production of a privilege log of documents withheld under attorney-client privilege alongside production of non-privileged documents). Indeed, parties must provide the requisite information describing the withheld documents and any privileges asserted at peril of waiving that privilege entirely. *See John B. v. Goetz*, 879 F. Supp. 2d 787, 890 (M.D. Tenn. 2010) (waiving privileges not asserted on defendants' privilege log because "a party's failure to assert a privilege on a privilege log constitutes a waiver of that privilege.") (collecting cases); *CommonSpirit Health v. HealthTrust Purchasing Grp. L.P.*, 2022 WL 19403855, at *2 (M.D. Tenn. Oct. 17, 2022) (collecting cases).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court compel the Legislators to produce the relevant documents in response to Plaintiffs' requests and to provide deposition testimony.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2024, the undersigned filed the foregoing document via this Court's electronic filing system, which sent notice of such filing to the following counsel of record:

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