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

TENNESSEE STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. WILLIAM B. LEE, in his official capacity as Governor of the State of Tennessee, *et al.*, Defendants.	Case No. 3:23-cv-00832 Judge Eric Murphy Judge Eli Richardson Judge Benita Pearson

SUBPOENA RECIPIENTS' REPLY SUPPORTING THEIR MOTION TO QUASH AND FOR A PROTECTIVE ORDER

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INTRODUCTION

Legislative privilege bars the subpoenas in this commonplace constitutional challenge. Plaintiffs' responsive briefing continues to build on unsound district court precedent while disregarding a tidal wave of unfavorable circuit court opinions, not to mention many of the Subpoena Recipients' arguments. Plaintiffs (at 1 & n.1) would have the Court believe that the legislative privilege is being used as a sword and shield. Not so. The Subpoena Recipients have not relied on one word of privileged information. *See* Dkt. 62 at 1, 16-17. Plaintiffs say (at 2 & n.2) legislative privilege is unfair because Defendants can still seek discovery about the legislative process from Plaintiffs when Plaintiffs cannot, in turn, demand it from state legislators. Plaintiffs ignore that legislative privilege also bars Defendants from subpoenaing the legislature for helpful discovery. Legislative privilege, in fact, protects fairness by ensuring that private litigants cannot force an entire branch of state government to grind to a halt by bombarding it with discovery demands about speculative allegations.

ARGUMENT

I. Legislative Privilege Precludes Plaintiffs' Discovery of Legislative Documents.

Plaintiffs demand documents that fall directly within the scope of the legislative privilege. The document subpoenas are thus impermissible—even under Plaintiffs' outdated balancing test.

A. Legislative privilege safeguards the legislative process, the separation of powers, and comity.

Legislative privilege aids legislative function and furthers principles of separation of powers and comity. Dkt. 62 at 8-10. Plaintiffs misconstrue the Subpoena Recipients' position on the privilege's origins and scope. They sidestep the past decade of federal circuit court precedent that devastates their arguments. And they give short shrift to the privilege's protection of separation of powers and comity.

Scope of Legislative Privilege. Plaintiffs (at 3-7) are incorrect that the Subpoena Recipients argue for an absolute legislative privilege. The Subpoena Recipients recognize an exception to the privilege exists for extraordinary cases that resemble criminal prosecutions, protect unique federal

interests, and contain allegations so rare that they would not destroy the privilege. Dkt. 62 at 9, 16, 22 (citing *La Union del Pueblo Entero v. Abbott* (*"Abbott"*), 93 F.4th 310, 323-24 (5th Cir. 2024)). But this commonplace challenge does not meet those stringent requirements, as Plaintiffs do not dispute.

Supreme Court Guidance. Plaintiffs argue (at 3-4) that, in citing Supreme Court precedent about legislative immunity, the Subpoena Recipients conflate privilege with immunity.[1] Legislative immunity protects legislators from the same discovery "burden" as legislative privilege, *Supreme Ct. of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732 (1980), so it is appropriate to rely on "caselaw involving either the Constitution's Speech or Debate Clause or legislative immunity (rather than legislative privilege)," *La Union Del Pueblo Entero v. Abbott* ("*Hughes*"), 68 F.4th 228, 237 (5th Cir. 2023).

Federal Circuit Guidance. In their 49 pages of briefing, Dkts. 59, 63, Plaintiffs avoid any direct interaction with a decades' worth of adverse circuit court precedent. The Fifth, Eighth, Ninth, and Eleventh Circuits have ruled that legislative privilege is a broader barrier to discovery than Plaintiffs say. *Hughes*, 68 F.4th at 228; *Abbott*, 93 F.4th at 310; *In re N. Dakota Legis. Assembly*, 70 F.4th 460 (8th Cir. 2023), *pet. writ. cert. filed sub nom. Turtle Mountain Band of Chippewa Indians v. N. Dakota State Legis. Assembly*, No. 23-847 (U.S. Feb. 2, 2024); *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018); *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015); *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339 (11th Cir. 2023). Rather than argue about the inapplicability of this precedent, Plaintiffs relegate it to *"but see"* and *"cf."* citation sentences with no analysis. Dkt. 59 at 18; Dkt. 63 at 7.

Plaintiffs instead embrace district court cases that a wave of circuit court opinions has entirely undermined. Two of the district court opinions Plaintiffs reference (at 7, 10, 16-17, 20)—*Bethune-Hill v. Va. State Bd. of Elections.*, 114 F. Supp. 3d 323 (E.D. Va. 2015), and *Rodriguez v. Pataki*, 280 F. Supp.

[1] Of the seven Supreme Court opinions Plaintiffs accuse Subpoena Recipients of improperly citing (at 4-5 & n. 4-5), only two were in the Subpoena Recipients brief: *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) and *United States v. Helstoski*, 442 U.S. 477 (1979).

2d 89 (S.D.N.Y. 2003)—suggest that legislative privilege could yield to the interests of private plaintiffs given interest-balancing in any given case. *Bethune-Hill* and *Rodriguez* likewise undergird the cited in-circuit district court opinions in Plaintiffs' brief. But the Eighth Circuit has expressly rejected *Bethune-Hill*. *See In re N. Dakota Legislative Assembly*, 70 F.4th at 464-65. And the Fifth, Ninth, and Eleventh Circuits have in effect jettisoned the "manipulable" test of *Bethune-Hill* and *Rodriguez* by rejecting that the privilege yields when private plaintiffs bring run-of-the-mill constitutional challenges. *Pernell*, 84 F.4th at 1345; *see also Hughes*, 68 F.4th at 238; *Lee*, 908 F.3d at 1188. Plaintiffs' contrary arguments are thus castles built on sand.

Separation of Powers. To argue that the privilege does not protect separation of powers, Plaintiffs (at 9) assert that, in a federal *criminal* case, *United States v. Gillock*, 445 U.S. 360, 370 (1980), the Supreme Court found the Supremacy Clause prevails over a state's separation of powers. Plaintiffs fail to acknowledge that the Supreme Court has left the separation-of-powers purpose undisturbed in *civil* cases. Dkt. 62 at 10; *Consumers Union of U. S., Inc.*, 446 U.S. at 733; *see Hughes*, 68 F.4th at 238 ("[L]egislative discretion should not be inhibited by judicial interference . . . ." (citation omitted)).

Comity. Plaintiffs (at 9) attempt to dispose of comity by again relying on *Gillock*. Yet *Gillock* acknowledged that different comity considerations arise in "a civil action brought by a private plaintiff to vindicate private rights" than in a criminal case. 445 U.S. at 372-73. Plaintiffs have no answer for the Subpoena Recipient's argument that more recent Supreme Court precedent, *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996) (citing *Gillock*, 445 U.S. at 368 n. 8), calls on federal courts to consider state privileges in deciding the appropriate scope of federal privileges. Dkt. 62 at 10.

B. Legislative privilege bars the document discovery Plaintiffs seek.

In private constitutional challenges like this one, legislative privilege prevents Plaintiffs from intruding on the legislative process and deliberations with discovery requests. Dkt. 62 at 10-19. Plaintiffs argue (at 19-21) that the privilege does not apply to their requests for third-party

communications, for communications that post-date the enactment of the redistricting plans, and for purely factual documents. They also say (at 21-23) that the Subpoena Recipients must produce a privilege log. These arguments are based on outdated precedent, are often conclusory, and overlook that concerns about burden—not confidentiality—are the driving force for the privilege.

Covered Communications. In arguing against application of the privilege to third party communications, Plaintiffs cite Sixth Circuit district court opinions that, for the reasons discussed above, *supra* pp. 2-3, are outdated and unsound. And, when it comes to third-party communications, these *Rodriguez*-based cases are especially suspect because the Second Circuit has abrogated *Rodriguez's* finding that third-party communications are not privileged. *Compare Rodreguez*, 280 F. Supp. 2d at 101 (finding legislative privilege did not cover "conversation[s] between legislators and knowledgeable outsiders, such as lobbyists"), *with Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (finding the "legislative process" includes "[m]eeting with persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents").

Plaintiffs say (at 19-20) their position "makes sense" because third-party disclosure waives the privilege. But that argument disregards how third-party engagement is crucial to the legislative process, so this exception would swallow much of the rule. *See, e.g.*, *Almonte*, 478 F.3d at 107. That argument also only holds up if the privilege is exclusively driven by concerns about confidentiality. It is not. The driving force for the privilege is to remove burdens from the legislative process. Dkt. 62 at 9, 18-19. Thus, waiver occurs not if there is a public disclosure of documents as part of the legislative process, *see Abbott*, 93 F.4th at 321-23, but if legislators voluntarily insert themselves into litigation, Dkt. 62 at 19. Plaintiffs offer no response to how waiver works in the distinct context of legislative privilege.

Plaintiffs also claim (at 21) that the privilege does not apply to communications that post-date the enactment of the redistricting maps because these communications could not be part of the "pre-enactment deliberative process." This argument falls flat for two reasons: (1) it relies on the same

outdated caselaw in Plaintiffs' other arguments, and (2) it fails to consider that the legislative process does not end with the enactment of legislation. *See League of United Latin Am. Citizens v. Abbott* ("*LULAC v. Abbott II*"), No. 21-cv-00259, 2023 WL 8880313, at *5 (W.D. Tex. Dec. 21, 2023).

Covered Information. Plaintiffs say (at 20) that legislative privilege does not apply to "purely factual information." Plaintiffs give no reason for this other than nonbinding cases that they cite without any analysis. The one in-circuit district court case Plaintiffs cite is outdated for the reasons discussed. The Second Circuit case they cite is about deliberative process, not legislative privilege. *See Hopkins v. U.S. Dep't of Hous. & Urb. Dev.*, 929 F.2d 81 (2d Cir. 1991). Their Eighth Circuit district court case, *Brandt v. Rutledge*, No. 4:21-cv-450, 2022 WL 3108795 (E.D. Ark. Aug. 4, 2022), is of unsound precedential value given the Eight Circuit's more recent statement that legislative privilege prevents "compelled discovery of documents"—full stop. *In re N. Dakota Legislative Assembly*, 70 F.4th at 463. And the Ninth Circuit district court case rules *against* Plaintiffs' position, finding that "an 'objective facts' exception to the legislative process privilege" would "undermine[] its central purpose." *Kay v. City of Rancho Palos Verdes*, No. CV-02-03922, 2003 WL 25294710, at *11, *21 (C.D. Cal. Oct. 10, 2003). The position also falls apart under scrutiny. Knowledge of what facts a jury or judge pays careful attention to plainly reveals their deliberations and decision-making process. The same would be true of information revealing the facts that legislators considered.

Privilege Log. Plaintiffs accuse Subpoena Recipients (at 22) of "circular[ly]" arguing that a privilege log is unnecessary because all the relevant information falls within the scope of the legislative process. This is merely an undeveloped attack on the well-reasoned holding of the Eleventh Circuit. *See In re Hubbard*, 803 F.3d at 1311. Plaintiffs argue that Fed. R. Civ. P. 26(b)(5) requires a log because a party asserting a privilege must describe the "withheld documents" in a manner that "[w]ill enable the parties to assess the claim." Yet, the Eleventh Circuit, in analyzing the same concern about the same requirement in Fed. R. Civ. P. 45(e)(2)(A)(ii), found this requirement is met if lawmakers "point

out . . . that the only purpose of the subpoenas was to further . . . inquiry into the lawmakers' motivations" and that the "legislative privilege exempted them from such inquiries." *In re Hubbard*, 803 F.3d at 1311. The Subpoena Recipients have done just that. Dkt. 62 at 13-14.

For Plaintiffs to be correct, legislative privilege would have to protect only confidential documents. Then the assessment of whether confidentiality had been breached would require a log. But, because the privilege's primary goal is "shielding lawmakers from the distraction created by inquiries into the regular course of the legislative process," it is irrelevant whether documents were kept confidential. *In re Hubbard*, 803 F.3d at 1311. A privilege log is thus "unnecessary," *id.*, and the extraordinary effort and intrusions required to produce one would render the privilege self-defeating.

C. This Panel should reject some courts' legislative-privilege balancing test, which Plaintiffs fail in all events.

The *Rodriguez* balancing test is an outdated test reflecting an overly narrow understanding of the scope of legislative privilege that the Court should discard or else counsels protecting the privilege here. Dkt. 62 at 19-24. Plaintiffs justify using this test (at 7-8) by citing prior in-circuit district court opinions that apply it. But, as discussed, those opinions lacked the guidance of more recent Fifth, Eighth, Night, and Eleventh Circuit opinions. *Supra* pp. 2-3. Plaintiffs also suggest (at 8) that the balancing test aligns with the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). And again, Plaintiffs ignore a body of federal circuit court precedent interpreting *Arlington Heights* far more narrowly. *Supra* pp. 2-3.[2]

Even if applied, the five-factored *Rodriguez* test weighs against Plaintiffs:

[2] Plaintiffs also claim *Arlington Heights* "assumed it would have been proper to question Board members [in the litigation] 'about their motivation at the time they cast their votes.'" Dkt. 63 at 8 (citing *Arlington Heights*, 429 U.S. at 270 n.20). Not so. To start, it is unclear whether the legislative actors who testified in the underlying case ever asserted legislative privilege or maintained that claim through the proceedings. *See Arlington Heights*, 429 U.S. at 270 & n.20. The Supreme Court moreover found it was proper that the district court *"forbade* questioning [the legislative actors] about their motivations." *Id.*

Relevancy. In arguing relevancy, Plaintiffs (at 13) discard negative president, such as *United States v. O'Brien*, 391 U.S. 367 (1968), as "inapposite" because the plaintiffs in those cases had not alleged "discriminatory intent." Plaintiffs throw the baby out with the bathwater. The *O'Brian* Court's iconic comment—"[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it," 391 U.S. at 384—is an often-referenced caution in lawsuits about discriminatory legislative intent. *See League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 932 (11th Cir. 2023); *Am. Trucking Associations, Inc. v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021); *Veasey v. Abbott*, 830 F.3d 216, 233-34 (5th Cir. 2016) (plurality opinion). As the Eighth Circuit put it in declining to exempt similar requests from the privilege, "[e]ven where 'intent' is a claim, statements by individual legislators are an insufficient basis from which to infer the intent of a legislative body as a whole." *In re N. Dakota Legislative Assembly*, 70 F.4th at 465. So too here.

Availability of Other Evidence. Plaintiffs (at 15) again concede that they seek publicly available information. Yet they say it falls on the Subpoena Recipients "to specify what specific requests could be satisfied via public or other sources." But Plaintiffs already have been directed to information available online or from other sources, *see* Dkts. 43, 59-9, 63-2, 63-3, 63-4, that is responsive to *all* Plaintiffs' requests, including those about the legislative process, Dkt. 59-1 ¶¶ 1-2 and 4-6, legislation on critical race theory, *id.* ¶ 3, census data, *id.* ¶ 7, vendor payments, *id.* ¶ 8, voting districts, *id.* ¶ 9, and documents produced by the parties to this or other redistricting litigation, *id.* ¶ 10. It would turn the privilege's chief concern with legislative burdens on its head to require that Subpoena Recipients identify what redistricting documents are publicly available when Plaintiffs could just as easily do so—yet have not over the course of eighteen months.

Seriousness of Litigation. Plaintiffs' position (at 6, 17), that the "unique nature of legislative redistricting . . . raises the stakes" of this lawsuit above other constitutional challenges, demonstrates the danger of the balancing test. This argument preferences the right to vote over and above other

significant constitutional rights with no guiding rubric judges can objectively apply. Dkt. 62 at 18. Still, under the principled three-factor "extraordinary circumstances" test of the Fifth Circuit, Dkt. 62 at 22, which Plaintiffs do not attempt to meet, this case is not so serious that the privilege is inapplicable.

Role of Government. Plaintiffs say (at 8-9, 18) that this factor weighs in their favor because the Subpoenaed Legislators have no direct interest in the outcome of this redistricting case. But one page earlier (at 17), they acknowledged that redistricting directly impacts a legislator's interest in reelection. If impact by the outcome of the proceedings is "what this factor seeks to evaluate," then by Plaintiffs' own admission (at 17), it weighs in favor of the Subpoenaed Legislators.

Purpose of Privilege. Plaintiffs' focus (at 18) on the "chilling effect" of disclosure ignores other key "purpose[s] of the privilege" like protections "from the burdens of compulsory process" and of "legislative independence." *Bethune-Hill*, 114 F. Supp. 3d at 338, 341. Disclosure here would burden both. Dkt. 62 at 23. Plaintiffs cast a Supreme Court opinion about governmental liability as suggesting discovery would not chill legislators without risk of personal liability. Dkt 63 at 18 (citing *Owen v. City of Indep., Mo.*, 445 U.S. 622, 656 (1980)). But the "*Owen* majority's tentative empirical speculation that governmental liability may not affect individual officials was *dictum* on which the Court did not rely." *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1138 n.18 (10th Cir. 1999). And more pertinent opinions on legislative and executive privilege—not to mention common sense—support that a threat of disclosing private deliberations would "deter[]" them. *Pernell*, 84 F.4th at 1345; Dkt. 62 at 9, 23.

II. Legislative Immunity and Privilege, as Well as the *Morgan* Doctrine, Preclude Plaintiffs' Deposing Legislators and Their Aides.

Legislative privilege bars the depositions, as does the *Morgan* Doctrine. Dkt. 62 at 24-25. Plaintiffs' contrary claim ignores swaths of Subpoena Recipients' briefing and persuasive precedent.

A. Legislative privilege bars the deposition subpoenas.

Plaintiffs say (at 23) that their deposition demands evade the barrier of legislative privilege for "the same reasons" as their written discovery demands. Since none of their subpoenas for written

discovery are proper, *supra* Part I, neither are their deposition subpoenas. *See* Dkt. 62 at 24-25.

Rather than address the Subpoena Recipients' actual argument against depositions—filing deposition transcripts under seal would be an ineffective compromise that would disregard the driving purpose of legislative privilege, *id.*—Plaintiffs (at 23-24) again attribute arguments to these officials that they have not made. The Subpoena Recipients have not discussed whether the Court should constrain the scope of questioning at deposition. And even if not "endless," Plaintiffs (at 24) do not disavow desire to engage in days of extensive depositions of legislators. Plaintiffs' failure to rebut the Subpoena Recipients' analysis of legislative privilege is fatal to their subpoenas. *Kensu v. Michigan Dep't of Corr.*, No. 18-CV-10175, 2021 WL 5280072, at *2 (E.D. Mich. Nov. 12, 2021) (noting that a party "effectively concede[s]" if the party does not meaningfully respond to opposing arguments), *aff'd on other grounds*, No. 21-1802, 2022 WL 17348384 (6th Cir. Dec. 1, 2022).

B. The *Morgan* Doctrine Bars the Nine Legislator Deposition Subpoenas.

The landmark decision in *Morgan v. United States*, 313 U.S. 409 (1941), is another insurmountable barrier to Plaintiffs' subpoenas for deposition testimony from nine state senators and representatives. Dkt. 62 at 25-27; *see. Dep't of Com. v. New York*, 139 S. Ct. 2551, 2564 (2019).

1. The subpoenaed legislators are high-ranking officials whom the *Morgan* Doctrine protects. Dkt. 62 at 26. Plaintiffs (at 25) say "[n]one of the Legislators—besides Deputy Speaker Johnson—qualify as 'high ranking.'" They cite no cases in support and just point out that the Tennessee Constitution separately provides for legislative leadership positions. The same is true of the United States Constitution. U.S. Const. art. I, §§ 2 cl. 5, 3 cls. 4-5. And federal courts still consider rank-and-file members of Congress high ranking. *See Blankenship v. Fox News Network, LLC*, No. 2:19-CV-00236, 2020 WL 7234270, at *1 (S.D.W. Va. Dec. 8, 2020); *Byrd v. D.C.*, 259 F.R.D. 1, 7 (D.D.C. 2009). These state officials deserve the same respect given to their federal counterparts.

Plaintiffs argue (at 25-26) that *McNamee v. Massachusetts*, No. CIV.A. 12-40050, 2012 WL 1665873 (D. Mass. May 10, 2012), is "inapposite" because the "high-ranking" congressional chief of staff subpoenaed in that case did not have personal knowledge of the facts at issue. But that analysis goes to the second *Morgan* factor—whether extraordinary circumstances justify a deposition—not to whether the subpoenaed official is "high ranking." *Burgess v. United States*, No. 17-11218, 2022 WL 17725712, at *4 (E.D. Mich. Dec. 15, 2022). Likewise, in arguing (at 25) that elected representatives cannot be "high ranking" because "no legislator could ever be deposed," Plaintiffs forget that extraordinary circumstances might still allow the depositions.

2. Plaintiffs have not established extraordinary circumstances requiring the subpoenaed testimony. Dkt. 62 at 26-27. They claim (at 27-28) that legislators had improper motives, the information cannot be obtained from another source, and the depositions are essential to their case. But improper motive alone does not show extraordinary circumstances—otherwise, any Plaintiff could bootstrap mere allegations into invasive depositions. *See United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 322 (D.N.J. 2009). At least some information can be obtained from other sources. *Supra* Part I.C.; Dkt. 59 at 20-21. Nor is this information essential because the motives and beliefs of individual legislators should not be attributed to the entire legislative body. *Supra* Part I.C.

III. Other Privileges and Doctrines May Also Restrict the Subpoenas.

The Subpoena Recipients reserve the right to assert attorney-client privilege and work-product doctrine. Should discovery progress to the point that this is required, Subpoena Recipients will, at that time, respond to Plaintiffs arguments (at 28-29).

CONCLUSION

For these reasons, the motion to compel should be denied, the motion to quash granted, and a protective order issued.

Respectfully submitted,

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I hereby certify that on May 22, 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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