2007 WL 2815810
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

ACORN (The NEW YORK ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW), et al., Plaintiff(s),
v.
COUNTY OF NASSAU, et al., Defendant(s).

No. CV 05-2301(JFB)(WDW). | Sept. 25, 2007.

Attorneys and Law Firms

Frederick K. Brewington, Law Offices of Frederick K. Brewington, Hempstead, NY, Joseph D. Rich, Nicole Birch, Washington, DC, Paul B. Sweeney, Kim Frances Bridges, Michael Starr, Cynthia Dorsainvil Sleet, Jenny Rubin Robertson, Hogan & Hartson, LLP, Megumi Sakae, Proskauer Rose LLP, Peter Joseph Dennin, Simpson, Thacher & Bartlett LLP, New York, NY, for Plaintiffs.

Andrew Reginald Scott, Ralph J. Reissman, David Bruce Goldin, Karen Schmidt, Nassau County Office of the County Attorney, Mineola, NY, James G. Ryan, Cullen and Dykman, LLP, Garden City, NY, for Defendants.

Opinion

ORDER

WALL, Magistrate Judge.

***1** By letter dated January 3, 2007, plaintiffs moved to compel certain deposition testimony and documents from defendants the Incorporated Village of Garden City and the Garden City Board of Trustees (collectively, "Garden City"), their employees, and consultants. *See* Docket Entry ("DE") [58]. The Garden City defendants submitted opposition, DE [60], and a conference before the undersigned was held at which the court requested additional briefs from the parties. DE [64]. Those submissions have been received and reviewed by the court.

This case involves the rezoning of the former "Social Services site" located at 101 County Seat Drive in Garden City. Plaintiffs seek discovery regarding Garden City's "true reasons for blocking the proposed zoning that would have permitted construction of more affordable multi-family housing, and whether justifications enunciated were simply a pretext for discriminatory animus." *See* Letter Motion, DE [58] at 2. Defendant Garden City seeks to assert "legislative privilege" on behalf of members of the Board of Trustees, as well as Michael Filippon, the Garden City Building Superintendent, Robert Schoelle, the Garden City Village Administrator, and personnel from the firm of Buckhurst, Fish and Jacquemart, Inc. ("BFJ"), retained by Garden City as a land use/zoning specialist. *See* Letter in Opp., DE [60] at 2.

The issue of the extent to which legislative privilege is available in this case first arose during the deposition of Frank Fish of BFJ. During that proceeding, Garden City asserted the legislative privilege on several occasions, at which point Mr. Fish's attorney directed him not to answer. Mr. Fish's attorney at one point stated that the legislative privilege "is not our privilege to assert, and we are respecting Garden City's right to raise the privilege and holding off on answering any questions until so directed." Fish Dep. at 45:9-13. In their motion to compel, plaintiffs indicate that Mr. Fish was instructed not to answer questions about the following issues:

1. BFJ's development of zoning proposals for the site;
2. Garden City's objections to BFJ's proposed zoning, and the basis for these objections by both Garden City and its residents;
3. involvement by local community organizations in the rezoning of the site;
4. Garden City's rezoning of the property previously owned by Doubleday & Co.; and
5. Garden City's hiring of a public relations consultant regarding the Social Services site rezoning.

Garden City's position is that testimony regarding any non-public communications between or among Board members and BFJ personnel, Mr. Fillippon, and/or Mr. Schoelle are protected from disclosure by legislative privilege. Garden City has indicated that it will, consistent with this position, instruct all witnesses not to answer such questions until it has received direction from the court. Plaintiffs have moved to compel the testimony of Mr. Fish as well as testimony from future deponents on the grounds that the legislative privilege

does not apply, or if it does apply, that it has been waived. For the following reasons, plaintiffs' motion is granted in part and denied in part.

DISCUSSION

***2** Since this case arises under the Fair Housing Act and thus involves federal questions, any asserted privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed.R.Evid. 501. Generally, testimonial privileges are not favored because they "contravene the fundamental principle that 'the public ... has the right to every man's evidence.' " *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (quoting *United States v. Bryan,* 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950)). Garden City asserts legislative privilege as to any testimony or document production that would reveal the deliberative process underlying the decision made by the Board regarding the rezoning of the Social Services site.

The concept of legislative privilege arises from, and is often discussed interchangeably with, the concept of legislative immunity. Legislative immunity, which provides absolute immunity from suit, has been extended to protect local legislators from suit for acts taken in their legislative capacity. *Searingtown Corp. v. Incorporated Village of North Hills,* 575 F.Supp. 1295, 1298 (E.D.N.Y.1981).[1] As to legislative privilege, "the purpose in preventing inquiry into motivation of legislative acts is to shield legislators from civil proceedings which disrupt and question their performance of legislative duties to enable them to devote their best efforts and full attention to the 'public good.' " *Id.* at 1298-99 (citations omitted). The Supreme Court has, however, "rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege." *Manzi v. DiCarlo,* 982 F.Supp. 125, 129 (E.D.N.Y.1997) (citing *United States v. Gillock,* 445 U.S. 360, 374, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980)). The legislative privilege is qualified, not absolute, " 'and must therefore depend on a balancing of the legitimate interests on both sides.' " *Rodriguez v. Pataki,* 280 F.Supp.2d 89, 96 (S.D.N.Y.2003), *aff'd* 293 F.Supp.2d 302, (quoting *Fla. Ass'n of Rehab. Facs. v. Fla. Dep't of Health & Rehab. Servs.,* 164 F.R.D. 257, 267 (N.D.Fla.1995)). The threshold issue raised by plaintiffs is whether legislative privilege can be applied in this particular case.

1 Since there are no individual defendants named in the complaint, there are no claims for legislative immunity in the instant case.

I. Applicability of Qualified Legislative Privilege

The only privilege raised by Garden City is legislative privilege .[2] As this is a qualified privilege, the court must balance the extent to which the production of the disputed evidence would have a chilling effect on the Garden City Board against those factors favoring disclosure. "Among the factors that a court should consider in arriving at such a determination are: '(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.' " *Rodriguez,* 280 F.Supp.2d at 100-01 (quoting *In re Franklin Nat'l Bank Secs. Litig.,* 478 F.Supp. 577, 583 (E.D.N.Y.1979)).

2 Garden City has not asserted a deliberative process privilege, perhaps in light of the uncertainty as to whether such a privilege is available in the legislative context. *See, e.g., Manzi,* 982 F.Supp. at 130 (stating that the application of the deliberative process privilege to state legislators "remains an 'open question.' "). Since that question is not currently before it, the court makes no determination as to whether that privilege is available to the Garden City defendants. Courts addressing the question of legislative privilege have, however, utilized criteria established in deliberative process privilege cases. *See Rodriguez,* 280 F.Supp.2d at 100-01; *Manzi,* 982 F.Supp. at 130.

***3** The plaintiffs in this case claim that Garden City's zoning decision was motivated by discriminatory animus. Defendants in opposition do not seriously challenge the relevancy of the information sought, but rather suggest that it should be protected by legislative privilege. The court finds that the discovery sought is clearly relevant to the claims at issue.

The most significant factors to be considered in this case are the availability of other evidence and the seriousness of the litigation. To prevail in their case, plaintiffs will have to prove the discriminatory intent of the defendants. Plaintiffs' needs are in conflict with a legislator's need to be free to act without worry about inquiry into deliberations. The tension

between these two conflicting needs has been previously noted-"even where the plaintiff must prove invidious purpose or intent, and judicial inquiry into legislative motive cannot be avoided, as in a racial discrimination cases such as *Village of Arlington Heights*, the Supreme Court has indicated that only in 'some extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of the official action, *although even then such testimony frequently will be barred by privilege.' "* *Orange v. County of Suffolk*, 855 F.Supp. 620, 623 (E.D.N.Y.1994) (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (emphasis added)).

Plaintiffs suggest that given the seriousness of this litigation concerning fair housing rights, this may be one of the extraordinary cases in which plaintiffs' needs override the testimonial privilege. In support of their argument, plaintiffs rely exclusively on the *Manzi* case in which the court found that the privilege, asserted as to two documents which were unrelated to the passage of legislation, fell in the face of that plaintiff's need to protect her statutory rights. *Manzi*, 982 F.Supp. at 130. However, neither plaintiffs' submissions nor the court's own research has identified a single case in which the seriousness of the litigation overrode the assertion of legislative privilege as to testimony regarding a legislator's motivations. Moreover, plaintiffs cannot point to any independent evidence of a discriminatory motive that would convince the court that this is an "extraordinary instance" in which such inquiry should be allowed. Although the court recognizes the difficulty of plaintiffs' burden of proving discriminatory intent, they have not produced a compelling reason sufficient to overcome the legislative privilege.

Although testimony regarding a legislator's stated motivation might be the most direct form of evidence, there are other paths of discovery available to plaintiffs. Although assertion of a legislative privilege may bar inquiry into deliberations, it would not bar inquiry regarding the materials and information available at the time a decision was made. *See Arlington Heights*, 429 U.S. at n. 20 (noting that plaintiffs "were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision"). Substantial documentary evidence has also been made available to plaintiffs.

***4** The court has considered the remaining two factors, the role of the government in the litigation and the possible chilling effect on legislators, and finds that they do not tip the balance significantly in favor of either party. Balancing all the factors, the court concludes that legislative privilege may be asserted in this case.

II. Assertion of Qualified Legislative Privilege

Having concluded that legislative privilege may be asserted in this case, the court turns to consideration of who is entitled to assert that privilege. The legislative privilege "is a personal one and may be waived or asserted by each individual legislator." *Marylanders for Fair Representation, Inc. v. NAACP, Inc.*, 144 F.R.D. 292, 298 (D.Md.1992). Thus, "it is not up to the [Board] to assert or waive the privilege; the [Board members] must do so for themselves." *Almonte v. City of Long Beach*, 2005 WL 1796118, at n. 2 (E.D.N.Y. July 27, 2005). Plaintiffs have not challenged Garden City's assertion of privilege on behalf of the individual Board members, and the court will assume, for purpose of this motion, that the privilege is being asserted on behalf of them individually. It must be noted, however, that there may well come a time in this litigation where each Board member will need to appear and individually determine whether to assert legislative privilege as to his or her testimony. *See A Helping Hand LLC v. Baltimore County, Md.*, 295 F.Supp.2d 585, 590 (D.Md.2003) (noting that plaintiff was free to serve deposition notices on each legislator "and to require each of those persons to assert the privilege on his own behalf").

Assuming legislative privilege has been properly asserted, the court addresses plaintiffs' argument that the privilege has been waived as to communications made in the presence of non-legislators. As with many testimonial privileges, the legislative privilege may be waived as to communications made in the presence of third parties. *Almonte v. City of Long Beach*, 2005 WL 1971014, at *3 (E.D.N.Y. Aug.16, 2005). Thus, the court must determine whether the presence of certain non-legislators caused a waiver in this matter.

A. Fillippon and Schoelle

Plaintiffs argue that the presence of Michael Fillippon and/or Robert Schoelle at any meeting, or the dissemination of any document to either of them, causes a waiver as to that evidence. Defendants claim that Fillippon and Schoelle are akin to legislative staff members in that they work closely with the Garden City Board in its decision-making process and that therefore their presence does not effect a waiver of

privilege. Where a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator. *See U.S. v. Gravel*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).[3] As one court noted, "it is literally impossible ... for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Id.* at 616-17. Although Schoelle and Fillippon work for the Village and not exclusively for the Board members, the court will examine the extent to which they act as legislative staff members.

3 Although this case construes privileges and immunities under the Speech and Debate Clause of the United States Constitution, the rationale employed is applicable to state and local legislators as well. For the sake of brevity, the court will not repeat the line of cases and reasoning that lead to this conclusion. A review of that reasoning can be found in *Rodriguez*, 280 F.Supp.2d at 94-96.

***5** Schoelle, Garden City's Village Administrator, has submitted an affidavit describing his duties as prescribed in the Code of the Village of Garden City, including the making of reports and recommendations to the Board of Trustees. Schoelle Aff., ¶ 2, DE [69-2]. Schoelle further notes that the Board members are elected officials who perform their official duties on a part time, volunteer basis, and that he acts as a "liaison between the Board members and those involved in various legislative activities." *Id* . ¶ 3. Fillippon, the Superintendent of the Village's Building Department, has also submitted an affidavit regarding his duties, including the making of recommendations regarding zoning laws or for the adoption of new laws. Fillippon Aff., ¶ 2, DE [69-3].

As defendants note, the Board members perform their legislative functions on a voluntary, part time basis. In such a situation, it is impracticable if not impossible for such a legislator to perform his duties without assistance. Defendants have established that in the Village of Garden City, such assistance is given by Village employees including the Village Administrator and the Superintendent of the Building Department. *Cf. Almonte*, 2005 WL 1796118, at * 3 (citing lack of evidence to support proposition that City Manager had a legislative role). Michael Fillippon and Robert Schoelle are determined to be legislative staff members and as such, may assert legislative privilege as to their acts performed in furtherance of their legislative duties. Accordingly, the presence of either does not act as a waiver of the privilege.

B. BFJ Firm

Garden City also claims that any communications with the BFJ consulting firm should be protected by legislative privilege. Plaintiffs argue that BFJ employees are not legislators, staffers or Village employees, but rather outside advisors who not only are not entitled to legislative privilege, but whose presence waives any such privilege held by the Board members.

In support of its position that BFJ personnel are covered by legislative privilege, Garden City cites a single Appellate Division case, *Campaign for Fiscal Equity, Inc. v. State*, 265 A.D.2d 277 (1st Dep't 1999). In that case, the court found that inquiry into communications between an official with the State Education Department and state legislators was barred by legislative privilege. This case is distinguishable, in part because it involved communications between the executive and legislative branches of government, not between the legislator and non-government persons. Moreover, the holding in that case and the limited discussion of the court's reasoning is, by itself, simply insufficient to support the expansion of legislative privilege suggested by defendants. The court finds the *Rodriguez* case to be of more value.

In *Rodriguez*, the state legislature created a Task Force on Demographic Research and Reapportionment ("LATFOR") to provide technical assistance with respect to the task of redistricting congressional districts. *Rodriguez*, 280 F.Supp.2d at 92. LATFOR consisted of six members, four legislators and two non-legislators, had a staff, was authorized to hold public and private hearings, and had all the powers of a legislative committee. *Id.* LATFOR published its proposed redistricting plan which was later adopted by the New York State Legislature. The plaintiffs in *Rodriguez* "sought information concerning the process by which the 2002 redistricting maps were drawn and subsequently adopted by the Legislature." *Id.* at 93. In examining the question of whether the activities of LATFOR were covered by legislative privilege, the court noted that LATFOR's workings were "more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up a legislation-a session for which no one could seriously claim privilege." *Id.* at 101. The court ultimately granted plaintiffs' motion to compel to the extent it sought information pertaining to the operation of LATFOR, but denied the motion to the extent it sought information

concerning "the actual deliberations of the Legislature-or individual legislators-which took place outside LATFOR, or after the proposed redistricting plan reached the floor of the Legislature." *Id.* at 102-03. The legislative privilege did not bar all inquiry into the workings of LATFOR, an entity with far greater legislative ties than BFJ.

***6** Presumably, the Board members had not pre-determined their positions, and retained BFJ to provide them with information from which they could begin their deliberations regarding the rezoning of the Social Services site. From the record currently before the court, it is unclear whether BFJ issued its own report or whether its activities were limited to commenting upon plans for the site issued by Nassau County. Not unlike LATFOR, which had a much stronger legislative mandate and powers, BFJ presumably investigated and prepared a report from which legislation was introduced. Communications prior to the issuance of the report are more like conversations between legislators and knowledgeable outsiders and therefore are discoverable. Accordingly, the court finds that until such a report, if any, was presented to the Board, no privilege existed. Taking the presentation of a report upon which legislation was based as the necessary starting point of the Board's deliberations, any communications subsequent to that event that reflect a legislator's deliberation or motivation are deemed to be covered by legislative privilege. If necessary, the court will make a determination regarding production of post-report documents on a case by case basis after in camera review.

The court notes that a contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity. While legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view. Defendants have not cited any caselaw that suggests otherwise, and the court is simply unwilling to approve such an unprecedented expansion of the qualified legislative privilege.

III. Documents Submitted for In Camera Review

Defendants have submitted documents withheld on the basis of privilege for the court's review. The court has, by this order, established essentially a temporal marker for the assertion of legislative privilege as to work performed by BFJ. Accordingly, defendants shall provide the undersigned with a date upon which BFJ submitted its report to the Board. At that time, the court will issue further rulings regarding the documents submitted for in camera review.

CONCLUSION

Plaintiffs' motion to compel is granted in part and denied in part. Plaintiffs' request to compel testimony and document production over the assertion of legislative privilege is denied. Legislative privilege is available to protect inquiry into the actual deliberation and motivations of legislators in this case.

Plaintiffs' request to compel testimony and document production on the grounds that legislative privilege has been waived is granted as to any communications or documents produced or shared with BFJ personnel prior to issuance of its report, if any, to the Board. Any BFJ documents prepared subsequent to that date shall be reviewed in camera for a determination of privilege consistent with the rulings made above. Plaintiffs' request is denied on the additional grounds asserted by them.

***7 SO ORDERED.**

2013 WL 124306
Only the Westlaw citation is currently available.
United States District Court,
N.D. Alabama,
Northeastern Division.

ALABAMA EDUCATION ASSOCIATION; et al., Plaintiffs,
v.
Robert BENTLEY, in his official capacity as Governor of the State of Alabama and President of the State School Board; et al., Defendants.

Civil Action No. CV–11–S–761–NE. | Jan. 3, 2013.

Attorneys and Law Firms

Edward Still, Birmingham, AL, Alice O'Brien, Philip A. Hostak, National Education Association, Washington, DC, Annary A. Cheatham, Cheatham & Associates PLLC, Herman Watson, Jr., Rebekah Keith McKinney, Watson McKinney & Artrip LLP, Huntsville, AL, Gregory B. Stein, Stein and Pilcher LLC, J. Cecil Gardner, Samuel H. Heldman, The Gardner Firm PC, Mobile, AL, Robert D. Segall, Copeland Franco Screws & Gill PA, Theron Stokes, Alabama Education Association, Montgomery, AL, for Plaintiffs.

J.R. Brooks, Taylor P. Brooks, William W. Sanderson, Jr., Lanier Ford Shaver & Payne PC, Julian D. Butler, Sirote and Permutt PC, Huntsville, AL, for Defendants.

Opinion

MEMORANDUM OPINION AND ORDER

C. LYNWOOD SMITH, JR., District Judge.

***1** This action is before the court on motions to quash subpoenas *duces tecum* issued by plaintiffs to four non-parties: *i.e.*, Alabama Senate President *Pro Tempore* Del Marsh; Speaker of the Alabama House of Representatives Mike Hubbard; former Alabama Governor Robert R. ("Bob") Riley; and, current Alabama Governor Robert J. Bentley, who was a defendant until August 22, 2012, when all claims against him were dismissed.[1] Understanding how the documents sought by the contested subpoenas relate to claims asserted by plaintiffs requires a review of the case's procedural history.

1 *See* doc. no. 126 (Memorandum Opinion and Order), at 82–84 and 100; *see also* note 13, *infra*, and the accompanying text.

I. PROCEDURAL HISTORY

The Alabama Education Association ("AEA"), Alabama Voice of Teachers for Education ("A–VOTE"), and six individuals affiliated with those organizations commenced this action in February of 2011.[2] They challenged the constitutionality of Alabama Act No. 2010–761 ("Act No. 761"), an amendment of preexisting law that was enacted by the Alabama Legislature on December 15, 2010, and signed into law by Governor Riley on December 20, 2010.[3]

2 AEA is an Alabama non-profit corporation. Its membership consists of approximately 75,000 active and 30,000 retired public educators and education support personnel employed by the State of Alabama, or one of Alabama's four-year colleges and universities, or the State's Department of Postsecondary Education ("DPE"), or one of the State's postsecondary institutions (two-year colleges and trade and vocational training schools that function under the supervision of the DPE), or one of the State's local boards of education. *See* doc. no. 1 (Complaint) ¶¶ 5–7. "AEA's mission is to promote educational excellence, advocate for its members, and lead in the advancement of equitable and quality public education for a diverse population." *Id.* ¶ 24. To advance that mission, "AEA advocates on an array of issues that are of concern to its members, including questions relating to tax policy, pension and insurance issues, education funding, tenure protections for education employees, school curriculum, and charter schools." *Id.* ¶ 25.

"A–VOTE" is a political action committee sponsored by AEA that functions as "a vehicle for members who wish to support candidates whose positions are consistent with AEA's missions and goals." *Id.* ¶ 26. AEA members who contribute to A–VOTE have the "opportunity to participate in the electoral process and to support and elect candidates of their choice." *Id.* The "vast majority" of AEA members have, for decades, executed voluntary requests to have their AEA membership dues, as well as their voluntary

contributions to A–VOTE, automatically deducted from their respective paychecks. *Id.* ¶ 7.

The six individual plaintiffs, all of whom are members of AEA, are: Pam Hill, an education support professional who is employed by the Huntsville City Board of Education; Dr. Cathy McNeal, Ph.D., a professional educator who is employed by the same public school system; Chassity Smith, a professional educator who is employed by the City of Madison Board of Education; Jeff Breece, a professional educator who is employed by the Madison County Board of Education; Dorothy J. Strickland, a professional educator who is employed by the Lee County School District; and Ronald Slaughter, a professional educator who is employed by Alabama Agricultural & Mechanical University. *See* doc. no. 1 (Complaint) ¶¶ 8–13.

This court also allowed an intervention complaint to be filed by the Alabama State Employee Association ("ASEA"), the State Employee Association Political Action Committee ("SEA–PAC"), Randy Hebson (President of ASEA), Edwin J. McArthur (Executive Director of ASEA), and three State employees who are members of ASEA and contributors to SEA–PAC: *i.e.*, Larry Sanders, JoAnne Brown, and John Allen. *See* doc. no. 86 (Order entered May 30, 2012, allowing complaint in intervention to be filed), and doc. no. 87 (Complaint in Intervention). The intervenor-plaintiffs assert essentially the same claims as the original plaintiffs.

[3] *See* doc. no. 1 (Complaint) ¶¶ 1–2.

A. Preexisting Alabama Law

Prior to the enactment of Act No. 761, Alabama Code § 16–22–6 directed city and county boards of education, as well as some post-secondary institutions, to adopt procedures to allow employees to deduct from their paychecks contributions for, among other things, "membership dues" and "voluntary contributions." The pertinent portion of the statute as it then existed provided that:

> Each local board of education and certain postsecondary institutions shall adopt policies or regulations which will provide for deductions from salaries of its employees or groups of employees whenever a request is presented to the board or postsecondary institution by the employees or groups. The deductions shall be made from salaries earned in at least nine different pay periods and shall be remitted to the appropriate company, association, or organization as specified by the employees within 10 days following each deduction. *The deductions may be made for, but [are] not limited to,* savings plans, tax sheltered annuities, the Public Employees' Individual Retirement Account Fund, *membership dues, voluntary contributions,* and group insurance premiums. Deductions for membership dues and voluntary contributions shall be made based upon membership lists and forms provided by the employees' organization. Such lists are to be corrected, updated, and returned to the employees' designated organization(s) not later than November 10 of each school year....

Ala.Code § 16–22–6(a) (1975) (2001 Replacement Vol.) (emphasis and alteration supplied). Those statutory requirements had been a part of the *corpus* of Alabama law since at least 1973. Relatedly, Alabama Code § 36–1–4.3 provided that:

> (a) The state Comptroller shall adopt statewide policies which provide for deductions from the salaries of state employees or groups of state employees whenever a request is presented to the state Comptroller by a group of participating state employees equal in number to at least 200 provided, however, that deductions being made as of April 23, 1985, shall continue to be made. The deductions shall be made at least monthly and shall be remitted to the appropriate company, association, or organization as specified by the employees. The deductions may be made for *membership dues,* and *voluntary contributions,* and insurance premiums. Any deduction provided under the provisions of this section may be terminated upon two months' notice in writing by a state employee to the appropriate company, association, or organization and to the appropriate payroll clerk or other appropriate officials as specified by the state Comptroller.
>
> ***2** (b) The state Comptroller may, at his discretion, collect from the deductions withheld a cost of administration fee not to exceed one percent of the total deduction collected.

Ala.Code § 36–1–4.3 (1975) (2001 Replacement Vol.) (emphasis supplied). Again, the basis for those statutory requirements had been a part of the *corpus* of Alabama law since at least 1985.

Both of the foregoing statutes were tempered by Alabama Code § 17–17–5, which is located in a chapter addressing "Election Offenses," and which read as follows prior to the enactment of Act. No. 761:

> No person in the employment of the State of Alabama, a county, or a city whether classified or unclassified, shall use any state, county, or city funds, property or time, for any political activities. Any person who is in the employment of the State of Alabama, a county, or a city shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for the officer or employee in a subordinate capacity. It shall also be unlawful for any officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced, or both, as provided by Section 13A–10–63.

Ala.Code § 17–17–5 (1975) (2007 Replacement Vol.). [4]

[4] The statute referenced in the last line of the textual quotation (*i.e.*, "Section 13A–10–63") states the elements of the crime of "trading in public office" as follows:

> (a) A person is guilty of trading in public office if:
>
> (1) He offers, confers or agrees to confer any pecuniary benefit upon a public servant or party officer upon an agreement or understanding that he himself will or may be appointed to a public office or public employment or designated or nominated as a candidate for public office; or
>
> (2) While a public servant or party officer, he solicits, accepts or agrees to accept any pecuniary benefit from another upon an agreement or understanding that that person will or may be appointed to a public office or public employment or designated or nominated as a candidate for public office.
>
> (b) This section does not apply to contributions to political campaign funds or other political contributions.
>
> (c) Trading in public office is a Class A misdemeanor.

Ala.Code § 13A–10–63 (1975) (2005 Replacement Vol.). Class A misdemeanors are punishable by imprisonment in the county jail or by hard labor for the county for a term of not more than one year, or by a fine of not more than $2,000, or both. *See id.* §§ 13A–5–2(c), 13A–5–7(a)(1), and 13A–5–12(a)(1).

B. Alabama Act No. 761

Act No. 761 specifically addressed Alabama Code § 17–17–5, and amended the language of that provision in the following manner:

> ENROLLED, **An Act,**
>
> **To amend Section 17–17–5, Code of Alabama 1975, relating to prohibited political activities by state, county, and city employees; to further specifically prohibit employees of the state, a county, a city, a local school board, or other governmental agency from using any agency funds, property, or time arranging for payments by salary deduction, or otherwise, to a political action committee or dues for membership organizations that use funds for political activities.**

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

> Section 1. Section 17–17–5, Code of Alabama 1975, is amended to read as follows:
>
> " § 17–17–5.
>
> "(a) No person in the employment of the State of Alabama, a county, a city, *a local school board, or any other governmental agency*, whether classified or unclassified, shall use any state, county, city, *local school board, or other governmental agency* funds, property, or time, for any political activities.

"(b) *No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency may arrange by salary deduction or otherwise for any payments to a political action committee or arrange by salary deduction or otherwise for any payments for the dues of any person so employed to a membership organization which uses any portion of the dues for political activity. For purposes of this subsection (b) only, political activity shall be limited to all of the following:*

***3** "(1) *Making contributions to or contracting with any entity which engages in any form of political communication, including communications which mention the name of a political candidate.*

"(2) *Engaging in or paying for public opinion polling.*

"(3) *Engaging in or paying for any form of political communication, including communications which mention the name of a political candidate.*

"(4) *Engaging in or paying for any type of political advertising in any medium.*

"(5) *Phone calling for any political purpose.*

"(6) *Distributing political literature of any type.*

"(7) *Providing any type of in-kind help or support to or for a political candidate.*

"*Any organization that requests the State of Alabama, a county, a city, a local school board, or any other governmental agency to arrange by salary deduction or otherwise for the collection of membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall certify to the appropriate governmental entity that none of the membership dues will be used for political activity. Thereafter, at the conclusion of each calendar year, each organization that has arranged for the collection of its membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall provide the appropriate governmental entity a detailed breakdown of the expenditure of the membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency collected by the governmental entity. Any organization that fails to provide the required certifications, that reports any expenditures for political activity or that files false information about political activity in any of its reports shall be permanently barred from arranging for the collection of its membership dues by any governmental entity. The Examiners of Public Accounts shall annually review a sample of at least ten percent of the certifications filed with each governmental entity and report its findings to the appropriate governmental entity.*

> "(c)Any person who is in the employment of the State of Alabama, a county, a city, *a local school board, the State Board of Education or any other governmental agency*, shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays. *It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for the officer or employee in a subordinate capacity.* It shall also be unlawful for any officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced, or both, as provided by Section 13A–10–63."

***4** Section 2. The provisions of this act are severable. If any part of this action is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 3. All law or parts of laws which conflict with this act are repealed.

Section 4. This act shall become effective 90 days following its passage and approval by the Governor or its otherwise becoming law.

Act of Dec. 15, 2010, Ala. Act No. 2010–761 (boldface emphasis in original, underscoring applied to language added to preexisting law).

C. Codification of Alabama Act No. 761

The language of Act No. 761 as signed into law by Governor Riley was subsequently codified as follows:

> (a) No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency, whether classified or unclassified, shall use any state, county, city, local school board, or other governmental agency funds, property, or time, for any *political activities.*
>
> (b)(1) No person in the employment of the State of Alabama, a county, a city, a local school board, or any other governmental agency may arrange by salary deduction *or otherwise* for any payments to a political action committee or arrange by salary deduction *or otherwise* for any payments for the dues of any person so employed to a membership organization which uses any portion of the dues for *political activity.* For purposes of this subsection only, *political activity* shall be limited to all of the following:
>
> a. Making contributions to or contracting with any entity which engages in any form of political communication, including communications which mention the name of a political candidate.
>
> b. Engaging in or paying for public opinion polling.
>
> c. Engaging in or paying for any form of political communication, including communications which mention the name of a political candidate.
>
> d. Engaging in or paying for any type of political advertising in any medium.
>
> e. Phone calling for any political purpose.
>
> f. Distributing political literature of any type.
>
> g. Providing any type of in-kind help or support to or for a political candidate.
>
> (2) Any organization that requests the State of Alabama, a county, a city, a local school board, or any other governmental agency to arrange by salary deduction *or otherwise* for the collection of membership dues from persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall certify to the appropriate governmental entity that none of the membership dues will be used for *political activity.* Thereafter, at the conclusion of each calendar year, each organization that has arranged for the collection of its membership dues from persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency shall provide the appropriate governmental entity a detailed breakdown of the expenditure of the membership dues of persons employed by the State of Alabama, a county, a city, a local school board, or any other governmental agency and collected by the governmental entity. Any organization that fails to provide the required certifications, that reports any expenditures for *political activity,* or that files false information about *political activity* in any of its reports shall be permanently barred from arranging for the collection of its membership dues by any governmental entity. The Examiners of Public Accounts shall annually review a sample of at least 10 percent of the certifications filed with each governmental entity and report its findings to the appropriate governmental entity.
>
> ***5** (c) Any person who is in the employment of the State of Alabama, a county, a city, a local school board, the State Board of Education or any other governmental agency, shall be on approved leave to engage in political action or the person shall be on personal time before or after work and on holidays. It shall be unlawful for any officer or employee to solicit any type of political campaign contributions from other employees who work for the officer or employee in a subordinate capacity. It shall also be unlawful for any officer or employee to coerce or attempt to coerce any subordinate employee to work in any capacity in any political campaign or cause. Any person who violates this section shall be guilty of the crime of trading in public office and upon conviction thereof, shall be fined or sentenced, or both, as provided by Section 13A–10–63.

Ala.Code § 17–17–5 (1975) (Supp.2011) (boldface emphasis supplied).

D. This Court's Preliminary Injunction

Plaintiffs' complaint alleged, among other things, that the changes to preexisting Alabama law worked by Act No. 761 violated the Free Speech and Free Association Clauses of the First Amendment, as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitutions.[5] Following a hearing, this court held that the Act infringed important First Amendment rights, and that plaintiffs had demonstrated a substantial likelihood of

ultimately prevailing on the merits of their claims that the Act's restrictions were overly broad, and that the Act itself was unduly vague.[6] Specifically, this court reasoned that the phrase "or otherwise" reached beyond payroll deductions, and attached the personal political contributions of government employees.[7] This court also held that the term "political activity," found in both subsections of § 17–17–5(b), did not clearly define the nature of prohibited acts.[8] For such reasons, this court preliminarily enjoined the implementation and enforcement of Act. No. 761, and required defendants to honor all employee requests for payroll deductions to AEA, and to remit those deductions to AEA, including all amounts representing contributions to "A–VOTE,"[9] the political action committee sponsored by AEA.[10]

5 *See* doc. no. 1 (Complaint) at, *e.g.*, ¶¶ 1–2.

6 To justify the entry of an order granting preliminary injunctive relief, plaintiffs generally must satisfy four prerequisites: (1) demonstrate a substantial likelihood of ultimately prevailing on the merits; (2) show that plaintiffs will suffer irreparable harm if an injunction maintaining the *status quo pendente lite* does not issue; (3) prove that the threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause to the opposing parties; and (4) demonstrate that the injunction will not be adverse to the public interest. *See Alabama Education Association v. State Superintendent of Education*, 788 F.Supp.2d 1283, 1301–03 (N.D.Ala.2011).

7 *Id.* at 1319–24.

8 *Id.* at 1324–28.

9 *See* doc. no. 37 (Preliminary Injunction).

10 *See supra* note 2.

E. Appeal of Order Granting Preliminary Injunctive Relief

Most of the defendants appealed the order granting preliminary injunctive relief.[11] The Eleventh Circuit concluded that the constitutional issues raised by plaintiffs turned upon questions of state law that had not been specifically addressed by either the Alabama Supreme Court or the State's intermediate courts of appeal. Consequently, rather than speculating as to the proper interpretation of a state statute, the Circuit Court certified two questions:

11 *See* doc. no. 40 (Notice of Appeal by *AEA* Bice Defendants); doc. no. 41 (Amended Notice of Appeal by Bice Defendants); and doc. no. 45 (Notice of Appeal by *AEA* Governor Defendants).

TO THE SUPREME COURT OF ALABAMA AND THE HONORABLE JUSTICES THEREOF:

AEA contends that Alabama Act No. 2010–761 infringes a broader range of constitutionally protected activity than previously recognized as permissible under the First Amendment. Specifically, AEA argues that the Act's "or otherwise" language would prevent government employees from making contributions to an organization engaged in political activity through any means, including personal donations of their own money. AEA also argues that the term "political activity" reaches a wide number of ill-defined activities, making it impossible for any organization to certify that it is in compliance with the Act. The state counters that "or otherwise" simply prevents the use of state resources in any way—whether through salary deductions or some other state mechanism—from benefitting organizations involved in political activities. The state argues that "political activity" means electioneering activities.

***6** The interpretation of the Act is a question of state law that has not been specifically addressed by the Alabama Supreme Court or the intermediate state appellate courts. Therefore, we certify the following questions to the Alabama Supreme Court:

1. Is the "or otherwise" language in the statute limited to the use of state mechanisms to support political organizations, or does it cover all contributions by state employees to political organizations, regardless of the source?

2. Does the term "political activity" refer only to electioneering activities?

The answers to these questions will permit this court to address AEA's concerns and determine whether the Act runs afoul of the First Amendment. To facilitate the resolution of these questions, we direct the Clerk to transmit the entire record of this case, together with copies of the parties' briefs, to the Alabama Supreme Court. Of course, the Alabama Supreme Court is in no way limited by our questions and may consider the case as it sees fit.

Alabama Education Association v. State Superintendent of Education, 665 F.3d 1234, 1238–39 (11th Cir.2011) (Dubina, C.J.). [12]

12 The other judges comprising the panel are Emmett Ripley Cox, Senior Circuit Judge, and Willis B. Hunt Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

The Circuit opinion on interlocutory appeal also narrowed this court's injunction, and permitted the State to enforce Act No. 761, but only to the extent that it restricted payroll deductions for organizations engaged in "electioneering activities." *Id.* at 10–12. That part of the Circuit opinion was based upon the Supreme Court's decision in *Ysursa v. Pocatello Education Association*, 555 U.S. 353, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009), holding that a properly conceived ban on salary deductions to organizations engaged in electioneering activities would be constitutional. The Eleventh Circuit opinion summarized the *Ysursa* holding as follows:

> In *Ysursa*, public employee unions challenged an Idaho state law ban on political payroll deductions as a violation of the First Amendment. The Court began by reiterating that the First Amendment "protects the right to be free from government abridgment of speech. While in some contexts the government must accommodate expression, it is not required to assist others in funding the expression of particular ideas, including political ones." *Id.* at 358, 129 S.Ct. at 1098; *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549, 103 S.Ct. 1997, 2003, 76 L.Ed.2d 129 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."). The Court accepted that the unions challenging Idaho's law faced substantial difficulties in collecting funds for their political speech without the assistance of the state through salary deductions. However, this fact posed no difficulty for the Court, which concluded,
>
> > While publicly administered payroll deductions for political purposes can enhance the unions' exercise of First Amendment rights, Idaho is under no obligation to aid the unions in their political activities. And the State's decision not to do so is not an abridgment of the unions' speech; they are free to engage in such speech as they see fit. They simply are barred from enlisting the State in support of that endeavor.
>
> ***7** *Ysursa*, 555 U.S. at 359, 129 S.Ct. at 1098. The Court then held, "Idaho's decision to limit public employer payroll deductions as it has is not subject to strict scrutiny under the First Amendment." *Id.* (internal citations and quotation marks omitted). Instead, "[g]iven that the State has not infringed the unions' First Amendment rights, the State need only demonstrate a rational basis to justify the ban on political payroll deductions." *Id.* The Supreme Court concluded that the payroll deduction ban met the rational basis test. It wrote,
>
> > The concern that political payroll deductions might be seen as involving public employers in politics arises only because Idaho permits public employer payroll deductions in the first place.... [T]he State's response to that problem is limited to its source—in this case, political payroll deductions. The ban on such deductions plainly serves the State's interest in separating public employment from political activities.
>
> *Id.* at 361, 129 S.Ct. at 1099.
>
> Thus, the question before this court in the present case turns entirely on how the Act is interpreted. If it is meant only to reach payroll deductions for organizations engaged in electioneering activities such as those targeted by the Idaho statute at issue in *Ysursa*, then it presents no constitutional problems. A statute with a broader reach may implicate First Amendment concerns not explored in *Ysursa*....

Alabama Education Association, 665 F.3d at 1237–38 (alterations in original) (footnote omitted).

F. Subsequent Disposition of Claims Not Addressed in the Prior Opinion

This court recently narrowed the claims that were not addressed in the opinion granting preliminary injunctive relief. All claims against the current Governor of Alabama, Dr. Robert J. Bentley, M.D., were dismissed without prejudice on August 22, 2012. [13] The same opinion dismissed with prejudice all claims against any defendant that were based upon the Equal Protection Clause of the Fourteenth Amendment, as well as plaintiffs' claims for so-called "viewpoint discrimination" and "unconstitutional conditions." [14]

13 *See* doc. no. 126 (Memorandum Opinion and Order), at 82–84 and 100 ("Pursuant to the consent of both the

AEA and the *IAFF* plaintiffs, all claims asserted against Governor Robert Bentley are due to be, and hereby are, DISMISSED without prejudice."). Dr. Bentley assumed the Governor's office on January 17, 2011, after the events leading to the enactment of Act No. 761. Governor Bentley argued that, because plaintiffs failed to identify any specific connection between him and enforcement of the Act, plaintiffs had in effect sued the State of Alabama, which is immune from the claims asserted in both actions. Plaintiffs did not contest Governor Bentley's motion to dismiss. *See* doc. no. 75 (AEA's Response to Governor Bentley's Motion to Dismiss), at 1 ("The plaintiffs have no objection to the granting of Governor Bentley's motion to dismiss."); and doc. no. 109 (ASEA's Response to Governor Bentley's Incorporation of the Motions to Dismiss Against the Plaintiff Intervenors), at 1–2 ("As with AEA and A–VOTE, ASEA has no objection to the granting of Governor Bentley's Motion to Dismiss.").

14 *See* doc. no. 126 (Memorandum Opinion and Order), at 56–60 (discussion of "viewpoint discrimination" claims), 78–80 (discussion of "unconstitutional conditions" claims), and 100 (orders dismissing the foregoing claims with prejudice).

The ruling that led to the events forming the basis of the present motions to quash, however, was this court's determination that plaintiffs' First Amendment retaliation claim should not be dismissed. [15]

15 *Id.* at 60–78 (discussion of the motions to dismiss the First Amendment retaliation claim), and 100–01 (overruling the motions to dismiss that claim).

1. First Amendment Retaliation Claim

It is well established that governmental actions that do not violate the Constitution on their face may, nevertheless, become actionable constitutional "torts" *if* it is demonstrated that the contested acts were motivated in substantial part by a desire to punish an individual or group for the exercise of a constitutional right. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited."). [16]

16 *See also, e.g., Crawford–El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (holding that the act of intentionally depriving an inmate of his personal belongings may serve as the basis for a claim of retaliation for his exercise of First Amendment rights); *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (nonrenewal of plaintiff's government contract in retaliation for his exercise of free speech is actionable).

***8** Thus, a cause of action may arise from the curtailment or elimination of a governmental benefit in retaliation for a plaintiff's exercise of First Amendment rights. *See, e.g., Georgia Association of Educators v. Gwinnett County School District*, 856 F.2d 142, 144–45 (11th Cir.1986) (recognizing a First Amendment retaliation claim based upon materially similar facts: *i.e.*, the termination of a payroll deduction service for three teachers' associations based upon an alleged desire to destroy the local teachers' union in retaliation for the union's exercise of First Amendment rights) (citing *Perry*, 408 U.S. at 597).

The policy rationale for the recognition of a cause of action for governmental acts motivated in substantial part by a desire to punish an individual or group for the exercise of First Amendment rights was succinctly stated by the Supreme Court in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), where the Court held: "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.' " *Id.* at 256 (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588 n. 10, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998)) (alteration in original).

a. *Prima facie* elements of a First Amendment retaliation claim

The Eleventh Circuit defined the elements of a *prima facie* First Amendment retaliation claim in *Castle v. Appalachian Technical College*, 631 F.3d 1194 (11th Cir.2011), holding that a plaintiff must show that: "(1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech." *Id.* at 1197 (citing *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir.2005)). "In order to establish a causal connection, the plaintiff must show that the defendant was subjectively motivated to take the adverse action because of the protected speech." *Keeton v. Anderson–Wiley*, 664 F.3d 865, 878 (11th Cir.2011) (quoting *Castle*, 631 F.3d at 1197).

b. The basis for plaintiffs' First Amendment retaliation claim

In substance, plaintiffs allege that AEA had a long history of expressing and advocating political viewpoints opposed by Alabama elected officials affiliated with the Republican Party. That difference of opinion and policy continued into and intensified during the two terms of the Riley Administration, [17] as seen by, among other disputes, AEA's act of lobbying for a cloture vote on then-State Senator Bradley Byrne's filibuster of a teacher tenure bill, and AEA's opposition to Governor Riley's 2007 nomination of Byrne for Chancellor of the Alabama Department of Postsecondary Education. [18] Further, and according to plaintiffs:

17 Robert R. "(Bob") Riley served two consecutive, four-year terms as Governor of the State of Alabama, from Jan. 20, 2003 to Jan. 17, 2011.

18 *See, e.g.*, doc. no. 1 (Complaint) ¶ 35.

> In late 2009 and early 2010, Governor Riley criticized AEA for its opposition to legislation authorizing charter schools. And, in 2010, AEA and Riley clashed over a State Board of Education policy prohibiting two-year college system employees from serving in the state legislature. Riley (then serving as both Governor of Alabama and *ex officio* President of the State Board of Education) and Bradley Byrne (whom Riley had appointed to be Chancellor of DPE) both supported the policy. AEA vocally opposed that policy, and brought a lawsuit to invalidate it. [19]

19 *Id.*

***9** The conflict between plaintiffs and Governor Riley came to a head during the 2010 election cycle, when AEA and A–VOTE spent a great deal of money in the Republican primary to thwart Bradley Byrne's attempt to become Riley's successor as Governor. As a result, a dark-horse candidate, Dr. Robert J. Bentley, M.D., a retired dermatologist from Tuscaloosa who had served two terms in the Alabama House of Representatives (2002 to 2010), surprised political analysts by finishing second in the June 1, 2010 primary election, and forcing a run-off with Byrne. [20] On June 26, 2010, during the run-up to the July 13th run-off election, Riley stated that "we do not support the AEA and we don't want 'em in our primary and we don't want anyone that wants 'em in our primary." [21] Only two days later, his administration ended the decades-old policy of making payroll deductions for public employee contributions to political action committees:

20 Out of a field of seven candidates, Byrne ran first with 137,349 votes (27.9% of all votes cast), followed by Bentley with 123,870 votes (25.2% of the total), and Tim James with 123,662 votes (25.1%). *See* http://www .sos.state.al.us/elections/2010/electionInfo2010.aspx.

21 Doc. no. 1 (Complaint) ¶ 39. *See also, e.g.*, www.youtube.com/watch?v=LaXwNIp34qg (videotape recording of a portion of Governor Riley's remarks at the GOP Summer Dinner).

> On June 28, 2010—two days after Governor Riley stated his desire that AEA stay out of the Republican primary—Alabama Comptroller Thomas White announced to all state departments, agencies and personnel officers that "Payroll deductions for Political Action Committees (PACs) will no longer be withheld from employees' pay effective July 1, 2010." Comptroller White subsequently amended the Fiscal Policy and Procedures Manual—which had expressly authorized payroll deductions for PAC contributions—to omit any mention of PACs as recipients of voluntary contributions. The Comptroller purported to have come to the view that, even though such requests had been honored and effectuated for decades, longstanding statutory authority—in particular, the provision of Ala.Code § 17–17–5 prohibiting public employees from "us[ing] any state, county, or city funds, property, or time, for any political activities"—made it unlawful for the State to comply with such payroll deduction requests. [22]

22 Doc. no. 1 (Complaint) ¶ 40 (alteration in original).

Governor Riley issued a press release taking credit for the change: *e.g.*, "the Riley Administration stopped payroll deductions...." [23]

23 *Id.* ¶ 41.

Despite Riley's public endorsement of Byrne prior to the primary run-off election, [24] Dr. Bentley handily defeated his opponent with 56% of the votes cast, and claimed the Republican nomination. He went on to defeat the nominee of the Democratic Party in the November 2, 2010 general election by a margin of 230,000 votes: just over 58% of the total number cast.

24 *See, e.g.*, David Catanese, *Riley lines up behind Byrne*, Politico (July 9, 2010, 4:05 p.m. EST), http://dyn.politico . com/news/stories/0710/39543.html.

Of greater significance, however, is the fact that, during the 2010 general election, Republicans gained firm control of

both chambers of the Alabama Legislature for the first time in 136 years.[25] According to plaintiffs, the "new Republican majority consist[ed] almost exclusively of legislators that AEA and A–VOTE failed to support or actively opposed during the 2010 election campaign."[26]

25 Republican candidates won 21 of 35 seats in the Alabama Senate, and 63 of 105 seats in the Alabama House of Representatives during the November 2010 general election. *See, e.g.*, www.legislature.state.al.us. Republicans previously controlled Alabama government only during a brief period following the Civil War and the end of "Presidential Reconstruction," and the general election of 1874, when candidates affiliated with the so-called "Conservative and Democratic Party" "redeemed" control of State government from the "Radical Republicans," a political coalition among Northern Carpetbaggers, Southern Scallywags, and a handful of recently-freed slaves. The adjective "radical" was used to describe those white, Northern Republican officeholders who had most strongly opposed slavery prior to and during the Civil War; who distrusted former Confederate Army officers and those who had held political offices in the former Confederate States; who believed that harsh and punitive policies were required to punish those who had led the nation into civil war, and to "Reconstruct" the South; who demanded civil and political rights for the recently-freed slaves; and who understood that the moral redemption and future prosperity of the South were dependent upon the education and elevation of the former slaves.

26 Doc. no. 1 (Complaint) ¶ 43 (alteration supplied).

Further, even though Alabama legislators assume office the day after they are elected,[27] they normally do not convene in Montgomery until the first Tuesday in March of the following year.[28] Thus, when Governor Riley "took the extraordinary step" on December 1, 2010 of issuing a "call" for a special session of the newly-elected legislature to convene on December 8th,[29] it gave him a "small window of opportunity"[30] to end his two terms in office with the enactment of "the most stringent ethics law in the country."[31]

27 *See* Ala. Const., art. IV, § 46(a), 2d sent. (1901) ("The terms of office of the senators and representatives shall commence on the day after the general election at which they are elected ....").

28 *See* Ala.Code § 29–1–4 (1975) (2003 Replacement Vol.). *See also* http://www.legi slature.state.al.us/misc/visitorsguide/visitorsguide.html # anchor985286.

29 Doc. no. 1 (Complaint) ¶ 45.

30 Cameron McWhirter, "Alabama Seeks Ethics Overhaul," *The Wall Street Journal* (Nov. 15, 2010) ("Now, with winning legislators taking office immediately and his own party in charge, Gov. Riley says he's winding down his eight years in office by using a 'small window of opportunity' to take action before budget debates consume political discussion."), at http://online.wsj.com/article/SB 10001424052748704865704575610730582946 15.

31 Kim Chandler, "Gov. Riley calls for special session on ethics reform for Alabama government," at http://blog.al.com/spotnews (posted Dec. 1, 2010).

***10** Plaintiffs assert that Republican lawmakers involved in the enactment of Act No. 761 shared Governor Riley's animus against AEA:

> 47. On December 10, 2010, Senator Marsh [President *Pro Tempore* of the upper house] introduced in the Alabama Senate a bill to prohibit public employees from "arrang[ing] by salary deduction or otherwise" for the payment of "dues for any membership organization which engages, directly or indirectly, in political activity" as well as to prohibit public employees from "arrang[ing] by salary deduction or otherwise" for the payment of PAC contributions.
>
> 48. On information and belief, defeated gubernatorial candidate Byrne participated in the drafting of the legislation and heavily lobbied Republican lawmakers to support it. Indeed, Byrne lobbied legislators on the floor of the legislature while the legislation was being debated.
>
> 49. On information and belief, a majority of the members of the new legislature share then-Governor Riley's antipathy toward the political activities of AEA and A–VOTE, and/or were recruited by then-Governor Riley and/or his supporters to support the Riley Administration's campaign against those activities through legislation.[32]

32 Doc. no. 1 (Complaint) ¶¶ 48–49 (first alteration supplied, all other alterations in original).

Plaintiffs also contend that the Act will reduce AEA's membership and A–VOTE's funding, thereby diminishing their future ability to engage in protected speech.[33]

33 *Id.* ¶ 75.

In summary, AEA and A–VOTE allege sufficient facts to show that they engaged in constitutionally protected speech during the 2010 Alabama Republican gubernatorial primary; that Governor Riley and members of his administration expressed animosity towards plaintiffs' political speech; and that those individuals played a critical role in the enactment of Act No. 761 shortly after plaintiffs utilized their protected speech to influence the selection of the Republican Party's nominee for the office of Governor.

Moreover, plaintiffs allege sufficient facts from which an inference can be drawn that a majority of the Republican members of the Alabama legislature who had been elected in the 2010 general election harbored an animus against AEA and A–VOTE due to their protected speech.

For all of those reasons, this court allowed plaintiffs' claim for First Amendment retaliation to survive defendants' motions to dismiss. [34]

34 *See* doc. no. 126 (Memorandum Opinion and Order), at 60–78.

G. The Contested Subpoenas

The need for the present opinion grew from plaintiffs' act of serving subpoenas *duces tecum* on Governor Bentley, former Governor Riley, Alabama Senate President *Pro Tempore* Del Marsh, and Speaker of the Alabama House of Representatives Mike Hubbard (collectively, "the Officials"). The subpoenas ask for the production of documents and communications that may show a causal relationship between plaintiffs' political speech during the 2010 Republican Party primary, and Act No. 761's termination of the payroll deduction service that had been a part of Alabama law since at least 1973. Specifically, plaintiffs request production of six categories of documents:

***11** 1. Produce each document in your possession or control which explains the requirements of Alabama Act 2010–761, including any cover letter showing the person or agency sending you the document or to whom you sent the document.

2. Produce each document in your possession or control which is a draft of (or proposal for) any legislative bill, proposed rule, or proposed regulation to prohibit or restrict payroll deductions of dues or contributions to the Alabama Education Association, the Alabama State Employees Association, any other organization composed primarily of state or local government employees, or any political action committee associated with any of the foregoing; and any document showing the person or persons who drafted the bill or proposal.

3. Produce each communication (including emails) of which you were the sender or a recipient and which related to or concerned Senate Bill 2 in the 2010 Special Session of the Alabama Legislature . [35]

35 Senate Bill 2 became Act No. 761. *See, e.g.,* http:// lrs.state.al.us/ publications/2010_special_summaries.html.

4. Produce each document or communication (including emails) in your possession or control with a known or apparent creation date in 2009 or 2010 and which related to or concerned Alabama Education Association, A–Vote, the Alabama State Employees Association, SEA–PAC, Dr. Paul Hubbert, Dr. Joe Reed, or Edwin "Mac" McArthur.

5. Produce each document or communication (including emails) received from the office of Gov. Bob Riley, the Comptroller, or the Finance Director and which related to or concerned any proposal to stop the collection of dues for membership organizations through payroll deduction.

6. Produce each document or communication (including emails) received from the office of Gov. Bob Riley, the Comptroller, or the Finance Director and which related to or concerned any proposal to stop the collection of contributions to political organizations through payroll deduction. [36]

36 Doc. no. 104–1(Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), Exhibit "A," at 33 (Attachment F) (alteration supplied).

The phrasing of the request for documents in the possession of Governor Bentley is not identical to the language quoted in the text accompanying this footnote, but it is substantially the same. *Compare id. with* doc. no. 104–2, Exhibit "B," at 3–4.

H. The Motions to Quash and the Privileges Relied Upon

Motions to quash plaintiffs' subpoenas were filed on behalf of the Officials.[37] The motions contend that the subpoenas seek information protected from disclosure by the privileges discussed in the following subsections.[38]

37 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants); doc. no. 106 (Motion to Quash Subpoena by Former Governor Riley); and doc. no. 127 (Motion to Quash Subpoena by Governor Bentley).

38 In addition to the privileges discussed hereafter, Governor Bentley argued that the subpoenaed documents are protected by the "attorney-client" and "work-product" privileges. *See* doc. no. 127, at 2–3.

1. Executive privilege

"Executive privilege"[39] refers to a doctrine under which "documents from a former or an incumbent President [or, arguably, the chief executive of a state government] are presumptively privileged." *United States v. Poindexter*, 727 F.Supp. 1501, 1505 (D.D.C.1989) (citing *United States v. Nixon*, 418 U.S. 683, 708–13, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)) (alteration supplied).[40] The privilege recognizes "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367, 382, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (citing *Nixon*, 418 U.S. at 715).

39 *See* doc. no. 104, at 1–2; doc. no. 106, at 1 (incorporating by reference the arguments in doc. no. 104); and doc. no. 127, at 2–3 (same).

40 Just as the President is the head of the executive branch of the United States government, so a Governor is the head of the executive branch of a state government. Thus, extending the executive privilege to the current and former Governors of Alabama serves the interest of maintaining the separation of powers between the executive and judicial branches of government. *See Thomas v. Cate*, 715 F.Supp.2d 1012 (E.D.Cal.2010); *Wilson v. Brown*, 404 N.J.Super. 557, 563–64, 962 A.2d 1122 (App.Div.2009) (both applying the executive privilege to discovery sought from Governors).

It may also serve the purpose of insulating a state government from federal intervention. *See generally Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 102, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). In *Pennhurst*, the Supreme Court held that a suit against state officials may be functionally equivalent to a suit against the state served by those officials, "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the [Pennsylvania] Government from acting, or to compel it to act.' " *Id.* at 102 (citing *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963)) (alteration supplied). Even though there are no claims pending against any of the four current and former Alabama officials upon whom plaintiffs have served the subject subpoenas, plaintiffs are seeking documentary evidence that may support their challenge to Act No. 761. Thus, there is at least a colorable argument that state sovereignty is "in play." *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), at 15.

Any claim of executive privilege implicates three non-harmonious interests: (1) "the undeniable interest of the executive branch of government in maintaining confidentiality over certain types of information necessary for the performance of its constitutional duties"; (2) "the unquestionable interest of the litigant in seeking information for the just resolution of the legal dispute"; and (3) "the perplexing separation of powers question that is lurking in the background." *Assured Investors Life Insurance Co. v. National Union Associates, Inc.*, 362 So.2d 228, 233 (Ala.1978), *overruled on unrelated grounds by Ex parte Norfolk Southern Railroad Co.*, 897 So.2d 290, 295 (Ala.2004) (citing *United States ex rel. Jackson v. Petrilli*, 63 F.R.D. 152 (N.D.Ill.1974)). Given that mix of conflicting interests,

> ***12** claims of executive privilege, like other evidentiary privileges, must be narrowly construed so as to permit the broadest possible discovery otherwise allowed under the Rules. 35

> C.J.S. *Federal Civil Procedure* § 709. The governmental interest in favor of maintaining confidentiality under the cloak of privilege must be tempered by the historical function of the courts to provide compulsory process for the production of material needed for a just determination of the legal dispute.

Assured Investors, 362 So.2d at 233 (citing *Jabara v. Kelley*, 75 F.R.D. 475 (E.D.Mich.1977); *Equal Employment Opportunity Commission v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373 (D.N.M.1974); *Wood v. Strickland*, 420 U.S. 308, 317, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Glick v. McKesson & Robbins, Inc.*, 10 F.R.D. 477 (W.D.Mo.1950); 35A C.J.S. *Federal Civil Procedure* § 738).

2. Legislative immunity and legislative privilege

The Officials also urge this court to quash the subpoenas based on the doctrine of "legislative *immunity*," [41] which grants state legislators "common law immunity *from liability* for their legislative acts." *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir.2005) (emphasis supplied). [42] In order to effectuate its purpose of freeing state legislators from the "worries and distractions" of a lawsuit, legislative immunity applies regardless of the legislators' subjective motivations, regardless of whether the legislators are sued in their individual or official capacities, and regardless of whether the plaintiffs seek a retroactive or prospective form of relief. *Id.* at 1256–57.

41 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), at 1–2; doc. no. 106 (Motion to Quash Subpoena by Former Governor Riley), at 1 (incorporating by reference the arguments in doc. no. 104); and doc. no. 127 (Motion to Quash Subpoena by Governor Bentley), at 2–3 (same) (emphasis supplied).

42 Despite the implication of its name, the doctrine of "legislative immunity" protects members of the executive branch as well as the legislative branch. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir.2003) (applying legislative immunity to the Governor of Florida).

Of course, the Officials on whose behalf motions to quash the subpoenas have been filed are not, in fact, being *sued*. Even when the doctrine of legislative immunity applies, state legislators still may be "required to supply evidence in a federal civil case where, like the instant case, there is no threat of personal liability." *Doe v. Nebraska*, 788 F.Supp.2d 975, 984 n. 2 (D.Neb.2011) (interpreting *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). Specifically, they "may be protected from testifying, but are not necessarily exempted from producing documents." *Id.* at 984 (citing *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C.1994); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 302 n. 20 (D.Md.1992)).

Accordingly, the Officials supplement their discussion of legislative *immunity* with a discussion of a related doctrine called "legislative *privilege*," [43] which applies to protect legislators from the compulsory production of "evidence or testimony about all 'acts that occur in the regular course of the legislative process.' " *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 292 (D.P.R.1989) (quoting *U.S. v. Brewster*, 408 U.S. 501, 525, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972)). The doctrine of "legislative privilege" is an emanation of the Speech or Debate Clause of the United States Constitution and, as such, it "exists to safeguard ... legislative immunity and to further encourage the republican values it promotes." *Equal Employment Opportunity Commission v. Washington Suburban Sanitary Commission*, 631 F.3d 174, 181 (4th Cir.2011) (citing *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir.1996)).

43 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), at, *e.g.*, 8, 12 (emphasis supplied).

***13** In spite of the importance of those interests, the legislative privilege is not absolute, and "may be overridden in circumstances where 'reason and experience' suggest that the claim of privilege should not be honored." *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 99–100 (S.D.N.Y.2003) (citing Fed.R.Evid. 501; *Manzi v. DiCarlo*, 982 F.Supp. 125, 131 (E.D.N.Y.1997)). Thus, courts must " 'balance the various competing interests' to determine whether to apply the ...

legislative privilege to shield the legislature's documents from discovery." *Rodriguez*, 280 F.Supp.2d at 99–100 (quoting *Manzi*, 982 F.Supp. at 131). When doing so, "any confidential privilege for legislators must be 'narrowly tailored.' " *Manzi*, 982 F.Supp. at 130 (quoting *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir.1987)).

3. Deliberative process privileges

The motions to quash also assert the so-called "deliberative process privilege,"[44] which actually constitutes two related privileges: *i.e.*, the "*executive* deliberative process privilege," a subcategory of the executive privilege; and the "*legislative* deliberative process privilege," a subcategory of the legislative privilege.

44 *See id.* at 1–2; doc. no. 106 (Motion to Quash Subpoena by Former Governor Riley), at 1 (incorporating by reference the arguments in doc. no. 104); and doc. no. 127 (Motion to Quash Subpoena by Governor Bentley), at 2–3 (same).

a. Executive deliberative process privilege

The *executive* deliberative process privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 8–9, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (citing *Environmental Protection Agency v. Mink*, 410 U.S. 73, 86–87, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802, 104 S.Ct. 1488, 79 L.Ed.2d 814 (1984)). Thus, the privilege serves the purpose of enhancing the quality of decisions by "protecting open and frank discussion among those who make them within the Government." *Id.* (citing *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 151, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)).

The executive deliberative process privilege "covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Alabama v. Abbott Laboratories, Inc.*, No. 08–3429, 2009 U.S. Dist. LEXIS 20379, *5, 2009 WL 692189 (M.D.Ala. Mar. 13, 2009) (quoting *Klamath Water Users*, 532 U.S. at 8). As a result,

> [t]wo requirements must be met for the deliberative process privilege to apply. *First, the material must be pre-decisional, i .e.*, "prepared in order to assist an agency decision maker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975); *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1490–91 (11th Cir.1992) *abrogated on unrelated grounds*, *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 170, 113 S.Ct. 2014, 124 L.Ed.2d 84, (1993). *Second, it must be deliberative*, "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Nadler*, 955 F.2d at 1490–91. Even factual material contained in a "deliberative" document may be withheld pursuant to the privilege where disclosure of the factual material would reveal the deliberative process or where the factual material is so inextricably intertwined with the deliberative material that meaningful segregation is not possible. *Id.*, at 1490.

***14** *Abbott Laboratories*, 2009 U.S. Dist. LEXIS 20379 at *6–7, 2009 WL 692189 (alteration and emphasis supplied).

Nevertheless, the executive deliberative process privilege "is a qualified privilege which may be overcome upon a showing that the adverse party's need for disclosure outweighs the interest in confidentiality." *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 98 (S.D.N.Y.2003). When weighing the interests protected by the privilege against the adverse party's need for disclosure, the leading considerations include the following five factors:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence, *see, e.g.*, *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 331 (D.D.C.1966), *aff'd. on opinion below*, 128 U.S.App. D.C. 10, 384 F.2d 979, *cert. denied*, 389 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967); (iii) the "seriousness" of the litigation and the issues involved, *see, e.g.*, *Freeman v. Seligson*, 132 U.S.App. D.C. 56, 60, 405 F.2d 1326, 1340 (D.C.Cir.1968); (iv) the role of the government in the litigation, *see, e.g.*, *Carl Zeiss Stiftung*, 40 F.R.D. at 329; *Bank of Dearborn v. Saxon*, 244 F.Supp. 394, 401–03 (E.D.Mich.1965), *aff'd.*, 377 F.2d 496 (6th Cir.1967); and (v) the possibility of future timidity by government employees who will be

> forced to recognize that their secrets are violable.

In re Franklin National Bank Securities Litigation, 478 F.Supp. 577, 583 (E.D.N.Y.1979).

b. Legislative deliberative process privilege

The "deliberative process privilege ... is more typically asserted in cases which challenge the decisions of administrative agencies." *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 97–98 (S.D.N.Y.2003). Even so, some courts have also extended that privilege to protect the deliberative processes of local legislators. *See, e.g.*, *North Pacifica, L.L.C. v. City of Pacifica*, 274 F.Supp.2d 1118, 1121 (N.D.Cal.2003). When doing so, those courts have reasoned that the deliberative process privilege for executive officials "provides a useful analogy for a confidentiality-based privilege for state legislators because executive agencies, like state legislators, engage in a wide variety of activities, including factual investigations for quasi-legislative rulemaking." *In re Grand Jury*, 821 F.2d 946, 958–59 (3d Cir.1987).

Thus, "in terms of the alleged need for secrecy surrounding deliberations, there is no principled distinction" between state legislators and executive officials. *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D.Cal.1989). Like the *executive* deliberative process privilege, the *legislative* deliberative process privilege protects "only documents which are pre-decisional, deliberative and reflect the subjective intent of the legislators." *See Doe v. Nebraska*, 788 F.Supp.2d 975, 985 (D.Neb.2011) (citing *Qamhiyah v. Iowa State University*, 245 F.R.D. 393, 396 (S.D.Iowa 2007)). [45] However, it does not protect "documents containing factually based information used in the decision-making process or disseminated to legislators or committees, such as committee reports and minutes of meetings." *Doe*, 788 F.Supp.2d at 984–85. Likewise, it does not protect documents "shared with non-legislative members." *Id.* at 987.

45 Even though the *Abbott Labs* test for the *executive* deliberative process privilege discussed in the previous section lists only the first two prongs of the *Doe* test for the *legislative* deliberative process privilege (*i.e.*, that documents are protected only if they are both pre-decisional and deliberative), it appears that the definition of "deliberative" from *Abbott Labs* incorporates the third prong of *Doe* (*i.e.*, that protected documents must reflect the subjective intent of legislators). *Compare Abbott Labs*, 2009 U.S. Dist. LEXIS 20379, at *5, 2009 WL 692189 (describing a deliberative document as one that is "a direct part of the deliberative process in that it makes *recommendations* or expresses *opinions* on legal or policy matters") (emphasis supplied) (quoting *Nadler*, 955 F.2d at 1490–91) *with Doe*, 788 F.Supp.2d at 985 (requiring protected documents to "reflect the *subjective* intent of the legislators") (emphasis supplied).

***15** Further, and even though the purposes and applications of the executive and legislative deliberative process privileges are similar, there may be valid policy reasons for construing the legislative deliberative process privilege more narrowly. *See Rodriguez*, 280 F.Supp.2d at 98; *Manzi v. Dicarlo*, 982 F.Supp. 125, 130 (E.D.N.Y.1997); *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 298 (D.P.R.1989). In *Corporacion Insular*, for example, the court reasoned that legislators

> are part of the governmental branch that historically has been subjected to the greatest degree of public accountability. There are too many potentially detrimental ramifications to applying a confidentiality-based privilege to a governmental body that should continually remain open to the legitimate scrutiny of its constituents. Legislators should be protected from overreaching and intimidation by other branches of government and possibly from abusive or disruptive public intrusion but we refuse to swaddle them in a cocoon of secrecy for acts that go to the core of our democratic processes.

Id. at 298. Moreover,

> the cases discussing both the legislative and deliberate process privileges make clear that these protections are only "qualified." Accordingly, either privilege may be overridden in circumstances where "reason and experience" suggest that the claim of privilege should not be honored. *See* Fed.R.Evid. 501; *Manzi v. DiCarlo*, 982 F.Supp. 125, 131 (E.D.N.Y.1997) (indicating that the court needs to "balance the various competing interests" to determine

> whether to apply the deliberative process or state legislative privilege to shield the legislature's documents from discovery).

Rodriguez, 280 F.Supp.2d at 99–100.

Thus, even when a certain legislative record or document appears to fall under the privilege, "protection from production is not a given." *Doe*, 788 F.Supp.2d at 985. Instead, courts should balance four considerations: "(1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.* (citing *Qamhiyah*, 245 F.R.D. at 396; *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir.1984); *Rodriguez*, 280 F.Supp.2d at 101). [46]

46 Unlike the five-factor *Franklin* test for the *executive* deliberative process privilege discussed at the end of the previous section, the *Doe* test for the *legislative* deliberative process privilege does not list the factor of "the 'seriousness' of the litigation and the issues involved." *See Franklin*, 478 F.Supp. at 583. However, both tests are worded in non-exclusive terms. *See id.* (listing "*some of the factors* that assume significance") (emphasis supplied); *Qamhiyah*, 245 F.R.D. at 396 (noting that, "[u]sually[,] four factors weigh in the balance") (alterations supplied).

c. The applicability of the deliberative process privileges when the governmental decision-making process is "*the* issue" in the litigation

Neither the executive nor the legislative deliberative process privilege is available when the governmental decision-making process is, itself, the subject of the litigation, or when the purpose of the disclosure is to expose governmental malfeasance. *See, e.g.*, *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C.Cir.1998); *Texaco P.R., Inc. v. Department of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir.1995); *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 99 (S.D.N.Y.2003); *Corporacion Insular de Seguros v. Garcia*, 709 F.Supp. 288, 292 (D.P.R.1989); *Burka v. New York City Transit Authority*, 110 F.R.D. 660, 667 (S.D.N.Y.1986).

***16** A number of courts have held that the deliberative process privilege does not apply in actions where the government's decision making is central to the plaintiff's case. *E.g. In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424–25, 330 U.S.App. D.C. 352 (D.C.Cir.1998); *United States v. Lake County Bd. of Comm'rs*, 233 F.R.D. 523, 526 (N.D.Ind.2005) (collecting cases). As the Court of Appeals for the District of Columbia explained in *In re Subpoena:*

> The privilege was fashioned in cases where the governmental decisionmaking process is collateral to the plaintiff's suit. *See, e.g., In re Subpoena Served Upon the Comptroller of the Currency*, 296 U.S.App. D.C. 263, 967 F.2d 630 (D.C.Cir.1992) (shareholders sought Comptroller's bank examination reports to prove fraud charges against corporation); *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200 (4th Cir.1964) (petitioner wanted deliberative materials to establish a defense to an unfair labor practice charge). If the plaintiff's cause of action is directed at the government's intent, however, it makes no sense to permit the government to use the privilege as a shield. For instance, it seems rather obvious to us that the privilege has no place in a Title VII action or in a constitutional claim for discrimination. The Supreme Court struggled in *Crawford–El* and *Webster* with governmental claims that discovery in such a proceeding should be limited, but no one in any of these cases ever had the temerity to suggest that the privilege applied. The argument is absent in these cases because if either the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue, the privilege is a *nonsequitur*. The central purpose of the privilege is to foster government decisionmaking by protecting it from the chill of potential disclosure. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975).

In re Subpoena, 145 F.3d at 1424–25.

Thomas v. Cate, 715 F.Supp.2d 1012, 1020–21 (E.D.Cal.2010) (emphasis in original); *see also Rodriguez*, 280 F.Supp.2d at 99 (relying on *In re Subpoena*, 145 F.3d at 1424, to grant voters' motions to compel their legislators to produce requested documents).

Because plaintiffs, in order to support their claim for First Amendment retaliation, must be able to explore any evidence indicating that defendants, acting through (among others) the Officials, intended to punish plaintiffs for their political speech, the governmental decision-making process in the drafting and enactment of Act No. 761 is "*the* issue" in this action.

II. DISCUSSION

Historically, courts have been cautious about the creation or extension of privileges because they do not aid in the ascertainment of truth. Those privileges that have been recognized by federal and state courts generally have been justified on the basis of protecting "interests or relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Ex parte Rudder*, 507 So.2d 411, 414 (Ala.1987) (Shores, J.) (citing *McCormick on Evidence* § 72, at 171 (1984)).

***17** It must always be remembered, however, that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (alteration supplied) (footnote omitted).[47] Indeed, in the case just cited—overriding a sitting President's claims of executive privilege and compelling him to comply with a subpoena seeking recordings of his conversations with aides and advisers—the Supreme Court affirmed that the "need to develop all relevant facts in the adversary system is both fundamental and comprehensive.... The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Id.* at 709.[48]

47 *See also, e.g., Greenpeace v. National Marine Fisheries Service*, 198 F.R.D. 540, 543 (W.D.Wash.2000) ("Like all evidentiary privileges that derogate a court's inherent power to compel the production of relevant evidence, the deliberative process privilege is narrowly construed."); *Kaufman v. City of New York*, No. 98–2648, 1999 U.S. Dist. LEXIS 5779, at *11, 1999 WL 239698 (S.D.N.Y. Apr. 22, 1999) ("The [deliberative process] privilege, as it is in derogation of the search for truth, is not to be expansively construed.") (alteration supplied); *Pacific Gas & Electric Co. v. United States*, 70 Fed. Cl. 128, 133 (2006) (quoting *Greenpeace*, 198 F.R.D. at 543, and *Kaufman*, 1999 U.S. Dist. LEXIS 5779, at *11, 1999 WL 239698 with approval).

48 Even though the Court's opinion in *Nixon* addressed subpoenas that had been issued in aid of a criminal investigation, courts have regularly applied both its holding and rationale to civil cases in which government officials asserted the deliberative process privilege. *See, e.g., Kelly v. San Jose*, 114 F.R.D. 653, 659 (N.D.Cal.1987) (quoting *Nixon*, 418 U.S. at 710, for the proposition that, "[s]ince privileges derogate the search for the truth they are supposed to be narrowly construed") (alteration supplied); *Resolution Trust Corp. v. Diamond*, 773 F.Supp. 597, 604 (S.D.N.Y.1991) (quoting *Nixon*, 418 U.S. at 706, for the proposition that a "broad, undifferentiated ... generalized interest in confidentiality is insufficient to assert the deliberative-process privilege") (internal quotation marks and citations omitted); *Pacific Gas & Electric Co. v. United States*, 70 Fed. Cl. 128, 141 (2006) (quoting *Nixon*, 418 U.S. at 706, for the proposition that a "broad, undifferentiated claim of public interest in the confidentiality of ... conversations" is not enough to support the deliberative process privilege) (internal quotation marks and citations omitted).

Moreover, as the discussion in Part I(H) of this opinion demonstrates, none of the privileges relied upon as the basis for the motions to quash are absolute. Instead, each is qualified, and subject to a balancing of interests.

A. The Minimum Requirements for Invoking Governmental Privileges

At least four requirements must be satisfied in order to support a claim of privilege based upon the doctrines discussed in Part I(H) of this opinion, *supra.*

[1] The head of the agency claiming the privilege must personally review the material,[49] [2] there must be "a specific designation and description of the documents claimed to be privileged," and [3] there must be "precise and certain reasons for preserving" the confidentiality of the communications. [4] Usually such claims must be raised by affidavit.

49 Of course, none of the Officials are heads of "agencies" in the strict sense of that term. Nevertheless, Governor Bentley, former Governor Riley, Senate President *Pro Tempore* Marsh, and Speaker Hubbard are likewise subject to the requirement of personally reviewing the material requested by plaintiffs' subpoenas before a privilege may be validly invoked. *See, e.g., K.L. v. Edgar*, 964 F.Supp. 1206, 1209 (N.D.Ill.1997) (holding in the context of a motion to compel discovery from a governor and a mental health department that "the department head with control over the matter must make

a formal claim of privilege, after personal consideration of the problem").

United States v. O'Neill, 619 F.2d 222, 226 (3d Cir.1980) (alterations supplied) (quoting *A.O. Smith v. Federal Trade Commission*, 403 F.Supp. 1000, 1016 (D.Del.1975) (other citations omitted)). [50] As will be seen, the motions before this court do not comply with any of those requirements.

50 A recent decision of the Northern District of California in the case of *In re: McKesson*, 264 F.R.D. 595 (N.D.Cal.2009), parsed the requirements as follows:

> In order to invoke the privilege, there are several requirements, none of which is met here. For example, CDHCS *[i.e.*, the state agency supervising and operating California's medicaid program] should have provided *a declaration from an agency head* that includes the following information with respect to each document for which the deliberative process privilege is asserted: 1) specific facts demonstrating why each document is "deliberative" and "predecisional"; 2) specific facts concerning: a) the degree and type of harm that would result from requiring production of each document; and b) what type of protective order would be necessary to reduce that harm or, alternatively, why a protective order would not reduce this harm; and 3) what portions of each document are deliberative and, if specific sections are purely factual, why those sections cannot be produced. Without this information, the Court cannot determine whether the documents at issue are deliberative or predecisional. Nor can the Court adequately assess the harm that would result if production is ordered. *See e.g.*, *L.H. v. Schwarzenegger*, [No. 06–2042,] 2008 WL 2073958, *7 (E.D.Cal. May 14, 2008) (finding waiver of deliberative process privilege where no declarations supporting privilege were filed).

McKesson, 264 F.R.D. at 602 (alteration and emphasis supplied). None of the requirements have been satisfied in this case.

1. Personal consideration by the relevant official

The first requirement was best stated by the Supreme Court in *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), holding that: "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7–8 (footnote omitted). [51] *See also, e.g.*, *L.H. v. Schwarzenegger*, No. 06–2042, 2008 U.S. Dist. LEXIS 86829, at *25, 2008 WL 2073958 (E.D.Cal. May 14, 2008) (holding that a public official "cannot invoke a privilege without personally considering the material for which the privilege is sought"); *In re Nelson*, 131 F.R.D. 161, 164 (D.Neb.1989) (holding that a privilege "exists only when raised by a formal claim of privilege, *lodged by the head of the department which has control over the matter*, after actual personal consideration by that officer") (emphasis in original); *Resident Advisory Board v. Rizzo*, 97 F.R.D. 749, 752 (E.D.Pa.1983) (quoting *Reynolds*, 345 U.S. at 7–8, *supra*); *Pierson v. United States*, 428 F.Supp. 384, 395 (D.Del.1977) ("Requiring the agency head to review the documents sought and to claim the privilege where appropriate is the most effective method available to assure consistency and prudence [in the invocation of the privilege].") (alteration supplied).

51 The omitted footnote emphasized the importance of this requirement:

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced.

United States v. Reynolds, 345 U.S. at 8 n. 20 (citation and internal quotation marks omitted). Even though *Reynolds* addressed a claim of privilege for state and military secrets, "its prerequisites for formal invocation of the privilege have been uniformly applied irrespective of the particular kind of executive claim advanced." *Carter v. Carlson*, 56 F.R.D. 9, 10 (D.D.C.1972). *See also, e.g.*, *United States v. O'Neill*, 619 F.2d 222, 226 (3d Cir.1980) (same).

***18** The Supreme Court's reference to "a formal claim of privilege" in *Reynolds*, *supra*, is a remark that calls attention to a corollary of the first requirement: *that is*, the claim of privilege cannot be invoked merely by attorneys acting on behalf of the governmental official. "Usually such claims must be raised by affidavit [of the responsible governmental official]." *O'Neill*, 619 F.2d at 226 (alteration supplied).

> The requirement that the privilege be invoked only by the head of the department after actual personal consideration has been promulgated to insure that the privilege remains a narrow privilege which is not indiscriminately invoked. As stated in *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D.Del.1980):
>
> > Requiring the agency head to claim the privilege assures the Court, which must make the ultimate decision, that

> executive privilege has not been lightly invoked by the agency, *United States v. Reynolds, supra,* and that in the considered judgment of the individual with an overall responsibility for the administration of the agency, the documents withheld are indeed thought to be privileged.
>
> *Id.* at 518. *Thus, the courts have not permitted staff attorneys, especially those who are participating in the pending litigation, to assert the privilege on behalf of the agency. Exxon Corp. [v. Department of Energy],* 91 F.R.D. [26,] 43–44 [(N.D.Tex.1981)]; *see also, Pierson v. United States,* 428 F.Supp. 384, 395 (D.Del.1977).

In re Nelson, 131 F.R.D. 161, 164 (D.Neb.1989) (emphasis and alterations supplied). *See also, e.g., O'Neill,* 619 F.2d at 225 (holding the invocation of a privilege by a municipality to be improper because, among other deficiencies, "it was not invoked by the department head, but by the attorney for the City"); *United States v. Burr,* 25 F. Cas. 187, 192 (C.C.Va.1807) (Marshall, C.J., sitting on Circuit) ("The propriety of withholding [the allegedly privileged letter] must be decided by [the President] himself, not by another for him.") (alteration supplied). [52]

52 For a discussion of Aaron Burr's attempts to obtain a copy of a letter from General James Wilkinson (one of the principals who accused Burr of treason) to President Thomas Jefferson, see Paul A. Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege,* 88 HARV. L.REV.. 13, 22–31 (1974), and *In re Sealed Case,* 116 F.3d 550, 559 (D.C.Cir.1997).

No case reviewed by this court has held that the assertion of a privilege by only an attorney for the governmental official was adequate. *See, e.g., In re Nelson,* 131 F.R.D. at 165 ("An assertion of the 'deliberative process privilege' by defense counsel is wholly inadequate for the proper invocation of that privilege."); *Rizzo,* 97 F.R.D. at 752 (observing that, "in no case has assertion [of a privilege] by the litigation attorney for the government been held adequate") (alteration supplied); *United States v. American Telephone & Telegraph,* 86 F.R.D. 603, 605 (D.D.C.1979) ("All the cases sustaining government privilege appear to require an assertion of the claim by some responsible officer other than the Government's attorneys.").

The initial motion to quash plaintiffs' subpoenas was filed by the Alabama Attorney General on behalf of former Governor Riley, Senate President *Pro Tempore* Marsh, and Speaker Hubbard. [53] Notably, however, the motion was not accompanied by affidavits executed by any of those officials, and indicating that any of them had personally "seen and considered the contents of the documents [sought by plaintiffs' subpoenas] and ... formed the view that on grounds of public interest they ought not to be produced." *Reynolds,* 345 U.S. at 8 n. 20 (alterations supplied). [54]

53 *See* doc. no. 104 (Motion to Quash Subpoenas Directed to Speaker Hubbard, President *Pro Tempore* Marsh, and Former Governor Riley, and to Stay All Discovery Pending Resolution of the Defendants' Motions to Dismiss by Alabama House of Representatives Speaker Mike Hubbard, Alabama Senate President *Pro Tempore* Del Marsh, and the Bice Defendants), signed by Assistant Attorney General Joshual K. Payne.

Various Assistant Alabama Attorneys General previously had appeared on behalf of several of the named defendants. *See* doc. no. 22 (Notice of Appearance by Assistant Alabama Attorneys General James W. Davis, Margaret L. Fleming, and William G. Parker Jr. on behalf of defendants, Dr. Joseph B. Morton, State Superintendent of Education; Dr. Freida Hill, Chancellor of Postsecondary Education; and Robert T. Treese III, District Attorney of Lee County); doc. no. 83 (Notice of Appearance by Assistant Alabama Attorney General Joshua K. Payne as additional counsel for defendants Dr. Thomas R. Bice, State Superintendent of Education; Susan Price, Interim Chancellor of Postsecondary Education; and Robert T. Treese III, District Attorney of Lee County); doc. no. 101 (Notice of Appearance by Assistant Alabama Attorney General James W. Davis as counsel of record for non-parties Mike Hubbard, Speaker of the Alabama House of Representatives, and Del Marsh, President *Pro Tempore* of the Alabama Senate); doc. no. 102 (Notice of Appearance by Assistant Alabama Attorney General William G. Parker Jr. as additional counsel of record for non-parties Mike Hubbard, Speaker of the Alabama House of Representatives, and Del Marsh, President *Pro Tempore* of the Alabama Senate); and doc. no. 103 (Notice of Appearance by Assistant Alabama Attorney General Joshua K. Payne as additional counsel of record for non-parties Mike Hubbard, Speaker of the Alabama House of Representatives, and Del Marsh, President *Pro Tempore* of the Alabama Senate).

54 *See supra* note 51 and accompanying text.

***19** A separate motion to quash the subpoena issued to former Governor Riley was later filed by a member of the Birmingham law firm Bradley Arant Boult Cummings LLP. [55] Again, however, the motion did not include an

affidavit executed by Mr. Riley, indicating that he had personally seen and considered the contents of the documents sought by plaintiffs' subpoena, and personally concluded that, on grounds of public policy, they ought not to be produced.

55 *See* doc. no. 106 (Motion to Quash Subpoena by former Governor Riley).

A separate motion to quash the subpoena issued to Governor Bentley was also filed by attorneys affiliated with the Birmingham law firm Wallace Jordan Ratliff & Brandt LLC, and the Montgomery firm Ryals, Plummer, Donaldson, Agricola & Smith, P.C. [56] Yet again, the motion was not accompanied by an affidavit executed by Governor Bentley, indicating that he had seen and considered the contents of the documents sought by plaintiffs' subpoenas, and concluded that, on grounds of public policy, they ought not to be produced.

56 *See* doc. no. 127 (Motion to Quash Subpoena by Governor Bentley).

All cases hold that such omissions render the attempted invocation of privileges wholly inadequate. *See, e.g.*, *O'Neill,* 619 F.2d at 225 (holding "unsatisfactory" the omission of an affidavit indicating that "the privilege was being invoked by the responsible public official on the representation that he had personally examined the documents and determined nondisclosure was required"); *id.* at 226 (observing that "there was no indication here that the department heads made the type of personal careful examination which must precede invocation of the privilege"); *Rizzo,* 97 F.R.D. at 752 (holding an attempted invocation of privilege to be invalid because "there is no indication in the record that these officials personally reviewed the evidentiary material in question and made a determination that the public interest, as opposed to the government's interest in this litigation, would best be served by nondisclosure").

2. A specific description of the documents claimed to be privileged

The second requirement for invoking any of the privileges at issue is "a specific designation and description of the documents claimed to be privileged, of sufficient detail to allow a reasoned determination as to the legitimacy of the claimed privilege." *In re Nelson,* 131 F.R.D. at 165 (citations omitted). *See also, e.g, O'Neill,* 619 F.2d at 225 (holding a municipality's invocation of a privilege to be improper because, among other deficiencies, "it was a broadside invocation of privilege which failed to designate with particularity the specific documents to which the claim of privilege applied"); *Rizzo,* 97 F.R.D. at 753 ("Specificity of description is necessary to enable the Court to comply with its duty of insuring that the privilege is invoked as narrowly as possible consistent with its objectives."); *Black v. Sheraton Corp. of America,* 371 F.Supp. 97, 101 (D.D.C.1974) (Ritchey, J.) ("A formal and proper claim of executive privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality.") (citing *United States v. Article of Drug,* 43 F.R.D. 181, 190 (D.Del.1967); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 327 (D.D.C.1966)).

***20** "The 'precise and certain reasons' requirement is well established in the case law." *Resolution Trust Corp. v. Diamond,* 773 F.Supp. 597, 604 (S.D.N.Y.1991) (citing *O'Neill,* 619 F.2d at 225–26; *Mary Imogene Bassett Hospital v. Sullivan,* 136 F.R.D. 42, 44 (N.D.N.Y.1991); *Mobil Oil Corp. v. Department of Energy,* 102 F.R.D. 1, 5–6 (N.D.N.Y.1983); *Rizzo,* 97 F.R.D. at 752; *Coastal Corp. v. Duncan,* 86 F.R.D. 514, 519, 522 (D.Del.1980); *Black,* 371 F.Supp. at 101). [57]

57 Other decisions to the same effect as those cited in the text include *Mobil Oil Corp. v. Department of Energy,* 520 F.Supp. 414, 416 (N.D.N.Y.1981), and *A.O. Smith v. Federal Trade Commission,* 403 F.Supp. 1000, 1016 (D.Del.1975).

This case-law requirement was incorporated into Federal Rule of Civil Procedure 45, expressly commanding that privilege claims be stated with clarity and specificity:

> A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material *must:*
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

Fed.R.Civ.P. 45(d)(2) (emphasis supplied). [58] As emphasized by the italicized word "must," the requirements of that rule are mandatory, not precatory. [59] The Advisory Committee's Notes are consistent with the cases discussed

above, and make clear that "[t]he person claiming a privilege or protection cannot decide the limits of that party's own entitlement." Fed.R.Civ.P. 45 advisory committee's note (1991 amends.) (alteration supplied). Instead, the purpose of Rule 45(d)(2) "is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified." *Id.*

58 *See also* Fed.R.Civ.P. 26(b)(5)(A), which addresses the proper method for failing to produce materials that would otherwise be discoverable under Rule 26, but which the withholding party contends are subject to a privilege. Specifically:

> When a party withholds information otherwise discoverable by claiming that the information is privileged ... material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed.R.Civ.P. 26(b)(5)(A).

59 *See, e.g.*, Bryan A. Garner, *Garner's Dictionary of Legal Usage* 953 (3d ed.2011) (defining "must" as meaning "is required to").

Thus, broad, undifferentiated claims of privilege, such as those lodged in the motions before this court, provide sufficient reason to deny them. *See, e.g., O'Neill,* 619 F.2d at 227 ("The indiscriminate claim of privilege may in itself be sufficient reason to deny it"); *Resolution Trust Corp. v. Diamond,* 773 F.Supp. 597, 603 (S.D.N.Y.1991) (holding that a "blanket" approach of "asserting the privilege for all predecisional, deliberative documents, is unacceptably inflexible.... The deliberative process privilege presupposes a review to determine, document by document, whether the assertion of the privilege is justified in each instance.") (citations omitted); *In re Nelson,* 131 F.R.D. at 165 (holding that parties asserting a privilege must provide "a specific designation and description of the documents claimed to be privileged") (citations omitted).

3. Precise reasons for preserving confidentiality

The third requirement, closely related to the second, "is a demonstration, usually by affidavit of the responsible agency official, of precise and certain reasons for preserving the confidentiality of the governmental communication." *Rizzo,* 97 F.R.D. at 753. *See also, e.g., In re Sealed Case,* 856 F.2d 268, 271 (D.C.Cir.1988) (holding that "the information for which the privilege is claimed must be specified, with an explanation of why it properly falls within the scope of the privilege"); *A.O. Smith,* 403 F.Supp. at 1016 (holding that the requirement for the agency head to state "precise and certain reasons for preserving" the confidentiality of the communications sought "is necessary in order [for] a court [to] be able to make a knowledgable decision as to whether any document or portion thereof actually contains advisory or deliberative materials. Any attempts to invoke executive privilege in the absence of this specific factual showing are actually attempts to interfere with the proper functioning of the judicial branch of our government by appropriating the means of [making] this decision to the executive branch.") (alterations supplied); *In re Nelson,* 131 F.R.D. at 165 (holding that "there must be a specification of precise and certain reasons for the need to preserve the confidentiality of the documents at issue") (citing *Mobil Oil Corp.,* 102 F.R.D. at 6 (same)); *Coastal Corp.,* 86 F.R.D. at 517–19 (observing that the governmental entity "failed to proffer 'precise and certain' reasons for preserving the confidentiality of the requested documents"); *Exxon Corp. v. Department of Energy,* 91 F.R.D. 26, 44 (N.D.Tex.1981) (holding that the agency must articulate "precise reasons why the public interest would be affected adversely by disclosure").

***21** No such demonstration has been made in the present case. Indeed, no justification for withholding the documents sought by plaintiffs' subpoenas has been advanced at all, other than the bare assertion that one or more of the privileges discussed in Part I(H) of this opinion, *supra,* applies. Such broad, undifferentiated claims deprive this court of the ability to determine whether the plaintiffs' need for the documents and communications sought by the subject subpoenas "outweighs the harm that would result from their disclosure." *McKesson,* 264 F.R.D. at 602.

B. Conclusions

Numerous cases have held that improperly asserted claims of privilege are no claims of privilege at all. *See, e.g., Coastal Corp.,* 86 F.R.D. at 522–23; *A.O. Smith,* 403 F.Supp. at 1017; *Black,* 371 F.Supp. at 101.

In addition, when, as here, privileges are asserted in vague, nonspecific terms, untethered from the requirements discussed above, the privileges are deemed to have been waived. *See Nelson,* 131 F.R.D. at 165 (ordering a governmental agency to disclose requested documents because "conclusional assertions as to its right to protect

the documents at issue on the basis of privilege are wholly inadequate not only to invoke the privilege but also to demonstrate that they are properly within its coverage"); *L.H.*, 2008 U.S. Dist. LEXIS 86829, at *27, 2008 WL 2073958 (ordering the Governor of California and other state officials to disclose requested documents because "defendants have presented no declarations whatsoever to support their claim of deliberative process privilege or official information privilege"); *McKesson*, 264 F.R.D. at 602 (ordering the California agency responsible for overseeing and operating the state's medicaid program to disclose requested documents because it cited "no authority for the proposition that a state agency can avoid its initial burden to satisfy the requirements for invoking the deliberative process privilege simply by arguing financial burden"). [60]

60 *See* doc. no. 105 (AEA Plaintiffs' Response to Motion to Quash Subpoenas to Hubbard, Marsh, and Riley etc.), at 7 (arguing that "the Court should deny the motion to quash because of the failure of the Officials to comply with Rule 45(d)(2), FRCivP"); and doc. no. 129 (AEA Plaintiffs' Response to Alabama Governor Robert Bentley's Motion to Quash Subpoena), at 8 (arguing that the motion to quash is due to be denied "*because of the waiver of the claimed privilege* by Governor Bentley's predecessor, Governor Riley," *and*, "*in the alternative* ... because of Governor Bentley's failure to comply with Rule 45(d)(2), FRCivP") (emphasis supplied).

III. ORDERS

For all of the foregoing reasons, it is **ORDERED** that the motions to quash be, and the same hereby are, **DENIED.** It is further **ORDERED** that Alabama Governor Robert J. Bentley, M.D., former Alabama Governor Robert R. ("Bob") Riley, Alabama Senate President *Pro Tempore* Del Marsh, and Speaker of the Alabama House of Representatives Mike Hubbard, separately and severally, provide full and complete responses to the subpoenas *duces tecum* served upon each of them on or before Friday, February 1, 2013.

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2005 WL 1796118
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Maria ALMONTE, et al., Plaintiffs,
v.
THE CITY OF LONG BEACH, et al., Defendants.

No. CV 04-4192(JS)(JO). | July 27, 2005.

Attorneys and Law Firms

Louis D. Stober, Stephen G. Walko, Heather Patton, Law Office of Louis D. Stober, Jr., Garden City, NY, for Plaintiffs.

Ronald J. Rosenberg, Rosenberg Calica & Birney LLP, Garden City, NY, Anthony V. Merlino, Thomas J. Donovan, Bee Ready Fishbein Hatter & Donovan, LLP, Mineola, NY, for Defendants.

Opinion

MEMORANDUM AND ORDER

ORENSTEIN, Magistrate J.

***1** By letter motion dated July 20, 2005, Docket Entry ("DE") 45, the plaintiffs seek to compel defendant Glen Spiritis ("Spiritis") to answer certain questions that he refused to answer on the basis of his invocation of legislative privilege when he was deposed in this action on June 29, 2005. In a responsive letter dated July 25, 2005, counsel for all defendants opposes the application. DE 48. For the reasons set forth below, I now grant the plaintiffs' application. [1]

[1] While this Memorandum and Order was in draft form *in computero*, I became aware that the plaintiffs had submitted a letter in reply, DE 50, to which the defendants in turn responded, DE 51. Because my individual rules prohibit such additional submissions, I have considered neither.

I. *Background*

The general factual and procedural background of this case is set forth in my Memorandum and Order of July 12, 2005, DE 38, with which I assume the reader's familiarity. Additional background information is provided below as relevant. The only matter worth recounting here is the telephone conference that the parties refer to in their letters on the instant application. As the defendants' counsel correctly notes, the parties' counsel did call me on July 1, 2005, to seek a ruling on Spiritis' invocation of legislative privilege at his deposition. Assuming that the parties were acting in accord with the provisions of Local Civil Rule 37.3(b), I initially thought the deposition was proceeding at that time. When counsel revealed that the deposition had concluded earlier in the week, I reminded them of the local rule, informed them that I would make no ruling during the telephone call, and invited them to pursue the matter in an appropriate manner if they so desired. Not having made any ruling and having determined that the proceeding was improper, I made no entry on the docket. I thus treat the telephone call as a nullity that has no bearing on the instant application.

II. *Discussion*

The defendants raise four arguments in support of their contention that Spiritis should be permitted to avoid answering certain questions on the basis of his invocation of privilege: (1) all discovery is currently stayed; (2) the plaintiffs' application, being nine pages long, violates Local Civil Rule 37.3 and Rule III.A of my own individual practice rules; (3) the application "runs afoul of the Individual Defendants' legislative immunity and legislative privilege; and (4) the Individual Defendants did not waive theirs [sic] rights to legislative privilege." DE 48 at 1. I address each argument in turn below.

A. *The Stay Of Discovery*

On July 18, 2005, the parties filed a stipulation and proposed order that would, among other things, stay discovery pending the court's resolution of potentially dispositive motions, and thereafter require the parties to complete discovery within 90 days. DE 42. I ordered a stay pending resolution of some of the subject motions, and required discovery to be completed 30 days after the lifting of the stay.

The instant application does not strike me as inconsistent with the stay, but instead merely asks me to make a ruling so that the parties can more easily complete discovery on schedule once the stay is lifted. I do not contemplate that Spirits will continue his deposition and answer the questions at issue before the stay is lifted, although I will certainly endorse any application to lift the stay for such purposes should the parties agree to make one.

***2** Further, I ordered the stay based on the parties' stipulation. Any party is free to withdraw from that stipulation and seek to have the stay lifted if it believes its adversary is violating the terms of the parties' agreement. I offer no opinion on whether such relief is warranted under the circumstances, but merely note that the instant ruling does nothing to prejudice such an application.

2. ***The Length Of The Plaintiffs' Letter***

Local Civil Rule 37.3(c), in pertinent part, allows the plaintiffs to make the instant application by submitting a "letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials." Similarly, Rule III.A.3 of my individual practice rules provides: "All letters submitted pursuant to this rule shall be no longer than three pages in length, exclusive of attachments." The defendants object that the plaintiffs have violated those rules by submitting a letter-motion that is nine pages in length.

The letter-motion from the plaintiffs' counsel consists of two paragraphs of introductory text on the first page, three paragraphs of concluding text spread across the final two pages, and a transcript of the testimony at issue that begins on the first page and ends on the eighth. DE 45. The defendants' objection thus plainly exalts form over substance, in that the exact same application could have been made by placing the transcript of the testimony at issue in an attachment rather than reprinting it in the body of the letter, and the letter would then have been well within the page limits.

I could of course require the plaintiffs to resubmit their motion in a form that complies with the rules, and then further require the defendants to resubmit their response. Such a vindication of the defendants' vigorous policing of rules intended to streamline litigation and ease the burden on courts would simply increase the parties' burden without affecting in the slightest the substance of the arguments presented in support of or in opposition to the instant application. Rather than engage in such a purposeless exercise, I will proceed to the merits.

3. ***Legislative Immunity***

Spiritis was the City Manager and not a member of the City Council. Unlike the Council Member defendants, he did not invoke legislative immunity to resist appearing at a deposition altogether. At his deposition, he answered a variety of questions, but declined to answer others on the basis of privilege. In doing so, he did not cite legislative immunity as an independent basis for refusing to answer, *see* DE 45 at 1-8. The objection based on immunity as such has therefore been waived.

Reliance on legislative immunity is in any event misplaced. Counsel argues that legislative immunity extends to "executives, outside the legislative branch of local government, as long as they exercise discretionary functions which fall within the legitimate sphere of legislative-related activities." DE 48 at 2. He goes on to cite several cases, one of which is even controlling authority. *See id.* (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55, 118 S.Ct. 966, 140 L.Ed.2d 79 (1988) (non-legislative officials "are entitled to legislative immunity when they perform legislative functions,.... Bogan's actions were legislative because they were integral steps in the legislative process.")).

***3** Without questioning the validity or applicability of the cited authority, I note that the defendants make no effort to show that Spiritis, in the words of *Bogan*, "performs legislative functions" or took any "actions [that] were legislative because they were integral steps in the legislative process." Indeed, their argument in that regard is unavailing for two reasons. First, they seek to place the burden on the plaintiffs to prove that Spiritis is not entitled to invoke legislative immunity. As it is Spirits who seeks to avoid answering an otherwise appropriate question at a deposition, he bears the burden of persuasion, which in this case means he must point out the evidence in the record that establishes his legislative role.

Second, the defendants do not explain what evidence in the record supports the proposition that Spiritis had a legislative role, as opposed to his executive role as erstwhile City Manager. No such evidence has been brought to my attention. The only evidence of which I am aware that even suggests the possibility that he had a legislative role is his deposition testimony about meetings held at the private home of Charles Theofan, who was then the Long Beach Corporation Counsel, *see* DE 36 at 2, and has since succeeded Spiritis as City Manager. Present at these meetings were three Council Members (defendants Mona Goodman, James P. Hennessy, and Thomas Sofield, Jr.), two officials who were not members of the legislature (Spiritis and Theofan), and one private citizen, James Moriarty, who apparently was a political affiliate of the others. *See id.* Nothing in the record suggests that the meetings were legislative in nature or that they were "integral step in the legislative process." Moriarty's presence suggests otherwise. Legislative and executive officials are

certainly free to consult with political operatives or any others as they please, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative process or the basis on which to invoke privilege.

4. *Waiver Of Legislative Privilege*

The defendants next take issue with the proposition that, by including Moriarty in their discussions, they waived their legislative privilege. Or at least that is what their counsel's letter purports to do-but in fact it returns once again to the more familiar (albeit still inapposite) subject of immunity. DE 48 at 2-3. Such argument entirely misses the point. If Spiritis, or any other individual defendant, had a legislative privilege, it means they were entitled not to divulge their reasons for supporting or opposing legislation, and not to discuss such matters with outsiders. It does not mean they were entitled to discuss those matters with some outsiders but then later invoke the privilege as to others.

Equally inapposite is the defendants' argument that "the privilege is personal to each legislator" and that "a waiver can only be found if each of the Individual Defendants made an 'explicit and unequivocal renunciation' of the privilege." DE 48 at 3. There are two disturbingly obvious flaws with this argument. First, each individual defendant who was present with Moriarty and discussed assertedly privileged matters with him breeched the privilege. Second, the language about "explicit and unequivocal renunciation" that counsel quotes is taken out of context when applied to the issue of privilege. What the Supreme Court wrote is: "we perceive no reason to decide whether an individual Member may waive the Speech or Debate Clause's *protection against being prosecuted for a legislative act.* Assuming that is possible, we hold that waiver can be found only after explicit and unequivocal renunciation *of the protection."* *United States v. Helstoski,* 442 U.S. 477, 490, 99 S.Ct. 2432, 61 L.Ed.2d 12 (1979) (emphasis added). [2]

[2] Less obvious but equally flawed is counsel's argument that the personal nature of the privilege means that each holder of the privilege must waive it before any can testify. As the court reasoned, in language the defendants quote only in part (*see* DE 48 at 3):

> The privilege, however, is personal: it belongs to the individual members of a local legislature, not the municipality as a whole. *See Berkley v. Common Council of the City of Charleston,* 63 F.3d 295, 296 (4th Cir.1995) (en banc) (holding that a municipality is not immune from suit based on the actions of the local legislature); *Burtnick [v. McLean,* 76 F.3d 611, 613 (4th Cir.1996)] (indicating that local legislators have a "testimonial privilege" but "[t]his privilege may be waived" by members of the local legislature). It follows, in this case, that it is not up to the Council to assert or waive the privilege; the councilors must do so for themselves. Indeed, even before the Fourth Circuit's en banc ruling in *Berkley,* the District of Maryland held that "[t]he privilege is a personal one and may be waived or asserted by each individual legislator." *[Marylanders For Fair Representation, Inc. v. Schaefer,* 144 F.R.D. 292, 298 (D.Md.1992)]. Accordingly, Helping Hand, like previous litigants before this court, will be "free to notice for deposition individual ... legislators and to require each of those persons to assert the privilege on his own behalf." *Id.* at 299 n. 16.
>
> *A Helping Hand, LLC v. Baltimore County, Md.,* 295 F.Supp.2d 585, 590 (D.Md.2003).

***4** Aside from its misapplication of the language in *Helstoski,* Counsel makes no attempt to support the surprising assertion that a privilege can be waived only through explicit and unequivocal renunciation, and it would be an affectation of research to cite the many cases supporting the general proposition that a privilege can be waived when the parties holding the privilege share their communications with an outsider. With respect to the particular issue of legislative privilege, I am aware of no case law holding that a waiver is effective only if made in the form of an explicit and unequivocal renunciation. To the contrary, it appears that it is the invocation of privilege that must be explicit:

> A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him.... But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a waiver, by which the party is forever concluded.

Geyer's Lessee v. Irwin, 4 U.S. 107, 107-08, 4 Dall. 107, 1 L.Ed. 762 (1790); *see also Trombetta v. Board of Educ., Proviso Tp. High School Dist. 209,* 2004 WL 868265, *5 (N.D.Ill. Apr.22, 2004) (legislative privilege "is waivable and

is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters").

Carried to its logical consequence, the defendants' reasoning would mean that they could invoke legislative privilege to prevent a private citizen such as Moriarty from divulging what they told him, or what he told them, in unofficial conversations in a private home that excluded some of the legislators who purportedly shared in the privilege. The proposition is not only repugnant to the policy of liberal discovery embraced by the Federal Rules of Civil Procedure, but is also one that has been explicitly rejected. *See Cano v. Davis,* 193 F.Supp.2d 1177, 1179 (C.D.Cal.2002) ("The legislative privilege does not bar ... a third party non-legislator, from testifying to conversations with legislators and their staffs.") (citing *Gravel v. United States,* 408 U.S. 606, 629, 92 S.Ct. 2614, 33 L.Ed.2d 583, n.18 (1972)).

Spiritis, who is not a legislator, discussed the events at issue in this case with five other persons, some of whom were not legislators (including one who had no governmental position), to the exclusion of some members of the legislature. It would make a mockery of the concept of legislative privilege to hold that Spiritis could invoke it in these circumstances. Accordingly, once the stay of discovery ends, Spiritis must answer the questions he previously declined to answer on the basis of privilege.

III. *Conclusion*

***5** For the reasons set forth above, the plaintiffs' motion to compel defendant Glen Spiritis to answer certain questions notwithstanding his claim of privilege is GRANTED.

SO ORDERED.

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2011 WL 6122542
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

Alvin BALDUS, Carlene Bechen, Elvira Bumpus, Ronald Biendseil, Leslie W. Davis, Iii, Brett Eckstein, Gloria Rogers, Richard Kresbach, Rochelle Moore, Amy Risseeuw, Judy Robson, Jeanne Sanchez–Bell, Cecelia Schliepp, Travis Thyssen, Cindy Barbera, Ron Boone, Vera Boone, Evanjelina Cleerman, Sheila Cochran, Maxine Hough, Clarence Johnson, Richard Lange, and Gladys Manzanet, Plaintiffs,
Tammy Baldwin, Gwendolynne Moore and Ronald Kind, Intervenor–Plaintiffs,
v.
Members of the Wisconsin Government Accountability Board, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants,
F. James Sensenbrenner, Jr., Thomas E. Petri, Paul D. Ryan, Jr., Reid J. Ribble, and Sean P. Duffy, Intervenor–Defendants.
Voces De La Frontera, Inc., Ramiro Vara, Olga Vara, Jose Perez, and Erica Ramirez, Plaintiffs,
v.
Members of the Wisconsin Government Accountability Board, each only in his official capacity: Michael Brennan, David Deininger, Gerald Nichol, Thomas Cane, Thomas Barland, and Timothy Vocke, and Kevin Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board, Defendants.

Nos. No. 11–CV–562, 11–CV–1011. | Dec. 8, 2011.

Attorneys and Law Firms

Brady C. Williamson, Godfrey & Kahn S.C., Madison, WI, Rebecca K. Mason, Godfrey & Kahn S.C., Jacqueline E. Boynton, Law Offices of Jacqueline Boynton, Peter G. Earle, Law Offices of Peter Earle L.L.C., Milwaukee, WI, for Plaintiffs.

Daniel S. Lenz, P Scott Hassett, Lawton & Cates S.C., Madison, WI, for Intervenor–Plaintiffs.

Patrick J. Hodan, Daniel Kelly, Joseph W. Voiland, Reinhart Boerner Van Deuren S.C., Milwaukee, WI, Maria S. Lazar, Wisconsin Department of Justice Office of the Attorney General, Madison, WI, for Defendants.

Kellen C. Kasper, Thomas L. Shriner, Jr., Foley & Lardner L.L.P., Milwaukee, WI, for Intervenor–Defendants.

Opinion

ORDER

J.P. STADTMUELLER, District Judge.

***1** This matter comes before the court on two separate motions (Docket # 63, # 72) to quash third-party subpoenas issued by plaintiffs to Joseph Handrick and Tad Ottman.

On November 28, 2011, Joseph Handrick was served with a subpoena from the plaintiffs calling for his testimony and production of documents, all related to ongoing pretrial discovery. Mr. Handrick is a lawyer employed with Michael Best & Friedrich, LLP, who was hired by the Wisconsin Legislature ("Legislature") as a consulting expert to provide legal advice related to the development of Wisconsin's redistricting plan, which is now being challenged in this case. In their subpoena, the plaintiffs demand that Mr. Handrick: (1) produce "any and all documents used by you or members of the Legislature to draw the 2011 redistricting maps"; and (2) appear for a deposition on December 1, 2011. (Docket # 64, Ex. 1).

Several days later, on December 4, 2011, Tad Ottman, a legislative aide to Wisconsin State Senate Majority Leader Scott L. Fitzgerald, was served with a subpoena by the plaintiffs. That subpoena requested: (1) "any and all documents, electronically stored information, and tangible things used by you or members of the Legislature to draw the

2011 redistricting maps"; and (2) that Mr. Ottman appear for a deposition on December 7, 2011.

The Wisconsin Assembly and Senate (the "non-parties") have moved to quash both Mr. Handrick's and Mr. Ottman's respective subpoenas. Having received the plaintiffs' brief opposing the non-parties' motion to quash Mr. Handrick's subpoena, the Court believes it has received sufficient briefing to render its decision on both of the non-parties' motions. For the reasons which follow, the non-parties' motions to quash will be denied.

The information the plaintiffs seek from both Mr. Handrick and Mr. Ottman is relevant. In this case, the plaintiffs make claims under both the Voting Rights Act and the Equal Protection Clause. *(See* Docket # 12). And, as the plaintiffs correctly point out, proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in both types of claims. (Pl.'s Br. Opp. Mot. Quash, 2–3 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11–CV–5065, 2011 U.S. Dist. LEXIS 117656, at *11, 2011 WL 4837508 (N.D.Ill. Oct. 12, 2011))). Thus, any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs' claims as proof of discriminatory intent.

From the record before the court, it is apparent that attorney-client privilege has no application to the communications between the Legislature and Mr. Handrick. To be sure, the attorney-client privilege protects communications made from a client to an attorney who is acting as an attorney, but does not cover communications seeking only consulting service. *See Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir.2009), *In re Grand Jury Proc.*, 220 F.3d 568, 571 (7th Cir.2000). Despite Mr. Handrick's being a lawyer, the defendants state that he performed consulting work in connection with the redistricting legislation. (Defs.' Mot. Quash Handrick, 2) (stating "Handrick provided consulting services in connection with the undersigned firm's representation of the State Senate and State Assembly."). Because, as the defendants acknowledge, Mr. Handrick acted as a consultant, the Court finds that his communications are not covered by attorney-client privilege.

***2** Similarly, legislative privilege does not protect any documents or other items that were used by the Legislature in developing the redistricting plan. First, and most importantly, the Court finds it all but disingenuous for the Legislature to argue that these items be subject to privilege in a Court proceeding determining the constitutionality of the Legislature's actions, when the Legislature clearly did not concern itself with maintaining that privilege when it hired outside consultants to help develop its plans. The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services. *Comm. for a Fair & Balanced Map*, 2011 U.S. Dist. LEXIS 117656, at *35, 2011 WL 4837508. And, even without that waiver, the Court would still find that legislative privilege does not apply in this case. Legislative privilege is a qualified privilege that can be overcome by a showing of need. *Id.*, at *24–*25. Allowing the plaintiffs access to these items may have some minimal future "chilling effect" on the Legislature, but that fact is outweighed by the highly relevant and potentially unique nature of the evidence. *Id.*, at *25–*26. Additionally, given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans, the Court finds that legislative privilege simply does not apply to the documents and other items the plaintiffs seek in the subpoenas they have issued. *Id.*

The remainder of the non-parties' arguments, all of which are procedural, fail or can easily be cured. As the plaintiffs correctly note, Mr. Handrick was not employed by a *party* to this case, but instead by the Legislature, and he is, therefore, not excused from testifying under Rule 26(b)(4)(D). Fed.R.Civ.P. 26(b)(4)(D) (limiting a party's ability to depose "an expert who has been retained or specifically employed by another party in anticipation of litigation ...").

Next, while the initial subpoenas provided a potentially-inadequate time to comply under Rule 45(c)(2)(B), that problem has been substantially cured by the Court's delay while awaiting briefs. Having missed both requested deposition dates, the plaintiffs will now have to reschedule those depositions for a later time. Given the expedited schedule in this case, it is important for the parties to have a shortened turnaround between the issuance of a subpoena and the requested date for production and deposition. The Court notes that three days may be an excessively quick turnaround, however, in the future—except in an extraordinary circumstance—it will not find a *five-day* compliance interim to be unreasonable. The Court also adds that it is apparent that the Legislature has had a hand in causing the three-day interims by apparently refusing to accept service on behalf of its staff and consultants.

Considering the need for a quick turnaround in this case, the Court fully expects that the Legislature and its staff, consultants, and members, will cooperate with the efforts of the Court and the parties to expeditiously complete discovery.

***3** Finally, the plaintiffs' overly-broad production requests and failure to include a recording method may easily be cured. Perhaps as a result of oversight, the plaintiffs may have omitted phrases limiting their discovery requests to documents in Mr. Handrick's and Mr. Ottman's "possession, custody, or control." Accordingly, the Court would suggest that they modify their subpoenas so as to limit their requests and, at the same time, modify the subpoenas to specify the recording method for taking depositions.

Provided the plaintiffs make those changes, the Court finds no reason to quash the subpoenas the plaintiffs have issued to Mr. Handrick and Mr. Ottman. Therefore, the non-parties' motions to quash will be denied.

The Court also recommends that all parties (and non-parties) who consider filing motions to quash read very carefully *Committee for a Fair & Balanced Map,* which the Court has cited extensively in this order. The opinion and order in that case addresses head-on many of the issues raised by the non-parties in their motions to quash. Had the non-parties been aware of that case, perhaps they would not have filed their motions to quash or may have tailored their arguments more effectively. Thus, in this instance the Court will not grant costs and attorneys' fees to the plaintiffs for their defense against these motions.

However, having now brought that case to the non-parties' attention, it should go without saying that the Court will not hesitate to award costs together with actual attorneys' fees related to defending future motions to quash, if the Court deems those motions frivolous or otherwise made in bad faith.

Accordingly,

IT IS ORDERED that the non-party movants' motion to quash the plaintiffs' subpoena issued to Joseph Handrick (Docket # 63) be and the same is hereby **DENIED;**

IT IS FURTHER ORDERED that the non-party movants' motion to quash the plaintiffs' subpoena issued to Tad Ottman (Docket # 72) be and the same is hereby **DENIED,** and

IT IS FURTHER ORDERED that the plaintiffs shall redraft and reissue subpoenas to Joseph Handrick and Tad Ottman which correct any issues related to the overbreadth or recording method attendant to their discovery requests.

End of Document

2011 WL 4837508
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois,
Eastern Division.

COMMITTEE FOR A FAIR AND BALANCED MAP, Judy Biggert, Robert J. Dold, Randy Hultgren, ADAM Kinzinger, Donald Manzullo, Peter J. Roskam, Bobby Schilling, Aaron Schock, John M. Shimkus, Joe Walsh, Ralph Rangel, Lou Sandoval, Luis Sanabria, Michelle Caballero, Edmund Brenzinski, and Laura Waxweiler, Plaintiffs,
v.
ILLINOIS STATE BOARD OF ELECTIONS, William M. McGuffage, Jesse R. Smart, Bryan A. Schneider, Betty J. Coffrin, Harold D. Byers, Judith C. Rice, Charles W. Scholtz, and Ernest L. Gowen, Defendants.

No. 11 C 5065. | Oct. 12, 2011.

Attorneys and Law Firms

John Albert Janicik, Dana S. Douglas, Joshua D. Yount, Thomas Vangel Panoff, Tyrone C. Fahner, Lori E. Lightfoot, Mayer Brown LLP, Chicago, IL, for Plaintiffs.

Devon C. Bruce, Larry R. Rogers, Powers, Rogers & Smith, Barbara Carroll Delano, Brent Douglas Stratton, Jennifer Marie Zlotow, Jonathan A. Rosenblatt, Paul Joseph Gaynor, Office of the Illinois Attorney General, Carl Thomas Bergetz, Chief, Special Litigation Bureau, Office of the Illinois Attorney General, Chicago, IL, for Defendants.

Opinion

OPINION AND ORDER

JOHN DANIEL TINDER, District Judge.

***1** This matter is before the court on plaintiffs' motion to compel enforcement of third party subpoenas [Dkt. No. 52] and certain non-parties' motion to quash subpoenas and for a protective order [Dkt. No. 58]. The motions raise legislative privilege issues rarely addressed by the courts because they pertain to the redistricting activity that follows each decennial census. For this reason, this opinion is more lengthy than the typical ruling on discovery issues.

BACKGROUND

The United States Constitution requires Illinois lawmakers to redraw the state's congressional district boundaries after each decennial census. U.S. CONST. ART. I, § 2; *id.* amend. XIV, §§ 1 & 2; *id.* AMEND. XV; *Ryan v. State Bd. of Elections of State of Ill.*, 661 F.2d 1130, 1132 (7th Cir.1981). Pursuant to this authority, the Illinois General Assembly drafted, debated, and passed the Illinois Congressional Redistricting Act of 2011 (the "Redistricting Act") (P.A. 97–14). The Redistricting Act eliminates one congressional seat, as required by the 2010 United States Census results, and establishes boundaries for the state's eighteen remaining congressional districts.

Beginning on March 28, 2011, and continuing through May 2, 2011, members of the Illinois House of Representatives and the Illinois Senate held a series of public hearings at locations around the state where members of the public were allowed to comment on the redistricting process. *See* 10 Ill. Comp. Stat. 125/10–5. On May 27, 2011, the Democratic leadership of the Illinois House and Senate Redistricting Committees released the congressional redistricting plan ("2011 Map") on its website. Three days later, the Illinois House of Representatives passed the Redistricting Act, and the next day the Illinois Senate followed suit. On June 24, 2011, the Governor signed the Redistricting Act into law, and the present litigation ensued.

The plaintiffs comprise three groups: The Committee for a Fair and Balanced Map, a notfor-profit organization created by Illinois citizens concerned about the congressional redistricting process in Illinois; nine Republican Congressmen and one Republican Congresswoman; and six registered voters, four of whom are identified as Latino and two as Republican (collectively "plaintiffs"). The defendants include the Illinois State Board of Elections, the agency charged with implementing the 2011 Map, and its individual members (collectively "defendants").

Plaintiffs allege that the 2011 Map discriminates against Latino and Republican voters, and they seek to invalidate the redistricting plan in whole or in part. Specifically, plaintiffs allege that the 2011 Map violates the Voting Rights Act of 1965, 42 U.S.C. § 1973 ("VRA") (Count I), the Fourteenth

Amendment (Count II) and the Fifteenth Amendment (Count III) by diluting the voting strength of Latino voters. Plaintiffs also claim that the 2011 Map constitutes an impermissible racial gerrymander in violation of the Fourteenth Amendment (Count IV) and a partisan gerrymander in violation the First Amendment (Count V) and Fourteenth Amendment (Count VI).

***2** The parties have engaged in expedited discovery. Pursuant to Federal Rule of Civil Procedure 45, plaintiffs served thirty subpoenas *duces tecum* [1] on a number of non-party entities and individuals, including the (i) Illinois House of Representatives (through Tim Mapes, Chief of Staff); (ii) Office of the Speaker of the Illinois House of Representatives (through Tim Mapes, Chief of Staff); (iii) Illinois House Redistricting Committee (through Barbara Flynn Currie, Chairperson); (iv) Illinois Senate (through Jillayne Rock, Secretary of the Senate); (v) Office of the Senate President (through Andrew Manar, Chief of Staff); (vi) Illinois Senate Redistricting Committee (through Kwame Raoul, Chairperson); and (vii) various legislative staffers with knowledge of the reapportionment scheme (collectively "Non–Parties"). The subpoenas contain twenty-one requests for production encompassing documents and communications related to the 2011 Map. Non–Parties refused to comply with plaintiffs' requests, claiming that legislative immunity, the deliberative process privilege, the attorney-client privilege and/or the workproduct doctrine protect the documents from disclosure.

1 The United States District Court for the Central District of Illinois issued twenty-five of the thirty subpoenas served by plaintiffs because most of subpoenaed witnesses reside in Springfield, Illinois. The remaining five subpoenas were issued by the United States District Court for the Northern District of Illinois. According to Non–Parties, the Northern District of Illinois subpoenas capture all of the documents within the scope of the Central District of Illinois subpoenas, including those possessed by the Illinois House and Senate Redistricting Committees and individual staff members.

On September 15, 2011, plaintiffs filed a motion to compel enforcement of the third party subpoenas. The next day, the President of the Illinois Senate, the Speaker of the Illinois House of Representatives, and the chairpersons of the Illinois House and Senate Redistricting Committees moved to quash. Each party was allowed to file a response and this three judge court heard arguments on September 29, 2011.

ANALYSIS

I. Relevance of Requested Discovery

Plaintiffs have served Non–Parties with twenty-one document requests.

A. Requested Documents

Plaintiffs seek a plethora of documents concerning the planning, development, negotiation, and drawing of the 2011 Map. [2] These documents can be broadly categorized as (1) information concerning the motives, objectives, plans, reports, and/or procedures used by lawmakers to draw the 2011 Map; [3] (2) information concerning the identities of persons who participated in decisions regarding the 2011 Map; [4] (3) the identities of experts and/or consultants retained to assist in drafting the 2011 Map and contractual agreements related thereto; [5] and (4) objective facts upon which lawmakers relied in drawing the 2011 Map. [6]

2 Plaintiffs' document requests include:

1. All documents related to the state of Illinois legislative and/or congressional redistricting process which led to the planning, development, negotiation, drawing, revision or redrawing of the 2011 Map.
2. All documents, including, but not limited to, reports, analyses, election results or other election data, and communications pertaining or relating to the planning, development, negotiation, drawing, revision or re-drawing of the 2011 Map.
3. All documents regarding any communications, discussions, meetings and/or conversations, pertaining or relating to the planning, development, negotiation, drawing, revision or re-drawing of the 2011 Map with any of the following: Defendants; Democratic Congressional Campaign Committee or anyone else acting on its behalf; Illinois House and Senate Redistricting Committees; any member of the Illinois General Assembly or anyone acting on their behalf; any current or former member of Congress and anyone acting on their behalf; any interest groups that testified at the redistricting hearings.
4. All documents, communications or other matter, including all data files or other data type related to election and/or voter data; election redistricting software; and all 2010 Census data used for the purpose of planning and drawing the 2011 Map or

any other potential congressional plan that was not adopted.

5. All documents, communications or other matter, that constitute, refer or relate to data files and drafts of data files used to formulate the composition of Districts 3, 4, 5 of the 2011 Map.
6. Any draft drawings of any Districts of the 2011 Map.
7. All documents which reflect the identity of any and all persons who assisted in the drawing of Districts 3, 4, and 5 of the 2011 Map.
8. All documents which reflect when the planning and drawing of Districts 3, 4, and 5 of the 2011 Map were finalized.
9. All documents which reflect the identity of person(s) who made or participated in the decision to have the Latino Voting Age Population ("VAP") in District 3 as 24.64%.
10. All documents which reflect the identity of person(s) who made or participated in the decision to have the Latino VAP in District 4 as 65.92%.
11. All documents which reflect the identity of person(s) who made or participated in the decision to have the Latino VAP in District 5 as 16.05%.
12. All documents which reflect the identity of any expert or consultant who reviewed, commented on, advised or otherwise rendered any advice or opinion concerning the 2011 Map.
13. All documents which reflect the identity of any expert or consultant who conducted any racial bloc voting or racial polarization analysis concerning the 2011 Map.
14. Documents which reflect any racial bloc voting or racial polarization analysis conducted by any expert or consultant.
15. All documents or communications pertaining or relating to any analysis, review, study or consideration undertaken by any expert, consultant, scholar or other person regarding whether the 2011 Map complies with the VRA, the U.S. Constitution, or the Illinois Constitution.
16. All documents which consist of reports or opinions of any expert or consultant used to support the composition of the entire 2011 Map.
17. All documents which reflect any and all analysis concerning the viability of drawing two Latino congressional Districts, whether the Districts be considered majority or influence districts.
18. Any engagement letters provided to experts or consultants engaged for the purposes of planning, preparing, drawing, and analyzing or providing supporting evidence for the 2011 Map.
19. All records of payment to any experts or consultants.
20. All documents identifying any person(s) involved in the decision to post the proposed congressional plan on the Illinois Senate website during the early morning hours of May 27, 2011.
21. All documents identifying any person(s) who actually posted the congressional plan on the Illinois Senate website during the early morning hours of May 27, 2011.

[3] *See* Req. Nos. 1–6, 8, 14–17. [Doc. No. 52–1.]

[4] *See* Req. Nos. 7, 9–11, 20–21. [Doc. No. 52–1.]

[5] *See* Req. Nos. 12–13, 18–19. [Doc. No. 52–1.]

[6] *See* Req. Nos. 2 & 4. [Doc. No. 52–1.]

B. Relevancy of Requested Documents

Under Rule 26 of the Federal Rules of Civil Procedure, parties may obtain discovery of any nonprivileged matter that is relevant to any party's claim or defense. Plaintiffs make six claims related to the 2011 Map. *See* Compl. ¶¶ 108–38. Proof of discriminatory intent is required for plaintiffs to prevail on their Fourteenth and Fifteenth Amendment racial discrimination claims.[7] It has also been found sufficient, though not necessary, to sustain a VRA claim. *See United States v. Irvin*, 127 F.R.D. 169, 171 (C.D.Cal.1989) (after the 1982 amendments to the VRA, "plaintiffs may carry their burden by fulfilling *either* the more restrictive intent test or the results test") (internal quotation marks and citations omitted); *accord Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir.1990).

[7] The test for plaintiffs' partisan gerrymandering claims is unsettled. *See Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004).

***3** To demonstrate intentional discrimination, however, plaintiffs need not offer direct evidence of discriminatory intent. Direct evidence includes statements made by the decision making body or members thereto. *See, e.g., ACORN v. County of Nassau*, No. 05–2301, 2007 WL 2815810, at *3 (E.D.N.Y. Sept.25, 2007) (*ACORN I*) ("testimony regarding a legislator's stated motivation might be the most direct form of evidence" of discriminatory intent.) Instead, plaintiffs may rely on circumstantial evidence to show that lawmakers purposefully discriminated against Latino and/or Republican voters in enacting the 2011 Map. *See Ketchum v. Byrne*, 740 F.2d 1398, 1406 (7th Cir.1984) ("In *Rogers*, the [Supreme] Court affirmed the district court's finding of intentional

discrimination based on indirect and circumstantial evidence and endorsed its reliance on a 'totality of the circumstances' approach.") (citing *Rogers v. Lodge*, 458 U.S. 613, 622–27, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982)).

For example, to evaluate claims of racial vote dilution under the Fourteenth Amendment, courts rely on the totality of the circumstances test. *See Rogers*, 458 U.S. at 618. Under this test, courts may infer discriminatory intent from a variety of circumstantial factors. These factors include, but are not limited to, bloc voting along racial lines; low minority voter registration; exclusion from the political process; unresponsiveness of elected officials to needs of minorities; and depressed socio-economic status attributable to inferior education and employment and housing discrimination. *Ketchum*, 740 F.2d at 1406 (citing *Rogers*, 458 U.S. at 622–27). Other factors include the historical background of the decision; the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; minority retrogression (i.e. a decrease in the voting strength of a cohesive voting bloc over time); and manipulation of district boundaries to adjust the relative size of minority groups, including the "packing" of minority voters. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Rybicki v. State Bd. of Elections*, 574 F.Supp. 1082, 1108–12 (N.D.Ill.1982). Thus, under the totality of the circumstances test, the court may infer an "invidious discriminatory purpose ... from the totality of the relevant facts," including the discriminatory effect of the redistricting scheme. *Rogers*, 458 U.S. at 618 (citation omitted).

Plaintiffs allege many of these circumstantial factors in their Complaint. *See* Compl. ¶¶ 38–45 (events leading up to enactment); ¶ 60 (history of discrimination); ¶¶ 52–54 (manipulating district boundaries); ¶ 57 (racial polarization of elections). Yet many of plaintiffs' document requests solicit direct, not circumstantial, evidence of legislative intent, by demanding documents that contain communications between lawmakers and their staff. *See, e.g.*, Req. Nos. 1–5 & 8. These documents are likely to contain the motives, impressions and/or opinions of those responsible for drafting the 2011 Map. Other requests seek the identities of those who made or participated in key decisions, suggesting an attempt by plaintiffs to gain insight to the thought processes of these individuals, if not now, then perhaps later through depositions. *See, e.g.*, Req. Nos. 7, 9–13.

***4** To be sure, statements made by members of the decision-making body are relevant to show discriminatory intent. *See Village of Arlington Heights*, 429 U.S. at 268. But this is but one factor among many that plaintiffs may use to prove their claims. As acknowledged by the Supreme Court,

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

Hunter v. Underwood, 471 U.S. 222, 228, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (quoting *United States v. O'Brien*, 391 U.S. 367, 383–84, 88 S.Ct. 1673, 1682–1683, 20 L.Ed.2d 672 (1968)); *see also Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971) ("no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it"); *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm.*, 536 F.Supp. 578, 586 (D.Pa.1982) (holding that discriminatory statements made by the chairman of a city redistricting committee were insufficient to prove discriminatory intent absent a showing that the state legislative body adopted the chairman's views). Thus, the individual motivations and objectives of those who drafted the 2011 Map, although relevant, are not critical to the outcome of this case.

The remainder of plaintiffs' document requests pertain to facts, plans, reports or procedures created, formulated or used by lawmakers to draft the 2011 Map. Objective facts, such as United States Census reports and election returns, are highly

relevant to plaintiffs' claims and necessary to prove many of the totality of the circumstances factors, including racial bloc voting, retrogression and manipulation of district boundaries. The actual facts upon which lawmakers relied, however, are less relevant because they say little as to whether the overall effect of the 2011 Map is discriminatory. Lawmakers may have considered a lot of facts and drawn a discriminatory map, or considered no facts and drawn a perfectly constitutional map. The proof, so they say, is in the pudding; and the pudding is the 2011 Map.

Finally, to the extent that the plans, reports and procedures used by lawmakers to draw the 2011 Map shed light on the sequence of events leading up to its enactment, this information may be relevant to plaintiffs' claims. The most important events, however, are those undertaken by the legislative body, such as public hearings, committee meetings and floor debates. The deliberations of individual lawmakers, even those who helped draw the 2011 Map, are less probative of the totality of the circumstances test. Nevertheless, because most of plaintiffs' requests seek material relevant within Rule 26, the court will consider whether any of these documents are privileged from disclosure.

II. Identification of Nonprivileged Matter

***5** The issue before this court is the extent to which legislative immunity shields non-party state lawmakers from providing evidence in a civil lawsuit related to their legislative activities. Plaintiffs argue that the privilege is qualified and narrow. Non–Parties argue that it is absolute.

A. Absolute Legislative Immunity

The Speech or Debate Clause of the United States Constitution grants federal lawmakers absolute legislative immunity from civil suit for their legitimate legislative activities. The Clause states that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." U.S. CONST. ART. I, § 6, cl. 1. When applied, this provision shields federal lawmakers "engaged in the sphere of legitimate legislative activity" from being sued for prospective relief or damages. *Supreme Ct. of Va. v. Consumers Union of U.S.*, 446 U.S. 719, 732, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980) (quoting *Tenney v. Branhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)). It also mandates an evidentiary privilege that prevents the legislative acts of a member of Congress from being used against him or her in court. *See United States v. Helstoski*, 442 U.S. 477, 488–89, 99 S.Ct. 2432, 61 L.Ed.2d 12 (1979). Finally, it provides a testimonial privilege that protects a member or the member's aides from judicial questioning regarding the member's legislative acts. *Gravel v. United States*, 408 U.S. 606, 616, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972). "In sum, the Speech or Debate Clause prohibits inquiry ... into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 512, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972).

The Speech or Debate Clause, by its terms, does not apply at all to state and local legislators. *See, e.g.*, *Fla. Ass'n of Rehab. Fac., Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 266 (N.D.Fla.1995). Instead, the federal common law applies.[8] Applying the federal common law, the Supreme Court in *Tenney* held that members of a state legislative committee were immune from civil liability for allegedly violating an individual's civil rights by calling him before the committee to testify in an effort to interfere with his First Amendment rights. 341 U.S. at 376–77. Since *Tenney*, it is clear that under the federal common law "state and local officials are absolutely immune from federal suit for personal damages for their legitimate legislative activities." *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 527 (7th Cir.2011) (citations omitted), *partially vacated and decided on unrelated grounds by Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F3d 799 (7th Cir.2011); *see also Tenney*, 341 U.S. at 376–77. This immunity also extends to "legislative staff members, officers, or other employees of a legislative body, although it is considered less absolute as applied to these individuals." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D.Md.1992) (internal quotation marks and citations omitted).

8 This case presents federal questions and therefore the federal common law applies. Fed.R.Evid. 501; *see generally* 3 WEINSTEIN'S EVIDENCE § 501.02[2][b][i] (1997) (in federal question cases, federal privilege law, rather than the privilege law of the forum state, generally applies).

***6** The scope of the federal common law is not entirely settled, however. The Supreme Court has held that in a federal criminal prosecution, a state legislator did not have an absolute evidentiary privilege based in legislative immunity from introduction of evidence of his legislative acts. *United States v. Gillock*, 445 U.S. 360, 373, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980). *Gillock* carved out an exception from *Tenney*, reasoning that "the cases in this court which have

recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." 445 U.S. at 372. *See Fla. Ass'n of Rehab. Fac., Inc,* 164 F.R.D. at 267 ("legislators and some of their staff members may be immune to civil process in a suit directly against them ... [but this immunity] is not an evidentiary privilege").

Since *Gillock,* a number of courts have "rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege." *Manzi v. DiCarlo,* 982 F.Supp. 125, 129 (E.D.N.Y.1997) (citations omitted); *see Cano v. Davis,* 193 F.Supp.2d 1177, 1180 (C.D.Cal.2002) ("state legislators do not enjoy the type of absolute protection afforded members of the Congress under the Speech or Debate Clause"); *In re Grand Jury,* 821 F.2d 946, 957 (3d Cir.1987) ("Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause.").

The issue before this court is whether common law legislative immunity absolutely shields non-party state lawmakers from providing evidence in a civil lawsuit related to their legislative activities. Given the federal interests at stake in redistricting cases, this court concludes that common law legislative immunity does not entirely shield Non–Parties here. In *Gillock,* the Supreme Court noted that "where important federal interests are at stake, such as in the enforcement of federal criminal statutes, comity yields." 445 U.S. at 373. The federal government's interest in enforcing voting rights statutes is, without question, important. *See, e.g., Irvin,* 127 F.R.D. at 174 ("The federal interest in the present case is compelling. The Voting Rights Act forbids local practices that abridge the fundamental right to vote. This Act requires vigorous and searching federal enforcement."); *Bartlett v. Strickland,* 556 U.S. 1, ——, 129 S.Ct. 1231, 1240, 173 L.Ed.2d 173 (2009) ("Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote."). Voting rights cases, although brought by private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions. Thus, much as in *Gillock,* "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government." *Gillock,* 445 U .S. at 373.

***7** Moreover, the Supreme Court has stated that evidentiary privileges 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." *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (citation omitted). This court therefore does not find in the common law an absolute immunity for non-party state lawmakers that protects them from producing documents in federal redistricting cases. Instead, Non–Parties' privilege claims are best analyzed under the doctrine of legislative privilege.

B. Legislative Privilege

Other courts in different contexts have applied a qualified legislative privilege to protect state lawmakers from producing documents related to their legislative activities. This privilege is similar to the deliberative process privilege, which is also qualified, but the deliberative process privilege applies to the executive branch, not the legislature. The legislative privilege does not shield lawmakers from being sued, but rather protects them from producing documents in certain cases. *See Lindley v. Life Ins. Co. of Am.,* No. 08–CV–379, 2009 WL 2245565, at *9 (N.D.Okla. Jul. 24, 2009) ("Generally, legislators' immunity from suit is referred to as 'legislative immunity,' and the evidentiary privilege accorded legislators is referred to as the 'legislative privilege.' "). Under the federal common law, legislative privilege is qualified, not absolute, and may be overcome by a showing of need. *In re Grand Jury,* 821 F.2d at 958; *Joseph's House & Shelter, Inc. v. City of Troy, N.Y.,* 641 F.Supp.2d 154, 158 n. 3 (N.D.N.Y.2009).

In determining whether and to what extent a state lawmaker may invoke legislative privilege, the court will consider the following factors: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Rodriguez v. Pataki,* 280 F.Supp.2d 89, 101 (S.D.N.Y.2003) (citing *In re Franklin Nat'l Bank Secs. Litig.,* 478 F.Supp. 577, 583 (E.D.N.Y.1979)); *see also ACORN v. County of Nassau,* No.05–2301, 2009 WL 2923435, at *2 (E.D.N.Y. Sept.10, 2009) (*ACORN II*); *Joseph's House & Shelter, Inc.,* 641 F.Supp.2d at 158 n. 3. In considering these factors, the court's goal is to determine whether the need for disclosure and accurate fact finding outweighs the legislature's "need

to act free of worry about inquiry into [its] deliberations." *ACORN II*, 2009 WL 2923435, at *2 n. 2.[9]

9 These factors are also used by some courts to evaluate the availability and scope of the deliberative process privilege. *See, e.g., Doe v. Nebraska*, Nos. 8:09CV456, 4:09CV3266, 4:10CV3005, ––F.Supp.2d ––––, 2011 WL 1480483, at *7 (D.Neb. Apr.19, 2011). The deliberative process privilege prohibits discovery of communications that are used by governmental bodies in formulating policy. *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir.1993). The key difference between the deliberative process privilege and the legislative privilege is that the former protects executive and administrative deliberations, and the latter safeguards legislative independence. *See Kay v. City of Rancho Palos Verdes*, No. CV 02–3922, 2003 WL 25294710, at * 15 (C.D.Cal. Oct. 10, 2003).

Some courts considering the scope of the deliberative process privilege have applied the same legislative privilege factors discussed herein. *See, e.g, Doe*, 2011 WL 1480483, at *7; *Kay*, 2003 WL 25294710, at * 18. In this respect, "the balancing tests that courts have suggested for challenges to both the legislative privilege and the deliberative process privilege are quite similar and functionally interchangeable." *Kay*, 2003 WL 25294710, at * 17 (collecting cases).

Several cases in the Northern District of Illinois, however, have required a particularized showing to invoke the deliberative process privilege. *See, e.g., Buonauro v. City of Berwyn*, No. 08–C–6687, 2011 WL 2110133, at *2 (N.D.Ill. May 25, 2011) ("In order to invoke the privilege, a party must show three elements: (1) the department head with control over the information has made a formal claim of privilege; (2) the responsible official must demonstrate, usually by affidavit, the reasons for preserving the confidentiality of the documents; and, (3) the official must specifically identify and describe the documents in question.") (citing *Ferrell v. U.S. Dep't Hous. & Urban Dev.*, 177 F.R.D. 425, 428 (N.D.Ill.1998)); *see also Parvati Corp. v. City of Oak Forest*, No. 08–C–702, 2010 WL 2836739, at *5 (N.D.Ill. July 19, 2010).

Because Non–Parties are members of the legislative branch, not the executive branch, and because they have not made the particularized showing required to invoke the deliberative process privilege, the deliberative process privilege does not apply. This court will consider cases in other courts analyzing the deliberative process privilege only to the extent that they bear on the scope of the legislative privilege.

C. Balancing of Interests

1. The Seriousness of the Litigation and the Issues Involved, and the Role of the Government in the Litigation

***8** In balancing the relevant interests, the first two factors weigh in favor of disclosure. There can be little doubt that plaintiffs' allegations are serious. Plaintiffs raise profound questions about the legitimacy of the redistricting process and the viability of the 2011 Map. Moreover, the legislators' role in the allegedly unlawful conduct is direct. The General Assembly, through its members, aides and consultants, was primarily responsible for drafting, revising and approving the 2011 Map. These actions are under scrutiny. This is not, then, "the usual 'deliberative process' case in which a private party challenges governmental action ... and the government tries to prevent its decision-making process from being swept up unnecessarily into [the] public [domain]." *United States v. Bd. of Ed. of City of Chicago*, 610 F.Supp. 695, 700 (N.D.Ill.1985). Rather, "the decisionmaking process ... [itself] *is* the case," at least to the extent that plaintiffs allege that the General Assembly intentionally discriminated against Latino and/or Republican voters. *Id.* (emphasis in original). The seriousness of the litigation and the role of Non–Parties militate in favor of disclosure.

2. The Relevance of the Evidence Sought to be Protected and the Availability of Other Evidence

As discussed in Part I.B. the evidence plaintiffs seek is relevant, although it is not central to the outcome of this case. Moreover, the availability of other evidence favors non-disclosure. Plaintiffs already have considerable information at their fingertips. This includes public hearing minutes, special interest group position papers, statements made by lawmakers during debate, committee reports, press releases, newspaper articles, census reports, registered voter data and election returns. These documents and data are a matter of public record. As such, these factors weigh against disclosure.

3. The Possibility of Future Timidity by Government Employees

Finally, the need to encourage frank and honest discussion among lawmakers favors nondisclosure. Plaintiffs claim that disclosure of the subpoenaed documents will not unduly chill legislators in their future communications because Non–Parties are not defendants in the present litigation and there is little danger that any discovered material would be used

against them in a later criminal prosecution. Plaintiffs also claim that because this case involves redistricting—a task not oft performed by legislators—permitting discovery will not work to chill the day-to-day functioning of the legislature.

The Redistricting Act, however, evolved from the same legislative process as any other law. Legislators negotiated the law in private and debated it in public. Infrequency is therefore irrelevant. In addition, the need for confidentiality between lawmakers and their staff is of utmost importance. Legislators face competing demands from constituents, lobbyists, party leaders, special interest groups and others. They must be able to confer with one another without fear of public disclosure.

***9** In this respect, the legislature is not unlike other branches of government. As noted by the Third Circuit, a "legislator's need for confidentiality is similar to the need for confidentiality in communications between judges, between executive officials, and between a President and his aides." *In re Grand Jury,* 821 F.2d at 957 (citations omitted); *see also Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit,* 783 F.2d 1488, 1520 (11th Cir.1986) (judicial privilege applies where matters under inquiry implicate communications among a judge and his staff concerning official judicial business such as "the framing and researching of opinions, orders and rulings"); *N.L.R.B. v. Sears, Roebuck & Co.,* 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (executive privilege for agency officials applies to documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated") (citation omitted).

Failure to protect confidential communications between lawmakers and their staff will not only chill legislative debate, it will also discourage "earnest discussion within governmental walls." *Doe,* 2011 WL 1480483, at *6 (citations omitted). In the redistricting context, full public disclosure would hinder the ability of party leaders to synthesize competing interests of constituents, special interest groups and lawmakers, and draw a map that has enough support to become law. This type of legislative horse trading is an important and undeniable part of the legislative process.

Courts have recognized that disclosure of confidential documents concerning intimate legislative activities should be avoided. *See Rodriguez,* 280 F.Supp.2d at 102; *Kay,* 2003 WL 25294710, at * 14. Courts applying this approach have held that a qualified privilege protects documents "created prior to the passage and implementation [of a bill] that involve opinions, recommendations or advice about legislative decisions between legislators or between legislators and their aides." *Doe,* 2011 WL 1480483, at *8; *see generally City of Las Vegas v. Foley,* 747 F.2d 1294, 1297 (9th Cir.1984) ("The Court prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task.") (citations omitted).

By limiting privileged documents to those that contain "opinions, recommendations or advice," courts have allowed discovery of "documents containing factually based information used in the decision-making process or disseminated to legislators or committees, such as committee reports and minutes of meetings." *Id.* at *6 (citations omitted). Courts have also required disclosure of "the materials and information available [to lawmakers] at the time a decision was made." *ACORN I,* 2007 WL 2815810, at *4 (citing *Village of Arlington Heights,* 429 U.S. at n. 20).

***10** This approach strikes the proper balance between the need for public accountability and the desire to avoid future timidity of lawmakers. Although always accountable to the public, lawmakers must be able to confer in private. This court therefore concludes that the legislative privilege shields from disclosure pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation. It does not protect facts or information available to lawmakers at the time of their decision.

In terms of the categories identified above, (1) information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers to draw the 2011 Map; and (2) information concerning the identities of persons who participated in decisions regarding the 2011 Map, the need for the information is outweighed by the purposes of the qualified privilege. The contrary is true of (3) the identities of experts and/or consultants retained to assist in drafting the 2011 Map and contractual agreements related thereto; and (4) objective facts upon which lawmakers relied in drawing the 2011 Map. Indeed, much of this information is discoverable under Rule 26(a)(2)(B)(ii) should defendants' experts chose to rely on it.

D. Waiver

As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider. *See ACORN I,* 2007 WL 2815810, at *4 ("the legislative privilege may be waived as to communications made in the presence of third parties") (citation omitted). "Where a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator." *Id.* (citation omitted). Thus, communications between Non–Parties and their staff retain their privileged status. *See id.* at *5.

Communications between Non–Parties and outsiders to the legislative process, however, do not. This includes lobbyists, members of Congress and the Democratic Congressional Campaign Committee ("DCCC"). Although these groups may have a heightened interest in the outcome of the redistricting process, they could not vote for or against the Redistricting Act, nor did they work for someone who could. As such, the legislative privilege does not apply. *See Rodriguez,* 280 F.Supp.2d at 101 ("a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation [is] a session for which no one could seriously claim privilege").

The same rule applies to experts and/or consultants retained or utilized by Non–Parties to assist in the redistricting process. "While legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view.... [A] contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity." *ACORN I,* 2007 WL 2815810, at *6. Thus, to the extent that Non–Parties relied on reports or recommendations generated by outside consultants to draft the 2011 Map, they waived their legislative privilege as to these documents.

***11** Finally, Non–Parties cannot invoke the privilege as to themselves yet allow others to use the same information against plaintiffs at trial. *See, e.g., Brown v. City of Detroit,* 259 F.Supp.2d 611, 623–24 (E.D.Mich.2003); *Pacific Gas & Elec. Co. v. Lynch,* No. C–01–3023, 2002 WL 32812098, at *3 (N.D.Cal. Aug.19, 2002). As such, any communications disclosed by NonParties to defendants or their trial experts, upon which defendants or their experts intend to rely, must be disclosed to plaintiffs. *See* Fed.R.Civ.P. 26(a)(2)(B)(ii). [10]

10 Non–Parties indicated that to the extent the legislative privilege did not shield them from discovery, they would likely assert attorney-client privilege or work product immunity. This decision addresses only the legislative privilege raised in the motions. If Non–Parties have a serious basis for asserting any other privilege, this decision does not foreclose them.

ORDER

Plaintiffs' motion to compel enforcement of third party subpoena [Dkt. No. 52] and certain non-parties' motion to quash subpoenas and for a protective order [Dkt. No. 58] are granted in part and denied in part, respectively. Non-parties are directed to comply with this order by October 19, 2011, specifically as follows:

To the extent that plaintiffs seek documents containing the (1) motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the 2011 Map prior to the passage of the Redistricting Act; [11] or (2) identities of persons who participated in decisions regarding the 2011 Map, [12] their requests are denied and the subpoenas are quashed. Plaintiffs are also prohibited from subpoenaing the aforementioned documents from individual members of the General Assembly unless the member affirmatively waives his or her legislative privilege in writing.

11 *See* Req. Nos. 1–6, 8, 14–17. [Doc. No. 52–1.]

12 *See* Req. Nos. 7, 9–11, 20–21. [Doc. No. 52–1.]

The motion to compel is granted and the motion to quash is denied as to documents containing objective facts upon which lawmakers relied in drawing the 2011 Map; [13] documents available to members of the General Assembly at the time the Redistricting Act was passed; the identities of experts and/or consultants retained by Non–Parties to assist in drafting the 2011 Map and contractual agreements related thereto; [14] and any documents that do not contain information concerning categories (1) or (2) above or to which Non–Parties have waived their legislative privilege. This order is applicable only to those parties served with subpoenas issued by the Northern District of Illinois.

13 *See* Req. Nos. 2 & 4. [Doc. No. 52–1.]

14 *See* Req. Nos. 12–13, 18–19. [Doc. No. 52–1.]

All documents withheld as privileged under this order shall be identified in a privilege log that contains (1) the name and capacity of each individual from whom or to whom a document was communicated; (2) the date of the document and attachments; (3) the type of document; (4) Bates number identification; and (5) a description of the subject matter in sufficient detail to allow the receiving parties to determine whether the privilege claim should be challenged. *See Petrovic v. City of Chicago*, No. 06–C–611, 2007 WL 2410336, at *2 (N.D.Ill. Aug. 21, 2007).

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2013 WL 6570903

Supreme Court of Florida.

The LEAGUE OF WOMEN VOTERS OF FLORIDA, et al., Petitioners,
v.
The FLORIDA HOUSE OF REPRESENTATIVES, et al., Respondents.
Rene Romo, et al., Petitioners,
v.
The Florida House of Representatives, et al., Respondents.

Nos. SC13–949, SC13–951. | Dec. 13, 2013.

Synopsis

Background: Challengers to congressional apportionment plan brought action against state legislature for declaratory and injunctive relief, asserting unconstitutional partisan or discriminatory intent. The Circuit Court granted in part and denied in part the legislature's motion for a protective order with regard to challengers' discovery requests. On certiorari review, the First District Court of Appeal, 113 So.3d 117, Wetherell, J., quashed the order. The Supreme Court granted review.

Holdings: Addressing novel issues of law, the Supreme Court, Pariente, J., held that:

[1] state legislators and legislative staff members possess a legislative privilege under the state constitution's separation of powers provision;

[2] legislative privilege is not absolute and may yield to a compelling, competing interest;

[3] legislative privilege had to be balanced against a compelling, competing interest in ensuring compliance with state constitutional prohibiting against partisan political gerrymandering; and

[4] legislators and staff members could assert or waive legislative privilege at discovery stage as to their subjective thoughts or impressions, but could not refuse to testify or produce documents concerning any other information or communications pertaining to reapportionment process.

Decision of District Court of Appeal quashed.

Labarga, J., concurred with an opinion in which Lewis, J., concurred.

Perry, J., concurred with an opinion in which Quince, J., concurred.

Canady, J., dissented with an opinion in which Polston, C.J., concurred.

West Headnotes (6)

[1] Appeal and Error
Cases Triable in Appellate Court

Existence of a legislative privilege, and the parameters of such a privilege, are questions of law subject to de novo review.

1 Cases that cite this headnote

[2] Constitutional Law
Nature and Scope in General

States
Privileges and Exemptions

State legislators and legislative staff members possess a legislative privilege under Florida law, based on the principle under state constitution's separation of powers provision that no branch may encroach upon the powers of another and on inherent principles of comity that exist between the coequal branches of government; in other words, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. West's F.S.A. Const. Art. 2, § 3.

1 Cases that cite this headnote

[3] **States**
Privileges and Exemptions

Legislative privilege that exists under separation of powers principles codified in state constitution is not absolute and may yield to a compelling, competing interest. West's F.S.A. Const. Art. 2, § 3.

1 Cases that cite this headnote

[4] **States**
Privileges and Exemptions

When the legislative privilege is asserted, courts must engage in two-step inquiry to determine, first, whether the information sought falls within the scope of the privilege, and, second, whether the purposes underlying the privilege, namely, the deference owed by each coequal branch of government to the others and the practical concerns of legislators' abilities to perform their legislative functions free from the burdens of forced participation in private litigation, are outweighed by a compelling, competing interest. West's F.S.A. Const. Art. 2, § 3.

[5] **States**
Privileges and Exemptions

Legislative privilege based on separation of powers provision in state constitution had to be balanced against a compelling, competing interest in ensuring compliance with state constitutional prohibiting against partisan political gerrymandering, in action against state legislature in which challengers sought declaratory and injunctive relief in connection with congressional reapportionment plan, asserting improper legislative intent. West's F.S.A. Const. Art. 2, § 3, Art. 3, § 20(a).

[6] **States**
Privileges and Exemptions

Legislators and their staff members could assert or waive a claim of legislative privilege at discovery stage of declaratory judgment action against state legislature in connection with congressional reapportionment plan that purportedly violated state constitutional prohibition against partisan political gerrymandering, to the extent that challengers sought testimony or documents revealing legislators' or staff members' subjective thoughts or impressions, but could not refuse to testify or produce documents concerning any other information or communications pertaining to reapportionment process. West's F.S.A. Const. Art. 2, § 3, Art. 3, § 20(a).

Attorneys and Law Firms

Talbot D'Alemberte of D'Alemberte & Palmer, PLLC, Tallahassee, FL; Adam M. Schachter and Gerald E. Greenberg of Gelber Schachter & Greenberg, P.A., Miami, FL; David B. King and Thomas A. Zehnder of King, Blackwell, Zehnder & Wermuth, P.A., Orlando, FL; Mark Herron, Robert J. Telfer III and Angelina Perez of Messer Caparello P.A., Tallahassee, FL; and Marc Elias and John Devaney of Perkins Coie LLP, Washington, D.C., for Petitioners.

Raoul G. Cantero, Jason N. Zakia, and Jesse L. Green of White & Case LLP, Miami, FL; George T. Levesque, General Counsel, The Florida Senate, Tallahassee, FL; Charles T. Wells, George N. Meros, Jr., Jason L. Unger, and Andy Bardos of Gray Robinson, P.A., Tallahassee, FL; Miguel A. DeGrandy of Holland & Knight LLP, Miami, FL; and Daniel E. Nordby, General Counsel, The Florida House of Representatives, Tallahassee, FL; J. Andrew Atkinson, General Counsel, and Ashley E. Davis, Assistant General Counsel, Florida Department of State, Tallahassee, FL, for Respondents.

Daniel J. Gerber of Rumberger, Kirk & Caldwell, Orlando, FL, for Amici Curiae James Harold Thompson, John M. McKay, and Ken Pruitt.

Opinion

PARIENTE, J.

***1** Does enforcement of the explicit prohibition in the Florida Constitution against partisan political gerrymandering and improper discriminatory intent in

redistricting outweigh a claim of an absolute legislative privilege? Specifically, the issue presented to the Court is whether Florida state legislators and legislative staff members have an absolute privilege against testifying as to issues *directly* relevant to whether the Legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory "intent." *See* art. III, § 20(a), Fla. Const.

This Court is charged with the solemn obligation to ensure that the constitutional rights of its citizens are not violated and that the explicit constitutional mandate to outlaw partisan political gerrymandering and improper discriminatory intent in redistricting is effectively enforced. While the Legislature asserts that the challengers should be precluded from accessing relevant discovery information because it is absolutely privileged, we conclude that there is no unbending right for legislators and legislative staff members to hide behind a broad assertion of legislative privilege to prevent the discovery of relevant evidence necessary to vindicate the explicit state constitutional prohibition against unconstitutional partisan political gerrymandering and improper discriminatory intent.

This Court has held, in interpreting the constitutional redistricting "intent" standard, that "the focus of the analysis must be on both direct and circumstantial evidence of intent." *In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I),* 83 So.3d 597, 617 (Fla.2012). Further, this Court has stated that "there is no acceptable level of improper intent." *Id.* As Chief Judge Benton aptly observed in his dissenting opinion to the First District Court of Appeal's decision below, "[t]he enactment of article III, section 20 of the Florida Constitution makes plain that how and why the Legislature redistricts is a matter of paramount public concern." *Fla. House of Reps. v. Romo,* 113 So.3d 117, 131 (Fla. 1st DCA 2013) (Benton, C.J., dissenting).

In this opinion, we decide for the first time that Florida should recognize a legislative privilege founded on the constitutional principle of separation of powers, thus rejecting the challengers' assertion that there is no legislative privilege in Florida. We also hold, however, that this privilege is not absolute where, as in this case, the purposes underlying the privilege are outweighed by the compelling, competing interest of effectuating the *explicit* constitutional mandate that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting. We therefore reject the Legislature's argument that requiring the testimony of individual legislators and legislative staff members will have a "chilling effect" among legislators in discussion and participation in the reapportionment process, as this type of "chilling effect" was the precise purpose of the constitutional amendment outlawing partisan political gerrymandering and improper discriminatory intent.

***2** We also unequivocally reject the dissent's hyperbolic assertion that our decision "grievously violates the constitutional separation of powers," dissenting op. at ——, by recognizing a legislative privilege but concluding that it is not absolute as to enforcing this explicit constitutional mandate. To the contrary, we strike the appropriate balance between respecting the separation of powers and fulfilling this Court's obligation to uphold the citizens' explicit constitutional protection against partisan political gerrymandering and improper discriminatory intent in redistricting.

Accordingly, we quash the First District's decision in *Florida House of Representatives v. Romo,* 113 So.3d 117 (Fla. 1st DCA 2013), which erroneously afforded legislators and legislative staff members the absolute protection of a legislative privilege. We approve the circuit court's order permitting the discovery of information and communications, including the testimony of legislators and the discovery of draft apportionment plans and supporting documents, pertaining to the constitutional validity of the challenged apportionment plan. Further, we emphasize that the circuit court is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into the balancing approach set forth in this opinion.

FACTS AND BACKGROUND

In February 2012, the Florida Legislature approved the decennial plan apportioning Florida's twenty-seven congressional districts, based on population data derived from the 2010 United States Census. Soon after its adoption, two separate groups of plaintiffs filed civil complaints in circuit court, which were later consolidated, challenging the constitutionality of the plan under new state constitutional redistricting standards approved by the Florida voters in 2010 and now enumerated in article III, section 20, of the Florida Constitution. Those standards, governing the congressional reapportionment process, appeared on the 2010 general election ballot as "Amendment 6" and, together

with their identical counterparts that apply to legislative reapportionment ("Amendment 5"), were generally referred to as the "Fair Districts" amendments. [1] All together, these "express new standards imposed by the voters clearly act as a restraint on legislative discretion in drawing apportionment plans." *Apportionment I,* 83 So.3d at 599.

The Florida Constitution's Redistricting Standards

Article III, section 20, of the Florida Constitution prohibits the Legislature from drawing an apportionment plan or individual district "with the intent to favor or disfavor a political party or an incumbent" and "with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice." Art. III, § 20(a), Fla. Const. Specifically, this constitutional provision provides in its entirety as follows:

***3** In establishing congressional district boundaries:

(a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.

(b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

(c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Art. III, § 20, Fla. Const.

In interpreting the identical standards in article III, section 21, [2] during its initial 2012 review of the legislative apportionment plan, this Court explained that the requirement that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent" is "a top priority to which the Legislature must conform during the redistricting process." *Apportionment I,* 83 So.3d at 615. This Court stated that "by its express terms, Florida's constitutional provision prohibits intent, not effect, and applies to both the apportionment plan as a whole and to each district individually." *Id.* at 617.

Because "redistricting will inherently have political consequences," this Court explained that "the focus of the analysis must be on both direct and circumstantial evidence of intent." *Id.* In reviewing the objective evidence before it, this Court held that "the effects of the plan, the shape of district lines, and the demographics of an area are all factors that serve as objective indicators of intent." *Id.* Moreover, as to the intent to favor or disfavor an incumbent, this Court stated that "the inquiry focuses on whether the plan or district was drawn with this purpose in mind," and as to objective indicators of intent to favor or disfavor a political party, these "can be discerned from the Legislature's level of compliance with our own constitution's tier-two requirements, which set forth traditional redistricting principles." *Id.* at 618.

In reviewing these factors to assist this Court in discerning circumstantial evidence of intent, however, this Court was mindful that it was unable to engage in fact-finding. *See id.* at 612 & n. 13 (noting that the sole type of information available was "objective data" and refusing to consider an expert affidavit); *see also In re Senate Joint Resolution of Legislative Apportionment 2–B (Apportionment II),* 89 So.3d 872, 893 (Fla.2012) (Pariente, J., concurring) ("Working within a strict time period, this Court is realistically not able to remand for fact-finding, which creates concerns that are compounded by the fact that the Court is constrained to the legislative record that is provided to it."). Indeed, in *Florida House of Representatives v. League of Women Voters of Florida (Apportionment III),* 118 So.3d 198, 207 (Fla.2013), this Court subsequently explained that its decisions in *Apportionment I* and *Apportionment II* were "based solely on objective evidence and undisputed facts in the limited record before the Court." This Court also highlighted the need for judicial review of fact-intensive claims in order to effectuate the intent of the voters, who "clearly desired more judicial scrutiny" of apportionment plans, "not less." *Id.* at 205.

The Current Dispute

***4** In the consolidated circuit court lawsuit challenging the validity of the 2012 congressional apportionment plan

under the Florida Constitution's redistricting standards, the challengers[3] allege that the congressional apportionment plan and numerous individual districts violate the article III, section 20, standards by impermissibly favoring Republicans and incumbents, by intentionally diminishing the ability of racial and language minorities to elect representatives of their choice, and by failing to adhere to the requirement that districts be compact and follow existing political and geographical boundaries where feasible. The challengers seek both a declaratory judgment invalidating the entire plan, or at least the specific districts challenged, as well as a permanent injunction against conducting any future elections using the congressional district boundaries established by the 2012 apportionment plan.

As part of ongoing pretrial civil discovery—and specifically in an effort to uncover and demonstrate alleged unconstitutional partisan or discriminatory intent in the congressional apportionment plan—the challengers sought information from the Legislature and from third parties regarding the 2012 reapportionment process. From third-party discovery, the challengers uncovered communications between the Legislature and partisan political organizations and political consultants, which they allege reveal a secret effort by state legislators involved in the reapportionment process to favor Republicans and incumbents in direct violation of article III, section 20(a). The challengers have also taken deposition testimony from numerous third-party witnesses as to their involvement in the redistricting process and their communications with state legislators and legislative staff members, and have been provided with e-mail communications between legislators and legislative staff, as well as other public records from the Legislature.

In order to further develop and discover evidence concerning their claim of unconstitutional legislative intent in violation of article III, section 20(a), the challengers served a notice of taking depositions of the then-state Senate Majority Leader, an administrative assistant to the Senate Reapportionment Committee, and the staff director of the House Redistricting Committee. Thereafter, the Legislature filed a "Motion for Protective Order Based on Legislative Privilege," in which it requested the circuit court to enter an order "declaring that (i) no legislators or legislative staff may be deposed, and (ii) unfiled legislative draft maps and supporting documents are not discoverable." The Legislature's motion for a protective order was filed in direct response to the challengers' notice of taking depositions; however, the Legislature sought to more generally prevent the depositions of *any* legislators and legislative staff, as well as the "discovery of legislatively drawn draft redistricting plans that were never filed as bills."

***5** The circuit court granted in part and denied in part the Legislature's motion for a protective order. The circuit court determined that, although a legislative privilege exists in Florida, the privilege is not absolute and "must be balanced against other compelling government interests." Finding it "*difficult to imagine a more compelling, competing government interest* than that represented by the [challengers'] claim," the circuit court drew a distinction between "subjective" thoughts or impressions of legislators and the thoughts or impressions shared with legislators by staff or other legislators, and "objective" information or communication that "does not encroach" into those thoughts or impressions. (Emphasis added.) In drawing this distinction, the circuit court observed that "there are some categories of information and communications that are most in need of the protection offered by the privilege and some that are less in need of such protection."

Accordingly, because "the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the constitutional validity of the plan," and because the information sought by the challengers "is certainly relevant and probative of intent," the circuit court held that all "objective" information or communications "should not be protected by the privilege." However, the circuit court cautioned that any individual legislators or legislative staff members who assert a claim of legislative privilege "shall not be deposed regarding their 'subjective' thoughts or impressions or regarding the thoughts or impressions shared with them by staff or other legislators." The circuit court also determined that the same dichotomy applied to the production of documents. It therefore ordered the Legislature to produce all requested documents that do not contain "subjective" information and to schedule an in camera review as to any disputed documents.

On a petition for a writ of certiorari to review the circuit court's non-final order, the First District, relying on its prior decision in *Florida House of Representatives v. Expedia, Inc.*, 85 So.3d 517 (Fla. 1st DCA 2012), which was the first published Florida case to explicitly recognize the existence of a legislative privilege in Florida, concluded that the circuit court's order departed from the essential requirements of law when it allowed the challengers to depose legislators and legislative staff members "on any matter pertaining to their activities in the reapportionment process." *Romo*, 113

So.3d at 123. The First District reasoned that the legislative privilege "equally protects 'subjective' information, such as the legislator's rationale or motivation for proposing or voting on a piece of legislation, and 'objective' information, such as the data or materials relied on by legislators and their staff in the legislative process." *Id.* Thus, the First District quashed the circuit court's order "insofar as it permits [the challengers] to depose legislators and legislative staff members concerning the reapportionment process and insofar as it requires production of draft maps and supporting documents for an in camera review under the erroneous, unworkable objective/subjective dichotomy." *Id.* at 128.

***6** Chief Judge Benton dissented, observing in part that "[p]artisan political shenanigans are not 'state secrets,' " and that, at this stage of the litigation, "it is impossible to say that any question [the challengers] would actually have asked would be objectionable." *Id.* at 130–31 (Benton, C.J., dissenting). Subsequently, after both groups of challengers in the consolidated litigation below sought review, we exercised our discretion to accept jurisdiction to review the First District's decision because that decision expressly affects a class of constitutional officers—namely, legislators—and because this Court has never considered whether a legislative privilege exists, which is clearly an important issue to resolve. *See* art. V, § 3(b)(3), Fla. Const.

ANALYSIS

[1] The questions we confront require this Court to interpret the Florida Constitution to determine whether a legislative privilege exists and to define the parameters of that privilege as applied in this case. These are pure questions of law that are subject to de novo review.

We hold, first, that a legislative privilege exists in Florida, based on the principle of separation of powers codified in article II, section 3, of the Florida Constitution. However, we conclude that this privilege is not absolute and may yield to a compelling, competing interest. We then proceed to review whether a compelling, competing interest exists in this case. Finally, we explain why we embrace the circuit court's balancing approach at this stage of the litigation, which determined that the compelling, competing constitutional interest present here outweighs the purposes underlying the privilege, therefore allowing discovery but retaining the right of an individual legislator or legislative staff member to assert the privilege as to his or her thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators.

I. Florida's Legislative Privilege

The challengers contend that this Court should not recognize a legislative privilege because the Florida Constitution lacks a Speech or Debate Clause, which is the constitutional provision upon which the legislative privilege is traditionally premised. This clause, which generally states that legislators shall in all cases except treason, felony, or breach of the peace, not be questioned in any other place for any speech or debate in either legislative chamber, [4] is the general justification that the federal courts and other states with a state-specific clause have utilized in recognizing the legislative privilege. *See City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co.*, 942 So.2d 455, 457 (Fla. 4th DCA 2006) ("The federal courts which have acknowledged and applied the privilege have done so based largely on the Speech and Debate Clause in Article I, section 6, of the United States Constitution, which protects federal legislators from suits."); *Kerttula v. Abood*, 686 P.2d 1197, 1205 (Alaska 1984) (applying Alaska's state constitutional version of the Speech or Debate Clause to preclude the deposition of a state legislator).

***7** In contrast to the vast majority of states, the Florida Constitution does not include a Speech or Debate Clause and has not included one since the clause was omitted during the 1868 constitutional revision. [5] In fact, Florida is one of only two states in the country that lacks either a state constitutional Speech or Debate Clause or a provision protecting legislators from arrest during legislative session. [6]

Coupled with the absence of a Speech or Debate Clause in the Florida Constitution is the presence of Florida's broad constitutional right of access to public records, set forth in article I, section 24, and right to transparency in the legislative process, codified in article III, section 4. Specifically regarding the Legislature, the Florida Constitution mandates as follows:

> [A]ll prearranged gatherings, between more than two members of the legislature, or between the governor, the president of the senate, or the speaker of the house of representatives, the purpose of which is to agree upon formal legislative

> action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.

Art. III, § 4(e), Fla. Const. Further, article I, section 24(a), which "specifically includes the legislative" branch, provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body" of the state. Art. I, § 24(a), Fla. Const.

Thus, the absence of a Speech or Debate Clause and the strong public policy, as codified in our state constitution, favoring transparency and public access to the legislative process, are factors weighing against recognizing a legislative privilege in Florida. Florida statutes also do not provide for a legislative privilege.[7] Further, any common law legislative privilege has been abolished by a provision in the Florida Evidence Code providing that Florida law recognizes only privileges set forth by statute or in the state or federal constitutions.[8]

These factors, however, are not conclusive because there is another important factor that weighs in favor of recognizing the privilege—the doctrine of separation of powers. It is through this separate and important constitutional principle, which is codified in article II, section 3, of the Florida Constitution, that we recognize a legislative privilege under Florida law.

Forty states, including Florida, have a specific state constitutional provision recognizing the separation of powers between the three branches of government.[9] Article II, section 3, of the Florida Constitution, which is Florida's separation of powers provision, provides as follows:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

***8** Art. II, § 3, Fla. Const.

In *Expedia,* which was the first published case to analyze and recognize the existence of a legislative privilege in Florida, the First District concluded that the state constitutional separation of powers provision provides an independent basis to recognize a legislative privilege under Florida law. 85 So.3d at 524. The issue in *Expedia* was whether a legislator and a member of the legislator's staff could be deposed in tax-related litigation so that a party in the lawsuit could "refute a claim that it had waived the attorney-client privilege" as to several documents the legislator had obtained. *Id.* at 525. The First District held that the legislator and his aide were entitled to assert a legislative privilege against the compelled testimony and that there was no compelling interest in seeking the depositions because the party seeking them was "attempting to refute a fact that has not yet been proven, and, as it appears from this record, may never be proven." *Id.*

Although *Expedia* was the first published Florida case to explicitly conclude that state legislators may assert a legislative privilege, various Florida circuit courts have, in unpublished orders over the years, quashed subpoenas requesting the testimony of state legislators or legislative staff members for various reasons. For example, in 2003, a circuit court quashed a subpoena seeking to elicit the intent, purpose, or motive behind a particular state senator's introduction of certain amendments to a 2002 piece of legislation. *See* Order Granting Motion to Quash, *Billie v. State,* No. 02–499–CA (Fla. 17th Cir.Ct. Feb. 7, 2003). None of these orders specifically analyzed the legislative privilege, however, and most have been premised on the tenet that an individual legislator's testimony as to individual intent is usually irrelevant in a typical lawsuit challenging a statute. These orders nevertheless support the premise that the judicial branch has respected the separation of powers between the three branches of government, particularly where no compelling interest in seeking the testimony has been demonstrated.

Such respect between the three branches is inherent in our democratic system of government. This Court has previously described the constitutional tenet of separation of powers as "[t]he cornerstone of American democracy," *Bush v. Schiavo,* 885 So.2d 321, 329 (Fla.2004), and has explained that article II, section 3, which is the state constitutional separation of powers provision, "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260, 264 (Fla.1991). Indeed, as pointed out by several former presiding officers of the Legislature in their

amicus curiae brief filed in this case, "the legislative privilege is critical to a proper separation of powers, upon which our system of government is built." [10]

***9** **[2]** Accordingly, because of the role that the principle of separation of powers plays in the structure of Florida's state government, as embodied in article II, section 3, of our state constitution, we reject the challengers' contention that there is no legislative privilege in Florida and hold that state legislators and legislative staff members do possess a legislative privilege under Florida law. This privilege is based on the principle that "no branch may encroach upon the powers of another," *Chiles,* 589 So.2d at 264, and on inherent principles of comity that exist between the coequal branches of government. In other words, "the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties." *United States v. Nixon,* 418 U.S. 683, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

Several reasons support recognition of a legislative privilege. The most obvious is the practical concern of protecting the integrity of the legislative process by not unnecessarily interfering with the Legislature's business. As the circuit court cogently articulated, "[l]egislators could not properly do their job if they had to sit for depositions every time someone thought they had information that was relevant to a particular court case or administrative proceeding." In addition, other reasons for recognizing a privilege include the "historical policy ... of protecting disfavored legislators from intimidation by a hostile executive" and protecting legislators "from the burdens of forced participation in private litigation." *Kerttula,* 686 P.2d at 1202. These other policies undergirding the legislative privilege aim to ensure that the separation of powers is maintained so that the Legislature can accomplish its role of enacting legislation in the public interest without undue interference.

[3] Although separation of powers principles require deference to the Legislature in refusing to provide compelled testimony in a judicial action, we emphasize that the legislative privilege is not absolute. As the United States Supreme Court has noted in determining that the President of the United States does not enjoy an absolute privilege of immunity from judicial process in all circumstances, "when the privilege depends solely on the broad, undifferentiated claim of public interest ... a confrontation with other values arises." *Nixon,* 418 U.S. at 706, 94 S.Ct. 3090. This public interest component is especially true in Florida, where one of our state constitutional values is a strong and well-established public policy of transparency and public access to the legislative process, which is enshrined in the Florida Constitution.

Indeed, the proposition that a legislative privilege is not absolute, particularly where another compelling, competing interest is at stake, is not a novel one. For example, in *United States v. Gillock,* 445 U.S. 360, 369, 372, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), the Supreme Court acknowledged the need to avoid unnecessary intrusion by the executive or judicial branches into the "affairs of a coequal branch," as well as the Court's "sensitivity to interference with the functioning of state legislators." However, the Court concluded nevertheless that "although principles of comity command careful consideration, ... where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *Id.* at 373, 100 S.Ct. 1185. The Court stated as follows:

> ***10** We recognize that denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function; however, similar arguments made to support a claim of Executive privilege were found wanting in *United States v. Nixon,* 418 U.S. 683 [94 S.Ct. 3090, 41 L.Ed.2d 1039] (1974), when balanced against the need of enforcing federal criminal statutes. There, the genuine risk of inhibiting candor in the internal exchanges at the highest levels of the Executive Branch was held insufficient to justify denying judicial power to secure all relevant evidence in a criminal proceeding. *See also United States v. Burr,* 25 F.Cas. 187 (No. 14,694) (C.C.Va.1807). Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

Id. While the interest implicated in this case is not the enforcement of the criminal laws, this case involves the vindication of an explicit constitutional prohibition

against partisan political gerrymandering and a constitutional restraint on the Legislature's actions—a public interest that is also compelling.

[4] As the First District itself has recognized, there may be a compelling, competing interest in a particular case that outweighs the purposes underlying the privilege. *See Expedia,* 85 So.3d at 525. When the legislative privilege is asserted, therefore, courts must engage in an inquiry to determine both if the privilege applies to protect the particular information being sought and the reason the information is being sought. [11] This inquiry is a two-step process.

The first step is to determine whether the information sought falls within the scope of the privilege. This is an important determination because, for example, information concerning evidence of a crime would not be covered by the legislative privilege. For purposes of our analysis in this case, however, we assume that all of the information being sought by the challengers, which relates to functions undertaken by legislators and legislative staff during the course of their legitimate legislative duties, would fall within the scope of the privilege. We therefore proceed to the next step.

Once a court determines that the information being sought is within the scope of the legislative privilege, the court then must determine whether the purposes underlying the privilege —namely, the deference owed by each coequal branch of government to the others and the practical concerns of legislators' abilities to perform their legislative functions free from the burdens of forced participation in private litigation —are outweighed by a compelling, competing interest. With this in mind, we next address the compelling, competing interest asserted in this case. Then, we analyze whether this compelling, competing interest outweighs the purposes underlying the privilege.

II. The Compelling, Competing Interest

***11** **[5]** The compelling, competing interest in this case is ensuring compliance with article III, section 20(a), which specifically outlaws improper legislative "intent" in the congressional reapportionment process. The language of article III, section 20(a), explicitly places legislative "intent" at the center of the litigation. Indeed, as the circuit court succinctly stated, it is "difficult to imagine a more compelling, competing government interest" than the interest represented by the challengers' article III, section 20(a), claims. The circuit court explained this finding as follows:

> [The challengers' claim] is based upon a specific constitutional direction to the Legislature, as to what it can and cannot do with respect to drafting legislative reapportionment plans. It seeks to protect the essential right of our citizens to have a fair opportunity to select those who will represent them. In this particular case, the motive or intent of legislators in drafting the reapportionment plan is one of the specific criteria to be considered when determining the constitutional validity of the plan. The information sought is certainly relevant and probative of intent. Frankly, if the compelling government interest in this case does not justify some relaxing of the legislative privilege, then there's probably no other civil case which would.

The first-tier requirements in article III, section 20, provide that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Art. III, § 20(a), Fla. Const. We recently explained that, in enacting these constraints on the Legislature's reapportionment of congressional and state legislative districts, "the framers and voters clearly desired more judicial scrutiny" of the apportionment plans, "not less." *Apportionment III,* 118 So.3d at 205. Indeed, as this Court has previously noted, "[t]he new requirements dramatically alter the landscape with respect to redistricting by prohibiting practices that have been acceptable in the past.... By virtue of these additional constitutional requirements, the parameters of the Legislature's responsibilities under the Florida Constitution" and therefore the scope of judicial review of the validity of an apportionment plan "have plainly increased, requiring a commensurately more expanded judicial analysis of legislative compliance." *Apportionment I,* 83 So.3d at 607.

Although the dissent relies heavily on the historical roots of the legislative privilege and the United States Supreme Court's decision in *Tenney,* 341 U.S. 367, 71 S.Ct. 783 *Tenney* was "a civil action brought by a private plaintiff to vindicate

private rights." *Gillock,* 445 U.S. at 372, 100 S.Ct. 1185. Specifically, the issue in *Tenney* was whether an individual plaintiff could maintain a cause of action for monetary damages against members of the California state legislature's "Fact–Finding Committee on Un–American Activities" after the committee held a hearing that the plaintiff alleged was designed "to intimidate and silence [him] and deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature." *Tenney,* 341 U.S. at 369, 371, 71 S.Ct. 783.

***12** The compelling, competing interest in this case is a far cry from the interests implicated in *Tenney.* Unlike the plaintiff in *Tenney,* the challengers seek not to vindicate private rights, but to determine whether the Florida Legislature violated an explicit constitutional provision outlawing improper partisan and discriminatory intent in the redistricting process. The challengers do not seek monetary damages, but instead challenge whether the congressional districts in which citizens exercise their fundamental democratic right to elect representatives of their choice were drawn in compliance with the Florida Constitution.

In order to fully effectuate the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering, it is essential for the challengers to be given the opportunity to discover information that may prove any potentially unconstitutional intent. The challengers assert that documents they have so far uncovered, primarily through third-party discovery, reveal direct, secret communications between legislators, legislative staff members, partisan organizations, and political consultants. In addition, because of Florida's broad public records laws, the challengers have received 16,000 e-mails, including e-mails between legislators and legislative staff, as part of the discovery process. [12] Contrary to the Legislature's argument, the fact that the challengers have already discovered communications between legislators and legislative staff, as well as between legislators, legislative staff members, and outside political consultants, related to the congressional apportionment plan, at least in part because Florida's strong public records constitutional provision requires it, does not make the depositions sought any less important to the critical issue of intent that is the focus of the challengers' article III, section 20(a), claims.

If the Legislature alone is responsible for determining what aspects of the reapportionment process are shielded from discovery, the purpose behind the voters' enactment of the article III, section 20(a), standards will be undermined. As we recently stated in connection with our decision to allow a fact-based challenge to the legislative apportionment plan to proceed in circuit court, the failure to permit factual inquiry and the development of a factual record in circuit court proceedings would allow

> the Legislature to circumvent the constitutional standards regarding "intent to favor or disfavor a political party or an incumbent" by concealing evidence of that intent from the public, knowing full well that discovery of any documents demonstrating this unconstitutional intent would never be reviewed by a court. While we do not suggest that this occurred during the 2012 redistricting process, these are the exact types of claims that must be subject to a fact-finder's scrutiny.

Apportionment III, 118 So.3d at 211.

In *Apportionment I,* we acknowledged the Legislature for engaging in extensive public hearings as indicative of an unprecedented transparent reapportionment process. *See Apportionment I,* 83 So.3d at 664 ("We commend the Legislature for holding multiple public hearings and obtaining public input."); *see also id.* at 637 n. 35 (noting that the Legislature held twenty-six hearings at different locations around the state, during which the public had the opportunity to provide recommendations for the legislative and congressional apportionment plans). However, if evidence exists to demonstrate that there was an entirely different, separate process that was undertaken contrary to the transparent effort in an attempt to favor a political party or an incumbent in violation of the Florida Constitution, clearly that would be important evidence in support of the claim that the Legislature thwarted the constitutional mandate.

***13** We reject the approach of the dissenting opinion, which contends that a broad claim of an absolute legislative privilege should prevent this discovery, and emphasize that this Court's first obligation is to give meaning to the explicit prohibition in the Florida Constitution against improper partisan or discriminatory intent in redistricting. The existence of a separate process to draw the maps with the intent to favor or disfavor a political party or an incumbent is precisely what the Florida Constitution now prohibits. This constitutional mandate prohibiting improper partisan or discriminatory intent in redistricting therefore requires that discovery be

permitted to determine whether the Legislature engaged in actions designed to circumvent the constitutional mandate.

Additionally, the compelling, competing constitutional interest in this case is completely unlike any competing interests implicated in a traditional lawsuit challenging a statutory enactment, where a court looks to determine legislative intent through statutory construction. Specifically, the Legislature argues that intent in a statutory enactment is best revealed through the actual language used and any applicable legislative history, rather than through the testimony of individual legislators regarding their subjective intentions in proposing, amending, or voting for or against a particular piece of legislation. *See, e.g.*, *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 198 (Fla.2007) (stating the general principle of statutory construction that "legislative intent is determined primarily from the statute's text"). In this context, however, the "intent" standard in the specific constitutional mandate of article III, section 20(a), is entirely different than a traditional lawsuit that seeks to determine legislative intent through statutory construction.

This Court has explained that the "intent" standard "applies to both the apportionment plan as a whole and to each district individually," and that "there is no acceptable level of improper intent." *Apportionment I*, 83 So.3d at 617. Thus, the communications of individual legislators or legislative staff members, if part of a broader process to develop portions of the map, could directly relate to whether the plan as a whole or any specific districts were drawn with unconstitutional intent.

As another court has explained in evaluating a similar claim, "[t]his is not ... 'the usual "deliberative process" case in which a private party challenges governmental action ... and the government tries to prevent its decision-making process from being swept up unnecessarily into [the] public [domain].' " *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11–C–5065, 2011 WL 4837508, at *8 (N.D.Ill.2011) (quoting *United States v. Bd. of Ed. of City of Chicago*, 610 F.Supp. 695, 700 (N.D.Ill.1985)). Instead, "the decisionmaking process ... [itself] *is* the case." *Id.* The same court also noted that cases concerning voting rights, "although brought by private parties, seek to vindicate public rights" and are, in this respect, "akin to criminal prosecutions." *Id.* at *6.

***14** Therefore, this case is completely distinguishable from the various circuit court orders and cases outside the reapportionment context from other jurisdictions cited by the Legislature that have quashed subpoenas of legislators or legislative staff members where the testimony of an individual member of the Legislature was not directly relevant to any issue in the case. This case is also readily distinguishable from the First District's decision in *Expedia*, where the party seeking to depose a member of the Legislature and a legislative aide was "attempting to refute a fact that ha[d] not yet been proven and ... may never be proven" by seeking to ask a question to which the parties had already acknowledged the answer. *Expedia*, 85 So.3d at 525. Unlike *Expedia* and other disputes not directly involving the Legislature, the lawsuit brought by the challengers seeks to vindicate the public interest in ensuring that unconstitutional partisan political gerrymandering by the Legislature itself did not occur.

Having concluded that this case presents a compelling, competing interest against application of an absolute legislative privilege, we now address the critical issue of whether this interest outweighs the purposes underlying the privilege.

III. The Balancing Approach

In this case, the circuit court determined that the legislative privilege does not shield most information or communications regarding the congressional apportionment process, but does protect the thoughts or impressions of individual legislators and legislative staff members at this stage of the litigation. We embrace the circuit court's balancing approach. We conclude that the compelling, competing constitutional interest in prohibiting the Legislature from engaging in unconstitutional partisan political gerrymandering outweighs the purposes underlying the legislative privilege as to all discovery, except to the extent that the circuit court protected the thoughts or impressions of individual legislators or legislative staff at this stage of the litigation. This is not a bright line, however, and involves a balancing of interests as specific questions are posed and additional discovery information is received in this case. The circuit court therefore is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into this balancing approach.

Although the Legislature, as well as the former legislative presiding officers in their amicus curiae brief, assert that a "chilling effect" will result if legislators are compelled

to testify in this case, we reject this argument. In doing so, we emphasize that this case is wholly unlike the traditional lawsuit challenging a statutory enactment, where the testimony of an individual legislator is not relevant to intent in statutory construction and there are few, if any, compelling, competing interests weighing against application of the privilege.

***15** Further, we observe that the major "chilling effect" asserted by the former presiding officers would be the alleged reluctance of legislators to meet with constituents to discuss private or intimate matters in fear of those private conversations becoming public. [13] This example is obviously a far cry from this case, which involves nothing less than the public's interest in ensuring compliance with a constitutional mandate in a process this Court has described as "the very bedrock of our democracy." *Apportionment I,* 83 So.3d at 600.

To the extent the Legislature and the former presiding officers assert that there will be a "chilling effect" among legislators in discussion and participation as to future apportionment plans, this type of "chilling effect" was the explicit purpose of the constitutional amendment imposing the article III, section 20(a), redistricting standards—to prevent partisan political gerrymandering and improper discriminatory intent. Indeed, if in fact there was a separate, secret process undertaken by the Legislature to create the 2012 congressional apportionment plan in violation of the article III, section 20(a), standards, the voters clearly intended for the Legislature to be held accountable for violating the Florida Constitution and to curb unconstitutional legislative intent in this and future reapportionment processes.

We also reject the Legislature's argument that this Court should apply an absolute privilege and preclude the discovery sought because all courts that have considered this issue have precluded similar discovery. First, we note that this Court has never had the occasion to specifically consider whether a legislative privilege exists in Florida and to delineate its boundaries, and, as we have explained, Florida stands apart from many other states in lacking a constitutional Speech or Debate Clause.

Second, although the Legislature has made a point of arguing that no court anywhere has ever allowed a legislator to be deposed regarding the legislative process outside of the criminal context, the Legislature also has candidly admitted that no court in a state with a constitutional provision similar to Florida's, which explicitly prohibits improper intent or purpose in redistricting, [14] has ever addressed this particular issue. Thus, despite the Legislature's claim that no court in any of these states has ever permitted the compelled testimony of a state legislator, no court in any of these states has ever expressly prohibited it either. In other words, there is no precedent on this issue in the narrow context of a constitutional provision that explicitly prohibits improper legislative intent in redistricting.

To say, as the dissent does, that our decision stands alone "in the recorded history of our Republic" in compelling legislators to be interrogated "in a civil case concerning their legislative activities," dissenting op. at ——— – ———, fails to take into account that this case is unlike any other "civil" case involving the legislative privilege. In contrast to traditional civil cases, this case concerns an issue of first impression involving an explicit state constitutional prohibition against partisan political gerrymandering and improper discriminatory intent.

***16** We likewise reject the dissent's reliance on a single case decided by a federal district court judge, who determined the scope of the federal legislative privilege in the context of preclearance review under the Federal Voting Rights Act. *See Florida v. United States,* 886 F.Supp.2d 1301, 1302 (N.D.Fla.2012). Although legislative purpose may be a relevant factor in a discriminatory intent challenge brought pursuant to the Federal Voting Rights Act, challenges under the federal statute primarily involve "effect" rather than "intent," which is an easier standard to establish since it does not involve probing the motives behind the plan. *See, e.g., Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). In addition, federal courts have long recognized the existence of a federal legislative privilege based on the explicit text of the Speech or Debate Clause of the United States Constitution and through federal common law—neither of which applies to an action in state court based on a specific prohibition in the state constitution.

Finally, in embracing the circuit court's approach, we reject the argument propounded by the First District that the dichotomy between discoverable and non-discoverable information recognized by the circuit court is an unworkable test. *See Romo,* 113 So.3d at 121. To the contrary, we have confidence that the circuit court will be able to capably make these determinations on a situation-by-situation basis as the specific issues arise, as circuit courts are often called upon to

do, and that the parties will conduct discovery in a good faith manner.

As to the procedure to determine whether the draft apportionment plans and supporting documents should be produced, we reject the First District's reasoning and approve the circuit court's approach. As the circuit court stated:

> Florida has a long and rich tradition of open government and the case law in this area suggests that questions about the interpretation of the Public Records Act should be resolved in favor of access by the public. Any specific exemptions are therefore to be strictly construed. Noting the legislative history of the exemption under which the [Legislature] seek[s] protection, I conclude that their very broad interpretation of the exemption is not supported by the language of the statute nor the case law in this area. The [challengers'] interpretation might be a little too narrow, as they suggest that once any plan has been passed, any documents that might have been exempted from the act, are no longer so.
>
> It is difficult for me to know where to draw the line between the plan that was actually proposed and adopted by the legislature and any other draft of a plan. The [challengers'] argument is that the entire process is designed to create a plan, not several plans. Without having precise knowledge of how plans are proposed, discussed, and developed, it is difficult for me to evaluate that assertion. The only way I know how to do so is to have any disputed documents presented to me in camera, with explanatory testimony as to their nature and how they compare or contrast with the plan ultimately adopted.

***17** We agree that the first issue to be decided is whether the draft plans fall within the scope of the public records exemption in section 11.0431(2)(e), Florida Statutes (2012), and that this exemption should be strictly construed in favor of disclosure. *See Rameses, Inc. v. Demings*, 29 So.3d 418, 421 (Fla. 5th DCA 2010) ("In light of the policy favoring disclosure, the Public Records Act is construed liberally in favor of openness, and exemptions from disclosure are construed narrowly and limited to their designated purpose."). However, even if the circuit court concludes, after undertaking an in camera review of any disputed documents, that the draft plans are exempt from public records disclosure, the circuit court should still require the Legislature to produce the draft apportionment maps and supporting documents under appropriate litigation discovery rules, to the extent these documents do not contain information regarding individual legislators' or legislative staff members' thoughts or impressions. *See Dep't of High. Saf. & Motor Veh. v. Krejci Co.*, 570 So.2d 1322, 1325 (Fla. 2d DCA 1990) (determining that a statutory exemption from public records disclosure is not a per se bar to insulate records from discovery in a civil action); *see also* Fla. R. Civ. P. 1.280(b)(1) ("Parties may obtain discovery regarding *any matter, not privileged,* that is relevant to the subject matter of the pending action...." (emphasis added)).

We emphasize that this case presents novel issues of law and the first circuit court litigation under the new article III, section 20(a), redistricting standards. Indeed, the specific claims raised by the challengers in this case are first of their kind claims under the Florida Constitution that require considerable factual development. *See Apportionment III*, 118 So.3d at 210. Given that the record at this time does not indicate that the challengers "have so much as framed the questions to be asked on deposition," *Romo*, 113 So.3d at 130 (Benton, C.J., dissenting), the challengers should not be prevented from developing evidence to support their constitutional claims.

Although the dissent criticizes our approval of the dichotomy between discoverable and non-discoverable information as having no principled basis, we approve the distinction drawn in the well-reasoned order of the circuit court, recognizing that this order was entered in anticipation of the depositions being set and the types of questions that could be posed. As Chief Judge Benton pointed out, "[a]ctually knowing what questions the litigants intended to ask could well shed an invaluable light on these important issues." *Id.* at 133. Without the depositions having taken place and specific objections raised, this Court can rule only on issues that are before us.

While the Florida Constitution authorizes the Legislature to adopt redistricting plans, it places significant limitations on how the redistricting plans are drawn and therefore the power is vested in the courts to determine the constitutionality of those plans. Accordingly, for all these reasons, we conclude that the circuit court recognized the proper balance in determining what information is protected by the legislative privilege at this stage of the litigation and what information the challengers should be permitted to discover. Because we conclude that the circuit court committed no error of law in its order, we also necessarily conclude that the First District erred in granting certiorari review of that non-final order because the circuit court's order did not depart from

the essential requirements of law, a necessary prerequisite for granting certiorari relief. *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n,* 104 So.3d 344, 351 (Fla.2012).

***18** **[6]** In sum, we hold that individual legislators may waive their privilege, or legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process. Further, we emphasize that the circuit court is not constrained by this opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into the balancing approach embraced herein.

CONCLUSION

Based on the foregoing, we conclude that Florida law should recognize a legislative privilege, but that this privilege is not absolute in this case, where the violations alleged are of an explicit state constitutional provision prohibiting partisan political gerrymandering and improper discriminatory intent in redistricting. We further conclude that the circuit court determined the proper balance of interests by protecting the thoughts or impressions of individual legislators and legislative staff members at this stage of the litigation, but recognizing the compelling, competing interest in ensuring that the Legislature complies with the constitutional mandate regarding redistricting by permitting discovery of all other information and communications pertaining to the constitutional validity of the challenged apportionment plan. Accordingly, we quash the First District's decision under review, approve the circuit court's order, and remand for further proceedings in accordance with this opinion.

It is so ordered.

LEWIS, QUINCE, LABARGA, and PERRY, JJ., concur.

LABARGA, J., concurs with an opinion in which LEWIS, J., concurs.

PERRY, J., concurs with an opinion in which QUINCE, J., concurs.

CANADY, J., dissents with an opinion in which POLSTON, C.J., concurs.

LABARGA, J., concurring.

I concur and write to emphasize the important duty of this Court to honor and effectuate the intent of the voters in passing Florida's groundbreaking constitutional amendment prohibiting partisan or discriminatory intent in drawing the congressional apportionment plan at issue in this case. While examination of objective data can disclose a discriminatory result, only the discovery authorized by the majority can disclose unconstitutional intent, if there be any, in the apportionment process. Moreover, the majority recognizes a constitutionally-founded legislative privilege, although not an absolute one. It is the Florida Constitution, not the judiciary, that creates the necessity for the Legislature to disclose any evidence of improper intent. Thus, there is no violation of the principle of separation of powers. Without the limited discovery authorized in this case, there is no other meaningful or practicable way for the intent of the voters in enacting the constitutional amendment to be realized.

***19** As has been true throughout Florida's constitutional history, the Legislature must act within the constitutional limitations imposed upon it by the people of Florida. *See e.g., In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session,* 263 So.2d 797, 805 (Fla.1972) ("It is well settled that the state Constitution is not a grant of power but a limitation upon power."). Nowhere is the will of the people expressed more strongly than in the Florida Constitution. In the matter before the Court, the people have spoken through their amendment limiting the ability of their elected representatives to carry out legislative redistricting with any partisan or discriminatory intent. The decision reached today allows realization of this limitation on legislative power. Thus, I fully concur in the majority decision in this case.

LEWIS, J., concurs.

PERRY, J., concurring.

I fully concur with the majority's decision in this case. And, I write separately to emphasize my agreement with Justice Pariente's previously expressed observations in *In re Senate Joint Resolution of Legislative Apportionment 2–B (Apportionment II),* 89 So.3d 872 (Fla.2012) (Pariente, J., concurring). It bears repeating that our constitution requires that politics be removed from the reapportionment process.

Art. III, §§ 20(a), 21(a), Fla. Const.; *see also In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 598 (Fla.2012). However, the reality is that there can never be an apolitical result from an inherently political process. As Justice Pariente so aptly stated in *Apportionment II:*

> The voters have spoken that neutrality, and not partisan politics, must be the polestar of legislative apportionment.
>
> ....
>
> ... In other words, the Fair Districts Amendment changed the standards governing the manner in which the Legislature accomplishes that task, adding an express prohibition against partisan and incumbent favoritism to eliminate the partisan nature of the apportionment process.
>
> ....
>
> ... [C]hanges must be made to the process to ensure that the purpose of the amendment—to take politics out of the apportionment equation—can be fully realized.... [I]t would be wise at this juncture to seriously examine the adoption of an independent apportionment commission to oversee this inherently political task....
>
> The creation of an independent commission as a means to reform the process is not a novel concept. Other states have established independent redistricting commissions to redraw legislative districts. *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(3) (added by initiative measure in 2000); Cal. Const. art. XXI, § 2 (added by initiative measure in 2008); Idaho Const. art. III, § 2(2) (created in 1994); Wash. Const. art. II, § 43 (added by constitutional amendment in 1982). In fact, even in Florida, numerous proposals have been advanced, but never adopted, for the creation of such a commission over the years.
>
> ***20** ....
>
> ... the time has come for this state to reevaluate the value of an independent apportionment commission.

Id. at 892–95. [15]

Indeed, the time has come for this idea to be given due consideration. I believe that the citizens of Florida would be well-served by an independent redistricting commission established for purposes of redrawing legislative districts. Such a commission would help ensure that the constitutional requirement of an apolitical reapportionment process is realized. Furthermore, an independent commission would limit the number of cases in which parties litigate reapportionment decisions that are perceived to be motivated by self-serving partisanship.

QUINCE, J., concurs.

CANADY, J., dissenting.

***20** In this case, for the first time in the recorded history of our Republic, a court has ruled that state legislators are required to submit to interrogation in a civil case concerning their legislative activities. I dissent from this unprecedented decision—a decision which effectively abrogates the well-established common law legislative privilege and grievously violates the constitutional separation of powers. I would approve the First District Court of Appeal's cogent decision.

I.

The legislative privilege—which the majority reduces to a matter of judicial discretion—is firmly rooted in the English common law and inherent in the constitutional separation of powers. In *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), the United States Supreme Court explained the historical origins of the privilege.

> The privilege of legislators to be free from ... civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.... In 1689, the Bill of Rights declared in unequivocal language: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."

Id. at 372, 71 S.Ct. 783 (quoting 1 Wm. & Mary, Sess. 2, c.II). Central elements of the Bill of Rights of 1689 were a provision abolishing the royal suspending power—that is, the monarch's asserted power to suspend the operation of laws without the consent of Parliament—and the provision recognizing the legislative privilege. "Together, the two provisions preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a system of separate powers." Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L.Rev. 1113, 1135 (1973). Along with the other provisions of the

English Bill of Rights, Magna Charta, and the writ of habeas corpus, the legislative privilege stands as a component in "a towering common law lighthouse of liberty." *Boumediene v. Bush*, 553 U.S. 723, 845, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (Scalia, J., dissenting) (quoting Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 663 (1996)). The legislative privilege undeniably is one of "the presuppositions of our political history." *Tenney*, 341 U.S. at 372, 71 S.Ct. 783.

***21** As *Tenney* recognizes, "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U.S. at 377, 71 S.Ct. 783. The privilege exists so that legislators will be "immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Id.* "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's [or judge's] speculation as to motives." *Id.* Any impairment of the legislative privilege threatens both to undermine the ability of legislators to carry out their constitutional duties and to weaken the constitutional separation of powers.

The autonomy of the core internal operations of the legislative branch is a bulwark of the separation of powers. That autonomy is violated by the intrusion of the judicial branch into the internal operations of the legislative process. When the constitutional autonomy of one branch is breached by another branch, the separation of powers is violated. Florida law has recognized that the judicial branch should not intrude into the internal operations of the legislative branch. "Florida courts have full authority to review the final product of the legislative process, but they are without authority to review the internal workings of [the Legislature]." *Fla. Senate v. Fla. Pub. Emps. Council 79*, 784 So.2d 404, 409 (Fla.2001); *see also Moffitt v. Willis*, 459 So.2d 1018, 1022 (Fla.1984) (rejecting judicial inquiry into "the propriety and constitutionality of certain internal activities of members of the legislature").

Due respect for the separation of powers precludes the judicial branch from requiring that legislators and legislative employees submit to an inquisition conducted to ferret out evidence of an improper purpose in the legislative process. As the Supreme Court stated in *Tenney*, the view that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. at 377, 71 S.Ct. 783 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130, 3 L.Ed. 162 (1810)). Courts are highly sensitive to the fact that "judicial inquiries into legislative ... motivation represent a substantial intrusion into the workings of [an]other branch[ ] of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n. 18, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). That is why the majority has been unable to cite any decision in which a legislator has been required to provide testimony in a civil case regarding the legislative process. The best that the petitioners offer is an unreported federal trial court order compelling a legislative staff member to submit to a deposition. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542 (E.D.Wis.2011).

Contrary to the majority's suggestion, *Tenney's* recognition of the important purpose of the legislative privilege is by no means undermined by *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), where the Supreme Court held that the legislative privilege was not applicable in a federal criminal prosecution of a state legislator. In *Gillock*, the Supreme Court reasoned that "the separation of powers doctrine [ ] gives no support to the grant of a privilege to state legislators in federal criminal prosecutions" because "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." 445 U.S. at 370, 100 S.Ct. 1185.

***22** Given "the absence of a constitutional limitation on the power of Congress to make state officials, like all other persons, subject to federal criminal sanctions," the Supreme Court concluded that no basis existed "for a *judicially created limitation* that handicaps proof of the relevant facts." *Id.* at 374, 100 S.Ct. 1185 (emphasis added). *Gillock* thus does not address the role that the legislative privilege plays in the separation of powers between the legislative and judicial branches. Instead, *Gillock* is a case about the scope of federal legislative power vis-à-vis state legislators. In *Gillock*, the recognition of the legislative privilege would have required "a judicially created limitation" impinging on the prosecution of federal offenses created by Congress. Here, however, it is the majority's failure to honor the legislative privilege that has required "a judicially created limitation" on the legislative privilege—a privilege that is rooted in the English common law and inherent in the constitutional separation of powers.

The absence of persuasive authority justifying the compelled deposition of state legislators was recently recognized by Judge Robert L. Hinkle in *Florida v. United States*, 886

F.Supp.2d 1301 (N.D.Fla.2012), a case arising under section 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973(a)–1973(q) (2006). Although Judge Hinkle recognized that in Voting Rights Act cases, as in equal protection cases, "the critical question often is whether the legislature acted with a discriminatory purpose," he held that legislators and legislative staff could not be compelled to testify. He observed:

> The considerations that support the result include the burden that being compelled to testify would impose on state legislators, the chilling effect the prospect of having to testify might impose on legislators when considering proposed legislation and discussing it with staff members, and perhaps most importantly, the respect due a coordinate branch of government. Legislators ought not call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not compel unwilling legislators to testify about the reasons for specific legislative votes. Nothing in the Voting Rights Act suggests that Congress intended to override this long-recognized legislative privilege.

Florida, 886 F.Supp.2d at 1303.

II.

The majority recognizes "that a legislative privilege exists in Florida, based on the principle of separation of powers codified in article II, section 3, of the Florida Constitution" but concludes "that this privilege is not absolute and may yield to a compelling, competing interest." Majority op. at ——. The majority holds that a compelling, competing interest is operative here because with the passage of article III, section 20, Florida Constitution, " 'the framers and the voters clearly desired more judicial scrutiny' of the [redistricting] plans, 'not less.' " Majority op. at —— (quoting *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So.3d 198, 205 (Fla.2013)). The majority adopts a "balancing approach"—applicable to both depositions and document production—under which "most information or communications regarding the congressional [redistricting] process" are discoverable, but the "thoughts or impressions of individual legislators and legislative staff members" are not subject to discovery "at this stage of the litigation." Majority op. at ——. The majority also holds that "any common law legislative privilege has been abolished by" the Florida Evidence Code. Majority op. at ——.

***23** The majority's conclusion that the common law legislative privilege has been abolished is unwarranted. Section 90.501, Florida Statutes (2013), which the majority relies on to support this conclusion, simply provides that no evidentiary privilege exists other than those "provided by [chapter 90], any other statute, or the Constitution of the United States or of the State of Florida." The English common law legislative privilege, however, is given the force of law in Florida by the terms of another statute. Section 2.01, Florida Statutes (2013), provides that the general "common and statute laws of England ... down to the 4th day of July, 1776, are declared to be in force in this state" to the extent they are "not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state." Section 90.501 does nothing to abolish any privilege established in Florida law by section 2.01. By the plain terms of section 2.01, the legislative privilege contained in the Bill of Rights of 1689 is in force under Florida law.

The majority is correct in acknowledging that the legislative privilege is inherent in the separation of powers under Florida's Constitution. But the majority errs in reducing the constitutional legislative privilege to a matter of unfettered judicial discretion. Like the presumption of constitutionality historically applied to redistricting plans passed by the Florida Legislature but effectively abrogated by this Court last year, what now remains of the legislative privilege in this context promises to be swiftly vanishing. There is an unmistakable signal in the majority's statements that the "thoughts or impressions of individual legislators and legislative staff members" are not discoverable "*at this stage of the litigation* " and that the circuit court "is *not constrained* by [the majority's] opinion from considering, as discovery proceeds, how a specific piece of information protected by the privilege fits into this balancing approach" adopted by the majority. Majority op. at —— (emphasis added). To the extent that the improper motivations of individual legislators are a legal basis for determining that a constitutional violation by the Legislature has occurred—a point the majority assumes but does not establish—it is unclear what rationale exists for holding that the "thoughts and impressions" of individual legislators are protected from discovery. It would seem to

be axiomatic that an individual's improper motivation will be reflected in that individual's "thoughts and impressions." Although the majority adopts the thoughts-and-impressions limitation "at this stage of the litigation," the majority certainly has not articulated a specific rationale for the limitation. Majority op. at ——. The tenuousness of the limitation is manifest; there is no reason to believe that the limitation will long survive.

The majority's balancing approach boils down to the exercise of unfettered judicial discretion: the legislative privilege inherent in the separation of powers will give way to the extent that an entirely subjective judicial determination requires that the privilege must give way. This is not the way that one branch of government should approach the acknowledged constitutional privilege of an equal and coordinate branch of government. When the judicial branch is called on to consider the scope of a privilege granted by the Constitution to another branch of government, it is incumbent upon the judicial branch to articulate clearly grounded, 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. At no time would it be more appropriate to pay heed to the maxim that "he is the best judge who leaves the least to his own discretion." [16] In a context such as this—where the internal functioning of a coordinate branch of government is at issue—due respect for the separation of powers requires that judicial restraint be at its zenith. Unfortunately, the balancing approach adopted by the majority represents the nadir of judicial restraint.

***24** Nothing in article III, section 20, justifies this evisceration of the constitutional legislative privilege. The majority's assertion that the constitutional legislative privilege is restricted by the desire of the voters for "more judicial scrutiny" is based purely on supposition. Majority op. at ——. The text of article III, section 20, provides directives to the Legislature regarding the redistricting process but says nothing about judicial scrutiny or the legislative privilege. Therefore, any impact of the adoption of this constitutional provision on the constitutional legislative privilege could arise only by implication. But the annulment or the fundamental alteration of an essential component of the constitutional separation of powers does not properly arise by implication. *See Jackson v. Consol. Gov't of City of Jacksonville*, 225 So.2d 497, 500–501 (Fla.1969) ("[I]t is settled that implied repeal of one constitutional provision by another is not favored, and every reasonable effort will be made to give effect to both provisions. Unless the later amendment expressly repeals or purports to modify an existing provision, the old and new should stand and operate together unless the clear intent of the later provision is thereby defeated.")

The view adopted by the majority works a radical change in the relationship between the judicial branch and the legislative branch by thrusting judicial officers into the internal workings of the legislative process. Such a radical alteration in the operation of the separation of powers should not be accomplished absent the clear assent of the people of Florida. No such assent was manifested by the adoption of article III, section 20. Nothing in the text of the proposed amendment—much less the ballot summary—informed the voters that this alteration would be a consequence of the adoption of the amendment by the people. When the validity of the ballot summary was under consideration in this Court, the sponsor of the proposed amendment argued that the proposal "*changes no judicial functions whatsoever*" and has "*no effects on judicial functions.*" Amended Answer Brief of Sponsor at 7, 15 n. 2, *Advisory Op. to Atty. Gen. re Standards for Establishing Legislative District Boundaries (Legislative District Boundaries)*, 2 So.3d 175 (Fla.2009) (emphasis added). The Court's plurality opinion approving the ballot summary concluded that the proposed amendment "*do[es] not alter the functions of the judiciary.*" *Legislative District Boundaries*, 2 So.3d at 183 (emphasis added). But now the Court has effectively accepted the petitioners' argument in this case that "[a]rticle III, section 20, *revised the balance of powers* in the redistricting context" and created a "*new arrangement*" requiring an aggressive judicial role. Petitioners' Initial Brief on the Merits at 19, *League of Women Voters of Fla. v. Fla. House of Representatives*, No. SC13–949, *review granted*, 122 So.3d 868 (Fla.2013) (table) (emphasis added). A revision of the "balance of powers" between the judicial and legislative branches should not be brought about by stealth.

III.

***25** In its treatment of the legislative privilege, the majority damages one of the "presuppositions of our political history." *Tenney*, 341 U.S. at 372, 71 S.Ct. 783. I dissent from this further unwarranted judicial encroachment on the Legislature's exercise of its constitutional authority to adopt redistricting plans. The decision of the First District should be approved.

POLSTON, C.J., concurs.

1 Amendment 5 is now codified in article III, section 21, of the Florida Constitution. The standards in article III, section 20—governing congressional reapportionment—and those in article III, section 21—governing legislative reapportionment—are identical.

2 Article III, section 21, provides as follows:

> In establishing legislative district boundaries:
>
> (a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Art. III, § 21, Fla. Const. The only difference between article III, section 21, and article III, section 20, is that article III, section 21, applies to legislative reapportionment, whereas article III, section 20, applies to congressional reapportionment. The substantive standards governing the Legislature's discretion in redistricting are identical in the two provisions. *See Apportionment I,* 83 So.3d at 598 n. 1 ("Amendment 6 adopted identical standards for congressional redistricting.").

3 The challengers collectively include the League of Women Voters of Florida, Common Cause Florida, named plaintiff Rene Romo, and ten other individually named plaintiffs.

4 *See* art. IV, § 11, Fla. Const. (1865); *see also* U.S. Const. art. I, § 6, cl. 1.

5 *See Girardeau v. State,* 403 So.2d 513, 515 n. 3 (Fla. 1st DCA 1981) ("Florida's 1865 Constitution contained a speech and debate clause in language substantially similar to that found in the United States Constitution; however, the clause was omitted from the 1868, 1885, and the current (1968) Florida Constitutions.").

6 North Carolina is the other state. Forty-three states have a state constitutional Speech or Debate Clause and five other state constitutions contain an arrest exemption without explicitly conferring a speech or debate privilege. Many states have both provisions.

7 *See Swerdlow Lightspeed Mgmt. Co.,* 942 So.2d at 457 ("No Florida legislative testimonial privilege has been recognized in the Evidence Code, statutes, or Florida constitution.").

8 *See Marshall v. Anderson,* 459 So.2d 384, 387 (Fla. 3d DCA 1984) (stating that the adoption of section 90.501, Florida Statutes (1981), "abolishe[d] all common-law privileges existing in Florida," making "the creation of privileges dependent upon legislative action or pursuant to the Supreme Court's rule-making power" (quoting Law Revision Council Note)).

9 *See* art. II, § 3, Fla. Const.; Ala. Const. art. III, § 43; Ariz. Const. art. III; Ark. Const. art. IV, § 2; Colo. Const. art. III; Conn. Const. art. II; Ga. Const. art. I, § 2, ¶ III; Idaho Const. art. II, § 1; Ill. Const. art. II, § 1; Ind. Const. art. III, § 1; Iowa Const. art. III, § 1; Ky. Const. §§ 27, 28; La. Const. art. II, § 2; Me. Const. art. III, § 2; Md. Const. Decl. of Rts. art. 8; Mass. Const. pt. 1, art. XXX; Mich. Const. art. III, § 2; Minn. Const. art. III, § 1; Miss. Const. art. I, § 2; Mo. Const. art. II, § 1; Mont. Const. art. III, § 1; Neb. Const. art. II, § 1; Nev. Const. art. III, § 1; N.H. Const. pt. 1, art. 37; N.J. Const. art. III, ¶ 1; N.M. Const. art. III, § 1; N.C. Const. art. I, § 6; N.D. Const. art. XI, § 26; Okla. Const. art. IV, § 1; Or. Const. art. III, § 1; R.I. Const. art. V; S.C. Const. art. I, § 8; S.D. Const. art. II; Tenn. Const. art. II, § 2; Tex. Const. art. II, § 1; Utah Const. art. V, § 1; Vt. Const. ch. II, § 5; Va. Const. art. III, § 1; W. Va. Const. art. V, § 1; Wyo. Const. art. II, § 1.

10 The amicus curiae brief from which this quotation is derived was filed by three former presiding officers of the Florida Legislature—former Senate Presidents Ken Pruitt and John M. McKay and former Speaker of the House James Harold Thompson—in support of the Legislature.

11 This case does not involve legislative immunity, nor does it involve the liability of any individual legislator. We note that the legislative privilege (that is, an evidentiary privilege against compelled judicial process) is different than legislative immunity from suit, even though federal courts have held that the legislative privilege is derived from the principles underlying legislative immunity. *See Gravel v. United States,* 408 U.S. 606, 615, 92 S.Ct.

2614, 33 L.Ed.2d 583 (1972). These principles are based on the United States Constitution's Speech or Debate Clause, *see* U.S. Const. art. I, § 6, cl. 1, and arise out of "the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

12 The number of e-mails—16,000—was provided during oral argument by the attorney representing the Legislature.

13 As an example, the former presiding officers assert in their amicus curiae brief that constituents will be less likely to bring difficult, emotional issues, such as issues relating to someone who has been the victim of a crime or a "glitch in Florida law" causing a businessperson to be unable to make ends meet, to the attention of their legislator without the protection of a dependable legislative privilege.

14 *See Apportionment I*, 83 So.3d at 615 n. 19 (noting that California and Washington share a similar constitutional provision and Idaho, Iowa, Montana, and Oregon codify similar provisions by statute).

15 In addition to Arizona, California, and Idaho, Alaska, Arkansas, Colorado, Hawaii, Missouri, New Jersey, Ohio, Pennsylvania, and Washington give an independent body primary responsibility for drawing legislative districts. *See* Alaska Const. Art. VI, § 3 (amended 1988); Ark. Const. Art. VIII, §§ 1–6; Colo. Const. Art. V, § 48; Haw. Const. Art. IV § 2; Mo. Const. Art. III, § 2; N.J. Const. Art. II § 2; Ohio Const. Art. XI, § 11.01; Pa. Const. Art. II, § 17; Wash. Const. Art. II, § 43.

16 From the Latin maxim *Optimus judex qui minimum sibi*. *Black's Law Dictionary* 1858 (9th ed. 2009).

Parallel Citations

38 Fla. L. Weekly S895

End of Document

2009 WL 2245565
Only the Westlaw citation is currently available.
United States District Court,
N.D. Oklahoma.

Denny LINDLEY, Plaintiff,
v.
LIFE INVESTORS INSURANCE
COMPANY OF AMERICA, Defendant.

No. 08–CV–379–CVE–PJC. | July 24, 2009.

Attorneys and Law Firms

Anthony D. Gould, Brown & Gould PLLC, Oklahoma City, OK, Eric James Begin, McGivern Gilliard Curthoys, Tulsa, OK, for Plaintiff.

Daniel Vaughn Carsey, Jack Lawrence Brown, Jones Gotcher & Bogan, Tulsa, OK, Irma Reboso Solares, Jason Patrick Kairalla, Julianna Thomas McCabe, Markham R. Leventhal, Richard James Ovelmen, Stephan I. Voudris, Jorden Burt LLP, Miami, FL, for Defendant.

Opinion

OPINION AND ORDER

PAUL J. CLEARY, United States Magistrate Judge.

***1** Before the Court is the Motion to Compel Against Glenn Coffee filed by Plaintiff Denny Lindley ("Lindley") (Dkt.# 74). Lindley seeks to compel non-party, the Honorable Glen Coffee ("Senator Coffee"), President Pro Tempore of the Oklahoma State Senate, to produce the following documents pursuant to the Subpoena issued on February 12, 2009:

a. Any documents that you received from Fried.Kilpatrick.Guinn and/or American Fidelity in connection with any proposed language to be included in the Actual Charge Legislation or any other legislation concerning the definition of "actual charge(s)" or "actual fee(s)."

b. All documents relating to, evidencing, memorializing or summarizing any drafts of, revisions to, or proposal language for, the Actual Charge Legislation.

c. All documents relating to, evidencing, memorializing or summarizing or recording any Communications between you and American Fidelity concerning: (a) any proposed or passed legislation relating to the definition of "actual charge" or "actual fee"; and/or (b) the Actual Charge Legislation.

d. All documents, including, internal memoranda relating to: (a) the definition of "actual charge(s)" or "actual fee(s)," "expense(s) incurred" or "incurred expense(s)"; (b) legislation (proposed or passed) concerning such definition(s); and/or (c) the Actual Charge Legislation.

e. All documents relating to, evidencing, memorializing or summarizing your knowledge and/or understanding of the terms, coverages, limitations, and benefits contained in any Limited Benefit Specified Disease Cancer Expense Policy sold by American Fidelity.

f. All documents relating to, evidencing, memorializing or summarizing the Actual Charge Litigation[1] or any other lawsuits, claims or disputes concerning the interpretation of the phrase "actual charge(s)" within the context of an insurance policy.

[1] The "Actual Charge Litigation" refers to the lawsuit brought by Delores Metzger against American Fidelity Assurance Company ("American Fidelity") in the Western District of Oklahoma, *Metzger v. American Fidelity Assurance Company*, Case No. CIV–05–1387–M. Metzger brought suit similar to this one, although against American Fidelity, the insurer who issued her deceased son a "cancer and specified disease treatment" policy. Metzger claimed that American Fidelity underpaid her son benefits under the policy because it paid the post-negotiation amount of the provider's medical bill as "actual charges" and that the breach was in bad faith. In September 2006 United States District Judge Vicki Miles–LeGrange held that "actual charges" under the policy referred to pre-negotiation and not post-negotiation amounts of a provider's medical bills. In January 2008, the jury awarded Metzger $503,500 in actual damages and more than $10.3 million in punitive damages.

g. All documents relating to, evidencing, memorializing, summarizing or recording Communications (including e-mails) between you and any member, official, officer, employee or agent of the legislature, judicial or executive branch of the Oklahoma government concerning: any proposed or passed legislation relating to the definition of "actual charge" or "actual fee"; and/or (b) the Actual Charge Legislation.

h. All documents relating to, evidencing, memorializing, summarizing, comprising or recording communications (including e-mails) between you and the Commissioner or any members, officers, employees or agents of the Insurance Department concerning: (a) any proposed or passed legislation relating to the definition of "actual charge" or "actual fee"; and/or (b) the Actual Charge Legislation.

I. All documents relating to, evidencing, memorializing, summarizing, comprising or recording any proposed drafts of, revisions to and/or proposed language to be included in the Actual Charge Legislation.

j. All documents relating to, evidencing, memorializing, summarizing or recording any communications (including e-mails), analysis, discussion, debates, investigations and research concerning whether the Actual Charge Legislation, as proposed, revised, amended, passed or codified, constitutes an unlawful ex post facto law by effectively impairing the contractual rights of Oklahoma policyholders in violation of the Constitutions of the United State and/or Oklahoma.

***2** k. All documents relating to, evidencing, memorializing, summarizing or recording any statements, representations, or testimony to any legislative, executive or judicial body relating to the Actual Charge Legislation.

l. All documents, including internal memoranda, all Communications and all drafts of legislative revisions relating to the inclusion of 36 O.S. § 3651(c) in the Actual Charge Legislation which states: "This section applies to an insurance policy in effect on the effective date of this act, only if the policy does not define 'actual charges' or 'actual fee.' "

Lindley states that these documents are relevant because Defendant Life Investors Insurance Company of America ("Life Investors") is relying on the "Actual Charge Legislation," Okla.Stat.tit. 36, § 3651 (2006), [2] in part of its defense of this action; *i.e.*, one of Life Investors' defenses is that some or all of Lindley's claims are barred by the statute. *See* Answer and Counterclaim, Fifth Defense (Dkt.# 9). Lindley further contends that the statute is unconstitutional and relevant to his bad faith claim as Life Investors is "relying on this *ex post facto* legislation for the sole purpose of retroactively depriving its insured of their fixed contractual rights to coverage. *Plaintiff's Motion to Compel, p. 3* (Dkt.# 74). [3]

2 "Actual charge" and "actual fee" defined—Application

A. As used in an individual or group specified disease insurance policy, "actual charge" or "actual fee" means the amount actually paid by or on behalf of the insured and accepted by a provider for services provided. Insurance policies that use these terms must use them as defined in this section.

B. Except as provided by subsection C of this section, the change in law made by this section applies only to insurance policies delivered, issued for delivery, or renewed on or after the effective date of this act. An insurance policy delivered, issued for delivery, or renewed before the effective date of this act is governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

C. This section applies to an insurance policy in effect on the effective date of this act only if the policy does not define "actual charge" or "actual fee".

Okla.Stat.tit.36, § 3651. The effective date of this legislation was November 1, 2006.

3 The "Actual Charge Legislation," later codified at Okla.Stat.tit.36, § 3651, was introduced by Ron Peterson of the House and Senator Coffee of the Senate of Oklahoma in February 2006. The legislation was passed by the Oklahoma State Legislature on May 9, 2006.

Senator Coffee resists the above discovery based on legislative immunity or the "Speech or Debate Clause" privilege. He contends that all of the documents he has been subpoenaed to authenticate and produce are the result of the legislative process and thus not discoverable. Lindley responds that (1) the privilege does not extend to documents; (2) if the privilege does extend to documents, the documents sought relate to "political activities," not "legislative activities"; and (3) if the privilege shields the documents from discovery, Senator Coffee waived the privilege by failing to meet the requirements of Rule 45(d)(2)(A).

I. Legislative immunity/privilege and the "Speech and Debate Clause" under the federal and state constitutions

The principle of "legislative immunity"/"legislative privilege" derives from the common law as well as federal and state constitutional law. Legislative immunity/privilege has its roots in the 17th and 18th century struggle for power between the Stuart monarchy and Parliament in England, in which the monarchs exerted "pressure on members of Parliament by using judicial process to make them more responsive to their wishes." *United States v. Gillock,* 445 U.S. 360, 368–69 (1980). From the English and American common law which subsequently developed, the authors of the United States Constitution [4] drafted an explicit provision referred to as the "Speech or Debate Clause" of the United States Constitution:

> The Senators and Representatives ... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in Either House, they shall not be questioned in any other Place.

***3** U.S. Const. Art. I § 6, ¶ 1. The reasons underlying the Clause are "first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." *Gillock,* 445 U.S. at 369 (citing *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 502–503 (1975)). Thus the Clause grants not only substantive immunity of a legislator from civil and criminal liability arising out of legislative acts and the motivation for those acts, [5] but also an evidentiary privilege against use of such acts or motive. *Gravel v. United States,* 408 U.S. 606, 616 (1972) (finding that Senator Gravel "may not be made to answer —either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting."); *Fields v. Office of Eddie Bernice Johnson,* 459 F.3d 1, 14 (D.C.Cir.2006) ("This evidentiary privilege includes a 'testimonial privilege.' A Member 'may not be made to answer' questions—in a deposition, on the witness stand, and so forth—regarding legislative activities.' "). Generally, legislators' immunity from suit is referred to as "legislative immunity," and the evidentiary privilege accorded legislators is referred to as the "legislative privilege"; however, the terms are also used interchangeably. The discovery dispute before the Court does not implicate the Speech or Debate Clause of the United States Constitution as it concerns the applicability and scope of the legislative privilege held by a state, not a federal, legislator. [6] Oklahoma, however, has adopted a constitutional provision essentially identical to the federal: [7]

4 James Wilson, who is credited with drafting this provision, summarized the reasons for including it in the United States Constitution:

> "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."

Tenney v. Brandhove, 341 U.S. 367, 373 (1951) (citing II Works of James Wilson (Andrews ed. 1896)).

5 The Supreme Court in *United States v. Johnson,* 383 U.S. 169 (1966) recognized that legislators were immune from prosecution not only for legislative acts but also from the member's "motives for performing them." *Id.* at 185.

6 Although the "Speech or Debate Clause" is limited to federal legislators, the United States Supreme Court extended the common law legislative privilege to state legislators sued in a federal civil rights action in *Tenney v, Brandhove,* 341 U.S. 367 (1951). The Court, however, refused to extend the privilege to state or local legislators in federal criminal prosecutions. *Gillock,* 445 U.S. at 373 ("[W]e believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.").

7 Article V, section 22 is an original provision of the Oklahoma Constitution which was adopted by a vote of the people on September 17, 1907. *Howard v. Webb,* 570 P.2d 42, 46 n. 7 (Okla.1977). Oklahoma Supreme Court Justice Marion Opala described the origin of the state "Speech or Debate" Clause in *Ethics Comm'n of State of Okla. v. Cullison,* 850 P.2d 1069 (Okla.1993) (Opala, J., concurring):

> Our Speech and Debate Clause was taken directly from the United States Constitution's Art. I, § 6, cl. 1, which provides that senators and representatives

> "for any Speech or Debate in either House ... shall not be questioned in any other Place." The origin of the Clause is attributed to the practice of the British Parliament. A suit against a member of the House of Commons in 1512 prompted Parliament to pass the first special immunity bill. The English Bill of Rights of 1689, which included a provision "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," appears to be the source of the privilege found in our 1776 Articles of Confederation. The latter privilege, with only a slight modification, was carried into the U.S. Constitution as the Speech and Debate Clause.
>
> *Id.* at 1084 n. 24 (citations omitted).
>
> Forty-three states have constitutional legislative privilege provisions: twenty-three of them, including Oklahoma, adopted essentially identical provisions to that of the United States Constitution. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures,* 45 Wm. & Mary L.Rev. 221, 236 (October 2003). Also, the Supreme Court has recognized state legislators' "common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Virginia v. Consumers Union of the United States,* 446 U.S. 719, 732 (1967).

> Senators and Representatives shall, except for treason, felony, or breach of the peace, be privileged from arrest during the session of the Legislature, and in going to and returning from the same, and, for any speech or debate in either House, shall not be questioned in any other place.
>
> Okla. Const. Art. 5 § 22. Further, the Oklahoma Supreme Court has recognized that the state clause "provides at least as much protection as the immunity granted by the comparable provisions of the Federal Constitution." *Brock v. Thompson,* 948 P.2d 279, 288 n. 26 (Okla.1997).

In a diversity case such as this, it is the law of the state which supplies the rule of decision; thus, the legislative privilege claimed by Senator Coffee is determined under Oklahoma law, specifically, Article 5, Section 22 of the Oklahoma Constitution. *See* Fed.R.Evid. 501. As there are few Oklahoma Supreme Court decisions interpreting the state constitutional provision and those that do are guided by United States Supreme Court interpretations of the essentially identical federal constitutional provision, the Court also looks to interpretations of the "Speech or Debate" Clause in the United States Constitution regarding legislative privilege. *See Brock,* 948 P.2d at 287–88 (citing United States Supreme Court cases interpreting the "Speech or Debate" clause of the United States Constitution as guidance in interpreting the analogous Oklahoma provision); *Oklahoma State Senate ex rel. Roberts v. Heatherington,* 868 P.2d 708, 709 (Okla.1994) (same); *Ethics Comm 'n of State of Okla. v. Cullison,* 850 P.2d 1069, 1083–85 (Okla.1993) (Opala, J., concurring) (same); *State ex rel. Oklahoma Bar Assoc. v. Nix,* 295 P.2d 286 (Okla.1956) (same).

II. Scope of the legislative privilege

***4** Although the Speech or Debate Clause on its face appears to limit its protection to a legislator's remarks on the House or Senate floor, the United States Supreme Court has broadly interpreted the Clause as protecting "legislative acts" which are "clearly a part of the legislative process—the due functioning of the process," *United States v. Brewster,* 408 U.S. 501, 516 (1972), as well as a legislator's motivation for those acts, *United States v. Johnson,* 383 U.S. 169, 185 (1966); *Bastien v. Office of Senator Ben Nighthorse Campbell,* 390 F.3d 1301, 1305 (10th Cir.2004) ("[T]he Supreme Court has long treated the Clause as constitutional shorthand for a more extensive protection."). Legislative acts are matters that are "*an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places with the jurisdiction of either House." *Hutchinson v. Proxmire,* 443 U.S. 111, 126 (1979) (quoting *Gravel,* 408 U.S. at 625) (emphasis in original)). "The line separating protected from unprotected legislative activity lies in the distinction between 'purely legislative activities' and those that are nongermane 'political matters.' " *Brock,* 948 P.2d at 288 (citing *Brewster,* 408 U.S. at 512).

The Tenth Circuit Court of Appeals recently summarized the decisional glosses on legislative privilege in light of the United States Supreme Court's evolving interpretations of the Clause (the majority of decisions having been handed down between 1966 and 1979) in *Bastien v. Office of Senator Ben Nighthorse Campbell,* 390 F.3d 1301 (10th Cir.2004). First, in light of the purpose and history of the Clause, " 'Speech or Debate' have been read broadly to encompass all formal actions in the official business of Congress, including voting, conducting hearings, issuing reports and issuing subpoenas." *Id.* at 1314 (citing *Kilbourn v. Thompson,* 103 U.S. 168, 204 (1880) (Speech or Debate includes "written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be

reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers"); *Tenney, supra* (Speech or Debate includes questioning witnesses in state investigative committee meetings); *Doe v. McMillan,* 412 U.S. 306, 312 (1973) (The Speech or Debate Clause barred suit by persons allegedly defamed by a committee report distributed within Congress and voted for public dissemination by the Government Printing Office.); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 505 (1975) (Speech or Debate Clause protects votes to authorize committee investigations as well as the issuance of subpoenas in that investigation.). "Speech or Debate in Either House," therefore, has a formal as well as spatial meaning. [8]

8 One commentator describes this as the "protection of the Clause is at least partly defined by the *real or metaphorical walls of Congress.*" 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5675 (3d. Ed.1992).

***5** Second, the Supreme Court recognized the "needs of a large and overburdened legislative body," and expanded "Senators and Representatives" to include their functional equivalents; *e.g.* "aides who function as their alter egos in performing legislative acts," and "committee hearings [to be] deemed 'in' the House even when conducted far away." *Id.* at 1315 (citing *Gravel,* 408 U.S. at 616–17 ("[T]he Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself."); *Eastland,* 421 U.S. at 507 (immunity for Chief Counsel to the Members in issuing subpoena); and *Hutchinson,* 443 U.S. at 124 ("[Committee hearings are protected, even if held outside the Chambers; committee reports are also protected.")).

Third, "an act is 'questioned' not only if it is the subject of civil or criminal prosecution but even if evidence of the act is offered at a trial." *Id.* (citing *Johnson,* 383 U.S. at 173–76 (Consideration of evidence relating to legislator's floor speech, its preparation and his motives for the speech amounted to "questioning" the legislator about a legislative act.); *United States v. Helstoski,* 442 U.S. 477 (1979) (The "evidence of a legislative act of a Member may not be introduced by the Government.")). Legislative immunity/ privilege, accordingly, not only enables legislators to serve the public without fear of personal liability, but without fear of litigation itself which "creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Supreme Court of Virginia v. Consumers Union of the United States,* 446 U.S. 719, 733 (1980) (brackets and internal quotation marks omitted). As explained in *Tenney*, "The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney,* 341 U.S. at 377; *Sable v. Myers,* 563 F.3d 1120, 1123–1124 (10th Cir.2009) (same).

Fourth, the broad constructions of the above "have always been confined within the limits of formal, official proceedings." *Bastien,* 390 F.3d at 1315 (citing *Kilbourn,* 103 U.S. at 204 (limited to "things generally done in a session of the House by one of its member in relation to the business before it"); *Johnson,* 383 U.S. at 172 (The Speech or Debate Clause does not reach conduct involved in legislator's attempt to influence an agency, the Department of Justice.); *Brewster,* 408 U.S. at 512 ("Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts"); *Gravel,* 408 U.S. at 625 (("Insofar as the Clause is construed to reach other matters [than speech or debate in either House], they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."); *Hutchinson,* 443 U.S. at 126 ("[T]his privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty.")). In sum, protected acts are more than those with "some nexus to legislative functions," *Brewster,* 408 U.S. at 528; they must be "an integral part of the deliberative and communicative processes" in which legislators engage, *Gravel,* 408 U.S. at 625. And that legislative process at least includes the following acts:

> ***6** "delivering an opinion, uttering a speech, or haranguing in debate"; proposing legislation; voting on legislation; making, publishing, presenting, and using legislative reports; authorizing investigations and issuing subpoenas; and holding hearings and "introducing material at Committee hearings."

Fields, 459 F.3d at 10–11 (citing United States Supreme Court decisions for each recognized legislative act) (footnotes omitted).

Accordingly, it is necessary to distinguish protected "legislative acts" from unprotected "political acts" attendant to legislator's duties. As the Supreme Court noted in *Brewster*,

> [i]t is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things 'generally done in a session of the House by one of its members in relation to the business before it,' or things 'said or done by him, as a representative, in the exercise of the functions of that office.'

Brewster, 408 U.S. at 512–513 (citations omitted).

And similarly, the privilege does not protect information about acts or conduct beyond "legitimate legislative activity"; it does not protect illegal acts, purely personal acts, or a promise to vote a certain way or give a speech at a future date. For example, the issue before the Supreme Court in *Brewster* was "whether it is necessary to inquire into how [former United States Senator Daniel Brewster] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of bribery under [18 U.S.C. § 201(c)]." [9] *Brewster*, 408 U.S. at 526. In finding that legislative immunity/privilege did not preclude the prosecution of Brewster under the bribery statute, the Supreme Court distinguished the necessary criminal elements to be proven from the protected legislative acts:

> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an 'act resulting from the nature, and in the execution, of the office.' Nor is it a 'thing said or done by him, as a representative, in the exercise of the functions of that office,' Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in Johnson, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe 'does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them.'
>
> ***7** *Id.* (citations omitted).

Applying the above Supreme Court jurisprudence on the Speech or Debate Clause, the Tenth Circuit in *Bastien* reversed the trial court's dismissal of plaintiff's employment discrimination claim against the employing office of Senator Ben Nighthorse Campbell ("Campbell") under the Congressional Accountability Act of 1995 ("CAA") based on the Speech or Debate Clause. Plaintiff Rita Bastien ("Bastien") worked as an aide in Campbell's Englewood, Colorado office for six years. On September 5, 2000, Bastien, then 61, was transferred to Campbell's Colorado Springs office as a District Director. Bastien alleged that Campbell's Office discriminated against her based on age and retaliated against her for discrimination complaints when it terminated her as District Director on April 10, 2001. The trial judge granted Campbell's Office's motion to dismiss, finding that the majority of Bastien's job responsibilities were directly related to the due functioning of the legislative process, and thus, Campbell's Office was entitled to immunity under the Speech or Debate Clause. *Bastien v. Campbell*, 209 F.Supp.2d 1095, 1106 (D.Colo.2002).

The Tenth Circuit reversed, finding that "the alleged discriminatory acts by the Senator were not legislative acts," and "even if there had been a legislative act—say, a committee resolution—directing a discriminatory action against Plaintiff, only the vote itself would be protected by the

9 The statute at issue in *Brewster* provided that a legislator who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value ... in return for ... (1) being influenced in his performance of any office act" is guilty of an offense. *Brewster*, 408 U.S. at 525–26 (quoting 18 U.S.C. § 201(c)).

Speech or Debate Clause." *Id.* at 1315. In so finding, the Tenth Circuit rejected Campbell's argument that the Supreme Court in *Doe*, *Eastland*, and *Hutchinson* indicated that the Speech or Debate Clause immunity extends to a legislator's or his aides' informal meetings with constituents or other members of the public "to the extent that information is gathered that could affect his votes or his efforts to craft proposed legislation." *Id.* at 1316. Specifically, the Tenth Circuit interpreted the "communicative processes" referred to in *Gravel* [10] as not extending to communication between legislators and their constituents or the public, only to "information gathering ... in the course of formal committee action, when the committee had subpoenaed witnesses or disclosed information during a hearing." *Id.; but see Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir.1983) (The Speech and Debate Clause prohibits questions about a legislator's sources of information because the legislator's receipt of "information pertinent to potential legislation or investigation" is part of the privileged legislative process.); *Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 521 (3d Cir.1985) ("We agree that fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation.")

10 The complete reference is to the following statement in *Gravel:*

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Gravel, 408 U.S. at 625.

Although the Tenth Circuit has very narrowly limited the "information gathering" that is privileged to that gathered "in the course of formal committee action," the Oklahoma Supreme Court appears to have interpreted legislative privilege under the Oklahoma Constitution for "the informing function"—the flip side of information gathering—more broadly in finding that a legislator's written version of his speech before the Senate attacking the "integrity and sincerity of the Criminal Court of Appeals of the State of Oklahoma ... in connection with a murder case" was privileged, although he deliver it to the press. *Nix*, 295 P.2d at 288–91. The Oklahoma Supreme Court, however, was quick to point out that the state senator "made his speech on the Senate floor and delivered press releases to newspaper men that the Senate was then in session." *Id.* at 291. The state Supreme Court, nonetheless, did recognize the importance of the "informing function of Congress," citing *Tenney* in support of its broad reading of the Oklahoma Speech or Debate Clause:

> ***8** Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to the motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162[167], that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not be beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions

> exclusively vested in the Judiciary or the Executive.

Id. at 291 (quoting *Tenney*, 341 U.S. at 377–78) (citation omitted).

It is, however, notable that *Nix* was decided before the United States Supreme Court emphasized that although the Clause should be interpreted "broadly to effectuate its purposes," *Eastland*, 421 U.S. at 501, it should "not extend beyond what is necessary to preserve the integrity of the legislative process," *Brewster*, 408 U.S. at 517. Indeed, *Nix* was decided many years before *Gravel* in which the United States Supreme Court required that a legislative act be "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation," and concluded that Senator Gravel's effort to arrange for private publication of material he had included in the record of a subcommittee hearing was not an "integral part" of the legislative process. *Gravel*, 408 U.S. at 625. Thus, the Oklahoma Supreme Court's broader interpretation of legislative privilege in *Nix* was likely due to the difference in policy considerations in 1956 and in 1972, rather than any real difference in the United States Supreme Court's and the Oklahoma Supreme Court's respective interpretations of the federal and state Constitutions.

This reading is consistent with the 1997 *Brock* decision in which the Oklahoma Supreme Court cited with approval *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979), in support of its legal statement that the "legislative privilege has never been limited to words spoken in debate." *Brock*, 948 P.2d at 288. The *Brock* Court characterized the holding in *Hutchinson* as follows: "in a libel suit against a United States senator the court held that the senator's press releases and newsletters were not protected by the Speech or Debate Clause." *Id* at 288 n. 9. And in *Hutchinson*, the United States Supreme Court emphatically rejected identifying a legislator's informing the public or his constituency of the basis of his actions as a "legislative function":

> ***9** Respondents also argue that newsletters and press releases are privileged as part of the "informing function" of Congress. Advocates of a broad reading of the "informing function" sometimes tend to confuse two uses of the term "informing." In one sense, Congress informs itself collectively by way of hearings of its committees. It was in that sense that Woodrow Wilson used "informing" in a statement quoted by respondents. In reality, Wilson's statement related to congressional efforts to learn of the activities of the Executive Branch and administrative agencies; he did not include wide-ranging inquiries by individual Members on subjects of their choice. Moreover, Wilson's statement itself clearly implies a distinction between the informing function and the legislative function:
>
> > "Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.... [T]he only really self-governing people is that people which discusses and interrogates its administration."
>
> It is in this narrower Wilsonian sense that this Court has employed "informing" in previous cases holding that congressional efforts to inform itself through committee hearings are part of the legislative function.
>
> The other sense of the term, and the one relied upon by respondents, perceives it to be the duty of Members to tell the public about their activities. Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process. As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.

Hutchinson, 443 U.S. at 132–133. The Court thus concludes that the Oklahoma Supreme Court's interpretation of the state Speech or Debate Clause mirrors that of the United States Supreme Court's interpretation of the federal Clause.

Finally, the Court addresses Lindley's argument that legislative privilege does not extend to document production as it is a privilege of non-evidentiary "use," not one of nondisclosure. As the United States Supreme Court has not yet addressed the question, courts are split as to what role, if any, legislative privilege plays in prohibiting the production of documents, especially in instances, like this, in which discovery is sought from a non-party legislator.

Courts persuaded by the policy argument for openness of the legislative process in a democracy generally find documents not privileged. *See Bastien,* 390 F.3d at 1306–07 (Emphasizing a more restrictive reading, the Tenth Circuit opined that the Speech or Debate Clause "should not be, and has not been, read to make members of Congress into a special class of citizens protected from suit (or prosecution) arising out of any activity that could assist in the performance of their official duties."); *Powell v. Ridge,* 247 F.3d 520, 524 (3rd Cir.2001) (legislative immunity is not "bottomed on confidentiality"); *In re Grand Jury (Granite Purchases for State Capital–Grand Jury Subpoena No. 86–1),* 821 F.2d 946, 953 n. 4 (3d Cir.1987) ("Our precedents have suggested that the privilege is primarily one of non-evidentiary use, not one of non-disclosure"); *In re Grand Jury Investigation,* 587 F.2d 589, 597 (3d Cir.1978) (reasoning that legislative privilege not designed to encourage confidences by maintaining secrecy "for the legislative process in a democracy has only a limited toleration for secrecy."); *Marylanders for Fair Representation, Inc. v. Schaefer,* 144 F.R.D.292, 301 n. 20. (D.Md.1992) (Legislative immunity does not extend to "certain types of documentation offering a 'speech or debate-like' privilege.").

***10** Courts, however, which stress the need to prevent interference in congressional business and distraction of Members from their legislative duties tend to extend legislative privilege to documents as well as "informal information gathering". *See Brown & Williamson Tobacco Corp., v. Williams,* 62 F.3d 408, 420, 421 (D.C .Cir.1995) (holding documentary evidence can be as revealing as oral communications and thus documents in the hands of congressional members are discoverable "only if the circumstances by which they come can be thought to fall outside 'legislative acts' or the legitimate legislative sphere"); *MINPECO, S.A. v. Conticommodity Servs., Inc.,* 844 F.2d 856, 860 (D.C.Cir.1988) (protecting "the process by which a committee takes statements and prepares them for publication"); *Miller,* 709 F.2d at 530–31 (legislator's receipt of "information pertinent to potential legislation or investigation" is part of privileged legislative process); *United Transportation Union v. Springfield Terminal Railway Company,* 132 F.R.D. 4, 6 (D.Me.1990) (Permitting discovery of internal legislative communications would cause a "significant entrenchment on legislative independence.").

To the extent Lindley is arguing that the legislative privilege can *never* prevent discovery of documents in any way related to the legislative process, the Court disagrees. Documents that are "an integral part of the deliberative and communicative processes" by which legislators participate in legislative or committee proceedings are clearly privileged. *Gravel,* 408 U.S. at 625. Although Senator Coffee cannot claim legislative privilege from producing all the documents requested by the subpoena simply because they are in some way related to his duties as a state legislator, if the documents are of matters which are "an integral part of the deliberative and communicative processes" by which legislators participate in legislative or committee proceedings, they are privileged. If they are not, the senator must produce them.

III. Discovery requests

In light of the above, the Court now turns to Lindley's Requests for Production from Senator Coffee. As Senator Coffee is asserting a legislative privilege, it is his burden to establish its applicability. *Kamplain v. Curry County Board of Commissioners,* 159 F.3d 1248, 1251 (10th Cir.1998) ("[G]overnment official seeking [legislative] immunity bears the burden of showing that an exemption from personal liability is justified."); *Manzi v. DiCarlo,* 982 F.Supp. 125, 128 (E.D.N.Y.1997) ("The burden of justifying application of any privilege [specifically, legislative privilege] falls upon the party seeking to invoke it."). Senator Coffee contends that all of the requests impermissibly seek documents which, if they exist, would be an "integral part of the legislative process in considering and enacting state law"; thus, they are privileged. *Response,* p. 6 (Dkt.# 115). Unfortunately, he offers nothing to support his position.

***11** Pursuant to Rule 45(d)(2)(A) of the Federal Rules of Civil Procedure, Senator Coffee not only is required to support his claim of legislative privilege "expressly," but he must "describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Fed.R.Civ.P. 45(d)(2)(A). However, he has presented no descriptions of the nature of the documents or a privilege log from which Lindley or the Court can determine the applicability of legislative

privilege. The statement in Senator Coffee's brief that all but one of the requests expressly refers to the "actual charge legislation" falls quite short of the requirements of Rule 45; and contrary to Senator Coffee's belief that the requested documents establish "by their own terms" that they are an "integral part of the legislative process," this Court apparently needs express guidance. For instance, while the request for "[a]ll documents relating to, evidencing, memorializing or summarizing any drafts of, revisions to, or proposal language for, the Actual Charge Legislation," is obviously broad enough to include privileged documents, Senator Coffee has offered no explanation why documents allegedly given him by American Fidelity are likewise entitled to legislative privilege.

Accordingly, the Court directs Senator Coffee to produce to Plaintiff on or before August 10, 2009 all the requested documents not protected by legislative privilege (determined in light of the Court's analysis of the law set forth above) and to provide the Court and Plaintiff a privilege log of the documents he contends are privileged. By that same date, Senator Coffee is to deliver the documents he purports to be privileged to the Court for its review. According to the Local Rules for the Northern District of Oklahoma, the privilege log should include the following: "the type of document; the general subject matter of the document; the date of the document; the author of the document, whether or not the author is a lawyer; each recipient of the document; and the privilege asserted." LCvR26.4(a). "If information called for by one or more of the foregoing categories is itself privileged, it need not be disclosed." LCvR26.4(b).

To assist Senator Coffee in determining what documents may be privileged, the Court offers the following summary of the "legislative acts" or matters that are "*an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places with the jurisdiction of either House," and those acts or matters that are not privileged, as discussed above.

Items which are protected by legislative privilege include:

(1) "all formal actions in the official business of [the Oklahoma Senate], including voting, conducting hearings, issuing reports and issuing subpoenas";

***12** (2) questioning witnesses in state investigative committee meetings;

(3) committee reports distributed within the Oklahoma Senate;

(4) votes to authorize committee investigations and the issuance of subpoenas in those investigations;

(5) Senator's floor speech, its preparation and motives for the speech;

(6) making, publishing, presenting and using legislative reports;

(7) introducing material at committee hearings;

(8) information gathering if in the course of formal committee action when the committee had subpoenaed witnesses or disclosed information during a hearing.

Contrarily, the following is a list of items *not* covered by legislative privilege:

(1) errands performed for constituents or other members of the public;

(2) making appointments with Government agencies;

(3) assistance in securing Government contracts;

(4) preparing "news letter" to constituents or other members of the public;

(5) news releases;

(6) speeches delivered outside the Senate;

(7) illegal acts;

(8) personal acts;

(9) promise to vote a certain way or give a speech at a future date;

(10) private publication of material included in the record of a subcommittee hearing;

(11) informal meetings with constituents or other members of the public.

The lists, of course, are not comprehensive. They are guidelines to assist the Senator in making his determination.

Should Senator Coffee wish to submit a short brief (not to exceed 10 pages) offering authority for claim(s) of legislative privilege not listed above or in some way distinguishable, he may file it with the privilege log on August 10, 2009. If Lindley wishes to file a response brief, he should notify the Court by the close of business on August 11, 2009 and his brief (not to exceed 10 pages) will be due on or before August 14, 2009. Otherwise, the Court will consider the matter at issue on August 10, 2009, review the documents and issue its ruling promptly.

IT IS SO ORDERED.

741 F.3d 480
United States Court of Appeals,
Fourth Circuit.

Marie M. McCRAY, Plaintiff–Appellant,
v.
MARYLAND DEPARTMENT OF TRANSPORTATION, MARYLAND TRANSIT ADMINISTRATION, Defendant–Appellee.

No. 13–1215. | Argued: Dec. 10, 2013. | Decided: Jan. 30, 2014.

Synopsis

Background: Former state employee brought action alleging that her termination was result of discriminatory animus due to her race, gender, age, and disability, in violation of Americans With Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and Title VII. The United States District Court for the District of Maryland, Ellen L. Hollander, J., 2013 WL 210186, granted state's motion for summary judgment, and employee appealed.

Holdings: The Court of Appeals, Gregory, Circuit Judge, held that:

[1] Eleventh Amendment barred employee's age and disability discrimination claims;

[2] employee was entitled to conduct discovery before entry of summary judgment; and

[3] summary judgment on legislative immunity grounds was not premature.

Affirmed in part, vacated in part, and remanded.

West Headnotes (10)

[1] Federal Courts
State Officers or Agencies, Actions Against

State's Eleventh Amendment immunity barred former state employee's age and disability discrimination claims against state agencies under ADEA and Title I of ADA. U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.; Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

[2] Federal Courts
Waiver of Immunity

Unconsenting state is immune from suits brought in federal courts by her own citizens. U.S.C.A. Const.Amend. 11.

[3] Federal Courts
Eleventh Amendment in General; Immunity

Because of its jurisdictional nature, court ought to consider issue of Eleventh Amendment immunity at any time, even sua sponte. U.S.C.A. Const.Amend. 11.

[4] Federal Courts
Waiver of Immunity

State did not waive its Eleventh Amendment immunity to suit in federal court due to fact that it raised issue for first time in Court of Appeals, where case had not advanced to discovery stage. U.S.C.A. Const.Amend. 11.

[5] Federal Civil Procedure
Time for Consideration of Motion

Former state employee was entitled to conduct discovery before entry of summary judgment in state's favor on basis of legislative immunity in her action alleging that her termination was result of discriminatory animus due to her race and gender, in violation of Title VII, where fact issues remained as to whether employee's claims were barred by legislative immunity, and employee had not had opportunity to depose her supervisors or received any information on how positions were chosen for termination or why other positions were kept. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

[6] Federal Courts
Trial De Novo

District court's legislative immunity finding is legal determination that Court of Appeals reviews de novo.

[7] Municipal Corporations
Duties and Liabilities

Legislative immunity protects those engaged in legislative functions against pressures of litigation and liability that may result.

[8] Municipal Corporations
Duties and Liabilities

Determination of legislative immunity is based on function being fulfilled, not title of actor claiming immunity.

[9] Municipal Corporations
Duties and Liabilities

Actions that qualify as legislative, and thus are entitled to legislative immunity, typically involve adoption of prospective rules that establish general policy affecting larger population, and they generally bear outward marks of public decisionmaking.

[10] Federal Civil Procedure
Employees and Employment Discrimination, Actions Involving

Genuine issue of material fact as to whether state officials' decision to terminate employee was motivated by discriminatory animus due to her race and gender, rather than by budget cuts, precluded summary judgment on legislative immunity grounds in employee's Title VII discriminatory termination action. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Attorneys and Law Firms

ARGUED: John Henry Morris, Jr., Law Office of John H. Morris, Jr., Baltimore, Maryland, for Appellant. Jennifer L. Katz, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellee. **ON BRIEF:**Douglas F. Gansler, Attorney General of Maryland, Eric S. Hartwig, Assistant Attorney General, Office of the Attorney General of Maryland, Baltimore, Maryland, for Appellee.

Before KING, GREGORY, and FLOYD, Circuit Judges.

Opinion

Affirmed in part, vacated in part, and remanded by published opinion. Judge GREGORY wrote the opinion, in which Judge KING and Judge FLOYD joined.

GREGORY, Circuit Judge:

Appellant Marie McCray worked for the Maryland Transit Administration ("MTA"), a subsidiary of the Maryland Department of Transportation ("MDOT"), for nearly four decades before her position was terminated because of budget cuts. McCray brought this action in federal district court alleging various forms of discrimination. The district court dismissed McCray's suit on legislative immunity grounds before any meaningful discovery could be conducted. We find that McCray's complaint alleges discriminatory conduct that occurred before any legislative activity. Because McCray's case was dismissed before she had the opportunity to discover evidence necessary to her claims, we conclude that this dismissal was premature under Rule 56(d) of the Federal Rules of Civil Procedure. However, we find that McCray's age discrimination and disability discrimination claims are barred by sovereign immunity. We affirm in part, vacate in part, and remand.

I.

Marie McCray began working for the Maryland Transit Authority, a precursor of the MTA, in 1971.[1] Her principal duty was to assemble an annual rider usage report for trains and buses. For three decades, she worked without incident and received no complaints from supervisors.

McCray was diagnosed with diabetes in 1995, but the illness had no effect on her job performance until 2007. In June of that year, co-workers discovered her after she fainted on the floor near her desk. She was taken to the hospital in an ambulance and treated for low blood sugar. She was discharged the same day and returned to work one week later.

After the incident, McCray's supervisor hectored her about her fitness and questioned her ability to work. It is this supervisor, Michael Deets, whose behavior is the core of McCray's claims. Deets confronted McCray ceaselessly, even after she provided written documentation from her doctors establishing her medical fitness. Eventually, Deets and a human resources official demanded that McCray submit to an independent medical examination. This independent doctor confirmed what McCray's doctors found: the diabetes would have no impact on her work. Nonetheless, Deets continued to plague McCray with questions about her health.

In January of 2008, McCray's principal job—the annual usage report—was transferred to a consultant, and McCray was left without significant work. Other employees in her unit were overwhelmed with work, but when McCray requested more responsibilities, she was denied.

In October of 2008, McCray was summoned to a meeting with Deets, who informed her that her position was abolished as part of a series of budget cuts in Maryland. In 2008, the Governor and Board of Public Works cut roughly 830 state positions to meet a budget shortfall.

McCray filed a claim with the United States Equal Employment Opportunity Commission ("EEOC"), alleging discrimination under Title I of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101–12113, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–634, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq. She alleged that her position was cut because of discriminatory animus due to her race, gender, age, and disability.

Before any meaningful discovery was conducted, the MTA and MDOT filed a motion to dismiss. The agencies argued that because McCray's position was cut pursuant to a state budget decision, legislative immunity blocked the lawsuit. At this point, McCray had not had an opportunity to gather information that was integral to her case. She had no evidence about how different positions were chosen for elimination, or on how many individuals with disabilities were employed by the MDOT or MTA. As such, she moved under Rule 56(d) of the Federal Rules of Civil Procedure for more time to conduct discovery.

The district court converted the MDOT and MTA's motion into a motion for summary judgment and then dismissed McCray's claims. The court found that because her position was terminated pursuant to budget cuts, any lawsuit based on that termination was blocked by legislative immunity. Further, any discovery that McCray would conduct would be immaterial to the legislative immunity issue. "Because [McCray's] proposed discovery relates to the motives of individual employees within the MTA and the MDOT," the district court reasoned, "McCray has not identified any factual issue pertinent to ... legislative immunity" that remained in dispute. J.A. 110. As such, the court also denied McCray's 56(d) motion. McCray filed a timely appeal, and we have jurisdiction under 28 U.S.C. § 1291.

II.

[1] **[2]** The MDOT and MTA argue that sovereign immunity bars McCray's age and disability discrimination claims. This argument is correct. "[A]n unconsenting State is immune from suits brought in federal courts by her own citizens." *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). This protection extends to state agencies. *See Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997). Therefore, absent abrogation of sovereign immunity or consent from Maryland, McCray cannot seek injunctive or monetary relief from the MDOT or MTA. *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363–64, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Sovereign immunity has not been abrogated for ADEA claims and ADA Title I claims. *See id.* at 374, 121 S.Ct. 955 (ADA Title I claims); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (ADEA claims); *cf. Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 489–90 (4th Cir.2005) (recognizing abrogation of sovereign immunity for Title II claims but not Title I claims). Thus, absent waiver of sovereign immunity, McCray's ADEA and ADA claims must be dismissed.

[3] **[4]** The MDOT and MTA raise their sovereign immunity argument for the first time on appeal. McCray argues that the MDOT and MTA waived this argument. We disagree. Our case law is clear that "because of its

jurisdictional nature, a court ought to consider the issue of Eleventh Amendment immunity at any time, even *sua sponte*." *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 227 (4th Cir.1997). The Supreme Court has allowed sovereign immunity to be claimed for the first time before a Court of Appeals. *Edelman*, 415 U.S. at 677–78, 94 S.Ct. 1347 ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."). There are limits to how long a state may wait before claiming immunity. For example, if a state loses a case on the merits after extensive discovery has taken place, it is inappropriate for the state to then claim sovereign immunity. *Ku v. Tennessee*, 322 F.3d 431, 435 (6th Cir.2003). As stressed by McCray, however, this case has not advanced to the discovery stage. Given the preliminary stage of the case, it is not too late for the MDOT and MTA to raise their sovereign immunity defense, even though it is raised before us for the first time. Thus, we affirm the district court's rulings on McCray's ADEA and ADA claims, albeit based on sovereign immunity, not legislative immunity.

III.

For McCray's remaining Title VII claim, the key question is whether the district court erred in dismissing McCray's action before she could conduct discovery. In general, summary judgment should only be granted "after adequate time for discovery." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask. For this reason, when a party lacks material facts necessary to combat a summary judgment motion, she may file an "affidavit or declaration that, for specified reasons, [the party] cannot present facts essential to justify its opposition." Fed.R.Civ.P. 56(d). In response, the district court may defer consideration of the summary judgment motion, deny the motion, or "issue any other appropriate order." *Id.*

We review a district court's 56(d) ruling for abuse of discretion. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir.2002). A Rule 56(d) motion must be granted "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Id. (quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Further, such motions are "broadly favored and should be liberally granted" in order to protect non-moving parties from premature summary judgment motions. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 281 (4th Cir.2013) (*quoting Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir.2010)). [2]

[5] Absent the legislative immunity consideration, McCray's 56(d) motion succeeds with ease. At the time of the summary judgment motion, McCray had not had the opportunity to depose supervisors at the MDOT and MTA. She had no information on how positions were chosen for termination or why other positions were kept. Without such information, it would be impossible for her to make an argument that she was fired because of discriminatory reasons. As we have emphasized, 56(d) motions for more time to conduct discovery are proper in cases such as this one, where the main issue is one of motive and where most of the key evidence lies in the control of the moving party. *See Harrods*, 302 F.3d at 246–47 (*citing Illinois State Employees Union v. Lewis*, 473 F.2d 561, 565–66 (7th Cir.1972)). Again, evidence of how defendants selected McCray's position (and other positions) for termination go to the crux of McCray's race discrimination claims. Absent discovery, she has no adequate access to this evidence, and therefore no way to shield herself from a premature summary judgment motion.

Further, many factors counseling against granting a 56(d) motion are absent here. Non-movants must generally file an affidavit or declaration before they can succeed on a 56(d) motion, or if not, non-movants must put the district court on notice as to which specific facts are yet to be discovered. *Nader v. Blair*, 549 F.3d 953, 961 (4th Cir.2008). In this case, McCray filed such a declaration and identified the material she needed to discover. J.A. 93–95. Similarly, nonmovants do not qualify for Rule 56(d) protection where they had the opportunity to discover evidence but chose not to. *Harrods*, 302 F.3d at 246 (noting that non-movant was entitled to 56(d) protection in part because it "was not dilatory in pursuing discovery"). There is no indication that McCray's inability to gather evidence was due to her own delay. In sum, if we set the legislative immunity argument aside, this case is an easy one: McCray's 56(d) motion should be granted.

However, as the district court noted, legislative immunity complicates the issue because the evidence that McCray has yet to discover "is not material to whether defendants are entitled to legislative immunity." J.A. 110. This assertion is correct, but we nonetheless vacate, because McCray's complaint alleges discriminatory actions that occurred well before any legislative activity. For this reason, this behavior

cannot be protected by legislative immunity, so the Rule 56(d) denial was premature.

[6] **[7]** A legislative immunity finding is a legal determination that we review *de novo*. *Kensington Volunteer Fire v. Montgomery Cnty.*, 684 F.3d 462, 470–71 (4th Cir.2012). Legislative immunity protects those engaged in legislative functions against the pressures of litigation and the liability that may result. *See E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir.2011) [hereinafter *Washington Suburban*]. "The practical import" of legislative immunity "is difficult to overstate." *Id.* It prevents those who were defeated in elections from waging political war through litigation. *Id.* It promotes a healthier, more thriving class of politicians by ensuring that legislative offices are not limited only to those individuals who are willing to withstand a lawsuit. *Id.*

[8] **[9]** The protections of legislative immunity extend beyond legislators themselves. *Bogan v. Scott–Harris*, 523 U.S. 44, 49, 55, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998). The determination of legislative immunity is based on the function being fulfilled-not the title of the actor claiming immunity. *Kensington*, 684 F.3d at 470. Actions that qualify as legislative "typically involve the adoption of prospective ... rules that establish a general policy affecting the larger population. They also generally bear the outward marks of public decisionmaking." *Washington Suburban*, 631 F.3d at 184 (internal quotations marks, citations and alteration omitted). Accordingly, this Court has had "no trouble concluding that enacting a budget is a legislative act." *See Kensington*, 684 F.3d at 471. Also relevant to this case, the Supreme Court has noted that "the termination of a position ... unlike the hiring or firing of a particular employee, may have prospective implications" and is therefore more likely to be legislative. *Bogan*, 523 U.S. at 56, 118 S.Ct. 966. In this case, both parties accept that McCray's position was terminated due to budget-making. [3]

Finally, and most helpful to the MDOT and MTA, our case law shows that legislative immunity extends to those individuals who advise legislators. *Kensington*, 684 F.3d at 471; *Baker v. Mayor & City Council of Balt.*, 894 F.2d 679 (4th Cir.1990) (applying legislative immunity to a government department that recommended that a position be cut pursuant to a mayor's request), overruled on other grounds by *Berkley v. Common Council of the City of Charleston*, 63 F.3d 295, 303 (4th Cir.1995); see also *Baraka v. McGreevey*, 481 F.3d 187, 196–97 (3d Cir.2007) (holding that governor's appointee's actions in "advising and counseling Governor McGreevey and the Legislature are also legislative" and protected under legislative immunity). This case law stands for the proposition that just as a legislator is immune from discrimination lawsuits when she makes budget decisions based on improper animus, aides to that legislator are also immune. Legislative immunity is a shield that protects despicable motives as much as it protects pure ones. For this reason, the district court's conclusion is correct insofar as it shields the MTA and MDOT from lawsuit based on the counsel they gave executive officials in Maryland who carried out the budget cuts.

[10] Nonetheless, we vacate and remand because the complaint alleges discriminatory actions that took place before the legislative activity began. Our ruling in *Washington Suburban* guides our decision today. In that case, former municipal employees brought an age discrimination claim with the EEOC against a local government agency, the Washington Suburban Sanitation Commission ("WSSC"). *Washington Suburban*, 631 F.3d at 177. In late 2005, the WSSC's Chief Information Officer conducted an assessment of the Information Technology department and concluded that it should be restructured, with several positions eliminated. *Id.* The restructuring required an increased budget, so WSSC executives met in 2006 and agreed to submit the new proposed budget to local legislators. *Id.* These legislators met to discuss the budget and sought advice from WSSC executives. *Id.* The legislators ultimately reached no decision on the proposal, which allowed the restructuring to go into effect by operation of law. *Id.*

The EEOC investigated the WSSC and requested information about how the Chief Information Officer selected positions for termination. This Court allowed the subpoena to be enforced. *Id.* at 185. Part of the basis for our decision was that the EEOC's investigation was aimed at discriminatory actions taken prior to and after the restructuring. *Id.* at 183. "In particular, the EEOC can continue with its stated current investigatory goals—determining whether WSSC discriminated in distributing training prior to the restructuring and whether it discriminated in hiring after the restructuring." *Id.* Inquiries into how the WSSC developed its budget would be problematic, as would inquiries into the legislators' deliberations on the proposal, because these actions were legislative ones that were protected by legislative immunity. *Id.* at 183–84. We upheld the subpoena, however, because the investigation was aimed at discriminatory behavior prior to and after these legislative actions.

As in *Washington Suburban,* McCray alleges discriminatory behavior that occurred before any legislative action took place. Per her complaint, her supervisor at the MTA stripped her of responsibilities in the years leading up to budget cuts. Even though her department was overwhelmed with work, her supervisor refused to give McCray additional responsibilities, even after she asked for more work. Thus, by the time of the 2008 budget crisis which led to the termination of McCray's position, Deets' actions had already made McCray vulnerable and therefore adversely affected her. McCray alleges her termination was a foregone conclusion because her supervisor—driven by discriminatory animus—stripped her of her duties. Had the legislature simply terminated McCray's position, that action would be shielded by legislative immunity. Similarly, if McCray's supervisors advised the legislature to terminate her position because of discriminatory animus, this too would be protected by legislative immunity. In this case, however, McCray's allegation is that she was subject to discriminatory adverse employment actions that made her position vulnerable to the budget cuts that eventually came, and she alleges that these actions were taken before any legislative activity. *See Crady v. Liberty Nat. Bank & Trust Co. of Ind.,* 993 F.2d 132, 136 (7th Cir.1993) (defining a tangible employment action for ADEA purposes as including an employer giving an employee "significantly diminished material responsibilities") (*cited with approval in Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)). Put another way, the basis of McCray's lawsuit is not the financial storm that rocked the state and forced Maryland's government to scale back its budget. Rather, her claim is that the MTA and MDOT gave her a lightning rod to hold and sent her to the roof.

This case presents a more difficult situation than *Washington Suburban,* which involved a subpoena during an initial investigation, rather than a lawsuit. We explicitly noted this distinction in *Washington Suburban.* "The threat to legislative immunity and privilege in [full-blown lawsuits] is more acute than it is here." *Washington Suburban,* 631 F.3d at 182–83. However, the importance of this point in *Washington Suburban* lends support to our ruling here. We drew attention to the early stage of the proceedings in that case because it was unclear whether the investigation would ever ripen into a case threatening legislative immunity. *Id.* at 183 ("We also cannot assume the EEOC's investigation will follow the path WSSC projects."). In other words, a legislative immunity holding is premature if the case might evolve in a way that poses no threat to legislators. McCray's case is far past the investigatory stage, but it focuses on behavior occurring before any legislative action. Thus, while the case here has advanced beyond the stage considered in *Washington Suburban,* the cases are similar because McCray's lawsuit has not yet implicated legislative immunity and need not develop in a way that would pose a threat to legislators.

In sum, we conclude that the Rule 56(d) motion should have been granted because McCray's lawsuit is aimed at discrimination that occurred before any legislative activity began. This is crucial to our 56(d) holding, because if legislative immunity were to apply, then the discovery that McCray requests would be irrelevant: her lawsuit would be barred regardless of whether the MDOT and MTA helped terminate her position because of discriminatory animus. However, because McCray's lawsuit activity, the summary judgment dismissal was premature.

IV.

Because summary judgment was granted before Appellant had a chance to discover facts essential to her claim, and she alleged discrimination occurring before any legislative activity, the district court's Rule 56(d) denial was an abuse of discretion. However, we find that the district court's dismissal of McCray's ADA and ADEA claims are supported by sovereign immunity. Accordingly, this case is

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

1 Because this is an appeal from a summary judgment order, we present the facts in the light most favorable to the non-movant. *Robinson v. Clipse,* 602 F.3d 605, 607 (4th Cir.2010).

2 The language of Rule 56(d) appeared in Rule 56(f) before amendments in 2010, but these amendments made no substantial change to the rule. *Id.* at 275 n. 6.

3 The government action in this case was carried out by the Governor and Board of Public Works-not the legislature. By statute, Maryland law allows for limited budget cuts by action of the Governor and Board of Public works. Md.Code Ann., State Fin. & Proc. § 7–213(a). The Maryland constitution gives the governor a central role in cutting the budget when revenue falls short. *Judy v. Schaefer,* 331 Md. 239, 627 A.2d 1039, 1049 (1993). One could argue that the budget cuts were therefore

executive in nature, not legislative. We need not decide this thorny question, however, because our holding that the Rule 56(d) motion should have been granted rests on our finding that McCray's lawsuit targets discrimination that occurred before any legislative activity occurred.

Parallel Citations

121 Fair Empl.Prac.Cas. (BNA) 761, 29 A.D. Cases 157

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