IN THE UNITED STATES DISTRIC COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC; TERRELL BLODGETT; TEXAS YOUNG DEMOCRATS; and TEXAS COLLEGE DEMOCRATS,

Plaintiffs,

v.

RUTH HUGHS, in her official capacity as the Texas Secretary of State,

Defendant.

CIVIL ACTION NO. 1:19-cv-01063

THIRD-PARTY LEGISLATORS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Plaintiffs served subpoenas on eight current or former members of the Texas Legislature. Each of the Legislators timely conducted searches of their records, produced non-privileged documents, and provided detailed privilege logs supporting their assertions of legislative privilege. Plaintiffs object to the legislators' assertion of privilege on two fronts. First, they assert that the legislative privilege does not apply at all in this context. Second, they argue that even if the legislative privilege applies, the documents that the Legislators withheld do not fall within the scope of the privilege.

Both contentions are wrong. First, federal case law is abundant with examples of courts upholding a claim of legislative privilege in the context of subpoenas directed towards state legislators. The importance of the legislative privilege has carried the day even when plaintiffs asserted voting rights claims, and even when those claims involved allegations of intentional discrimination. Second, the Legislators in this case have properly withheld documents that fall within that well-founded privilege. For these reasons and those discussed below, Plaintiffs' motion to compel should be denied.

BACKGROUND

The subject of this consolidated lawsuit is HB 1888, which was passed in the most recent regular session of the Texas Legislature. HB 1888 makes voting easier by directing local officials to keep polling places open longer. By requiring "each temporary branch polling place" to be open on "the days that voting is required to be conducted at the main early voting polling place" for at least eight hours per day in most cases, *see* Tex. Elec. Code § 85.064, HB 1888 also prevents local officials from abusing the electoral system by strategically opening polling places for limited hours in shifting locations. HB 1888 passed by a margin of 91-53 in the Texas House of Representatives and 20-11 in the Texas Senate. The Governor signed it on June 14, 2019, and it took effect September 1, 2019.

Plaintiffs have sued the Secretary of State to enjoin enforcement of HB 1888. Two motions to dismiss those claims are pending. Discovery is also ongoing, and on January 9, 2020, counsel for Plaintiffs informed the Secretary that they intended to serve subpoenas under Federal Rule of Civil Procedure 45 on eight current or former members of the Texas Legislature: Senator Joan Huffman, Senator Paul Bettencourt, Senator Patrick Fallon, Representative Greg Bonnen, Representative Valoree Swanson, Representative Drew Springer, Representative Candy Noble, and former Representative Jodie Laubenberg (collectively, the Legislators). The subpoenas sought a broad range of documents related to the passage of HB 1888 and prior legislation that sought to eliminate "rolling polling" in Texas.

Undersigned counsel worked with counsel for Plaintiffs to accept service on behalf of most of the legislators. On February 11, after a diligent search and review of potentially responsive documents, the Legislators served their objections and responses to the subpoenas. All told, the Legislators have produced 392 pages of documents and have withheld others as protected by either

legislative or attorney-client privilege.[1] All seven legislators who withheld documents provided detailed privilege logs. *See* Doc. 42-3–42.9. The eighth, former Representative Jodie Laubenberg, did not provide a privilege log as she did not locate any documents responsive to the subpoena.

On February 19, Plaintiffs sent a letter to the undersigned counsel objecting to the legislators' assertion of legislative privilege. The letter contended that the "legislative privilege is plainly inapplicable," *see* Exhibit A, but raised no specific objections to any of the withheld documents. The legislators responded to that letter, citing multiple cases upholding the assertion of legislative privilege. *See* Doc. 42-10. In an effort to resolve the parties' impasse and avoid court intervention, the legislators agreed to produce, and did simultaneously produce, all communications between the Legislators and constituents, lobbyists, and interest groups. *See id.* The next business day, Plaintiffs filed their motion to compel.

ARGUMENT

I. The Legislators Are Properly Asserting the Legislative Privilege.

The Supreme Court has long recognized a legislative privilege that protects anyone acting in a legislative capacity, including staff, from incurring civil liability for, or testifying about, legislative acts. *See, e.g., Gravel v. United States*, 408 U.S. 606, 615–16 (1972). For members of Congress and their staffs, this privilege is grounded in Article I of the United States Constitution. *See* U.S. Const. art. I, § 6, cl. 1. While state legislators lie beyond the reach of the Speech or Debate Clause, they hold a similar privilege under federal common law.[2] *See Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446

[1] Specifically, Senator Bettencourt has produced 253 pages of documents, Representative Bonnen has produced 117 pages of documents, Representative Fallon has produced 10 pages of documents, Senator Huffman has produced 5 pages of documents, Representative Swanson has produced 4 pages of documents, and Representative Noble has produced 3 pages of documents.

[2] As this is a federal case involving federal causes of action, "the state lawmaker's 'legislative privilege is governed by federal common law, as applied through Rule 501 of the Federal Rules of Evidence.'" *Hall v. La.*, 2014 WL 1652791, at *8 (M.D. La. Apr. 23, 2014) (citation omitted); *see also Texas v. Holder*, 2012 WL 13070060,

U.S. 719, 731–32 (1980). That privilege prevents compelled disclosure of a legislator's "thought processes or the communications he had with other legislators" regarding legislation. *Perez v. Abbott*, 2014 WL 3495414 (W.D. Tex. July 11, 2014). As D.C. Circuit Judge Tatel explained on behalf of a unanimous three-judge district court in *Texas v. Holder*, , the legislative privilege will be abrogated only in "extraordinary instances." 2012 WL 13070060, at *1, *2 (D.D.C. June 5, 2012) (quoting *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 268 (1977)).

The rationale behind the legislative privilege is that "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *see also id.* at 55 (noting that it is not "consonant with our scheme of government for a court to inquire into the motives of legislators") (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)); *Arlington Heights*, 429 U.S. at 268 n.18; *In re Hubbard*, 803 F.3d 1298, 1307–08 (11th Cir. 2015) ("The legislative privilege is important. It has deep roots in federal common law. . . . The privilege protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation.").

In keeping with this Supreme Court precedent, numerous courts have recognized that the common-law legislative privilege protects state legislators from testifying about legislative acts.[3] The

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at *1 (D.D.C. June 5, 2012) ("In a federal action based upon federal question jurisdiction, federal privilege law controls.").

[3] *See, e.g., Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 46 (4th Cir. 1988) ("Where, as here, the suit would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force."); *Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) ("[T]he legislators have a federal legislative privilege—at least qualified, if not absolute—not to testify in this civil case about the reasons for their votes. The privilege is broad enough to cover all the topics that the intervenors propose to ask them and to cover their personal notes of the deliberative process."); *Miles-Un-Ltd., Inc. v. Town of New Shoreham*, 917 F. Supp. 91, 98 (D.N.H. 1996) ("Effectuating the intentions of the legislative immunity doctrine, legislators acting within the realm of legitimate legislative activity, should not be required to be a party to a civil action concerning legislative activities, nor should they be required to testify regarding those actions"); *2BD Assocs. Ltd. P'ship v. County Comm'rs of Queen Anne's County*, 896 F. Supp. 528, 531 (D. Md. 1995) ("[T]he effect of the

United States District Court for the District of Columbia, for example, has held that the legislative privilege can be invoked even where proof of invidious purpose is an element of the plaintiff's claims. *Texas v. Holder*, 2012 WL 13070060, at *1–2. Guided by the reasoning in *Arlington Heights*, the court shielded all evidence relating to "legislative acts" and found that legislative privilege objections were appropriately asserted as to questions that sought "evidence regarding a legislator's motivations with respect to a bill (e.g., why a legislator voted a particular way, why a legislator supported or opposed different amendments, why a bill sponsor included different language in various bills what factual information a legislator did or did not consider in supporting or opposing a bill, etc.) and questions about legislative acts legislators engaged in with respect to a bill (e.g., voting, drafting, debating, information gathering, etc.)." *Id.* at *3.

The court's order in *Texas v. Holder* followed existing precedent establishing that the legislative privilege extends to (1) a legislator's subjective motivation regarding a bill or other legislative activity, *see, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The claim of an unworthy purpose does not destroy the privilege."); (2) legislative acts such as investigation and communications about pending legislation, *see, e.g.*, *United States v. Helstoski*, 442 U.S. 477, 489 ("[The Speech or Debate] Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.") (internal quotation marks omitted)); and (3) a legislator's thought process

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[common-law legislative privilege] doctrine is twofold; it protects [state] legislators from civil liability, and it also functions as an evidentiary and testimonial privilege. . . . [I]f immunity from civil liability attaches to a given action, then such testimonial immunity applies as well."); *Suhre v. Board of Comm'rs*, 894 F. Supp. 927, 932 (W.D.N.C. 1995) ("Because the commissioners are entitled to legislative immunity, they are protected from testifying concerning their motives for refusing to remove the [Ten Commandments display]. . . . Where the defense of the case would require the commissioners to testify about their legislative conduct and their motives, legislative immunity precludes the suit."), rev'd on other grounds, 131 F.3d 1083 (4th Cir. 1997); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992) ("Legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege. . . . The immunity enjoyed by legislative staff derives from the individual legislators themselves: to the extent a legislator is immunized, his staffers are likewise 'cloaked.'").

regarding pending legislation, including materials that were or were not considered, *see, e.g.*, *Brown & Williamson Tobacco Corp v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) ("[I]ndications as to what Congress is looking at provide clues as to what Congress is doing, or might be about to do—and this is true whether or not the documents are sought for the purpose of inquiring into . . . legislative conduct or to advance some other goals . . . .").

Plaintiffs mistakenly assert that the Fifth Circuit has "held that the legislative privilege is, at best, exceedingly narrow . . ." Mot. at 6–7 (citing *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017)). Not so. The Fifth Circuit merely stated that the legislative privilege is "qualified," rather than absolute. *Jefferson Par. Gov't*, 849 F.3d at 624. But the Fifth Circuit nevertheless assumed, without deciding, that the privilege would prevent compelled disclosure of the motivation or deliberation behind the legislators' actions in that case. *Id.* That is consistent with the argument the legislators advance here—that their internal deliberations and the documents that implicate those deliberations cannot be compelled for production. As explained above, the bulk of authority recognizes the existence and importance of the legislative privilege.

II. The Legislative Privilege Does Not Yield Merely Because Plaintiffs Assert that They Raise Serious Claims.

Plaintiffs' secondary argument is even less persuasive. They argue that if the Court finds that the legislative privilege applies, it "it is overcome by the federal interests at stake here." Mot. at 5. Plaintiffs appear to be referencing the five-factor test that courts in the Fifth Circuit have used to weigh the assertion of privilege against a plaintiff's claim that it should not apply. *See, e.g.*, *Hall v. La.*, 2014 WL 1652791, at *9 (M.D. La. Apr. 23, 2014). That test looks at the following considerations:

(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.

Id. Plaintiffs ignore all of these factors except for the "seriousness of the litigation and the issues involved." *See* Mot. at 5–6. But that factor alone cannot, and does not, defeat legislative privilege. If litigants could compel individual legislators or their staff to reveal privileged matters simply by alleging that a state law was enacted with an impermissible purpose, then the privilege would be a dead letter, and state lawmakers and their staff would be chilled from engaging in the communications necessary to perform their jobs properly. *Cf. United States v. Nixon*, 418 U.S. 683, 705 (1974); *Gravel*, 408 U.S. at 616-17 (noting that "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"). Adopting Plaintiffs' argument would create an exception to legislative privilege so broad that it would defeat the assertion of the privilege in almost all circumstances. It would also conflict with the Supreme Court's clear statement—in a case involving claims of intentional racial discrimination—that even in the extraordinary instances when government officials might be called "to testify concerning the purpose of the official action, . . . such testimony frequently will be barred by privilege." *Arlington Heights*, 429 U.S. at 268.

Indeed, the three-judge court in *Texas v. Holder* found that the legislative privilege applied even when the plaintiffs alleged impermissible race discrimination in violation of the Voting Rights Act. *Texas v. Holder*, 2012 WL 13070060, at *2 (noting that the legislative privilege is not abrogated in all Voting Rights Act cases). Moreover, even courts that have recognized the importance of the issues at stake have also observed that "f]ailure to afford protection to such confidential communications between lawmakers and their staff will not only chill legislative debate but also discourage earnest discussion within governmental walls." *Hall*, 2014 WL 1652791, at *10. Accordingly, in *Hall*, notwithstanding the importance of the issues presented—the plaintiffs were alleging racial

discrimination in voting in violation of the Fourteenth and Fifteenth Amendments—the court nonetheless issued an order holding that "the legislators are not required to produce any responsive documents or information that contains or involves opinions, motives, recommendations or advice about the referenced legislation, including communications between either legislators, or legislators and their staff." *Id.*

For these reasons, Plaintiffs are wrong to assert that the balancing of interests weighs in favor of disclosure. The privilege applies.[4]

III. The Legislative Privilege Applies to the Documents at Issue.

The Legislators have withheld documents that fall squarely within the legislative privilege. Plaintiffs raise several specific objections to those withheld documents, none of which they raised prior to filing their motion to compel, and all of which are unavailing.

First, Plaintiffs contend that documents from the Texas Conservative Coalition should be produced because those documents were not authored by legislators. Not so. The Texas Conservative Coalition is the conservative caucus of the Texas Legislature, and it comprises members of the Texas House of Representatives and the Texas Senate. *See* About TCC, *available at* https://www.txcc.org/about-tcc. The document that Plaintiffs reference concerns recommendations from members of the caucus concerning pending legislation, which is exactly the type of communication that is subject to the privilege. *See Comm. for a Fair & Balanced Map v. Ill. Bd. of Elections*, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011) ("Legislators face competing demands from constituents, lobbyists, party leaders, special interest groups and others. They must be able to confer

[4] Although Plaintiffs do not address the other factors, it is worth briefly noting that Plaintiffs already have access to the entire legislative history, which is available online, *see* https://capitol.texas.gov/, and which sets out the legislative interests that motivated the passage of HB 1888. Plaintiffs have thus not made a showing that the information that they seek is unavailable elsewhere.

with one another without fear of public disclosure.").

Second, Plaintiffs argue that the legislative privilege does not apply to documents authored by staffers in the Texas Legislature.[5] But courts have recognized that "any effort to disclose the communications of legislative aides and assistants who are otherwise eligible to claim the legislative privilege on behalf of their employers threatens to impede future deliberations by the legislature." *See Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014); *see also Citizens Union of City of New York v. Attorney General of New York*, 269 F. Supp. 3d 124, 170 (S.D.N.Y. 2017) ("Open dialogue between lawmakers and their staff would be chilled if their subjective, preliminary opinions and considerations are potentially subject to public disclosure and critique."); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015) (noting that the legislative privilege "is strongest as applied to communications among legislators and between legislators and their immediate aides" and that it "also applies, albeit with less strength, to 'legislative staff members, officers, or other employees of a legislative body.'" (citation omitted)). The thrust of these cases is that communications with individuals or groups "outside the employ of the legislature" may need to be disclosed, *see id.*, (and indeed, have been disclosed already in this case) but that internal communications and deliberations are protected. As explained above, the legislators have produced communications with individuals outside of the Texas Legislature. But with respect to documents within the Legislature, the staffers enjoy the same level of protection as the legislators themselves.[6]

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[5] In their privilege logs, the Legislators listed many of the authors of the documents at issue as "legislative staffers." This was not necessarily referring to "chamber-wide aides and staffers," *contra* Mot. at 8, but was also inclusive of individual legislators' staff members. If Plaintiffs had concerns with how those authors were listed or designated, or if they believed more specificity was necessary, the appropriate time to have raised that would have been prior to, rather than after, the filing of a motion to compel.

[6] Plaintiffs also specifically seek the production of calendar entries from one of Representative Bonnen's staffers. Mot. at 10. Upon further inspection, it appears that at least one such calendar entry has already been produced to Plaintiffs and was also produced to a third party in response to a Public Information Act request. In the interest of streamlining the issues before the Court, Representative Bonnen will produce those remaining calendar entries to Plaintiffs.

In that same vein, Plaintiffs argue that the legislative privilege should not apply to communications between Senator Bettencourt and Austin Griesinger. Mot. at 8. In support, they contend that Mr. Griesinger is a member of the Texas Public Policy Foundation. That contention is true so far as it goes, but when the communications at issue occurred, Mr. Griesinger was a staffer in the Texas House of Representatives with a ".gov" email address. Because Mr. Griesinger worked as Senator Bettencourt's staffer when the withheld communications occurred, the legislative privilege extends to the relevant communications.

Finally, Plaintiffs object to the assertion of privilege regarding any documents generated after HB 1888 passed in the House and the Senate. Mot. at 10. In particular, Plaintiffs identify three documents withheld by Representative Springer and two documents withheld by Senator Bettencourt that they claim are being improperly withheld. *See id.* Although the documents withheld by Representative Springer were "generated" on January 29, 2020, those documents contain recommendations from his staffers regarding three bills that were pending prior to May 24, 2019: HB 1462 (2017), HB 1888 (2019), and HB 2027 (2015). The staffers' recommendations in those documents were made prior to May 24, 2019, and are therefore protected by the legislative privilege.[7] *See Page*, 15 F. Supp. 3d at 667. Thus, those documents were properly withheld. And with respect to the two documents withheld by Senator Bettencourt, one of those documents was also withheld as attorney-client privileged—Benjamin Barkley, the recipient, is Senator Bettencourt's general counsel—and Plaintiffs make no argument that the attorney-client privilege was not properly invoked. The second document contains a staffer's impressions of the Senate floor hearing regarding HB 1888 (a hearing held prior to the bill's passage), and such impressions and opinions are also within the scope of the privilege. *See id.*

[7] Should it be helpful, these documents can be made available for *in camera* review.

CONCLUSION

Plaintiffs' motion to compel the production of documents from the eight non-party legislators should be denied.

Date: March 9, 2020

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on March 9, 2020, and that all counsel of record were served by CM/ECF.

Michael R. Abrams

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