UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EMILY GILBY; TEXAS DEMOCRATIC PARTY; DSCC; DCCC, Plaintiffs, v. RUTH HUGHS, in her official capacity as the Texas Secretary of State, Defendant.	Civil Action Case No. 1:19-cv-01063

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS IMPROPERLY WITHHELD BY NONPARTY LEGISLATORS

It is far from clear that state legislators enjoy *any* "legislative privilege" that they may invoke to avoid discovery in litigation in federal court brought to vindicate a federal constitutional right. This is reflected by the response brief filed by the Nonparty Legislators themselves, which fails to cite a single case applying a legislative privilege doctrine in a case such as this, where Plaintiffs seek to vindicate a fundamental right and the discovery sought is (1) not testimonial, but entirely document-based, and (2) directly relevant to Plaintiffs' federal constitutional claims. Even if there were an expansive federal legislative privilege that could apply in this situation (which there is not), the Nonparty Legislators' objections are woefully overbroad, extending even to documents that could not possibly be covered. For all of these reasons, the Court should grant the motion to compel and order the Nonparty Legislators to produce all subpoenaed documents they have broadly and improperly withheld based on "legislative privilege."

ARGUMENT

I. A federal common law evidentiary legislative privilege does not apply to the documents withheld by the Nonparty Legislators.

The Nonparty Legislators' response conflates immunity for civil liability with an

evidentiary privilege under Federal Rule of Evidence 501. *See* Third-Party Legislators' Response ("Resp."), ECF No. 43, at 3. The Supreme Court, however, made clear in *United States v. Gillock*, 445 U.S. 360, 366 (1980), that immunity from civil suits does not translate into an evidentiary privilege for state legislators in federal court, denying a state legislator's invocations of legislative privilege in a federal criminal case. The Court further held that Federal Rule of Evidence 501 did not encompass a legislative privilege and that the privilege enjoyed by *federal* legislators under the federal constitution's Speech and Debate Clause did not apply, given that the same separation of powers concerns were not raised by inquiry into the state legislative process. *Id.* at 370.

To further support their flawed argument, the Nonparty Legislators also rely on cases concerning a common law *testimonial* privilege. *See* Resp. at 4 n.3. There are, of course, entirely different issues present when seeking testimony as compared to documents—a fact that even the minority of courts that have recognized a privilege for state legislators have recognized. Indeed, even *testimony* from state legislators is not always prohibited in federal litigations brought to vindicate federal constitutional rights. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268, 268 n.18 (1977) (noting testimony concerning the purpose of legislative action might be required in some cases); *see also Nashville Student Organizing Comm. v. Hargett*, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015) (allowing depositions of state legislators in case challenging the Tennessee Voter Identification Act despite invocation of legislative privilege). This is not surprising, given that several courts have "rejected the notion that the common law immunity of state legislators gives rise to [any] general evidentiary privilege." *Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) (citations omitted); *see also Cano v. Davis*, 193 F. Supp. 2d 1177, 1180 (C.D. Cal. 2002) ("[S]tate 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) (same). Here, however, Plaintiffs seek only documents, and thus the Court need not reach that question. Instead, it can and should apply *Gillock* to hold that an evidentiary privilege does not apply and grant the motion to compel on that basis alone.

II. Even if a limited evidentiary privilege exists, it should yield given the important constitutional issues at stake in this litigation.

Even if the Court were inclined to find that a limited evidentiary privilege exists, it would necessarily give way here, where Plaintiffs seek limited discovery centrally relevant to their federal constitutional claims. *See Gillock*, 445 U.S. at 373 (noting that "where important federal interests are at stake, . . . comity yields," such that the federal interest supersedes any purported legislative privilege); *Comm. for a Fair & Balanced Ma*p, No. 11 C 5065, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) ("Voting rights cases. . . seek to vindicate public rights. . . . Thus . . . 'recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government.'") (quoting *Gillock*, 445 U.S. at 373).

Plaintiffs allege that Defendants intentionally discriminated against them in violation of the Twenty-Sixth Amendment, making the issue of legislative intent in the passage of HB 1888 critical here. The Nonparty Legislators have not met their burden to identify any "public good" sufficient to outweigh the necessity of the evidence to the vindication of Plaintiffs' constitutional rights. *See infra* at 3-5.

Indeed, a consideration of some of the documents that the Nonparty Legislators seek to withhold demonstrate why, to the extent any such privilege exists, it must yield here. For example, the Nonparty Legislators seek to withhold a document from Representative Springer that involves analysis of HB 1888 and two previous bills which similarly sought to limit the use of temporary early voting locations, just like HB 1888: HB 1462 (2017) and HB 2027 (2015). *See* Resp. at 10. The Nonparty Legislators fail to identify any competing interest that outweighs the interests in

disclosure of this document in this case involving the State's intentional attempt to restrict Plaintiffs' fundamental rights.

III. Even if the privilege exists, Defendants' objections are woefully overbroad.

In a transparent attempt to shift the burden to Plaintiffs to demonstrate the inapplicability of the privilege, the Nonparty Legislators ignore that "a party asserting a privilege exemption from discovery bears the burden of demonstrating its applicability." *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001). *See* Resp. at 6-8. And the Nonparty Legislators utterly fail on that front. Indeed, the vast majority of the documents were written by individual legislative aides and in any event do not involve core legislative activities, regardless of who drafted such documents.

First, because the legislative 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), a legislator may assert a privilege *only* over documents reflecting his or her own mental impressions. So, for example, a legislator has no standing to claim legislative privilege over a document authored by the Texas Conservative Coalition merely because the Coalition consists of a group of other legislators. *See* Resp. at 8 (referring to DOC00000676). The same is true for a document by the House Republican Caucus. *See* DOC00000666. These documents, and any others authored by someone other than the legislator or his staff, must be produced.[1]

Second, any documents over which the Nonparty Legislators claim privilege must be about core legislative activities. In *United States v. Brewster*, 408 U.S. 501 (1972), a case which involved

[1] The Nonparty Legislators' privilege log makes it impossible to determine the precise number of withheld documents that were improperly withheld in this way, as the vast majority list the sender/author as "Legislative Staffers" rather than specifying the individual staffer and their employer. *See* Doc. 42-11. To the extent these documents were written by individual staffers for the individual legislator asserting the privilege, the Nonparty Legislators should at a minimum be required to produce a revised privilege log accurately reflecting them as such.

the U.S. Constitution's Speech and Debate Clause as applied to a federal senator, the Supreme Court held that "only . . . 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" constitute privileged legislative activities exempt from disclosure. *Id.* at 512. The Nonparty Legislators effectively ask the Court to (1) ignore that the Speech and Debate Clause does not apply to them as state legislators, and (2) apply the precedent under the Speech and Debate Clause as it relates to federal legislators even more expansively to the state legislators here, asserting privilege over things that would plainly fall outside its scope if a federal legislator attempted to invoke it, even with regard to federal legislators.

For example, the Nonparty Legislators continue to assert privilege over five documents which were admittedly drafted well after HB 1888 had already become law on the basis that "those documents contain recommendations from [a legislator's] staffers regarding three bills that were pending prior to May 24, 2019." Resp. at 10. But documents "generated" after a bill was enacted (or failed) cannot possibly be deliberative in nature and, therefore, do not reflect core legislative activities. Four out of five such documents do not assert any other alleged basis for privilege. *See* Doc. 42-11; *Gravel v. United States*, 408 U.S. 606, 626 (1972) (that which occurred after deliberations was "not part and parcel of the legislative process"). The *one* case on which the Nonparty Legislators rely in no way suggests that documents created months *after* a bill became law and went into effect are somehow "deliberative" as to the passage of that law as a result. *See* Resp. at 10 (citing *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014)).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request this Court order the Nonparty Legislators to produce all documents improperly withheld based on legislative privilege.

Respectfully submitted,

/s/ *Kevin J. Hamilton*
Kevin J. Hamilton

John Hardin
TX State Bar No. 24012784
PERKINS COIE LLP
500 N. Akard St., Suite 3300
Dallas, TX 75201
Telephone: (214) 965-7743
Facsimile: (214) 965-7793
JohnHardin@perkinscoie.com

Marc E. Elias*
John M. Geise*
Alexi M. Velez*
Jyoti Jasrasaria*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-9959
melias@perkinscoie.com
jgeise@perkinscoie.com
avelez@perkinscoie.com
jjasrasaria@perkinscoie.com

Kevin J. Hamilton*
Amanda Beane*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (206) 359-8000
Facsimile: (206) 359-9000
khamilton@perkinscoie.com
abeane@perkinscoie.com

Counsel for the Plaintiffs

Chad W. Dunn
TX State Bar No. 24036507
Brazil & Dunn, LLP
4407 Bee Caves Road, Suite 111
Austin, Texas 78746
Telephone: (512) 717-9822
Facsimile: (512) 515-9355

chad@brazilanddunn.com

Counsel for Plaintiff Texas Democratic Party

** Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 16, 2020, I electronically served the foregoing Motion via ECF on all counsel of record, and I further served the foregoing Motion on counsel for Nonparty Legislators via electronic mail.

/s/ *Kevin J. Hamilton*
Kevin J. Hamilton