IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

TREVA THOMPSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Civil Action No. 2:16-CV-783-ECM-SRW**
	)	
JOHN H. MERRILL, in his Official Capacity as Secretary of State, et al.,	)	
	)	
	)	
Defendants.	)	

MOTION TO QUASH SUBPOENAS AND TO ENJOIN PLAINTIFFS FROM EFFECTING SAME UPON NONPARTY LEGISLATORS DAVID FAULKNER AND CAM WARD

COME NOW Non-Parties Representative David Faulkner, House District 46 of the Alabama House of Representatives and Senator Cam Ward, Senate District 14 of the Alabama Senate (collectively, the "Nonparty Legislators"), and by and through their counsel make this limited appearance solely for the purpose of moving this Court to enter an order (1) quashing service of subpoenas commanding them to testify at depositions next week and to contemporaneously produce documents, and (2) enjoining Plaintiffs from issuing subpoenas or attempting to effect any other service of process upon the Nonparty Legislators during the term of the 2019 Regular Session or thereafter.

As set out below, the subpoenas are due to be quashed pursuant to Rule 45(d)(3)(A)(iii), Fed. R. Civ. P., because they require disclosure of privileged and/or other protected matter. In support of this motion, the Nonparty Legislators state as follows:

I. STATEMENT OF RELEVANT FACTS

Plaintiffs commenced this action through the filing of a 15-count Complaint raising various challenges to Alabama constitutional and statutory provisions governing the disenfranchisement

of those convicted of felonies of moral turpitude; specifically, those provisions are Section 177(b) of Article VIII of the Alabama Constitution and Ala. Code § 15-22-36.1 (2016). By Memorandum Opinion and Order dated December 26, 2017 (Doc. 80), this Court dismissed several counts of Plaintiffs' Complaint, leaving five counts – all of which raise federal constitutional challenges – remaining for adjudication, which the Court summarized as follows:

> This action proceeds as to five counts: Plaintiffs' claims that section 177(b) of the Alabama Constitution is racially discriminatory in violation of the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment (Counts 1 and 2); Plaintiffs' claim that section 177(b) is an ex post facto law that retroactively punishes citizens (Count 11); Plaintiffs' claim that section 177(b) violates the Eighth Amendment's proscription against cruel and unusual punishment (Count 12); and Plaintiffs' claim that section 15-22-36.1(a)(3) of the Alabama Code violates the Fourteenth Amendment's Equal Protection Clause (Count 13).

(Doc. 80 at 40). Plaintiffs subsequently filed a supplemental complaint raising additional claims (Doc. 93), and a motion to dismiss is pending (Doc. 95).

On February 11, 2019, Plaintiffs served a subpoena upon Alabama State Senator Cam Ward. The subpoena is broad in scope and seeks not only a March 8, 2019, deposition of Sen. Ward, but also the contemporaneous production – at the March 8, 2019 deposition – of virtually any documents in Senator Ward's "possession, custody or control" relating to the legislative consideration, process and passage of the Definition of Moral Turpitude Act of 2017 ("HB 282" – which was passed after Plaintiffs filed their original Complaint), Section 177(b) of the Alabama Constitution, and Ala. Code § 15-22-36.1(a)(3) (2016), as well as any documents or other materials of any kind relating to felon voter disenfranchisement:

> 1. All documents and communications in your possession, custody, or control that relate in any way to the Definition of Moral Turpitude Act of 2017 ("HB 282"), also known as House Bill 282, HB 282, or Act No. 2017-[3]78, including but not limited to any email, text message, voice mail, or written communications concerning the purpose, design, drafting, passage, implementation, or effect of HB 282.

> 2. All documents, communications, and materials in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to the disqualification from registering to vote, or voting, of citizens with felony convictions, including but not limited to any email, text message, voice mail, or written communications discussing Alabama law on felony disenfranchisement.
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> 3. All documents, communications, and materials in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to Section 177(b) of the Alabama Constitution, including but not limited to:
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> > a. Any documents, communications, and materials regarding or related to proposed legislation to interpret, clarify, define, explain, amend, repeal, replace, or otherwise impose or remove legal obligations related to Section 177(b) of the Alabama Constitution;
> >
> > b. Any documents, communications, and materials regarding or related to the decision to draft, support, oppose, define, amend, lobby, discuss, revise, or otherwise argue for or against legislation related to Section 177(b) of the Alabama Constitution and/or the legal obligations, restrictions, or structures imposed thereunder.
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> 4. All documents and communications in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to Section 15-22-36.1(a)(3) of the Alabama Code.

Exhibit B (Subpoena to Sen. Cam Ward). On February 23, 2019, counsel accepted service of an identical subpoena from Plaintiffs directed to Alabama State Representative David Faulkner. The subpoena seeks Rep. Faulkner's deposition on March 7, 2019 and the contemporaneous production of the same series of documents sought from Sen. Ward. **Exhibit A** (Subpoena to Rep. David Faulkner).

Importantly, the dates designated by Plaintiffs for the depositions and document production fall within the opening days of the Alabama legislative session. The Alabama Legislature will convene on March 5, 2019, and will adjourn on June 18, 2019.

II. ARGUMENT

A. THE NONPARTY LEGISLATORS PROPERLY ASSERT LEGISLATIVE PRIVILEGE PURSUANT TO RULE 45(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

As set out above, through subpoenas, Plaintiffs seek to compel the Nonparty Legislators to provide deposition testimony and to produce documents and communications between themselves and various other persons related to (1) the proposal, formulation, and passage of the Definition of Moral Turpitude Act of 2017 ("HB 282"), also known as House Bill 282, HB 282, or Act No. 2017-378; (2) Section 177(b) of the Alabama Constitution; and (3) the proposal, formulation, and passage of Ala. Code § 15-22-36.1(a)(3). A party may serve a subpoena under Rule 45 of the Federal Rules of Civil Procedure to obtain "documents, electronically stored information, or tangible things." Fed. R. Civ. P. 45(a)(1)(C). The recipient of the subpoena may move to quash or modify a subpoena for four specific reasons, one of which is that the subpoena "requires disclosure of privileged or other protected matter." *In re Hubbard*, 803 F. 3d 1298, 1307 (11th Cir. 2015) (citing Fed. R. Civ. P. 45(d)(3)(A)(iii)). Indeed, "federal courts have the authority and duty to recognize claims of privilege that are valid under federal common law." *Id.* (citing Fed. R. Evid. 501). As the parties asserting a privilege claim, the Nonparty Legislators "must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim." *Id.* (citing Fed. R. Civ. P. 45(e)(2)(A)).

As set out herein, the Nonparty Legislators have met their burden under Rule 45 with regard to the assertion of legislative privilege in support of their motion to quash because they have asserted the privilege and described the nature of the documents they seek to withhold. Considering the nature of Plaintiffs' constitutional claims, which require proof of discriminatory motive, as well as extensive allegations of discriminatory motive and history set forth in their original Complaint, *see* Doc. 1 at ¶¶ 82-143, the Court has more than enough information under Rule 45 to

assess the Nonparty Legislators' claim of privilege and to compel the granting of this motion to quash.

B. LEGISLATIVE PRIVILEGE PROTECTS AGAINST INQUIRY INTO ACTS THAT OCCUR IN THE REGULAR COURSE OF THE LEGISLATIVE PROCESS AND INTO THE MOTIVATION FOR THOSE ACTS.

As a basis for this motion, the Nonparty Legislators assert legislative privilege to prevent Plaintiffs' improper inquiry into the sphere of legitimate legislative activity and into the motivation for that activity. "Legislative privilege clearly falls within the category of accepted evidentiary privileges" contemplated by Fed. R. Civ. P. 45(d)(3)(A)(iii). *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011). The privilege is rooted in the absolute immunity granted to federal legislators by the Speech or Debate Clause of the Constitution and exists to safeguard that immunity. *Id.* at 180–81. *See also* 03/13/2017 Mem. of Op. & Order in *Greater Birmingham Ministries, et al. v. John Merrill*, et al, Case No. 2:15-cv-02193-LSC (N.D. Ala., Mar. 13, 2017) (hereinafter, "*GBM v. Merrill*"), **Exhibit C** at p. 7. In *Tenney v. Brandhove*, the Supreme Court found that the Speech or Debate Clause was of a broader common law "tradition [of legislative privilege] . . . well grounded in history" and extended the benefit of that tradition (though not the Speech or Debate Clause itself) to state legislators. 341 U.S. 367, 372–76 (1951). *See also United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980) (noting that *Tenney* "was grounded on its interpretation of federal common law"); *Lee v. Virginia State Bd. of Elections*, Civ. A. No. 3:15CV357 (HEH-RCY), 2015 WL 9461505, at *3 (E.D. Va. Dec. 23, 2015) ("State legislators also enjoy legislative immunity and legislative privilege; however, insofar as state legislators may employ these protections in federal court, the protections are grounded in federal common law.").[1] The privilege "covers all those properly acting in a legislative capacity, not just

[1] Alabama law provides legislators immunity from suit and service of process as to both testimonial and document subpoenas while the Alabama Legislature is in session and, in fact, criminalizes any violation thereof. *See, e.g.*, Ala.

actual officeholders." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 (citing *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731–34 (1980)). Moreover, in order to "safeguard this [state] legislative immunity and to further encourage the republican values it promotes," courts have recognized a corresponding privilege "against compulsory evidentiary process" that can apply "whether or not the legislators themselves have been sued." *Id.*, 631 F.3d at 181.

Most recently, the Eleventh Circuit described and reaffirmed principles that compel a vigorous application of the legislative privilege as follows:

> The legislative privilege is important. It has deep roots in federal common law. *See Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783, 786, 95 L. Ed. 1019 (1951) (recognizing "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings"); *see also United States v. Gillock*, 445 U.S. 360, 372 n. 10, 100 S. Ct. 1185, 1193 n. 10, 63 L. Ed.2d 454 (1980) (noting that *Tenney* "was grounded on its interpretation of 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. *See Tenney*, 341 U.S. at 372, 376, 71 S. Ct. at 786, 788 (recognizing a legislative privilege for state legislators when acting "in the sphere of legitimate legislative activity"); *Reeder v. Madigan*, 780 F.3d 799, 800, 805 (7th Cir. 2015) (affirming the legislative privilege of state representatives and senators); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) (holding that Florida's governor was protected by legislative immunity when signing a bill into law); *Baraka v. McGreevey*, 481 F.3d 187, 196–97 (3d Cir. 2007) (holding that a governor falls within the sphere of legislative activity when "advocating and promoting legislation"). And it does not matter to the existence of the legislative privilege that the four lawmakers were not parties to AEA's lawsuit. The privilege "applies whether or not the legislators themselves have been sued." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d

Code § 29-1-7(a). This statute is an extension of the "speech and debate clause" of Article IV, § 56 of the Alabama Constitution of 1901 and embodies the same principles present in the federal speech and debate clause. Both the state and federal speech and debate clauses " 'protect[] against inquiry into acts that occur in the regular course of the legislative process and the motivation for those acts.' " *Marion v. Hall*, 429 So. 2d 937, 944 (Ala. 1983) (Torbert, C.J., concurring specially) (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1971)). Although not controlling, pursuant to well-established principles of comity, the Nonparty Legislators urge the Court in addressing this motion to consider the state's policy regarding legislative privilege as embodied in Ala. Code § 29-1-7(a).

> 174, 181 (4th Cir. 2011); *see MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988).
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> The legislative privilege "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525, 92 S. Ct. 2531, 2544, 33 L. Ed.2d 507 (1972) (emphasis added); *see Tenney*, 341 U.S. at 377, 71 S. Ct. at 788 (declaring "that it [i]s not consonant with our scheme of government for a court to inquire into the motives of legislators"). One of the privilege's principle purposes is to ensure that lawmakers are allowed to "focus on their public duties." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181; *cf. Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 1821, 44 L. Ed.2d 324 (1975) (explaining that the Speech or Debate Clause ensures that civil litigation will not "create[ ] a distraction and force[ ] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation"). That is why the privilege extends to discovery requests, even when the lawmaker is not a named party in the suit: complying with such requests detracts from the performance of official duties. *See Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181; *MINPECO*, 844 F.2d at 859 ("A litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive."). The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments.

In re Hubbard, 803 F.3d at 1307-08, 1310.[2] *See also id.* at 1310 n.11 (stating that "it is well-established that state lawmakers possess a legislative privilege that is "similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause") (citing *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980)); *see also Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009) (same).

[2] A subset of the legislative privilege is the deliberative process privilege. It protects documents which are "pre-decisional, deliberative and reflect the subjective motive of legislators." *Doe v. Nebraska*, 788 F. Supp.2d 975, 985 (D. Neb. 2011); *see also In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987) (suggesting the deliberative process privilege protects state legislators' "communications involving opinions, recommendations or advice about legislative decisions"). Many of the documents sought in the subpoenas issued to the Nonparty Legislators fall within those parameters as well.

1. The subpoenas improperly seek inquiry into acts that occurred during the regular course of the legislative process and/or inquiry into the motivation for those acts.

Here, the subpoenas issued to the Nonparty Legislators command both testimony and the production of literally every document in their possession touching upon HB 282 (Definition of Moral Turpitude Act of 2017), Section 177(b) of the Alabama Constitution, and Ala. Code § 15-22-36.1(a)(3). They target documents, communications and other materials that form an integral part of the deliberative and communicative process by which the Nonparty Legislators engaged in the legislative process, including the proposal, formulation, and passage of Section 177(b), HB 282, and Ala. Code § 15-22-36.1, and they seek evidence of motivation for those acts. For example, as previously established, Plaintiffs request the production of all documents and communications that relate in any way to HB 282 and concern "*the purpose, design, drafting, passage, implementation, or effect of HB 282*." *See* Faulkner Subpoena, **Exhibit A** at ¶II.1.; Ward Subpoena, **Exhibit B** at ¶II.1. Likewise, with respect to Section 177(b), Plaintiffs request the production of documents and communications that clearly concern the legislative process, including documents and communications that relate to "proposed legislation to *interpret, clarify, define, explain, amend, repeal, replace, or otherwise impose or remove legal obligations related to Section 177(b)* of the Alabama Constitution", and (2) "the *decision to draft, support, oppose, define, amend, lobby, discuss, revise, or otherwise argue for or against legislation related to Section 177(b)* of the Alabama Constitution and/or the legal obligations, restrictions, or structure imposed thereunder." *See* **Exhibit A** at ¶II.3.a-b; **Exhibit B** at ¶II.3.a.-b. Thus, with respect to the legislation at issue, the subpoenas target either acts that occurred during the regular course of the legislative process and/or the subjective motivation of the Nonparty Legislators (and, corporately, the Alabama Legislature) for acts undertaken during the legislative process. Indeed, Plaintiffs

specifically allege that racial discrimination was a "motivating factor" for passing HB 282 and Section 177(b). *See* Complaint, Doc. 1 at ¶¶ 161-168.

Thus, with respect to HB 282 and Section 177(b), the only purpose of the subpoenas directed to the Nonparty Legislators is to inquire either into acts that occur during the regular course of the legislative process or into the subjective motivation of those acting in a legislative capacity. *See In re Hubbard*, 803 F.3d at 1310-11. Legislative privilege, however, prohibits such discovery. *Gravel v. U.S.*, 408 U.S. 606, 625 (1972) (the privilege protects matters that are "an integral part of the deliberative and communicative process by which Members participate in 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").

It is equally impermissible to allow discovery directed at legislators for the purpose of proving the Legislature's intent or motive through indirect means – such as inquiring into "the historical background of past official actions; the sequence of events leading up to the challenged decisions; departures from normal procedural sequences; substantive factors usually considered important in such decisions; and the legislative history of the decisions." *Dyas v. City of Fairhope*, Civ. A. No. 08-0232-WS-N, 2009 WL 3151879, at *8 (S.D. Ala. Sept. 24, 2009). The privilege "applies to questioning seeking to undermine that decision, including questioning concerning acts that are not themselves legislative and thus not independently privileged." *Id*. Thus, when the Supreme Court held in *Bogan v. Scott Harris* that "it simply is not consonant with our scheme of government for a court to inquire into the motives of legislators," 523 U.S. 44, 55 (1998) (internal quotes omitted), the Court did not open the door for proving legislative motive by indirection:

> A privilege that prohibits a plaintiff from asking a legislator what was said in the decisive meeting but allows questions concerning

> any potential influences on his or her decision-such as conversations with constituents, ***review of documents and other information***-gathering, as well as potential bias-offers a legislator no protection worth having. Independence is equally threatened by the scrutiny, motives are probed by indirection, and the hassle and distraction are if anything enhanced.

Dyas, 2009 WL 3151879 at *9 (emphasis added).

In the instant case, it is difficult to imagine a more compelling case for the application of legislative privilege. Plaintiffs have requested all documents and communication "concerning the purpose, design, drafting, passage, implementation, or effect of HB 282." *See* **Exhibit A** at ¶II.1.; **Exhibit B** at ¶II.1. Plaintiffs plainly seek the subject materials to discredit legislative motive. Compelled disclosure of these materials, however, would chill future legislative deliberations and jeopardize legislative independence.

That same compelling case for legislative privilege extends to Plaintiffs' request for all documents and communications related to proposed legislation to "interpret, clarify, define, explain, amend, repeal, replace, or otherwise impose or remove legal obligations related to Section 177(b)", or materials related to the "decision to draft, support, oppose, define, amend, lobby, discuss, revise, or otherwise argue for or against legislation related to Section 177(b)." *See* **Exhibit A** at ¶II.a.b.; **Exhibit B** at ¶II.3.a.-b. As the Supreme Court recognized in *Tenney*, in its most basic formulation, legislative immunity attaches to *any act undertaken within the "sphere of legitimate legislative activity.*" *Tenney*, 341 U.S. at 376 (emphasis added). More specifically, it covers any act that is an "integral part of the deliberative and communicative processes by which [legislators] participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation." *Gravel*, 408 U.S. at 625; *accord Bryant v. Jones*, 575 F.3d 1281, 1304-05 (11th Cir. 2009).

2. Plaintiffs may establish discriminatory purpose and motive through non-privileged evidence.

This is not to say that Plaintiffs are in any way prohibited from proving discriminatory purpose and motive by using evidence that does not implicate protected legislative matters. They are free to develop independent sources of evidence that do not violate the privilege, such as public statements made by elected officials, evidence of past and related discriminatory legislation, publicly available voting records, etc. *See, e.g., Simpson v. City of Hampton*, 166 F.R.D. 16, 19 (E.D. Va. 1996) ("[T]he plaintiffs in the case at bar may undertake to prove the council intended to discriminate, but their undertaking may not include the use of the councils' personal notes and files."). In fact, the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-68 (1977) not only suggested such permissible alternative sources of motive that did not violate legislative privilege, but also the Court noted that it would be an "*extraordinary instance*" that would allow the direct questioning of legislators to establish motive.

Arlington Heights involved claims of racial discrimination against a municipality based on the denial of a zoning request that was necessary to build low and moderate-income housing. Recognizing that proof of a discriminatory motive was required to establish such claims, the Court outlined the sources of *non-privileged* information from which evidence could be derived including (1) "the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (2) "the specific sequence of events leading up to the challenged decision"; (3) "[d]epartures from the normal procedural sequence"; (4) "[s]ubstantive departures [as when] factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (5) "[t]he legislative or administrative

history . . . especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports." *Id.* at 267-68.

Importantly, the *Arlington Heights* Court did not say that a litigant may depose a legislator to obtain information of such unlawful discriminatory motive. On the contrary, the Court made clear that utilizing a legislator to prove intent would rarely if ever be available. Given that "[p]lacing a decisionmaker on the stand is . . . usually to be avoided," it is only "[i]n some extraordinary instances [that] the members might be called to the stand at trial to testify concerning the purpose of the official action, [and] *even then such testimony frequently will be barred by privilege.*" *Id.* at 268 & n. 18 (emphasis added). "*Arlington Heights* thus appears to require both extraordinary circumstances ***and*** an exception to the privilege in order to question a legislator concerning intent." *GBM v. Merrill*, **Exhibit C** at 10.

The Honorable Judge Scott Coogler, United States District Court for the Northern District of Alabama, recently had occasion to address the application of *Arlington Heights* in a case involving strikingly similar challenges under the Fourteenth and Fifteenth Amendments of the U.S. Constitution. In *GBM v. Merrill*, the same organizing Plaintiff in the instant case−Greater Birmingham Ministries-unsuccessfully challenged Alabama's Photo ID Law, Ala. Code § 17-9-30, claiming that the law violated the Fourteenth and Fifteenth Amendments to the U.S. Constitution and various sections of the Voting Rights Act of 1965 ("VRA"). *See GBM v. Merrill*, **Exhibit C** at 2. As in this case, GBM issued subpoenas to nonparty legislators seeking legislative documents and communications to support their claims of purposeful discrimination under the Fourteenth and Fifteenth Amendments and to a lesser extent their VRA claims. *Id*. at 3.

In support of their subpoenas, GBM argued that the legislative privilege was not absolute, and that a claim of racial discrimination in voting (specifically their challenge to the Alabama

Photo ID law under the Fourteenth and Fifteenth Amendments) constituted the type of "extraordinary circumstance" recognized by *Arlington Heights*. *Id*. at 11. Judge Coogler, however, disagreed and specifically distinguished the decisions recognizing a limited exception to legislative privilege. Judge Coogler soundly rejected the Plaintiffs' argument.

First, Judge Coogler correctly found that, with respect to the enforcement of federal criminal statutes (as recognized in *United States v. Gillock*, 445 U.S. 360, 373 (1980)), the Supreme Court had

> explained that, for purposes of the legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government. *Gillock* 455 U.S. at 372–73 ("[I]n protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.").

Id. at 12. *See also In re Hubbard*, 808 F.3d at 1311.

Second, Judge Coogler noted that, although it was true that some district courts had found a limited exception to legislative privilege in cases involving legislative redistricting, *i.e*., "gerrymandering," the exception made sense because in contrast to GMB's challenge to the Voter ID Law, the subjective decision-making process of the legislature in redistricting is the very issue and crux of the constitutional challenge. *GBM v. Merrill*, **Exhibit C** at 12. Recognizing redistricting cases as "extraordinary" as contemplated by *Arlington Heights*, however, is not dispositive of the application and scope of the privilege. As Judge Coogler noted, many courts still apply a balancing test to determine whether and to what extent the privilege should be honored. *Id*. at 13. Even then, Judge Coogler noted that the application of a balancing test is limited to redistricting cases.[3] *Id.*

[3] Judge Coogler also cited a string of decisions wherein courts declined to abrogate the legislative privilege in cases dealing with Section 2 VRA challenges. *GBM v. Merrill*, **Exhibit C** at 15.

The "extraordinary instances" *Arlington Heights* contemplates do not exist here.[4] For example, in *Lee v. Virginia State Bd. of Elections*, No. 3:15CV357, 2015 WL 9461505 (E.D. Va. Dec. 23, 2015), the plaintiffs filed suit seeking to invalidate Virginia's voter identification bill. In furtherance of their claims, they issued several non-party subpoenas to members of the Virginia General Assembly for purposes of obtaining evidence of legislative intent, including requests for communications between the non-party legislators and legislative employees regarding several Senate voter identification bills and related topics discussed in the Virginia Senate. *Id*. at *1-2. The non-party legislators moved to quash the subpoenas, claiming that legislative privilege shielded the communications against disclosure. The court agreed, finding that "the Nonparty Legislators were acting in a legislative capacity by passing the Senate Bills in question and debating the topic of voter identification." *Id.* at *7. Consequently, the court granted the non-party legislators' motion to quash. *Id*. at *7-8. The same result should follow here.

Since *Arlington Heights*, courts, including the Eleventh Circuit in *In re Hubbard*, have relied on the legislative privilege to prevent efforts by plaintiffs to subject legislators to the burdens of civil litigation. *See, e.g.*, *Reeder v. Madigan*, 780 F.3d 799, 806 (7th Cir. 2015) (dismissing, based on legislative immunity, plaintiff's claim that the Illinois Senate violated his First Amendment rights by denying him media credentials); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (quashing subpoenas for disclosure of subcommittee documents served on members of a Congressional subcommittee by private defendants in an

[4] As recognized in *In re Hubbard*, there are occasions when a lawmaker's legislative privilege must yield to vindicate important federal interests such as the enforcement of federal criminal statutes. 808 F.3d at 1311. Indeed, the Supreme Court has recognized a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government. *See United States v. Gillock*, 445 U.S. 360, 372-73 (1980) ("[I]n protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.").

unrelated civil lawsuit); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (same).

In the instant case, Plaintiffs' own Complaint reveals that they have made detailed allegations in 61 paragraphs of their Complaint to support their claims of discriminatory motive. *See* Complaint Doc. 1 at ¶¶ 82-143. Indeed, this Court cited these allegations as a basis for denying Plaintiffs motion to dismiss Counts I and II of their Complaint. 12/26/2017 Mem. Op. & Order, Doc. 80 at 16. Furthermore, Plaintiffs are free to further delve into these sources of evidence that do not violate the privilege. *See, e.g., Simpson*, 166 F.R.D. at 19.

3. Legislative privilege provides a testimonial privilege as well.

Although discussed generally above, State legislative privilege in federal question cases protects state legislators not only from compelled disclosure of documentary evidence, but also from inquiry through testimony directed at acts that occurred during the regular course of the legislative process and into the motivation for those acts.[5] *See Kay v. City of Rancho Palos Verdes*, No. CV 02–03922 MMM RZ, 2003 WL 25294710, at *9–11 (C.D. Cal. Oct. 10, 2003). *See also Butnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (local legislators are entitled to immunity and testimonial privilege for legislative acts); *Texas v. Holder*, Case No. 12-128, 1012 WL 13070060, at *1 (D.D.C., June 5, 2012) ("Like the Constitution's Speech or Debate Clause, the legislative privilege provides a legislator not only immunity from suit, but also a testimonial and evidentiary privilege.) (internal citations omitted), *rev'd on other grounds*, 133 S. Ct. 2886 (June 27, 2013); *Cunningham v. Chapel Hill, ISD*, 438 F. Supp. 2d 718, 722 (E.D. Tex. 2006) ("local legislators are protected by the testimonial privilege from having to testify about actions taken in the sphere

[5] *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 93–94, 101 (S.D.N.Y. 2003) (broadly defining the scope of legitimate legislative activity to include preliminary fact-finding and bill-drafting activities, since, "[a]s every high school student knows, the process of drafting legislation is also an important part of how a bill becomes law.").

of legitimate legislative activity"); *Florida v. United States*, 886 F. Supp. 1301 (N.D. Fla. 2012) (denying motion to compel testimony and documents in VRA case).

The application of the privilege to testimony is supported by its underlying policy goal, namely protecting legislators from interference with their legislative duties and to "protect the integrity of the legislative process by [e]nsuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). *See also Spallone v. United States*, 493 U.S. 265, 279 (1990) ("[A]ny restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"); *Small v. Hunt*, 152 F.R.D. 509, 512 (E.D.N.C. 1994) ("[L]egislative immunity is both an evidentiary and testimonial privilege, as well as a protection against civil suit"); *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"). Requiring a legislator to testify in a suit harms the independence of the legislative process whether or not the legislator also faces civil liability.

Furthermore, as previously established, the Supreme Court recognized in *Arlington Heights* that only in "*extraordinary instances*" would direct questioning be allowed of legislators concerning the purpose of an official action, and even then, "*such testimony will be frequently barred by privilege*." 429 U.S. at 268 (emphasis added). In other words, this precedent suggests that even when information sought by Plaintiffs from the state legislators is relevant, its relevance is insufficient to overcome the legislative privilege.[6] Indeed, the *Arlington Heights* Court

[6] *See also John Does 1-4 v. Snyder*, 932 F. Supp. 2d 803, 810 (E.D. Mich. 2013) ("[C]ourts are wary of considering the 'almost always cacophonous' comments of individual legislators in determining legislative intent.") (citing *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784 (6th Cir. 2003) (legislative "intent is better derived from the words of the statute itself than from a patchwork record of statements inserted by individual legislators and proposals that may never have been adopted by a committee, much less an entire legislative body.")).

specifically cautioned against compelling such testimony, stating that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and that "[p]lacing a decisionmaker on the stand is therefore 'usually to be avoided.'" *Id.* at 268 & n.18. *See also Favors v. Cuomo*, Case No. 11–CV–5632, 2015 WL 7075960, *15 (E.D.N.Y., Feb. 8, 2015) ("In only the rarest of circumstances will courts compel testimony from legislators asserting legislative privilege."). Such protection is necessary 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." *See, e.g.*, *Searingtown Corp. v. Incorporated Village of N. Hills*, 575 F. Supp. 1295, 1299 (E.D.N.Y. 1981) (precluding discovery into motivation of local legislators for rezoning decision that plaintiffs claimed violated their constitutional rights).

III. CONCLUSION

Without question, the testimony and documents Plaintiffs seek in the instant case concern the motivation of the Nonparty Legislators (and, corporately, the Alabama Legislature), as well as acts that fall well-within the sphere of legitimate legislative activity, including, as set out in the subpoenas, *designing, drafting, passing or implementing, interpreting, clarifying, defining, explaining, amending, repealing, replacing, lobbying, discussing, supporting, opposing, and revising* legislation. *See* **Exhibit A** at ¶II.1, 2., 3.a-b; **Exhibit B** at ¶II.1., 2., 3.a.-b. Such activity is quintessentially legislative, and legislators so engaged deserve the protection the *Tenney* Court has extended to them. Furthermore, in the instant case, the potential interference with the Nonparty Legislators' performance of their public duties is greatly exacerbated by the fact that their depositions and document production deadlines are scheduled during the opening days of the 2019 Regular Session, and would require additional time to prepare.

Hauling legislators into court to testify about how or why a bill was voted on in committee and by the chamber as a whole is precisely the sort of burden the doctrine of legislative privilege is designed to preclude. *See MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 862-63 (D.C. Cir. 1988); *United Transp. Union v. Springfield Terminal Ry. Co.*, 132 F.R.D. 4, 6 (D. Me. 1990). The Supreme Court, moreover, has recognized that legislative protections extend beyond pure legislative speech or debate "'when necessary to prevent indirect impairment of such deliberations.'" *United States v. Swindall*, 971 F.2d 1531, 1545 (11th Cir. 1992) (quoting *Gravel*, 408 U.S. at 625, 92 S. Ct. at 2627) (emphasis omitted). As cogently summarized by Judge Coogler in *GBM v. Merrill*,

> [L]egislative privilege protects the process that legislators must go through in opposing or responding to such requests and is not simply based upon the substance of the requests. *See In re Hubbard*, 803 F.3d at 1310 (holding that one of the privilege's principle purposes is to ensure that lawmakers are allowed to focus on their public duties free from the distraction of complying with discovery requests). Legislators, and their staff members, must divert substantial time, energy, and attention from their legislative work to oppose discovery requests. Such actions deprive the legislators of the time and freedom to carry out the duties the public has entrusted to them.

GBM v. Merrill, **Exhibit C** at 23-25. These are precisely the problems that Nonparty Legislators seek to halt in this motion to quash.[7]

In sum, as the Founders recognized long ago, for democracy and federalism to flourish, state legislators must be free to operate within their proper legislative sphere without fear of being subjected to civil suits or civil process in state or federal court. There is no precedent or policy

[7] *See also Powell v. Ridge*, 247 F.3d 520, 530 (3d Cir. 2001) (Roth, J., concurring) ("If legislative privilege from civil discovery exists, either for a party, as in the instant case, or for a non-party as it may arise in the future, it exists to protect legislators from the burden of having to respond to discovery and of having to deal with the distractions and disruptions that discovery imposes on their ability to carry out their governmental functions."); *United States v. Rayburn House Office Building*, 497 F.3d 654, 660 (D.C. Cir. 2007) (noting that discovery procedures can prove just as intrusive as naming legislators as parties).

that overrides these fundamental principles. "[A]ny restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone v. United States*, 493 U.S. 265, 279, 110 S. Ct. 625, 634 (1990) (citations omitted).

WHEREFORE, PREMISES CONSIDERED, the Nonparty Legislators respectfully request that the Court enter an immediate order (1) quashing service of subpoenas commanding them to testify at deposition and to contemporaneously produce documents, and (2) enjoining Plaintiffs from issuing subpoenas or attempting to effect any other service of process upon the Nonparty Legislators during the term of the 2019 Regular Session or thereafter.

Respectfully submitted this 25th day of February, 2019.

/s/ Christopher W. Weller
CHRISTOPHER W. WELLER (WEL020)
Attorney for Defendant Representative David Faulkner

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CERTIFICATE OF SERVICE

I hereby certify that, on the 25th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Armand G. Derfner (aderfner@derneraltman.com);

Danielle Lang (dlang@campaignlegalcenter.org);

James U. Blacksher (jblacksher@ns.sympatico.ca);

Jessica Ring Amunson (jamunson@jenner.com);

J. Gerald Herbert (gherbert@campaignlegalcenter.org);

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/s/ Christopher W. Weller

Exhibit A

Subpoena to Rep. David Faulkner

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Treva Thompson, *et al.*, Plaintiffs, v. John H. Merrill, in his official capacity as Secretary of State, *et al.*, Defendants.	Civil Action No. 2:16-CV-783-ECM-SRW

SUBPOENA TO PRODUCE DOCUMENTS AND TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Rep. David Faulkner
11 South Union Street
Suite 522-B
Montgomery, AL 36130-2950

I. YOU ARE COMMANDED, pursuant to Federal Rule of Civil Procedure 45, to appear at the date, time, and place set forth below to testify at a deposition to be taken under oath in this civil action. The deposition will be taken before a court reporter authorized to administer oaths by the laws of the State of Alabama, and testimony will be recorded stenographically.

DATE AND TIME: March 7, 2019 at 10:00am.

PLACE: McGuire & Associates LLC, 31 Clayton Street, Montgomery, AL 36104

II. YOU ARE COMMANDED, pursuant to Federal Rule of Civil Procedure 45, to produce to McGuire & Associates LLC, 31 Clayton Street, Montgomery, AL 36104, at the time and place of the deposition, the following electronically stored information, or objects, and to permit inspection or copying of the same:

1. All documents and communications in your possession, custody, or control that relate in any way to the Definition of Moral Turpitude Act of 2017 ("HB 282"), also known as House Bill 282, HB 282, or Act No. 2017-278, including but not limited to any email, text message, voice mail, or written communications concerning the purpose, design, drafting, passage, implementation, or effect of HB 282.

2. All documents, communications, and materials in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to the disqualification from registering to vote, or voting, of citizens with felony convictions, including but not limited to any email, text message, voice mail, or written communications discussing Alabama law on felony disenfranchisement.

3. All documents, communications, and materials in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to Section 177(b) of the Alabama Constitution, including but not limited to:

    a. Any documents, communications, and materials regarding or related to proposed legislation to interpret, clarify, define, explain, amend, repeal, replace, or otherwise impose or remove legal obligations related to Section 177(b) of the Alabama Constitution;

    b. Any documents, communications, and materials regarding or related to the decision to draft, support, oppose, define, amend, lobby, discuss, revise, or otherwise argue for or against legislation related to Section 177(b) of the Alabama Constitution and/or the legal obligations, restrictions, or structures imposed thereunder.

4. All documents and communications in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to Section 15-22-36.1(a)(3) of the Alabama Code.

To the extent responsive records rely on administrative or electronic codes, provide information to understand those codes, such as the name and description of the fields in the data and a description of each code, including, where applicable, any documents, communications, or things related to the means by which a particular code was assigned to an applicant or voter, to the extent not otherwise included in your response to this requires.

Electronic information in its original format is preferred.

III. Pursuant to Fed. R. Civ. P. 45(a)(l)(iv) the text of Fed. R. Civ. P. 45 (c), (d), (e), (g) is reproduced below:

(c) PLACE OF COMPLIANCE.

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) PROTECTING A PERSON SUBJECT TO A SUBPOENA; ENFORCEMENT.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) DUTIES IN RESPONDING TO A SUBPOENA.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* 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.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

DATED: February 11, 2019

Respectfully submitted,

Joseph Mitchell McGuire (AL Bar: ASB-8317-S69M)
McGuire & Associates LLC
31 Clayton Street
Montgomery, AL 36104
(334) 517-1000
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Counsel for Plaintiffs and Plaintiff Class

Exhibit B

Subpoena to Sen. Cam Ward

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Treva Thompson, *et al.*, Plaintiffs, v. John H. Merrill, in his official capacity as Secretary of State, *et al.*, Defendants.	Civil Action No. 2:16-CV-783-ECM-SRW

SUBPOENA TO PRODUCE DOCUMENTS AND TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Sen. Cam Ward
11 South Union Street
Suite 719
Montgomery AL 36130-4600

I. YOU ARE COMMANDED, pursuant to Federal Rule of Civil Procedure 45, to appear at the date, time, and place set forth below to testify at a deposition to be taken under oath in this civil action. The deposition will be taken before a court reporter authorized to administer oaths by the laws of the State of Alabama, and testimony will be recorded stenographically.

DATE AND TIME: March 8, 2019 at 10:00am.

PLACE: McGuire & Associates LLC, 31 Clayton Street, Montgomery, AL 36104

II. YOU ARE COMMANDED, pursuant to Federal Rule of Civil Procedure 45, to produce to McGuire & Associates LLC, 31 Clayton Street, Montgomery, AL 36104, at the time and place of the deposition, the following electronically stored information, or objects, and to permit inspection or copying of the same:

1. All documents and communications in your possession, custody, or control that relate in any way to the Definition of Moral Turpitude Act of 2017 ("HB 282"), also known as House Bill 282, HB 282, or Act No. 2017-278, including but not limited to any email, text message, voice mail, or written communications concerning the purpose, design, drafting, passage, implementation, or effect of HB 282.

2. All documents, communications, and materials in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to the disqualification from registering to vote, or voting, of citizens with felony convictions, including but not limited to any email, text message, voice mail, or written communications discussing Alabama law on felony disenfranchisement.

3. All documents, communications, and materials in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to Section 177(b) of the Alabama Constitution, including but not limited to:

   a. Any documents, communications, and materials regarding or related to proposed legislation to interpret, clarify, define, explain, amend, repeal, replace, or otherwise impose or remove legal obligations related to Section 177(b) of the Alabama Constitution;

   b. Any documents, communications, and materials regarding or related to the decision to draft, support, oppose, define, amend, lobby, discuss, revise, or otherwise argue for or against legislation related to Section 177(b) of the Alabama Constitution and/or the legal obligations, restrictions, or structures imposed thereunder.

4. All documents and communications in your possession, custody, or control created or revised on or after January 1, 2016, that relate in any way to Section 15-22-36.1(a)(3) of the Alabama Code.

To the extent responsive records rely on administrative or electronic codes, provide information to understand those codes, such as the name and description of the fields in the data and a description of each code, including, where applicable, any documents, communications, or things related to the means by which a particular code was assigned to an applicant or voter, to the extent not otherwise included in your response to this requires.

Electronic information in its original format is preferred.

III. Pursuant to Fed. R. Civ. P. 45(a)(l)(iv) the text of Fed. R. Civ. P. 45 (c), (d), (e), (g) is reproduced below:

(c) PLACE OF COMPLIANCE.

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) PROTECTING A PERSON SUBJECT TO A SUBPOENA; ENFORCEMENT.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) DUTIES IN RESPONDING TO A SUBPOENA.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* 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.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt. The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

DATED: February 11, 2019

Respectfully submitted,

Joseph Mitchell McGuire (AL Bar: ASB-8317-S69M)
McGuire & Associates LLC
31 Clayton Street
Montgomery, AL 36104
(334) 517-1000
jmcguire@mandabusinesslaw.com
Counsel for Plaintiffs and Plaintiff Class

~~DATED: February ____, 2019~~

~~Respectfully submitted,~~

~~J. Mitch McGuire (AL Bar: ASB-8317-S69M)~~
~~McGuire & Associates LLC~~
~~31 Clayton Street~~
~~Montgomery, AL 36104~~
~~(334) 517-1000~~
~~jmcguire@mandabusinesslaw.com~~
~~*Counsel for Plaintiffs and Plaintiff Class*~~

Exhibit C

03/13/2017 Mem. of Opinion & Order
Greater Birmingham Ministries v. John Merrill,
Case No. 2:15-cv-02193-LSC (N.D. Ala., Mar. 13, 2017)

FILED
2017 Mar-13 AM 11:39
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GREATER BIRMINGHAM MINISTRIES, *et al.*, Plaintiffs, vs. JOHN MERRILL, *in his official capacity as the Alabama Secretary of State*, Defendant.	)	2:15-cv-02193-LSC

MEMORANDUM OF OPINION AND ORDER

I. Introduction

This matter is before the Court on a "Motion to Quash Subpoenas Directed to Representatives Micky Hammon, Reed Ingram, and Kerry Rich" (doc. 80) and a "Motion to Quash Subpoena Directed to Senator Gerald Allen" (doc. 151). Plaintiffs have served subpoenas *duces tecum* on several nonparty current members of the Alabama House of Representatives and Alabama Senate (hereinafter, the "Nonparty Legislators"). Through these subpoenas, Plaintiffs seek to compel the Nonparty Legislators to produce documents and communications between themselves and various other persons related to the passage of section 17-9-30 of

the Alabama Code (the "Photo ID Law"), other Alabama voter identification legislation including Senate Bill 86 of 2011, House Bill 56 of 2011, Senate Bill 256 of 2011, House Bill 293 of 2015, and any other legislation, laws, or proposals related to voter identification requirements. The Nonparty Legislators refused to produce these documents and communications, arguing that they are protected by legislative privilege.

Having reviewed the submissions by Plaintiffs and the Nonparty Legislators, and for the reasons discussed herein, the Court finds that the motions to quash are due to be granted.

II. Background

Greater Birmingham Ministries, the Alabama State Conference of the National Association for the Advancement of Colored People, Giovana Ambrosio, Debra Silvers, Elizabeth Ware, and Shameka Harris ("Plaintiffs") brought this suit against John Merrill in his official capacity as Alabama's Secretary of State,[1] claiming that Alabama's Photo ID Law violates the Fourteenth and Fifteenth Amendments to the U.S. Constitution, Section 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301, and Section 201 of the VRA, 52 U.S.C. § 10501.

[1] Plaintiffs also named as Defendants the State of Alabama, Robert J. Bentley in his official capacity as Governor of Alabama, Steven T. Marshall in his official capacity as Alabama's Attorney General, and Stan Stabler in his official capacity as the Secretary of the Alabama Law Enforcement Agency, but this Court has since dismissed those defendants.

Plaintiffs request a declaratory judgment and an injunction enjoining enforcement of the Photo ID Law.

Plaintiffs acknowledge that they issued these subpoenas to the Nonparty Legislators to support their claims of purposeful discrimination under the Fourteenth and Fifteenth Amendments and to a lesser extent their VRA claims. The Fourteenth Amendment subjects all racial classifications to strict scrutiny, and the Fifteenth Amendment prohibits abridgments of the right to vote based on race. Claims under either Amendment require proof that the law "has a discriminatory effect and that it was motivated by a discriminatory purpose" before it is considered a suspect racial classification. *United States v. Armstrong*, 517 U.S. 456, 465 (1996). To subject the Photo ID Law to strict scrutiny, Plaintiffs thus must allege and prove both elements. Moreover, they must demonstrate discriminatory motive for the entire Alabama Legislature. *See Hunter v. Underwood*, 771 U.S. 222, 228 (1985). Evidence of discriminatory motive may also bolster their VRA claims, although such violations only require discriminatory results and not proof of discriminatory motive. *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1564 (11th Cir. 1984). Plaintiffs' Second Amended Complaint contains numerous discriminatory-purpose allegations. For example, they assert that legislators made various statements that demonstrate that the Photo ID Law is the product of overt

racial animus and a deliberate strategy to suppress African-American voter turn-out. [Doc. 112 at ¶¶ 61-67, 70-72, 83-84, 88-94.] Indeed, the second heading in the "Factual Allegations" of Plaintiffs' Second Amended Complaint plainly states: "The passage of the Photo ID Law was motivated by a discriminatory purpose." [*Id.* at 22.]

The documents Plaintiffs seek from the Nonparty Legislators can generally be divided into two overlapping categories: documents relating to (1) acts that occurred during the regular legislative process and (2) the motivation for those acts. For example, documents requested that concern the regular legislative process include:

> "Documents regarding legislative procedures of drafting, introducing, debating, considering, deliberating, enacting and enforcing [the Photo ID Law], Senate Bill 86, House Bill 56, Senate Bill 256, House Bill 293 and other voter identification-related bills."
>
> "Documents concerning the legislative and procedural powers, responsibilities and role of House Majority Leader Hammon in drafting, deliberation, debate, consideration, passage, enactment or enforcement of [the Photo ID Law], Senate Bill 86, House Bill 56, Senate Bill 256, House Bill 293 and other voter identification legislation since January 1, 2010."
>
> "Documents considered by the legislators to review, analyze, or research the administration or integrity of Alabama elections."
>
> "Documents concerning impact of voter identification laws on voter turnout, registration, and provisional ballot usage and potential impact

> on African-Americans, Latinos, racial minorities, low-income people and political groups."
>
> "Studies, memoranda, research reports, drafts, communications or correspondence between legislators, Defendants, advisors, consultants or others, including documents related to [the Photo ID Law], Senate Bill 86, House Bill 56, Senate Bill 256, House Bill 29."
>
> "Documents related to the number of eligible voters or registered voters who have or lack photo identification required to vote under [the Photo ID Law]."
>
> "Communications regarding the purpose, effect or impact of [the Alabama Law Enforcement Agency] office closures."
>
> "Documents regarding legislative agendas (e.g., Republican Handshake with Alabama)."
>
> "Documents related to decision making concerning the schedule for implementing [the Photo ID Law]."

[*See* docs. 80-1, 80-2, 80-3, 151-1.] Similarly, the subpoenas request the following documents concerning the underlying motivation for legislative acts:

> "Statements, opinions and judgments of legislators and their offices in support of and/or opposition to, and voting histories regarding [the Photo ID Law], Senate Bill 86, House Bill 56, Senate Bill 256, House Bill 293 and legislator voting histories."
>
> "Documents concerning communications with other legislators, constituents, lobbyists, consultants, employees, and members of the public."
>
> "Communications related to the necessity and likelihood of passage of House Bill 293, its impact on voters or its ability to prevent alleged voter fraud."

> "Documents relating to efforts to obtain or avoid preclearance of voter identification legislation."

[*See id.*]

III. Discussion

A party may serve a subpoena under Rule 45 of the Federal Rules of Civil Procedure to obtain "documents, electronically stored information, or tangible things." Fed. R. Civ. P. 45(a)(1)(C). The recipient of the subpoena may move to quash or modify a subpoena for four specific reasons, one of which is that the subpoena "requires disclosure of privileged or other protected matter." *In re Hubbard*, 803 F. 3d 1298, 1307 (11th Cir. 2015) (citing Fed. R. Civ. P. 45(d)(3)(A)(iii)). "The federal courts have the authority and duty to recognize claims of privilege that are valid under federal common law." *Id.* (citing Fed. R. Evid. 501). As the parties asserting a privilege claim, the Nonparty Legislators "must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim." *Id.* (citing Fed. R. Civ. P. 45(e)(2)(A)).

Here, the Nonparty Legislators have met their burden under Rule 45 with regard to the assertion of privilege in support of their motion to quash because they have asserted the privilege and described the nature of the documents they seek to withhold. Considering the nature of Plaintiffs' constitutional claims, which require

proof of discriminatory motive, as well as Plaintiffs' admission that they seek discovery to find discriminatory purpose or motive evidence, the Court has sufficient information pursuant to Rule 45 to assess the Nonparty Legislators' claim of privilege.

"Legislative privilege clearly falls within the category of accepted evidentiary privileges." *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011). The privilege is rooted in the absolute immunity granted to federal legislators by the Speech or Debate Clause of the Constitution and exists to safeguard that immunity. *Id.* at 180–81. In *Tenney v. Brandhove*, the Supreme Court found that the Speech or Debate Clause was part of a broader common law "tradition [of legislative privilege] . . . well grounded in history" and extended the benefit of that tradition (though not the Speech or Debate Clause itself) to state legislators. 341 U.S. 367, 372–76 (1951).

In *In re Hubbard*, the Eleventh Circuit recently reaffirmed the principles that compel a vigorous application of the legislative privilege, as follows:

> The legislative privilege is important. It has deep roots in federal common law. *See Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S. Ct. 783, 786, 95 L. Ed. 1019 (1951) (recognizing "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings"); *see also United States v. Gillock*, 445 U.S. 360, 372 n. 10, 100 S. Ct. 1185, 1193 n. 10, 63 L. Ed. 2d 454 (1980) (noting that *Tenney* "was grounded on its interpretation of 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. *See Tenney*, 341 U.S. at 372, 376, 71 S. Ct. at 786, 788 (recognizing a legislative privilege for state legislators when acting "in the sphere of legitimate legislative activity"); *Reeder v. Madigan*, 780 F.3d 799, 800, 805 (7th Cir. 2015) (affirming the legislative privilege of state representatives and senators); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) (holding that Florida's governor was protected by legislative immunity when signing a bill into law); *Baraka v. McGreevey*, 481 F.3d 187, 196–97 (3d Cir. 2007) (holding that a governor falls within the sphere of legislative activity when "advocating and promoting legislation"). And it does not matter to the existence of the legislative privilege that the four lawmakers were not parties to AEA's lawsuit. The privilege "applies whether or not the legislators themselves have been sued." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011); *see MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988).

. . .

The legislative privilege "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525, 92 S. Ct. 2531, 2544, 33 L. Ed. 2d 507 (1972) (emphasis added); *see Tenney*, 341 U.S. at 377, 71 S. Ct. at 788 (declaring "that it [i]s not consonant with our scheme of government for a court to inquire into the motives of legislators"). One of the privilege's principle purposes is to ensure that lawmakers are allowed to "focus on their public duties." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181; *cf. Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503, 95 S. Ct. 1813, 1821, 44 L. Ed. 2d 324 (1975) (explaining that the Speech or Debate Clause ensures that civil litigation will not "create[ ] a distraction and force[ ] Members to divert their time, energy, and attention from their legislative tasks to defend the litigation"). That is why the privilege extends to discovery requests, even when the lawmaker is not a named party in the suit: complying with such requests detracts from the performance of official duties. *See Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181; *MINPECO*, 844 F.2d at 859 ("A litigant does not have to name members or their staffs as parties to a suit in order to

> distract them from their legislative work. Discovery procedures can prove just as intrusive."). The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments.

803 F.3d at 1307-08, 1310. Thus, this Court's analysis begins with the premise that state lawmakers' legislative privilege is important, that it shields lawmakers from inquiries into acts that occurred during the regular course of the legislative process and from inquiries into the underlying motivations for those acts, and that one of the primary purposes of the privilege is to ensure that lawmakers are allowed to focus on their public duties without distraction and diversion.

Plaintiffs argue that these principles do not control in this particular case for several reasons. First, relying upon the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, Plaintiffs claim that the legislative privilege is not absolute, but qualified, and that it therefore must yield when confronted with the magnitude of the federal interest in uncovering intentional racial discrimination in voting. *Arlington Heights* set forth principles governing the analysis to undertake when a claim is made that a facially neutral law masks an invidiously discriminatory purpose on the part of the drafters of the law. 429 U.S. 252, 265 (1977). The Supreme Court instructed that in evaluating such a claim, courts must engage in a "sensitive inquiry" into whatever "circumstantial and direct evidence of intent as may be available." *Id.* at 266. According to the

Court, this evidence might include the following *non-privileged* information (1) "the historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (2) "the specific sequence of events leading up to the challenged decision"; (3) "[d]epartures from the normal procedural sequence"; (4) "[s]ubstantive departures [as when] factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (5) "[t]the legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-68. However, the Court did *not* say that a litigant may depose a legislator to obtain information of such unlawful discriminatory motive. On the contrary, the Court made clear that utilizing a legislator to prove intent would rarely if ever be available. Given that "[p]lacing a decisionmaker on the stand is . . . usually to be avoided," it is only "[i]n some extraordinary instances [that] the members might be called to the stand at trial to testify concerning the purpose of the official action, [and] even then such testimony frequently will be barred by privilege." *Id.* at 268 & n. 18. *Arlington Heights* thus appears to require both extraordinary circumstances and an exception to the privilege in order to question a legislator concerning intent.

Plaintiffs say that a claim of racial discrimination in voting is one of those "extraordinary circumstances" mentioned in *Arlington Heights* that warrants a yield of the legislative privilege. It is true that the Supreme Court has recognized that a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests such as "the enforcement of federal criminal statutes." *United States v. Gillock*, 445 U.S. 360, 373 (1980). In that case, the Court held that a state legislator could not invoke legislative privilege in a case wherein he was being prosecuted for violation of a federal criminal statute. *Id.* at 374. According to the Court,

> [A]lthough principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields. . . . 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. at 373 (footnote omitted). The Court noted that a similar result had been reached in *United States v. Nixon*, 418 U.S. 683 (1974), where the President's claim of executive privilege was subordinated to the need to enforce the federal criminal laws. In reaching its decision, the Supreme Court distinguished its prior holding in *Tenney*, explaining that legislators enjoy immunity in civil cases, but that legislators cannot utilize the "judicially fashioned doctrine of official immunity . . . to

immunize criminal conduct proscribed by an Act of Congress." *Id.* at 372 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974)). Plaintiffs have offered no support for extending *Gillock*'s exception to the legislative privilege in criminal prosecutions to the instant case. To the contrary, the Court explained that, for purposes of the legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government. *See id.* at 372–73 ("[I]n protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at civil actions.").

It is also true that some district courts have found a limited exception to legislative privilege in cases involving legislative redistricting, i.e., "gerrymandering." This makes sense because in contrast to the case at bar, the subjective decision-making process of the legislature in redistricting is the very issue and crux of the constitutional challenge:

> Legislative redistricting is a *sui generis* process. While it is an exercise of legislative power, it is not a routine exercise of that power. The enactment of statutes ordinarily involves the implementation of public policy by a duly constituted legislative body. Redistricting involves the establishment of the electoral structure by which the legislative body becomes duly constituted. Inevitably, it directly involves the self-interest of the legislators themselves.

Marylanders for Fair Representation Inc. v. Schaefer, 144 F.R.D. 292, 304 (D. Md. 1992) (Murnaghan & Motz, JJ., concurring); *see also See Bethune-Hill v. Virginia*

State Bd. of Elections, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015) (the reason redistricting cases are "extraordinary" as contemplated by *Arlington Heights* is because the "natural corrective mechanisms built into our republic system of government offer little check upon the very real threat of legislative self-entrenchment") (internal quotation marks omitted). If legislative privilege is raised in opposition to a discovery request in these types of cases, courts often use a balancing test to determine whether and to what extent the privilege should be honored. *See, e.g., Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003). Among the considerations are (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *See id.* 100–01.

However one characterizes the legislative privilege, Plaintiffs offer no support for applying this balancing test in anything other than redistricting cases. Indeed, virtually all of the cases Plaintiffs cite in support concern redistricting litigation. *See Bethune-Hill*, 114 F. Supp. 3d at (Virginia redistricting case concerning state house districts); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014) (Virginia redistricting case concerning congressional district);

Favors v. Cuomo, 285 F.R.D. 187, 219 (E.D.N.Y. 2012) (New York redistricting case concerning general assembly districts); *Baldus v. Brennan*, 2011 WL 6122542 (E.D. Wis. Dec. 8, 2011) (Wisconsin redistricting challenge); *Committee for a Fair and Balanced Map v. Ill. State Bd. of Educ.*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) (Illinois redistricting challenge to state congressional district boundaries); *United States v. Irwin*, 127 F.R.D. 169 (C.D. Cal. 1989) (challenge to California county redistricting plan). Even then, many courts applying a balancing test in redistricting challenges have upheld the application of legislative privilege in whole or in part. *See, e.g., Bethune-Hill*, 114 F. Supp. at 342-43 (redistricting case holding that legislative privilege does not extend to commentary or analysis following legislation's enactment, but still extends to protect "integral steps" in the legislative process); *Hall v. Louisiana*, 2014 WL 1652791, at *10 (M.D. La. April 23, 2014) (judicial redistricting case holding the privilege applies to any documents or information that contain or involve opinions or motives, including any procedures used by lawmakers in the legislative process as well as the identification of any specific legislators that were involved in any particular step in the process); *Committee for a Fair and Balanced Map*, 2011 WL 4837508, at *10 (redistricting decision holding that "the legislative privilege shields from disclosure predecisional, non-factual communications that contain opinions,

recommendations or advice about public policies or possible legislation"); *Rodriguez*, 293 F. Supp. 2d at 304 (redistricting case holding that although legislative privilege did not shield information regarding an advisory task force, it did protect information concerning deliberations of the Legislature).

In contrast, district courts have refused to abrogate the legislative privilege in cases dealing with Section 2 VRA challenges. *See, e.g., Lee v. Va. State Bd. of Elections*, 2015 WL 9461505, at *6 (E.D. Va. Dec. 23, 2015) (VRA case granting motion to quash subpoenas requesting communications between the non-party legislators and legislative employees regarding voter identification bills and related topics discussed in the Virginia Senate, and specifically rejecting the "flexible approach" applied in redistricting cases); *Marylanders for Fair Representation, Inc.*, 144 F.R.D. at 297 n.12 (rejecting NAACP's argument that inquiring into the motive behind alleged violations of Section 2 of the VRA constitutes an "extraordinary instance" described by *Arlington Heights*); *Simpson v. City of Hampton, Va.*, 166 F.R.D. 16, 18-19 (E.D. Va. 1996) (denying motion to compel production of city council documents because it found legislative privilege protected them in a Section 2 VRA challenge to the city's electoral plan as intentionally discriminatory).

In sum, this Court is not persuaded that decisions in criminal prosecutions or inapposite redistricting cases compel the broad production of documents sought in the instant case, especially in light of binding Eleventh Circuit principles with regard to the legislative privilege espoused in *In re Hubbard.*

Plaintiffs also argue that *In re Hubbard* is distinguishable because there, the Eleventh Circuit held that because the First Amendment claim at issue was non-cognizable, the subjective views of the legislators were irrelevant, while here, Plaintiffs are raising a different constitutional claim in which "inquiry into intent is necessary." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485 (1982). In *In re Hubbard*, a public-sector union sought to use subpoenas directed at legislators to uncover evidence that the entire legislature had purposefully conspired to retaliate against it for past political activity in alleged violation of the First Amendment. 803 F.3d at 1301-02. The Eleventh Circuit held that the lawmakers' legislative privilege did not have to yield to the plaintiff union's subpoenas because, "as a matter of law, the First Amendment does not support the kind of claim [the union] makes here: a challenge to an otherwise constitutional statute based on the subjective motivations of the lawmakers who passed it." *Id.* at 1312. The union therefore had "no valid federal claim to justify intruding upon the lawmakers' legislative privileges." *Id.* at 1314-15. The court also cautioned that its holding was limited to

the facts before it. *Id.* at 1312 n.3. None of this alters the well-established principles underpinning the legislative privilege.

The Court recognizes that enforcing rights under the Constitution and the VRA is an important federal interest and acknowledges that evidence of discriminatory intent is essential to establish Plaintiffs' constitutional claims, albeit less relevant to their VRA claims. But Plaintiffs' own complaint reveals that they can develop evidence of motive through many of the alternative, non-privileged sources the Supreme Court identified in *Arlington Heights*. For example, Plaintiffs set forth detailed allegations regarding the history of racial discrimination in voting in Alabama; the alleged sequence of events leading to the passage and implementation of the Photo ID Law; the alleged racially charged environment in which the Alabama Legislature passed the Photo ID Law; the contemporaneous passage of the Photo ID Law and an allegedly discriminatory redistricting plan; and the alleged discriminatory statements by lawmakers. [Doc. 112 at ¶¶ 61-67, 70-72, 83-84, 88-94.] Plaintiffs are free to further delve into these sources of evidence that do not violate the privilege. *See, e.g., Simpson v. City of Hampton*, 166 F.R.D. 16, 19 (E.D. Va. 1996) ("[T]he plaintiffs in the case at bar may undertake to prove the council intended to discriminate, but their undertaking may not include the use of councils' personal notes and files.").

Nor is the Court persuaded by Plaintiffs' argument that two recent voter identification decisions with the most analogous claims to those presented here validate the importance of the type of privileged information they seek. Plaintiffs emphasize that the *en banc* Fifth Circuit in *Veasey v. Abbott* relied heavily on the deposition testimony of several Texas Senators in the context of motive evidence presented before the district court in addressing an equal protection challenge to Texas's voter identification law. 830 F.3d 216, 236-37 (5th Cir. 2016) (en banc). However, the majority opinion from the Fifth Circuit nowhere addresses legislative privilege. While the court *en banc* reversed and remanded the district court's decision striking down the law for additional consideration of other possible discriminatory motive evidence, *id.* at 272, the parties did not raise on appeal the district court's handling of the legislative privilege issue. There is thus no context provided, for example, whether the legislators chose to waive the privilege, which is their right, *see, e.g., Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1999). In fact, as set out in the district court's opinion, 54 of the Texas legislators either actively waived the privilege or passively waived the privilege by failing to assert it in response to inquiries directed to that question. *See Veasey v. Perry*, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014). This waiver resulted in both the trial court and the appellate court having significant deposition testimony before it. And while

the district court—in this Court's opinion erroneously—relied upon inapposite decisions such as *Gillock* and *Rodriquez*, *supra*, to conclude that on balance, disclosure of legislative documents was warranted, it still ordered that the production be done under seal and specifically reserved the issue of whether the legislative privilege should be pierced until the time of trial. *Id.* at *2-4 & n.3 (stating that "[g]iven the sensitive nature of the documents sought and the importance of preserving confidential communication among legislators, the Court is not inclined to fully pierce the legislative privilege at this point by authorizing complete and public disclosure of the documents and ESI at issue").

Although the parties did not raise the issue on appeal, the dissenters in *Veasey* nonetheless expressed concern with the district court's permitting "wide-ranging and invasive discovery into legislators' internal correspondence." *Id.* at 326 (Elrod, J., dissenting, joined by Smith, J.). Judge Edith Jones discussed the fact that legislative privilege typically precludes such invasive discovery and cited *In re Hubbard* as contrary to the district court's approach:

> In *Arlington Heights*, the Supreme Court cautioned that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and that "[p]lacing a decisionmaker on the stand is therefore 'usually to be avoided.'" 429 U.S. at 268 n.18, 97 S. Ct. at 565 n.18. "In some extraordinary instances . . . members 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." *Id.* at 268.
>
> Since *Arlington Heights*, courts frequently rely on the legislative privilege to repel attempts by plaintiffs to subject legislators to the burdens of civil litigation. *See In re Hubbard*, 803 F.3d 1298, 1307–08 (11th Cir. 2015) (quashing subpoenas for the production of documents served on legislators and a Governor in a First Amendment retaliation case); *Reeder v. Madigan*, 780 F.3d 799, 806 (7th Cir. 2015) (dismissing, based on legislative immunity, plaintiff's claim that the Illinois Senate violated his First Amendment rights by denying him media credentials); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (quashing subpoenas for disclosure of subcommittee documents served on members of a Congressional subcommittee by private defendants in an unrelated civil lawsuit); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (same). *In this case, however, the district court disregarded this authority and opted to take a piecemeal, balancing approach to the legislators' legislative privilege.*

Id. at 232 n. 14 (Jones, J. dissenting, joined by Jolly, J., Smith, J., Clement, J., and Owen, J.) (emphasis added). Thus, the Fifth Circuit majority's opinion in *Veasey* provides no support for Plaintiffs' position, and the only portion of the appellate court's decision relevant to the issue before the Court is the dissent, which supports recognition of the legislative privilege in this type of case.

Similarly, while Plaintiffs point out that in *North Carolina State Conference of NAACP v. McCrory*, the Fourth Circuit's decision rested in part on record evidence produced to the plaintiffs showing that state legislators had received data from the Board of Elections and Department of Motor Vehicles on the racially

disparate impact of the challenged photo ID law, there was no statement by that court on whether privilege was asserted by the legislators with regard to this specific information. 831 F.3d 204, 230 (4th Cir. 2016). The Fourth Circuit did hold that legislative privilege barred legislators' testimony as to the purpose of the challenged law: "And, as the Supreme Court has recognized, testimony as to the purpose of challenged legislation 'frequently will be barred by [legislative] privilege.' That is the case here." *Id.* at 229 (quoting *Arlington Heights*, 429 U.S. at 268). And while the Fourth Circuit ultimately enjoined North Carolina's enforcement of its omnibus voter law, including its voter identification requirements, it did so without violating the legislative privilege to obtain evidence to establish discriminatory motive. Instead, the Court looked to other non-privileged evidence of discriminatory motive identified in *Arlington Heights*, such as the historical background of the challenged decision; the specific sequence of events leading up to the challenged decision; departures from normal procedural sequence; the legislative history of the decision; and the disproportionate impact of the official action—whether it bears more heavily on one race than another. *Id.* at 220.

A few final points remain to be made. First, the subpoenas request documents, not testimony, but the Court declines to make a distinction between

testimony and document production in the context of legislative privilege, and notes that document requests could actually pose more of a threat to the free flow of legislator communication than seeking a lawmaker's testimony. Unlike testimony, document production requires a legislator to hand over communications, such as emails, shorn of all context. *See, e.g., United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007) ("[d]ocumentary evidence can certainly be as revealing as oral communications").

Second, the subpoenas also request that the Nonparty Legislators produce documents that they may have shared with third parties such as lobbyists, constituents, experts, or interest groups, or communications between the Nonparty Legislators and such third parties. The Eleventh Circuit has not directly addressed the issue of whether the legislative privilege extends to protect legislators from having to produce their communications with third parties. However, it has unequivocally held that "legislators' actions in the proposal, formulation, and passage of legislation" are protected by the privilege. *In re Hubbard*, 803 F.3d at 1308. The Court is of the opinion that the privilege should be applied to protect legislators from having to produce documents shared with third parties or communications between themselves and third parties where they engaged in such sharing or communications *for the purpose of exploring and formulating legislation.*

Indeed, such discussions aid legislators in the discharge of their legislative duty. *See Dyas v. City of Fairhope*, 2009 WL 3151879, at *8 (S.D. Ala. Sept. 24, 2009) ("A privilege that prohibits a plaintiff from asking a legislator what was said in the decisive meeting but allows questions concerning any potential influences on his or her decision—such as conversations with constituents, review of documents and other information-gathering, as well as potential bias—offers a legislator no protection worth having."); *Arizona v. Arpaio*, 314 F.R.D. 664, 670 (D. Az. 2016) (communications with constituents for purpose of "[o]btaining information pertinent to potential legislation or investigation" is a legitimate legislative activity protected by the federal legislative privilege); *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 57 (D.D.C. 2007) (communications with executive branch, constituents, interested organizations, and members of the public are protected by federal legislative privilege if these communications "constitute information gathering in connection with or in aid of . . . legislative acts").

Third, Plaintiffs insist that to the extent some of the requested documents and information pertain to *public* statements made by the Nonparty Legislators about the Photo ID Law or other voter legislation, surely such documents are not privileged. But Plaintiffs misunderstand that the legislative privilege protects the *process* that legislators must go through in opposing or responding to such requests

and is not simply based upon the substance of the requests. *See In re Hubbard*, 803 F.3d at 1310 (holding that one of the privilege's principle purposes is to ensure that lawmakers are allowed to focus on their public duties free from the distraction of complying with discovery requests). Legislators, and their staff members, must divert substantial time, energy, and attention from their legislative work to oppose discovery requests. Such actions deprive the legislators of the time and freedom to carry out the duties the public has entrusted to them. Plaintiffs are free to obtain any public statements made by the Nonparty Legislators from other, non-privileged, sources.

Finally, the Court declines Plaintiffs' invitation to draw an adverse inference from the Nonparty Legislators' mere assertion of the legislative privilege, as to do so would render the privilege meaningless.

IV. Conclusion

Because the legislative privilege protects the Nonparty Legislators from having to produce the documents requested in Plaintiffs' subpoenas, the motions to quash (docs. 80 and 151) are hereby **GRANTED**.

DONE AND ORDERED ON MARCH 13, 2017.

L. SCOTT COOGLER
UNITED STATES DISTRICT JUDGE

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