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-SMD**

PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S RULING ON MOTION TO QUASH SUBPOENAS (DOC. 133)

Pursuant to Federal Rule of Civil Procedure 72(a), Plaintiffs respectfully object to the ruling of Magistrate Judge Doyle granting State Representative David Faulkner's ("Faulkner") and State Senator Cam Ward's ("Ward") Motion to Quash Subpoenas (Doc. 133).

BACKGROUND

On February 11, 2019, Plaintiffs served subpoenas on Faulkner and Ward for documents and deposition testimony related to Alabama's felony disenfranchisement system, including related to the development and passage of HB 282 and to their participation on the Voter Disenfranchisement and Restoration of Rights Exploratory Committee ("Exploratory Committee"). *See* Subpoenas, Docs. 133-1, 133-2. The Committee members included, *inter alia*, a freelance journalist, judges, clergy, and an ACLU representative, and its purpose was to give policy advice to the Secretary of State about which felony convictions should be disqualifying for voting purposes. The Committee originally recommended a limited set of criminal convictions to be disqualifying for voting, but—apparently after conversations among Faulkner, Ward, and

Secretary Merrill—a more expansive list was recommended, and Secretary Merrill later lobbied the legislature to use the list to form HB 282—legislation that passed over a year later.

Faulkner and Ward moved to quash the subpoenas on legislative privilege grounds, Doc. 133, and Plaintiffs filed an opposition explaining that legislative privilege could not apply to the non-legislative Exploratory Committee, any privilege was waived by the presence of third parties, the privilege was overcome by the importance of the voting rights claims in this case, and Faulkner and Ward had failed to produce the privilege log necessary to satisfy Rule 45's requirement. *See* Doc. 139. Magistrate Judge Doyle granted the motion, but misapplied Supreme Court and Eleventh Circuit precedent in so doing. Order (Mar. 20, 2020), Doc. 199.

STANDARD OF REVIEW

A magistrate judge's ruling on a nondispositive matter must be "modif[ied] or set aside in any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). A ruling is "contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *Pigott v. Sanibel Development, LLC*, No. 07-0083-WS-C, 2008 WL 2937804, at *5 (S.D. Ala. July 23, 2008) (quotation marks omitted). Although a magistrate judge's factual determinations in nondispositive matters are afforded deference, *id.*, that deference does not apply to the magistrate judge's application of law, *id.*; *see also Dees v. Hyundai Motor Mfg. Ala., LLC.*, 524 F. Supp. 2d 1348, 1350 (M.D. Ala. 2007) (explaining that abuse of discretion standard applies only "in the absence of a legal error").

ARGUMENT

I. The Magistrate Judge's Conclusion that Ward's and Faulkner's Participation on the Exploratory Committee is Covered by Legislative Privilege is Contrary to Law.

The magistrate judge erred as a matter of law in concluding that Ward's and Faulkner's participation on the Exploratory Committee is subject to the legislative privilege or, in the

alternative, that the privilege was not waived by the presence of third parties. *See* Order at 5-6, Doc. 199.

The legislative privilege does not apply to the Legislators' Exploratory Committee participation. The legislative privilege does not "prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *United States v. Brewster*, 408 U.S. 501, 528 (1972) (interpreting the Speech and Debate Clause, U.S. Const. Art. I, § 6). Nor does the privilege apply simply because one is a legislator; rather, it "necessarily focuses on particular acts or functions, not on particular actors or functionaries." *Bryant v. Jones*, 575 F.3d 1281, 1305 (11th Cir. 2009). The Exploratory Committee and its members, including Faulkner and Ward, were not serving a legislative function, but rather working as a group of government officials, nonprofit leaders, advocates, and religious leaders formed by the Secretary of State to advise him in formulating a policy proposal for defining "moral turpitude." *See* Doc. 139-1 (E. Packard Dep.) at 161:16-162:8 (explaining that Secretary Merrill "decided to form a committee where he could get the input from various people across a wide spectrum" to address "concerns about there not being an authoritative list of moral turpitude felonies to be used for disenfranchising voters"). Because the Exploratory Committee was constituted of mostly non-legislators providing policy advice to a non-legislator, any testimony or documents about the Committee cannot plausibly be shielded by the legislative privilege. *See Bryant*, 575 F.3d at 1304 ("[T]he privilege [i]nures only to legislators engaging in actions considered an integral part of [ ] deliberative and communicative processes . . . with respect to the consideration and passage or rejection of proposed legislation." (internal quotation marks omitted)). The legislative privilege cannot plausibly be stretched to shield from discovery testimony and documents regarding a non-

legislative committee formed to give policy advice to a non-legislative official, simply because some of those advisors were legislators.

The magistrate judge erred in concluding otherwise. The magistrate concluded that "Ward's and Faulkner's activity on the committee is protected because it directly concerned the formulation, proposal, and passage of legislation." Order at 6, Doc. 199. But the Exploratory Committee was created by the Secretary of State, for the purpose of giving the *Secretary of State* policy advice. *See* Doc. 139-1 (E. Packard Dep.) at 161:16-162:8. The fact that the Secretary later lobbied the legislature to adopt the Exploratory Committee's proposal—something that happened more than a year after the Committee's final meeting—cannot transform a non-legislative official's non-legislative advisory committee into "a part of the legislative process itself." *Brewster*, 408 U.S. at 528.

There is no limiting principle to the magistrate judge's ruling. If the legislative privilege applies to the Exploratory Committee in this case, then the legislative privilege would apply to *any* collection of citizens who meet to consider and propose policies. Indeed, much legislation gets drafted and proposed by lobbyists, special interest groups, nonprofits, or constituent groups, and then ultimately provided to legislators. Under the magistrate judge's ruling, these private parties would be immune from civil discovery. This makes no sense. And it is no answer that this Committee happened to include two legislators—the focus of the privilege inquiry is not on "particular actors or functionaries" but instead on "particular acts or functions." *Bryant*, 575 F.3d at 1305.

The magistrate judge likewise erred in concluding that the presence of non-legislative third parties did not waive Ward and Faulkner's privilege, even if *their* work on the Exploratory Committee might otherwise be privileged. "As with any privilege, the legislative privilege can be

waived when the parties holding the privilege share their communications with an outsider." *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) ("*CFBM*") (differentiating between communication shared with third parties (unprotected) and those shared with staff (protected)); *see also Baldus v. Brennan*, No. 11-CV-562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) (finding that the legislature waived privilege when it hired outside consultants to help develop a redistricting plan); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (finding that privilege does not protect "conversation[s] between legislators and knowledgeable outsiders"). Communications with those who "could not vote for or against" legislation or with those who do not "work for someone who could" are therefore not covered by the privilege. *CFBM*, 2011 WL 4837508, at *10.

In this case, the magistrate judge rejected Plaintiffs' contention that the presence of a host of non-legislative community members "somehow waived the privilege." *Id.* The magistrate judge reached this conclusion because he determined that these community members were "integral to the formulation, proposal, and passage of legislation." Order at 6, Doc. 199. This was an error of law.

Consider the diverse membership of the Exploratory Committee:

> Members attending the Committee meeting included John H. Merrill, Secretary of State; State Senator Linda Coleman; State Senator Cam Ward; State Representative David Faulkner; Michael Coleman, Executive Director of Hope Inspired Ministries; Darlene Biehl, crime victim's advocate; Jeff Dunn, Commissioner of the Department of Corrections; Pastor Kenneth Glasgow, representing The Ordinary Peoples Society; Will Harrell, representing the American Civil Liberties Union; Carol Hill, member of the Shelby County Board of Registrars; Quin Hillyer, freelance journalist; Win Johnson, representing Rich Hobson, Director of the Administrative Office of the Courts; Summer Scruggs, Circuit Clerk of Clarke County; Gabrelle Simmons, representing Cliff Walker, Chairman of the Alabama Board of Pardons and Paroles. Also in attendance were Joel Laird, General Counsel for the Secretary of State, and Ed Packard, Director of Elections for the Secretary of State

Doc. 139-2 (Exploratory Comm. Mtg. Minutes, E. Packard Dep. Ex. 29). It includes, among other non-governmental actors, a freelance journalist, a pastor, a nonprofit leader, and an ACLU employee. No case law or any other authority supports the magistrate judge's sweeping ruling that a *freelance journalist* and an ACLU employee are within the scope of the legislative privilege. And if they are not covered by the legislative privilege, then their presence on the Committee waives any claim Ward and Faulkner could conceivably have. *See Bryant*, 575 F.3d at 1305.

The magistrate judge cited *Hubbard* and *Bryant* for the proposition that the privilege can apply to "non-legislators involved in the process." Order at 6, Doc. 199. Neither supports the conclusion that a non-governmental actor like a freelance journalist, for example, is covered by the legislative privilege and thus not a party whose presence waives the privilege. In *Hubbard*, the Eleventh Circuit noted that the *governor* is covered by the privilege when promoting legislation or "signing a bill into law." 803 F.3d at 1308. In *Bryant*, the Eleventh Circuit concluded that a county executive branch employee involved in the legislative process was covered by the privilege. 575 F.3d at 1305. In doing so however, the Eleventh Circuit expressly declined to adopt the rule that the magistrate judge seems to have adopted here: "a *per se* rule that would provide an executive official immunity any time he drafts a proposal that is later submitted to a legislative body. We decline to adopt such a rule as it cuts too broadly . . . ." *Id.* Neither *Hubbard* nor *Bryant*—nor any other case—supports the magistrate judge's conclusion that *anyone* invited to serve on a committee formed to give a non-legislative official policy advice can plausibly be covered by the legislative privilege. The magistrate judge's ruling creates a limitless expansion to the privilege, wholly unmooring it from any connection to the legislature or the legislative process. If the Eleventh Circuit considered such an approach "too broad[ ]" as applied to an actual governmental

official, then it cannot plausibly apply to a freelance journalist or the other non-governmental citizens on the Exploratory Committee.

Citizen committees working to formulate and propose policy to a non-legislative state official are not covered by the legislative privilege. And a retroactive privilege is not created merely by handing a proposal over to the legislature. The magistrate judge erred as a matter of law by concluding otherwise.

II. The Magistrate Judge's Conclusion that Legislative Privilege Cannot Be Overcome in Civil Cases Brought by Private Plaintiffs Is Contrary to Law.

The magistrate judge erred as a matter of law in concluding categorically that because this is a civil case brought by private plaintiffs, it cannot overcome the legislative privilege. Order at 6-7, Doc. 199. The magistrate judge concluded that *Hubbard* created a bright line rule that only "criminal prosecutions by the federal government" and not "a civil case brought by private plaintiffs" could overcome the privilege. Order at 7, Doc. 199. Indeed, this was the only consideration identified by the magistrate judge. *Id.* This was wrong as a matter of law.

In *Hubbard*, the Eleventh Circuit expressly warned lower courts against the reasoning employed by the magistrate judge here. "Our decision should not be read as deciding whether, or to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim than the one AEA made here. We address only the issues that are before us." *Hubbard*, 803 F.3d at 1312 n.13. This is not surprising because in *Hubbard*, the Eleventh Circuit's decision was motivated by the fact that it rejected plaintiff's constitutional claim as a matter of law—concluding that it had "not presented a cognizable First Amendment claim," *id.* at 1313—and encouraged the district court to dismiss the action on remand, *id.* at 1315. As such, the remaining claims did not raise important federal interests. Such is not the case here, where this Court has twice rejected State Defendants' efforts to dismiss Plaintiffs' constitutional

claims, and where the Eleventh Circuit has just recently issued a decision, binding on this Court, that compels judgment in Plaintiffs' favor on their Fourteenth Amendment wealth discrimination claim. *See Jones v. DeSantis*, 950 F.3d 795, 800 (11th Cir. 2020) (per curiam) (holding that the state may not withhold re-enfranchisement from citizens because of failure to pay financial obligations they are genuinely unable to pay).

The magistrate judge acted contrary to law by reading *Hubbard* in the manner the Eleventh Circuit expressly warned courts to avoid. In doing so, the magistrate judge departed from the approach taken by a host of other federal courts, which have applied a balancing test to cases involving voting rights to determine whether it was appropriate to pierce the legislative privilege. That test considers: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *CFBM*, 2011 WL 4837508, at *7 (quoting *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003)); *see id.* at *6; *see also Veasey v. Perry*, No. 2:13–CV–193, 2014 WL 1340077 (S.D. Tex. Apr. 3, 2014) (applying five part *Rodriguez* test and partially piercing legislative privilege in challenge to Texas's voter ID law brought by private plaintiffs); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003); *ACORN v. Cty. of Nassau*, 05–CV–2301 (JFB)(WDW), 2009 WL 2923435 (E.D.N.Y. Sept. 10, 2009); *Favors v. Cuomo*, No. 11–CV–5632 (DLI)(RR)(GEL), 2015 WL 7075960, at *10 (E.D.N.Y. Feb. 8, 2015); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 341 (E.D. Va. 2015).[1]

[1] Contrary to Ward's and Faulkner's argument before the magistrate judge, redistricting cases are not the sole category of civil litigation sufficiently important to justify piercing legislative privilege. At least two district courts have partially pierced legislative privilege in voter ID cases. *See Nashville Student Org. Comm.*, 123 F. Supp. 3d at 969; *Veasey v. Perry,* No. 2:13–CV–193, 2014 WL 1340077, at *3 (S.D. Tex. Apr. 3, 2014) (permitting disclosure "on a confidential basis"

As Plaintiffs explained in their opposition to the motion to quash, these factors weigh in favor of piercing the legislative privilege here. Opp. to Mot. to Quash at 7-10, Doc. 139. As to the first factor, no one disputes the relevance of the information sought, and "the second [*Rodriguez*] factor weighs slightly in favor of disclosure' despite the existence of other evidence 'given the practical reality that officials seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority.'" *Bethune-Hill*, 114 F. Supp. 3d at 341 (quoting *Veasey v. Perry*, No. 2:13–CV–193, 2014 WL 1340077 (S.D. Tex. Apr. 3, 2014)).

The third—and most important—factor weighs heavily in Plaintiffs' favor. The Supreme Court has explained that the right to vote is "fundamental" because it is "preservative of other basic civil and political rights," *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Thus, Courts have routinely held that voting rights cases warrant application of an exception to the qualified legislative privilege. "[W]here the *State* faces liability, the legislative privilege becomes qualified when it stands as a barrier to the vindication of important federal interests and insulates against effective redress of public rights." *Bethune-Hill*, 114 F. Supp. 3d at 334 (emphasis in original). "Voting rights cases, although brought by private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions." *CFBM*, 2011 WL 4837508, at *6; *see also United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1554 (11th Cir. 1984) ("There is no question that this case is a public matter, concerning the most fundamental of public rights, the right to participate in the political process."); *Machesky v. Bizzell*, 414 F.2d 283, 288-89 (11th Cir. 1969)

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and partially "piercing" the privilege). Indeed, in *Veasey*, the *en banc* Fifth Circuit went on to rely on evidence of legislative intent obtained by piercing the privilege. *Veasey v. Abbott*, 830 F.3d 216, 236-37 (5th Cir. 2016) (en banc) (quoting testimony of Senator Fraser).[1] A third court fully pierced the privilege in a constitutional challenge to a zoning ordinance. *See Loesel v. City of Frankenmuth,* No. 08-11131-BC, 2010 WL 456931, at *6 (E.D. Mich. Feb. 4, 2010).

("The most important public rights . . . are political rights which determine the composition of government and the direction of government policy."). Indeed, the Supreme Court has recognized that Congress considered private lawsuits advancing public rights to be of the utmost importance. "When a plaintiff succeeds in remedying a civil rights violation, . . . he serves as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Fox v. Vice*, 563 U.S. 826, 833 (2011) (internal quotation marks omitted).

The fourth factor—the government's role in the litigation—"does not turn on whether the legislature as an entity is a party to the action; rather, it considers the role played by that body and its members in the allegedly unlawful conduct." *Favors*, 2015 WL 7075960, at *11; *see also Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015) (ordering deposition of legislators and in camera review of transcripts to determine admissibility because the "government's conduct is squarely at issue[.]"); *Baldus*, 2011 WL 6122542, at *2. Here, the legislature's intent is a central issue in the case, supporting the evidentiary need for the subpoenaed documents and testimony.

Finally, the fifth factor weighs in Plaintiffs' favor too. There is no cognizable interest in protecting legislators' ability to express an intentionally discriminatory purpose in enacting future legislation. Such unconstitutional motives are surely not the type of legislative secrets that the legislative privilege seeks to protect. All five *Rodriguez* factors point toward requiring the legislative privilege to yield in this case.

The magistrate judge erred as a matter of law by misapplying *Hubbard*—disregarding the Eleventh Circuit's express warning to avoid the reading the magistrate judge adopted—and by

failing to apply the balancing test other courts have adopted. This case involves important constitutional claims that are sufficiently weighty to overcome the legislative privilege.[2]

III. The Magistrate Judge Acted Contrary to Law by Relieving Ward and Faulkner of their Burden to Produce a Privilege Log.

The magistrate judge acted contrary to law in ruling that Ward and Faulkner were not required to produce a privilege log. A party invoking privilege must "describe the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A)(ii). The magistrate judge reasoned that *Hubbard* "explicitly rejected" the requirement that legislators produce a privilege log. Order at 7-8, Doc. 199. Not so.

In *Hubbard*, the court concluded a privilege log was not necessary "[b]ecause the only remaining claim . . . struck at the heart of the legislative privilege, and none of the information sought could have been outside the privilege." 803 F.3d at 1311. For that reason, the court concluded "there was no need for the lawmakers to peruse the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied to those documents." *Id.* But the *Hubbard* court was careful to cabin that holding to the facts of that particular case: "[w]e need not decide in this case whether a document-by-document invocation of the legislative privilege would be required in a different case, one where the documents are requested to support a claim that is not at its core and in its entirety an inquiry into the subjective motivation that lawmakers had in passing legislation." *Id.*

This case is quite different from *Hubbard*. First, a substantial portion of the requested documents—those related to the Exploratory Committee—are plainly not subject to the legislative

[2] The magistrate judge also erred as a matter of law in disregarding *Hubbard*'s instruction that legislative intent is an appropriate inquiry for *ex post facto* claims. 803 F.3d at 1312 n.14.

privilege, or the privilege has been waived. *See supra* Part I. But without a privilege log identifying the recipients of the withheld communications, it is impossible to assess those subject to waiver. Because the subpoenas seek some documents that are plainly outside the scope of the legislative privilege, and because the available evidence shows a tendency of these particular legislators to communicate with third parties regarding Alabama's felony disenfranchisement scheme, Ward and Faulkner cannot satisfy their burden under Rule 45 without providing an adequate document-by-document log to permit Plaintiffs and the Court to assess the validity of their claim of privilege.

The magistrate judge's contrary ruling rests on two legal errors that require correction: first, he erred in concluding that the Exploratory Committee work was protected by the legislative privilege, and thus a log was unnecessary. Second, he viewed *Hubbard* as adopting a categorical rule that the Eleventh Circuit expressly rejected, and that would make no sense here given that this case plainly involves non-privileged communications and material that will be concealed in the absence of a log.

CONCLUSION

For the foregoing reasons, the magistrate judge's ruling should be set aside and the motion to quash subpoenas should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record as listed below.

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