IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

THE ARKANSAS STATE CONFERENCE NAACP, *et al.* **PLAINTIFFS**

v. **Case No. 4:21-cv-1239-LPR**

THE ARKANSAS BOARD OF APPORTIONMENT, *et al.* **DEFENDANTS**

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO QUASH CONSTITUTIONAL-OFFICER SUBPOENAS

INTRODUCTION

Plaintiffs respectfully submit this brief in opposition to the Defendants' motion to quash three subpoenas for witnesses to appear at the upcoming preliminary-injunction hearing. (ECF 60.) Those subpoenas seek to compel the attendance of the three members of Arkansas's Board of Apportionment—the Governor, Attorney General, and Secretary of State (together, the "board members")—which drew the reapportionment plan that is the subject of this lawsuit under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. Because the board members' testimony here is plainly relevant to the totality-of-circumstances inquiry required by Section 2 and is not subject to privilege, the Defendants' motion should be denied.

ARGUMENT

I. The board members' testimony is relevant to the plaintiffs' claim.

Defendants first argue that the testimony of the board members is "not relevant to Plaintiffs' claims because Plaintiffs do not allege that the Board intentionally discriminated against their members in adopting the final plans," and because "[t]heir reasons for voting to approve the final district plans are not relevant." (Doc. 60, at 3-4.) Defendants conceded the contrary less than a month ago, acknowledging that the board members' "justification for the

[adopted] plan is a potentially relevant factor in this case," even though Plaintiffs had not brought an intentional discrimination claim. (Doc. 38 ¶ 6.)

Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . ." 52 U.S.C. § 10301(a). A violation [of Section 2] . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *Id.* § 10301(b).

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), the Supreme Court identified three preconditions for a vote-dilution claim under Section 2. If a plaintiff satisfies those preconditions, Section 2 then requires the court to determine, based on the "totality of the circumstances" whether the challenged practice results in unequal electoral opportunity for minority voters. 52 U.S.C. § 10301(b); *see Gingles*, 478 U.S. at 79.

In this totality-of-circumstances analysis, courts evaluate several factors outlined in the Senate Judiciary Committee report that accompanied the 1982 amendments to the VRA. *Id.* at 36-37. The ninth of those so-called "Senate Factors" is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Courts routinely look to testimony from key decisionmakers behind a challenged voting law to discern the underlying policy or policies. *See, e.g., Wright v. Sumter Cnty. Bd. of*

Elections and Registration, 301 F. Supp. 3d 1297, 1321-22 (M.D. Ga. 2018) (relying on the testimony of a challenged redistricting plan's main sponsor regarding the policy underlying the plan), *aff'd* 979 F.3d 1282 (11th Cir. 2020). Indeed, testimony of Arkansas' executive officers in the redistricting context is commonplace, and this Court has relied on that testimony in coming to its decisions. *See Jeffers v. Beebe*, 895 F. Supp. 2d 920, 937 (E.D. Ark. 2012) (making credibility determinations as to testimony of Arkansas Governor and Attorney General in redistricting case last cycle); *Jeffers v. Clinton*, 730 F. Supp. 196, 210 (E.D. Ark. 1989) (three-judge district court) ("We find this testimony entirely credible.").

Any evidence making a proposition at issue "more or less probable" is considered relevant. Fed. R. Evid. 401. Plaintiffs clearly meet this low bar, given that the testimony of the only decisionmakers at issue in this case will make it more or less probable whether the "tenuousness" Senate Factor is met, and therefore whether the totality of circumstances weighs in favor of a Section 2 violation.

II. Defendants cannot meet their burden to establish privilege under Rule 45.

Defendants next argue that even if the board members' testimony were relevant, the subpoenas should be quashed under Rule 45(d)(3)(A)(iii) of the Federal Rules of Civil Procedure. (Doc. 60 at 4.) Rule 45 rule provides that a court "must quash or modify a subpoena that requires disclosure of privileged or other protected matter." Fed. R. Civ. P. 45(d)(3)(A)(iii). Defendants argue that three different types of privilege apply such that the subpoenas are improper. None of these arguments is availing.

This Court sitting in federal question jurisdiction "appl[ies] the federal law of privilege." *Cave v. Thurston*, No. 4:18-CV-00342-KGB, 2021 WL 4936185, at *5 (E.D. Ark. Oct. 22, 2021). The proponent of a privilege in federal court bears the burden to demonstrate "good

cause" for issuance of a protective order. *Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2*, 197 F.3d 922, 926 (8th Cir. 1999); *see also Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985)) (analyzing the attorney-client privilege) ("[T]he party who claims the benefit of the [privilege] has the burden of establishing the right to invoke its protection."). To meet this burden, Defendants must satisfy "the well-settled rule that courts require the party seeking to limit discovery to establish grounds for not providing the discovery that are specific and factual; the party cannot meet its burden by making conclusory allegations as to undue burden." *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 743 (8th Cir. 2018) (citations and internal quotation marks omitted). There is "no authority that the [legislative] privilege is absolute"; any legislative privilege that exists is qualified. *Cave*, 2021 WL 4936185, at *4.

A. Defendants cannot meet their burden to establish legislative privilege.

Defendants first argue that the board members are protected by legislative privilege. (Doc. 60 at 5-7.) This argument fails for two separate reasons.

First, the Defendants barely acknowledge the obvious: the board members are not legislators. As this Court has found recently, "[legislative] privilege does not belong to Secretary Thurston; it belongs to members of the General Assembly and perhaps their staff members." *Cave*, 2021 WL 4936185, at *4. Secretary Thurston, along with the two other board members in this case, are executive branch officials, not legislators or legislators' staff members. The duties of the board members, and the manner in which they are elected, are outlined in Article Six of the Arkansas Constitution, which deals with the "Executive Department," as opposed to Article Five, which deals with the "Legislative Department." *See* Ark. Const. Art. 6, §§ 2 ("Governor"), 3 ("Election of executive officers"); 21 ("Duties of Secretary of State"). The Board's authority comes from Article Eight of the Constitution, which discusses apportionment. As this Court

made clear just months ago, legislative privilege does not apply because the board members, as executive branch members, are ineligible. *See Cave*, 2021 WL 4936185, at *4.

Defendants cite only one case—an out-of-circuit district court case from Maryland—for the proposition that the Governor is entitled to legislative privilege. (Doc. 60 at 5-6.) Yet even this lone piece of authority is distinguishable. In the case Defendants cite, the Governor's responsibilities were to "prepar[e] and introduce[e] [] legislation for the legislature, in this case the General Assembly of Maryland, to consider and accept or reject." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 300 (D.M.D. 1992). The court there found that the Governor "functioned as would a legislator" because he "submitted the legislation to the General Assembly for the purpose of gaining passage of the plan into law." *Id.* at 301. Here, by contrast, the Arkansas Legislature was not at all involved in the process, and the only individuals who voted to approve the map were the three executive branch officials at issue here. Unlike the Maryland Governor, the board members here have no claim to be "within the sphere of legitimate legislative activity," given that the process entirely bypassed the Legislature. *Id.* at 300.

Second, even if the board members are somehow eligible for legislative privilege in the abstract, the privilege should not apply here. Under the five-factor inquiry that Defendants cite, courts look at: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (magistrate's order), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); *see also Cave*, 2021 WL 4936185, at *6; *Benisek v. Lamone*, 263 F. Supp. 3d 551 (D. Md. 2017),

aff'd, 241 F. Supp. 3d 566 (D. Md. 2017) (finding mapmakers were not entitled to qualified legislative privilege).

All five factors weigh in Plaintiffs' favor. First, as noted above, both parties have previously agreed that the board members' testimony is relevant because it bears directly on one of the Senate factors that guide the totality of the circumstances analysis central to Plaintiffs' Section 2 claim. Second, little or no meaningful evidence is available regarding the Board's justification for the adopted plan. While the Board has held a handful of public meetings, only one of these meetings—the one that took place on November 29, 2021—took place after the adopted plan was finalized. (*See* Doc. 53 at 4) (noting that "Board staff . . . made corrections and improvements to the proposed map" between October 29, 2021 and November 29, 2021). At that November 29, 2021 meeting, the Board took no questions and received no public comment. Third, this case is incredibly serious, as it will shape the political representation of Arkansans for an entire decade. Indeed, in the brief time since this case was filed, the Court has already noted "the importance of the issues at bar, the complexity of the law in this area, and the significant factual development necessary in these types of cases," (Doc. 9), as well as the fact that it is a "high-profile" case that is "highly emotional for . . . [the] public," (Doc. 42 at 16-17).

Fourth, the board members' "role in the allegedly unlawful conduct is direct, and therefore militates in favor of disclosure." *Favors v. Cuomo*, No. 11-CV-5632 (DLI)(RR)(GEL), 2013 WL 11319831, at *12 (E.D.N.Y. Feb. 8, 2013) (alterations omitted). Fifth, and finally, there is minimal risk of "future timidity" or a chilling effect here. For one, the redistricting process happens only once every ten years, making it an extremely rare event as compared typical legislation, which takes place every day. Further, Plaintiffs are not seeking the board members' "*preliminary* opinions and considerations," *Citizens Union of City of N.Y. v. Attorney*

Gen. of N.Y., 269 F. Supp. 3d 124, 170 (S.D.N.Y. 2017) (emphasis added); as per the Senate factor at issue, they are interested only in the policy underlying the adopted plan. *See infra*.

Finally, should this Court find that legislative privilege exists here, that privilege should not be "absolute" but qualified. *Cave*, 2021 WL 4936185, at *4. "A redistricting case . . . is a particularly appropriate circumstance for qualifying the privilege claimed by state legislators since judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue in the case." *Benisek*, 263 F. Supp. 3d at 553.

Ultimately, as this Court has already found, executive branch members are ineligible for legislative privilege. Even if they were, that privilege should not apply here because all five *Rodriguez* factors weigh in favor of disclosure.

B. Defendants cannot meet their burden to establish deliberative process privilege.

Defendants next argue that the deliberative process privilege should shield the board members from testifying. (Doc. 60 at 8.) There are two main reasons why this "very narrow and qualified" privilege does not apply here. *See Cave*, 2021 WL 4936185, at *5 (citing *Doe v. Nebraska*, 788 F. Supp. 2d 975 (D. Neb. 2011). First, the testimony at issue here is not "pre-decisional" or "deliberative," meaning the privilege does not apply. "The deliberative process exemption permits nondisclosure if the document is both predecisional and deliberative." *Mo. Coalition for Env'tl Found. v. U.S. Army Corps of Engineers*, 542 F.3d 1204, 1211 (8th Cir. 2008); *see also State of Mo. Ex rel. Schorr v. U.S. Army Corps of Engineers*, 147 F.3d 708, 710 (8th Cir. 1998) (finding deliberative process privilege applies only "if the document in question is an inter- or intra-agency memorandum which is both predecisional and deliberative."). "Pre-decisional" means that the communication was "prepared in order to assist an agency decisionmaker in arriving at his decision," while "deliberative" means that the communication

was "actually related to the process by which policies are formulated." *New York v. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 4853891, at *1 (S.D.N.Y. Oct. 5, 2018). Here, the board members would all be testifying months after making their decision. As noted *supra*, Plaintiffs—in an effort to probe the Senate factor that deals with the tenuousness of the policy underlying the adopted House plan—seek testimony regarding the board members' justification for the *actual* policy, not testimony or communications that concern the board members' preliminary drafts or thoughts. "[P]ostdecisional [testimony] setting forth the reasons for [a] . . . decision already made" are not protected by deliberative process privilege. *Allocco Recycling, Ltd. v. Doherty*, 220 F.R.D. 407, 411 (S.D.N.Y. 2004) (quoting *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)); *see also Casad v. U.S. Dep't of Health and Human Servs.*, 301 F.3d 1247, 1252 (10th Cir. 2002) (noting "final opinion explaining the reasons for a . . . decision already made" is not protected by deliberative process privilege) (internal quotation marks omitted).

At the very least, invoking deliberative process privilege before Plaintiffs even ask the board members a question extends the privilege far beyond its purpose, because any questions that do not concern pre-decisional or deliberative issues should not be protected. As such, the only proper approach is to permit the board members to testify, and if Defendants have objections to specific questions that they believe intrude on deliberative process, they can object in real-time. *See generally Kay v. City of Rancho Palos Verdes*, No. CV 02–03922 MMM RZ, 2003 WL 25294710, at *2 (C.D. Cal. Oct. 10, 2003) (evaluating "whether testimony *about certain subjects* properly may be withheld as privileged" under deliberative process privilege) (emphasis added). It would turn the very idea of privilege on its head to prophylactically block

any testimony from the board members because Defendants—without hearing any of Plaintiffs' questions—believe some might threaten deliberative process.

Second, to the extent this Court believes that this testimony would be entirely pre-decisional and deliberative—as it must, as a threshold matter, to block the testimony—the board members' testimony would still be permissible. As Defendants note, some courts analyzing deliberative process privilege claims adopt the same or substantially similar five-factor *Rodriguez* test discussed *supra*. *See Cave*, 2021 WL 4936185, at *6; *Benisek*, 241 F. Supp. 3d at 575. As Plaintiffs have already shown, all five factors weigh in favor of testimony.

C. Defendants cannot meet their burden to establish apex privilege.

Finally, Defendants argue that Plaintiffs must "first seek any necessary information from subordinates before burdening high-level officers." (Doc. 60 at 8.) For particularly high-ranking officers, testimony may not be appropriate unless those officers "possess information essential to [plaintiffs'] case which is not obtainable from another source." *In re United States of Am.*, 197 F.3d 310, 314 (8th Cir. 1999); *see also id.* (noting "the discovery sought [should be] relevant and necessary and [] it cannot otherwise be obtained"). Some courts have also found that the testimony cannot "significantly interfere with the ability of the official to perform his or her governmental duties." *S.L. ex rel. Lenderman v. St. Louis Metro. Police Dep't Bd. of Comm'rs*, No. 4:10–CV–2163 (CEJ), 2011 WL 1899211, at *2 (E.D. Mo. May 19, 2011).

The board members at issue here are obviously high-ranking. Yet, as noted *supra*, their testimony is relevant and necessary to Plaintiffs' case because it bears directly on one of the Senate factors at issue. Plaintiffs have issued trial subpoenas to some lower-ranking government officials, but these officials cannot testify as to the policy underlying the adopted House map because they are not the individuals who made the final decision to adopt the map. Only the

final decisionmakers—the three board members in this case—can provide the necessary testimony detailing the justification for adopting the map, which is the crucial inquiry as it pertains to the "tenuousness" Senate factor.

Finally, Plaintiffs respectfully argue that this testimony will not significantly interfere with the board members' other duties. Plaintiffs anticipate that the questioning of each officer will be targeted and relatively brief. Defendants detailed certain scheduling conflicts for the board members, but now that the hearing dates have changed, (*see* ECF 63), there is no indication that any board members will be unavailable during the postponed hearing.[1] To the extent any of the board members are out of state during the dates for the new hearing, Plaintiffs would be amenable to testimony via videoconference, with the Court's indulgence.[2] The plaintiffs would also be willing to leave the record open on their motion for a preliminary injunction until the board members are able to testify in person.

Further, should the Court find it prudent, Plaintiffs would find it acceptable to take the board members' testimony only after taking the testimony of the lower-ranking government officials for whom they have also issued trial subpoenas, to ensure that Plaintiffs can exhaust all other avenues for their testimony and the board members are burdened as minimally as possible.

[1] The board members submitted no declarations in support of their initial motion, meaning there was no evidentiary basis for the claim.

[2] The Governor has frequently used videoconference over the past several months when appearing on Sunday morning news talk shows. *See, e.g.*, *GOP Gov's message for Republicans: 'Don't minimize what happened' on Jan. 6*, CNN, (Jan. 9, 2022) https://www.cnn.com/videos/politics/2022/01/09/asa-hutchinson-full.cnn; *AR Gov*; *Hutchinson defends covid response despite low vaccination rate*, CNN, (Nov. 28, 2021) https://www.cnn.com/videos/politics/2021/11/28/governor-asa-hutchinson-full-interview.cnn; *AR Gov: Mandates deepen resistance to vaccines*, CNN, (Oct. 24, 2021) https://www.cnn.com/videos/politics/2021/10/24/asa-hutchinson-full-interview.cnn.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny the Defendants' motion to quash.

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Respectfully submitted,

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