UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

LEAGUE OF WOMEN VOTERS OF FLORIDA, INC., *et al.*,

Plaintiffs,

v.

LAUREL M. LEE, in her official capacity as Secretary of State of Florida, *et al.*,

Defendants,

and

NATIONAL REPUBLICAN SENATORIAL COMMITTEE, *et al.*,

Intervenor-Defendants.

Case No. 4:21-cv-186-MW-MAF

4:21-cv-187
4:21-cv-201
4:21-cv-242

THE EXECUTIVE OFFICE OF THE GOVERNOR'S MOTION TO QUASH THIRD-PARTY, RULE 30(B)(6) SUBPOENA AND INCORPORATED MEMORANDUM OF LAW

The Executive Office of the Governor ("Governor's Office") moves to quash the third-party subpoena served on it by the Plaintiffs in Case No. 4:21-cv-201 (the "Florida Rising Plaintiffs" or "Plaintiffs"). Quashing the subpoena is both appropriate and necessary because legislative and executive privileges apply, and the Governor's Office was given inadequate time to prepare a 30(b)(6) witness for the wide-ranging topics in the subpoena.

BACKGROUND

On October 6, 2021, the Florida Rising Plaintiffs served on the Governor's Office a third-party subpoena with ten topics for a corporate representative and scheduled the representative's deposition for October 20, 2021. (Subpoena, Ex. 1). On October 14, 2021, the Plaintiffs served an amended version of the subpoena with an additional eleventh Topic (the "Subpoena"). (Subpoena, Ex. 2). Specifically, the Subpoena seeks testimony regarding the following "Topics":

1. Each State interest, if any, that the Executive Office of the Governor believes or contends each of the Challenged Provisions serves, promotes, or advances, and all facts and evidence supporting a connection between the Challenged Provisions and the State interest(s).

2. The Executive Office of the Governor's statements and opinions concerning the conduct of the 2020 general elections in Florida.

3. The success or failure of the 2020 general election in Florida, and the Executive Office of the Governor's understanding of what contributed to that success or failure.

4. The Executive Office of the Governor's statements and opinions concerning Senate Bill 90, including any of its individual provisions; concerning actual or potential changes to Florida's election laws and policies since November 2020; or concerning the need for any such changes.

5. The role of the Executive Office of the Governor in drafting, discussing, negotiating and enacting Senate Bill 90.

6. All communications regarding Senate Bill 90 between the Executive Office of the Governor and the following individuals and entities: members of the Florida Legislature, the Florida Attorney General's Office, the Florida Department of State, any Florida Supervisor of Elections, the Florida Supervisors of Elections ('FSE'), Defendant-

Intervenors, the National Republican Congressional Committee, any Republican State or local officials, the Heritage Foundation, Heritage Action for America, and any of their employees, staff, contractors, consultants, advisors, agents, representatives, lobbyists, or anyone acting on their behalf.

7. Any analysis that the Executive Office of the Governor has conducted relating to or concerning the anticipated or actual effects of any of the Challenged Provisions on voting in Florida and any communications involving the Executive Office of the Governor regarding the anticipated or actual effects of any of the Challenged Provisions on voting in Florida.

8. Any analysis that the Executive Office of the Governor has conducted relating to or concerning the anticipated or actual costs of implementing any of the Challenged Provisions.

9. Any analysis that the Executive Office of the Governor has conducted relating to or concerning the need for or purpose of any of the Challenged Provisions.

10. The Executive Office of the Governor's collection and production of documents in response to the subpoena from League of Women Voters *et al.* in No. 21-cv-186, including but not limited to the sources of documents that were collected, the means by which such documents were searched and reviewed, and any sources of potentially responsive documents that were not collected, searched, and reviewed.[1]

11. Communications with the State Board of Education, the Board of Governors of the State University System of Florida, the State University System of Florida, or any public university in Florida, including any board members, trustees, employees, staff, contractors, consultants, advisors, counsel, agents, representatives, or anyone acting

[1] On July 2, 2021, the Governor's Office provided to the League of Women Voters Plaintiffs over 700 pages of responsive material, i.e., material responsive to their nine requests for production related to the legislation at issue in this case, to the extent that the League of Women Voters Plaintiffs would have been entitled to the material under Florida's Public Records Law, Chapter 119 of the Florida Statutes.

> on their behalf, concerning SB 90, litigation involving SB 90, or experts witnesses involved in litigation involving SB 90.

(Subpoena, Ex. 2).

On October 14, 2021, the Governor's Office met and conferred with counsel for the Florida Rising Plaintiffs and advised that the Governor's Office intended to assert, among other things, the legislative privilege in response to the Topics in the Subpoena. Initially, while it appeared that some Topics did not on their face implicate the privilege, the Governor's Office was concerned that questioning beyond purely superficial factual issues would be privileged. Discussions with the Florida Rising Plaintiffs' counsel confirmed those concerns.

As part of the circumstantial-evidence-of-intent test under *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), counsel for the Plaintiffs intend to inquire about the Governor's motivation in supporting the legislation at issue. The conversation confirmed, for example, that even questions concerning "[t]he Executive Office of the Governor's statements and opinions concerning the conduct of the 2020 general elections in Florida" would veer into why, considering the success of the 2020 general election, the Office supported an election reform bill.[2]

---

[2] On October 18, 2021, the Governor's Office and the Florida Rising Plaintiffs agreed that the Governor's Office would not be held to appear for a deposition pending this Court's decision on the motion to quash, and that the motion would be filed by October 21, 2021.

The Governor's Office subsequently served objections on privilege grounds. The Governor's Office also objected to the relevance of the Topics listed in the Subpoena and to the overbreadth and unduly burdensome nature of the Topics, especially given the truncated timeframe for the deposition. (Objections and Responses, Ex. 3).

The Parties have reached an impasse, necessitating this motion.

LEGAL STANDARD

Federal Rule of Civil Procedure 45(d)(3) provides that, on timely motion, a district court "must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; . . . (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A). This is just such a motion. And because the claims before this Court concern federal law, federal common law governs on issues concerning the legislative privilege. *See* Fed. R. Evid. 501.

ARGUMENT

I. The Subpoena seeks information protected by the legislative privilege.

"The legislative privilege is important." *In re Hubbard*, 803 F.3d 1298, 1307 (11th Cir. 2015). It "protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation." *Id.* at 1308 (citations omitted); *see also Baraka v. McGreevey*, 481 F.3d

187, 196–97 (3d Cir. 2007) (same).[3] "The privilege 'applies whether or not the legislators [or Governor] themselves have been sued.'" *In re Hubbard*, 803. F.3d at 1308 (citation omitted) And "[t]he reason . . . is clear": "[i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951) (collecting citations) (quotations omitted).

To be sure, the legislative privilege applies to the Governor of Florida and his Office. While not a member of the Florida Legislature, the Governor informs the Florida Legislature, "at least once in each regular session," about "recommend[ed] measures in the public interest." Fla. Const. Art. IV, § 1(e). And the Governor is responsible for the approval or veto of bills. Fla. Const. Art. III, § 8(a). Any public or private comments, material, or documents proposing, formulating, or supporting passage of the legislation at issue fall squarely within the legislative privilege's scope. *See In re Hubbard*, 803 F.3d at 1308. Stated differently, the privilege clearly applies to information concerning Topics 1 and 4-11—it shields from examination the Governor's perspective about the virtues of legislation (Topics 1, 4, 6, 7, 9, 10),

[3] It is equally clear that the legislative privilege applies to staff. *See, e.g.*, *Florida v. United States*, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012) (holding that the legislative privilege extends to legislative staff).

analysis of legislation (Topics 7, 8, 9, 10), formulation of legislation (Topics 5, 6, 10, 11), and interactions with stakeholders about legislation (Topics 6, 10, 11).

That leaves Topics 2 and 3. Topics 2 and 3 concern "statements and opinions concerning the conduct of the 2020 general elections" in Florida, and the "success" of the 2020 general election in Florida. The public statements speak for themselves. Other than confirming that certain statements were made on a certain date or that reporting of the statement was accurate, to which the Governor's Office is willing to stipulate, the only conceivable relevance of the Topics to this case stems from the questions that aim to connect the dots from a successful election to the need for an election reform package. More precisely, the Florida Rising Plaintiffs' *Arlington Heights* analysis requires that they ask questions about the motivations and process for proposing, formulating, and supporting legislation after a successful election—that they intrude into protected areas and "inquir[e] into acts that occur in the regular course of the legislative process and into the motivation for those acts." *In re Hubbard*, 803 F.3d at 1310 (citation omitted).

Thus, the Governor's Office moves to quash the Subpoena in its entirety.

In anticipation of arguments that the Florida Rising Plaintiffs might make, the Governor's Office makes two points: (1) the privilege is not waived because the Governor's Office might have had discussions with members of the other political branch of government or interested stakeholders; and (2) the privilege is absolute.

First, "the maintenance of confidentiality is not the fundamental concern of the legislative privilege." *Pulte Home Corp. v. Montgomery Cnty.*, No. GJH-14-3955, 2017 WL 2361167, at *8 (D. Md. May 31, 2017). That makes sense because the legislative process includes "[m]eeting with persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents—to discuss issues that bear on potential legislation, and participating in party caucuses to form a united position on matters of legislative policy, assist legislators in the discharge of their legislative duty." *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (citations omitted). It follows that "waiver cannot be premised on an action that courts have characterized as 'part and parcel' of the modern legislative process." *Pulte Home Corp.*, 2017 WL 2361167, at *8 (quoting *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)); *cf. In re Hubbard*, 803 F.3d at 1311 (finding "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").

Second, the privilege is absolute and should not yield even in a voting rights case. There is no binding case that directly says so, but the logic of the U.S. Supreme Court's legislative immunity cases makes clear that the legislative privilege should be absolute in *all* civil cases. Specifically, it is clear that "a state legislator's common law . . . immunity from civil suit" is "absolute." *United States v. Gillock*, 445 U.S.

360, 372 (1980) (citing *Tenney*, 341 U.S. at 373). It is also clear that the immunity from suit and the legislative privilege share an origin and further the same purposes. *See, e.g.*, *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186–88 (9th Cir. 2018); *EEOC v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). It follows that if one is absolute, then the other should be too. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) ("[T]he legislative privilege is 'absolute' where it applies at all."); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) (same).

Hubbard supports the point. There, the Eleventh Circuit held that "the [legislative] privilege extends to discovery requests, even when the lawmaker is not a named party in the suit," because "complying with such requests detracts from the performance of official duties." *In re Hubbard*, 803 F.3d at 1310 (citing *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181). The Eleventh Circuit's holding was rooted in the U.S. Supreme Court's immunity cases, explaining that "state lawmakers possess a legislative privilege that is 'similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.'" *Id.* at 1310 n.11 (citing *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980)). But, admittedly, the Eleventh Circuit did not need to address whether the privilege is absolute in all civil cases because the plaintiffs had "not presented a cognizable [] claim," so there could be "no important federal interest at stake . . . to

justify intruding upon the lawmakers' legislative privileges." *Id.* at 1313 (citing *Gillock*, 445 U.S. at 373).

This Court did go a step further in *Florida v. United States*. 886 F. Supp. 2d 1301 (N.D. Fla. 2012). There, this Court denied a motion to compel deposition testimony of legislators in a Voting Rights Act case. *Id.* at 1302. Recognizing that "legislative purpose" was relevant to the claims, this Court explained that "Voting Rights Act cases are important, but so are equal-protection challenges to many other state laws, and there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases." *Id.* at 1304. In other words, important federal interests did *not* justify intruding on the legislative privilege in *Florida*. *See id.*

No intrusion of the legislative privilege can be justified here either. The privilege is absolute. Regardless, the Plaintiffs have ample avenues for potentially obtaining relevant information from discovery requests and depositions of the Secretary of State's Office, the State's Supervisors of Elections, and the Republican Intervenors; and production of public records from the Florida Legislature and Governor's Office. Indeed, the Plaintiffs have and continue to probe these sources.

II. The Subpoena seeks information protected by the executive privilege.

For the reasons discussed in Part I, this Court should quash the Subpoena. To the extent the Court finds that the legislative privilege is not applicable to any of the Topics, however, then the Subpoena should still be quashed because much of the

information sought is protected by executive privilege, namely the deliberative process privilege. Indeed, "[t]he most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege," which "allows the government to withhold 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case*, 121 F. 3d 729, 737 (D.C. Cir. 1997) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1996), *aff'd*, 384 F. 2d 979 (D.C. Cir. 1967)). "In order for the privilege to apply, a document [but here the testimony sought] must be both 'pre-decisional, *i.e.*, 'prepared in order to assist an agency decision maker in arriving at his decision,' . . . [and] deliberative, 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Kearney Partners Fund, LLC v. United States*, 2013 U.S. Dist. Lexis 67797, at 6 (M.D. Fla. May 13, 2013) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1263 (11th Cir. 2008)); *see also U.S. Fish & Wildlife Serv. v. Sierra Club*, 141 S. Ct. 777, 785–86 (2021) (explaining that "deliberative process privilege . . . is a form of executive privilege" and protecting draft executive branch material from disclosure).

Essentially, "the privilege covers 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.'" *United States v. Zak*,

2021 U.S. Dist. LEXIS 153312, at *8 (N.D. Ga. July 8, 2021) (citation omitted). That is precisely the information that Plaintiffs seek to discover. *See, e.g.*, Topic 4 ("The Executive Office of the Governor's statements *and opinions* concerning Senate Bill 90, including any of its individual provisions; concerning actual *or potential* changes to Florida's election laws and policies since November 2020; or concerning the need for any such changes." (emphasis added)). Topics 7, 8, 9 similarly will infringe upon the deliberative process privilege, as they cover "[a]ny analysis that the Executive Office of the Governor has conducted relating to or concerning" certain subjects. These analyses are, by their very nature, pre-decisional. Before making any final decisions, the Governor's Office may consider an array of information and analyze potential issues from various perspectives. Delving into the process by which an ultimate determination was made by the Governor's Office is therefore inappropriate. The Subpoena should be quashed.

III. The Subpoena fails to allow a reasonable time to comply and subjects the Governor's Office to undue burden.

Finally, the Subpoena fails to afford a non-party, the Governor's Office, sufficient time to prepare a corporate representative for the deposition. "A party who wants to depose a person by oral questions must give *reasonable written notice* to every other party." Fed. R. Civ. P. 30(b)(1) (emphasis added). For non-parties like the Governor, the party serving a subpoena must "take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena," with

courts able to quash or modify subpoenas that impose unreasonable requirements. Fed. R. Civ. P. 45(d)(1), 45(d)(3)(A)(i).

Two timelines are relevant for this reasonableness inquiry: (1) those concerning the case, and (2) those concerning the Governor's Office.

First, this case is headed for trial the week of January 31, 2022. Summary judgment motions are due November 12, 2021. Fact discovery concludes October 22, 2021, and expert discovery concludes October 29, 2021. The Plaintiffs set a deposition for October 20, 2021. The Plaintiffs told the Governor's Office on October 6, 2021 about 10 of the 11 Topics for the deposition. They told the Governor's Office on October 14, 2021 about all 11 of the Topics.

Second, the Governor's Office is currently defending or overseeing the defense of numerous cases pending before the state and federal courts and the Florida Division of Administrative Hearings. The Governor's Office is also actively engaged in the legislative process for the upcoming regular session of the Florida Legislature. *See, e.g.*, Fla. Stat. § 216.162 (requiring the Governor to furnish a recommended budget to the Legislature); §§ 216.163–168 (additional provisions related to the Governor's recommended budget and recommended revenues). Committee meetings began in the Florida House of Representatives and Florida Senate in September of this year, and the sixty-day regular session convenes on January 11, 2022. *See generally* Florida House and Senate Calendars available at

https://www.myfloridahouse.gov/Sections/HouseSchedule/houseschedule.aspx?calendarListType=Interim&date=10-11-2021 (last visited Oct. 21, 2021) *and* https://www.flsenate.gov/Session/Calendars/2022 (last visited Oct. 21, 2021).

To an extent, the Florida Rising Plaintiffs are to blame for the two timelines intersecting and unduly burdening the Governor's Office. The Plaintiffs served the Subpoena with ten of the eleven Topics to the Governor's Office on October 6, 2021. The Plaintiffs could have sent the Subpoena sooner, especially since some of the topics seem to include the Governor's public comments from 2020, and documents were produced to the League of Women Voters Plaintiffs in early July of 2021. But they chose not to do so. Thus, "this is a problem of [the Plaintiffs'] own creation and one which could easily have been avoided." *Ransburg Corp. v. Champion Spark Plug Co.*, 648 F. Supp. 1040, 1047 (N.D. Ill. 1986); *see also Austin v. Public Reputation Mgmt. Servs.*, 2020 U.S. Dist. LEXIS 172968, at *7–10 (S.D. Fla. Sept. 22, 2020) (denying a party's request for an additional expert deposition because "it mismanaged the timing of the first deposition and related document requests").

Under these circumstances, the Florida Rising Plaintiffs unfairly place the burden on the Governor's Office to prepare and address too broad an array of Topics. The Governor's Office is expected to be prepared to discuss all facts and evidence it believes or contends support a connection between the challenged provisions of SB 90 and each State interest. Every public statement concerning the 2020 general

election—from those concerning litigation, to executive orders, to individual incidents, to COVID-related grants, to systemic comments are seemingly fair game. Every iteration of what became Senate Bill 90 is also of interest to the Plaintiffs. All communications regarding SB 90 between anyone in the Governor's Office,[4] and an unquantifiable number of elected and unelected stakeholders and lobbyists is a Topic for the deposition. Over 700 pages of documents the Governor's Office produced—to which the Plaintiffs or any member of the public would have been entitled under Florida's Public Records Law—can be discussed. And the subpoena also covers communications with anyone affiliated with the university system.

The Plaintiffs ask the Governor's Office to be prepared to address too much in too short a time. This is inappropriate under Rules 30 and 45. *See, e.g.*, *Reed v. Nellcor Puritan Bennett & Mallinckrodt*, 193 F.R.D. 689, 692 (D. Kan. 2000) ("An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task."); *Beaulieu v. Board of Trustees of Univ. of West Fla.*, 2007 U.S. Dist. LEXIS 108191, at *14–15 (N.D. Fla. Oct. 4, 2007); *Martin v. I-Flow Corp.*, 2008 U.S. Dist. LEXIS 133976, at *7 (N.D. Fla. Dec. 4, 2008) (granting a motion to quash where the party was not given adequate time to prepare).

[4] The Subpoena broadly defines the Governor's Office to include the Governor, his employees, staff, contractors, consultants, advisors, agents, or anyone acting on their behalf.

CONCLUSION

At bottom, the Governor's Office plays an integral part in the legislative process; the Governor's Office also helps set and execute policy for the State. Subjecting deliberations between the Governor's Office and his staff to third-party depositions seems an end-run around the legislative immunity that applies to bills that he chooses to sign. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003). And, as a practical matter, allowing discovery here might have a chilling effect on future occupants of the Governor's Office as they grapple with policy choices while weighing the burdens of litigation that stretches the Office's resources. Quashing the subpoena is more appropriate. This is especially so when depositions are set with mere weeks to prepare for topics as broad as all communications with all 160 members of the Florida Legislature, all 67 supervisors of elections, and all Republican official in the State of Florida.

Respectfully submitted by:

/s/ *Mohammad O. Jazil*
MOHAMMAD O. JAZIL (FBN 72556)
mjazil@holtzmanvogel.com
GARY V. PERKO (FBN 855898)
gperko@holtzmanvogel.com
Holtzman Vogel Baran Torchinsky
& Josefiak PLLC
119 S. Monroe St., Ste 500
Tallahassee, FL 32301
Phone: (850) 391-0503
Fax: (540) 341-8809

Phillip M. Gordon (VSB 95621)*
pgordon@holtzmanvogel.com
Holtzman Vogel Baran Torchinsky
& Josefiak PLLC
15405 John Marshall Highway
Haymarket, VA 20169
Phone: (540) 341-8808
Fax: (540) 341-8809
* Admitted *pro hac vice*.

Counsel for the Executive Office of Governor Ron DeSantis

CERTIFICATE OF COMPLIANCE

The HEREBY CERTIFY that the foregoing complies with the size and font requirements in the local rules. At 3,776 words, the foregoing also complies with applicable word limitations.

/s/ Mohammad Jazil
Attorney for the Executive Office of
Governor Ron DeSantis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion To Quash was served electronically to all counsel of record on October 21, 2021.

/s/ Mohammad Jazil
Attorney for the Executive Office of
Governor Ron DeSantis