UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA STATE CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

v. Case No. 4:21-CV-187

LAUREL M. LEE, in her official capacity as FLORIDA SECRETARY OF STATE, et al.,

Defendants.
_____/

FLORIDA RISING TOGETHER, et al.,

Plaintiffs,

v. Case No. 4:21-CV-201

LAUREL M. LEE, in her official capacity as FLORIDA SECRETARY OF STATE, et al.,

Defendants.
_____/

REPLY MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENAS FOR THE DEPOSITION TESTIMONY OF SEVEN MEMBERS OF THE FLORIDA LEGISLATURE

For the reasons set forth in the Members' initial memorandum and this reply, this Court should quash the depositions in their entirety. For their part, Plaintiffs do not seriously engage with the Members' analysis of the key authorities, let alone persuasively undermine that analysis. Accordingly, the Members submit just these few points in reply.

I. THE LEGISLATIVE PRIVILEGE IS ABSOLUTE IN CIVIL CASES.

As Plaintiffs agree, given the Supreme Court's decision in *Tenney v. Brandhove*, 341 U.S. 367 (1951), "[n]o one disputes that state legislators have absolute legislative immunity from civil lawsuits seeking to hold them liable for official legislative acts." ECF No. 268 at 5.[1] Two key errors underlie Plaintiffs' mistaken view that legislative immunity from compulsory process is different in that it is less than absolute in civil cases like theirs.

First, immunity from compulsory process derives from the same sources and serves the same interests as immunity from suit. Plaintiffs claim that legislative immunity from suit "ensures that legislators are 'free to speak and act without fear of criminal and civil liability,'" and in this case "no one is proposing to hold the legislators personally liable for their actions." ECF No. 268 at 5 (quoting *Tenney*, 341 U.S. at 375). But the Supreme Court has been clear that the basis of legislative

[1] ECF citations are to the Florida Rising docket. The Members' initial memorandum filed in the Florida Rising and NAACP cases is substantively identical. The same is true of Plaintiffs' opposition brief.

immunity is that suits "create[] a distraction and force[legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation.'" *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980) (quotations omitted; discussing *Tenney*). As the Court explained, the immunity "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney*, 341 U.S. at 377.

Immunity from compulsory process serves the same purpose; that is, *Tenney*'s "logic" in affording state legislators absolute immunity from civil suit "supports extending the corollary legislative privilege from compulsory testimony to state and local officials as well" because both doctrines serve to avoid "the distraction of diverting [legislators'] time, energy, and attention from their legislative tasks to defend the litigation." *Lee v. City of L.A.*, 908 F.3d 1175, 1187 (9th Cir. 2018) (cleaned up). That is why, in *Hubbard*, the Eleventh Circuit held that "the privilege [of immunity to civil suit] *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 1298, 1310 (11th Cir. 2015) (emphasis added). The Fourth, Ninth, and D.C. Circuits agree. *See EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011); *MINPECO*,

S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988); *Lee*, 908 F.3d at 1186–88.

Second, Plaintiffs suggest that federal criminal cases are a mere subset of those in which the privilege may yield. Plaintiffs principally base this view on the Supreme Court's statement in *United States v. Gillock*, 445 U.S. 360 (1980), that "where important federal interests are at stake, *as in* the enforcement of federal criminal statutes, comity yields." ECF No. 268 at 6 (citing *Gillock*, 445 U.S. at 373 (emphasis added by Plaintiffs)). But the rest of *Gillock* makes clear that, in fact, the Court drew a fundamental distinction between criminal and civil cases. The immediately preceding sentence explains why *Tenney* (an absolute immunity case) was different: not because it involved immunity from suit, but because "*Tenney* and subsequent cases on official immunity have drawn the line at civil actions." *Gillock*, 445 U.S. at 373. The appended footnote confirms the difference: "[f]ederal prosecutions of state and local officials, including state legislators, using evidence of their official acts are not infrequent." *Id.* at 373 n.11. And every example the Court gives of "comity yield[ing]" is a criminal case. *Id.* at 373 & n.12 (citing *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Burr*, 25 F. Cas. 187 (No. 14,694) (CCVa. 1807); *Gravel v. United States*, 408 U.S. 606 (1972)).

By asking this Court to ignore that context, Plaintiffs ask the Court to depart from the view of the Eleventh Circuit, which has read *Gillock* to stand for the

"fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government." *Hubbard*, 803 F.3d at 1311–12. And noting *Gillock*'s statement that the privilege yields "where necessary to vindicate important federal interests such as 'the enforcement of federal criminal statutes,'" the court found the limitation inapplicable because "[t]his is not a federal criminal investigation or prosecution." *Id.* at 1312 (citing *Gillock*, 445 U.S. at 373).[2] This Court should do the same.

[2] *Hubbard* stopped short of holding that immunity to compulsory process is absolute in civil cases. It was unnecessary to reach that question 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." *Hubbard*, 803 F.3d at 1313 (cleaned up). Judge Hinkle likewise reserved that question in *Florida v. United States*. 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) ("[E]ven if the state legislative privilege is qualified in civil as well as criminal cases, there is no reason not to recognize the privilege here."). Contrary to Plaintiffs' suggestion, ECF 268 at 8–9, the First and Ninth Circuits have likewise reserved the question, *see Lee*, 908 F.3d at 1187 ("Although the Supreme Court has not set forth the circumstances under which the privilege must yield to the need for a decision maker's testimony, it has repeatedly stressed that judicial inquiries into legislative . . . motivation represent a substantial intrusion such that calling a decision maker as a witness is therefore usually to be avoided.'" (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)) (cleaned up)); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021) ("[E]ven *assuming* that a state's legislative privilege might yield in a civil suit brought by a private party in the face of an important federal interest, the need for the discovery requested here is simply too little to justify such a breach of comity." (emphasis added)).

II. EVEN IF THE PRIVILEGE YIELDS IN SOME CIVIL CASES, IT WOULD NOT YIELD HERE.

Even if Plaintiffs are right that the privilege yields in civil cases that present "important federal interests" *like* those "in the enforcement of federal criminal statutes," *Gillock*, 445 U.S. at 373, this is no such case.

Gillock was a federal bribery prosecution in which the defendant, a state lawmaker, "moved to suppress all evidence relating to his legislative activities." 445 U.S. at 362. The Department of Justice sought to enforce an act of Congress that specifically targeted corrupt official acts and was therefore unmistakably intended to abrogate any otherwise applicable governmental privilege. Congress had acted "to make state [legislators], like all other persons, subject to federal criminal sanctions," and given that circumstance, the Court "discern[ed] no basis . . . for a judicially created limitation that handicaps proof of the relevant facts." *Id.* at 374. That made *Gillock* very different from *Tenney*, a private civil case brought under Section 1983 in which the Court held that "a state legislator's common-law absolute immunity from civil suit survived" that enactment because Congress did not clearly intend otherwise. *Id.* at 372 (discussing *Tenney*).

Reading the two cases together, even if *Gillock* qualifies the privilege in some civil cases, it does so only when the federal government enforces an act of Congress unmistakably intended to abrogate the privilege. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 419–20 (D.C. Cir. 1995) ("[S]ensitivities to the

existence of criminal proceedings . . . suggest that the testimonial privilege might be less stringently applied when inconsistent with a sovereign interest, but is 'absolute' in all other contexts."). And this is no such case. The federal government is not a party, and even if Plaintiffs stood in the government's shoes, they do not seek to enforce a statute comparable to one that criminalizes official corruption.

Plaintiffs assert "the federal interest in eradicating racial discrimination in our nation's elections," which they say "is no less vital in the context of private enforcement than it is when the government files similar suits." ECF 268 at 16. But there is no basis for such a case-by-case approach. *Tenney* makes clear that the pertinent question is whether Congress abrogated the privilege, and the Courts have concluded that Congress did not intend to do so when it enacted the statutes at issue here. *Tenney* itself held that the privilege survived the enactment of Section 1983, *see Gillock*, 445 U.S. at 372 (discussing *Tenney*), and the same is true of the Voting Rights Act, *see Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012) (Hinkle, J.) ("Nothing in the Voting Rights Act suggests that Congress intended to override this long-recognized legislative privilege."); *Lee*, 908 F.3d at 1188.

As in the three cases in which "courts of appeals that have considered a private party's request for such discovery in a civil case" without deciding whether the

privilege is qualified, this Court should find the depositions "barred by the common-law legislative privilege." *Am. Trucking Ass'ns, Inc.*, 14 F.4th at 88.

III. THE DEPOSITIONS SHOULD BE QUASHED IN THEIR ENTIRETY.

Assuming the privilege cannot be overcome, Plaintiffs nevertheless seek to depose the Members regarding certain topics that they believe are not "covered" by the legislative privilege. *See* ECF No. 268 at 21-25. But that is not the proper mode of analysis. As the Eleventh Circuit has explained, it is the "claim" that "defines the purpose of the subpoenas, which in turn answers the question of whether the privilege applies." *Hubbard*, 803 F.3d at 1311 n.12. And as Plaintiffs readily admit, the sole purpose of the depositions they seek is to prove their "allegations of discriminatory intent," which they agree "are 'central' to this case." ECF No. 268 at 2. Thus, just as a document-by-document analysis was inappropriate in *Hubbard* despite the claim that "[t]here might well be different sorts of documents, as to which the relevant claim of immunity was arguably stronger or weaker," Appellee's Brief, *In re Hubbard*, No. 13-10283, 2013 WL 858519, at 38-39 (Feb. 27, 2013), a question-by-question analysis would be inappropriate here because "the factual heart of the [relevant] claim and the scope of the legislative privilege [are] one and the same," *Hubbard*, 803 F.3d at 1311; *see id.* (concluding that it was an abuse of discretion for the district court to require a privilege log). In other words, the depositions should be quashed in their entirety because their purpose is "inquiry into

acts that occur in the regular course of the legislative process and into the motivation for those acts." *Id.* at 1310 (quotations omitted).

In any event, the topics Plaintiffs seek to explore are indeed "covered" by the privilege, which shields all acts "in the sphere of legitimate legislative activity." *Id.* at 1308 (citing *Tenney*, 341 U.S. at 376). "[F]actual questions about the ordinary legislative process and the underlying data that informed legislators' judgments about the proposed bill and its potential impact," ECF No. 268 at 24, plainly would explore the "regular course of the legislative process" and the Members' "motivation." *See Hubbard*, 803 F.3d at 1310 (quotation omitted). Such questions are therefore barred.

Plaintiffs' request to ask about communications "with individuals other than [the Members'] staff and other legislators," ECF No. 268 at 24, fares no better. In *Hubbard*, the Eleventh Circuit rejected the argument that "communication[s] from an outsider (a constituent, a lobbyist, a person with an interest in seeing legislation passed, or even perhaps an executive branch official who is pushing for the enactment of legislation) might well be considered materially different from a communication that was made between two legislators and shared with no outsiders." Appellee's Brief, *In re Hubbard*, 2013 WL 858519 at 38-39 (cleaned up). Judge Hinkle did the same in *Florida v. United States*. *See* 886 F. Supp. 2d at 1302 (quashing depositions of legislators in a Voting Rights Act case although

the parties seeking discovery sought to explore communications with political party officials and consulting firms); Memo. of Law in Support of Mot. to Compel, *Florida v. United States*, No. 4:12-mc-0003, ECF 1-1 at 12 (Jan. 13, 2012).

Three other circuits have likewise held that the privilege "is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process," including "[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." *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *see Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980); *Kalinoski v. Lackawanna Cnty.*, 511 F. App'x 208, 213 (3d Cir. 2013). Plaintiffs' only response to those cases is that they involved immunity from suit, not immunity from compulsory process. *See* ECF No. 268 at 23. That is no answer, because even if the immunity is qualified in the latter scenario but not the former, its *scope* is the same either way. *See Hubbard*, 803 F.3d at 1308 (adopting the scope of the privilege set forth in *Tenney*).

For much the same reason, Plaintiffs cannot "be allowed to ask the legislators who served on the Republican National Committee or the Republican State Leadership Committee Election Integrity Commissions about that service." ECF No. 268 at 24. Plaintiffs argue that "information about their work on the commissions

(*i.e.*, non-legislative bodies) cannot possibly be subject to legislative privilege." *Id.* But as explained above, "participating in party caucuses," including meetings and discussions intended "to form a united position on matters of legislative policy" are fully shielded by the privilege. *Almonte*, 478 F.3d at 107. That makes sense because the legislative process is, at its core, both political and partisan; every member of the Florida Legislature belongs to a major political party, and it is "a routine and legitimate part of the modern-day legislative process" that those parties are the driving force behind policy choices. *Id.* If lawmakers could be compelled to provide deposition testimony to explore their knowledge of party influence or related issues, it is difficult to imagine what would remain of the privilege.[3]

[3] It is, moreover, difficult to imagine what minimal relevance such information could possibly bear to any topic other than legislative motive. Plaintiffs certainly suggest none. Should the Court disagree, the Members would respectfully ask the Court, in the alternative, to quash the depositions on the ground that they are unduly burdensome given their slight relevance, if any, and the burden they would impose on the legislative process. *See Consumers Union of U.S., Inc.*, 446 U.S. at 733.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(F) of the Local Rules of the Northern District of Florida, I certify that the foregoing Memorandum contains 2,540 words.

/s/ *Daniel W. Bell*
Daniel W. Bell

CERTIFICATE OF SERVICE

I certify that on this 2nd day of November 2021, a copy of the foregoing was served on all counsel of record through the Court's CM/ECF Notice of Electronic Filing System.

/s/ *Daniel W. Bell*
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