IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA RISING TOGETHER, et al., Plaintiffs, v. LAUREL M. LEE, et al., Defendants.	Case Nos. 4:21-cv-201-MW/MJF 4:21-cv-187

PLAINTIFFS' OPPOSITION TO MOTION TO QUASH SUBPOENAS FOR THE DEPOSITION TESTIMONY OF SEVEN MEMBERS OF THE FLORIDA LEGISLATURE

The Court should deny the third-party legislators' motion to quash the deposition subpoenas. Under well-settled precedent, the legislative privilege is qualified and can be overcome where important federal interests are at stake. That standard is easily met here.

RELEVANT FACTUAL BACKGROUND

Plaintiffs are challenging multiple provisions of Florida's Senate Bill 90 (S.B. 90), a law that imposes substantial and unjustifiable restrictions on the ability of eligible Floridians to vote. As particularly relevant here, Plaintiffs assert that the Florida legislature adopted many of these restrictions for racially discriminatory purposes, in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the Voting Rights Act. *See FRT* Am. Compl. ¶¶ 165–182 (Case No. 201, ECF 59);

NAACP Am. Compl. ¶¶ 186–223 (Case No. 187, ECF 45). The legislators' motion to quash acknowledges that allegations of discriminatory intent are "central" to this case. Mot. 1, 2–3.

To resolve Plaintiffs' claims, this Court will need to determine whether race was a "motivating" factor in S.B. 90's enactment. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1997); *see also FRT* ECF 49-1 & 122-1; *NAACP* ECF 92-1 (Mot. to Dismiss) at 13 (acknowledging that *Arlington Heights* standard "governs all intent claims at issue here"). That will require "a sensitive inquiry into such circumstantial and direct evidence of [legislative] intent as may be available," including, among other things, the extent to which legislators knew the law would have a racially discriminatory impact and the sequence of events leading up to the law's enactment. *Arlington Heights*, 429 U.S. at 266. Defendants, for their part, have responded to the allegations by asserting that the Legislature engaged in "no intentional discrimination," arguing that the COVID-19 pandemic justified any deviations from the ordinary legislative process, and arguing that no legislators anticipated that S.B. 90 would have a racially disparate impact. *See FRT* ECF 49-1 & 122-1; *NAACP* ECF 92-1(Mot. to Dismiss) at 14–20.

Plaintiffs have sought discovery on these issues and others relevant to their intentional discrimination claims. As relevant here, Plaintiffs noticed the depositions of the following key legislators:

1. Senator **Dennis Baxley**, the lead sponsor of S.B. 90 and a member of the Senate Rules Committee. Senator Baxley played a uniquely central role in developing the bill and coordinating messaging. He also sponsored a 2011 law (H.B. 1355) targeting early voting and third-party registration that a court later deemed racially discriminatory. *See Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012). That law, Plaintiffs contend, is a critical part of S.B. 90's historical background and key legislators' knowledge about the potential effect of S.B. 90 on minority voters.

2. Senator **Joe Gruters**, the Vice Chair of the Senate Governmental Oversight and Accountability Committee and a member of the Senate Rules Committee. Notably, Senator Gruters served as Chair of the Republican Party of Florida and Chair of the Republican National Committee's Election Integrity Commission at the same time the Legislature considered S.B. 90. In those capacities, he played an important role in developing the bill and advocating for its enactment. At one point, Senator Gruters communicated to Representative Ingoglia that the House version of the bill would be "devastating" for Republican candidates.

3. Senator **Kathleen Passidomo**, the Chair of the Senate Rules Committee. Senator Passidomo also served on the Republican State Leadership Committee Election Integrity Commission with Secretary Lee during the Legislature's consideration of S.B. 90. At a hearing on S.B. 90, Senator Passidomo implemented unusually truncated procedures for witness testimony.

4. Senator **Jeff Brandes**, the Chair of the Senate Governmental Oversight and Accountability Committee and a member of the Senate Rules Committee. Senator Brandes opposed many of S.B. 90's provisions during the legislative debates on the bill and ultimately voted against final passage.

5. Senator **Jim Boyd**, a member of the Senate Rules Committee. Senator Boyd worked closely with sponsors of S.B. 90 to push the legislation through to passage, and at a hearing acknowledged but rejected the Supervisors of Elections' concerns about, and disagreements with, the bill.

6. Representative **Blaise Ingoglia**, the lead sponsor of H.B. 7041 and S.B. 90 in the Florida House of Representatives and a former Chair of the Republican Party of Florida. Representative Ingoglia communicated with agents of the Republican Party (its state Chair and its counsel) and the Heritage Foundation about S.B. 90.

7. Representative **Erin Grall**, the Chair of the House Committee on Public Integrity and Elections. Representative Grall solicited information from all of the Supervisors of Election prior to introduction of the House version of S.B. 90. At a hearing on S.B. 90, Representative Grall implemented unusually truncated procedures for witness testimony.

The legislators have now moved to quash the deposition subpoenas, arguing principally that they have an absolute evidentiary privilege in civil cases.

ARGUMENT

I. THE LEGISLATIVE EVIDENTIARY PRIVILEGE IS QUALIFIED, NOT ABSOLUTE, IN CIVIL CASES.

The legislators contend that the legislative privilege is "absolute in civil cases." Mot. 5. That is incorrect. Although state legislators have absolute legislative immunity from civil *lawsuits* seeking to hold them liable for legislative acts, they do not have an absolute privilege to refuse to provide relevant evidence in a civil case. The two doctrines—state legislative immunity and state legislative privilege—are distinct in their scope. The legislative privilege is qualified and can be overcome where important federal interests are at stake—including in voting rights cases alleging intentional discrimination on the basis of race.

A. The Legislators Misread the Relevant Supreme Court Precedent.

No one disputes that state legislators have absolute legislative immunity from civil lawsuits seeking to hold them liable for official legislative acts. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (immunity for local legislators). This immunity from suit is grounded in federal common law and ensures that legislators are "free to speak and act without fear of criminal and civil liability." *Tenney*, 341 U.S. at 375. Here, no one is proposing to hold the legislators personally liable for their actions; the only question is whether they can be compelled to provide testimony that is undisputedly relevant to Plaintiffs' case.

As to this evidentiary question, the Supreme Court has recognized a more limited legislative privilege grounded in federal common law. *See United States v. Gillock*, 445 U.S. 360 (1980). At issue in *Gillock* was whether a state legislator could assert the privilege to prevent the government from introducing evidence of his legislative acts during a federal criminal prosecution. The Court held the answer was no. The Court pointed to the Supremacy Clause, under which federal law prevails over state law "in those areas where the Constitution grants the Federal Government the power to act." *Id.* at 370. In light of that principle, the Court concluded, notions of comity do not require federal courts to recognize a state legislative privilege in cases involving important federal interests. *Id.* at 373.

The legislators seek to limit *Gillock* to its facts—*i.e.*, as qualifying the legislative privilege only in federal criminal prosecutions. Mot. 8–9. But the Court explained the privilege's limits in substantially broader terms, stating that "where important federal interests are at stake, *as in* the enforcement of federal criminal statutes, comity yields." *Gillock*, 445 U.S. at 373 (emphasis added). In other words, federal criminal cases are one class of cases involving sufficiently important federal interests—but they are not the only ones.

Accordingly, legislative privilege does not bar evidence or testimony about legislative acts in criminal *or* civil cases that seek to advance important federal interests by enforcing federal law. As explained further below, many lower courts have reached this conclusion, rejecting the legislators' position that *Gillock* only limits the legislative privilege in criminal cases. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011) (relying on *Gillock* to reject an argument for absolute legislative privilege in a redistricting case, since "[t]he federal government's interest in enforcing voting rights statutes is, without question, important"); *infra* pp. 8–10.[1]

[1] *See also, e.g.*, *League of Women Voters of Mich. v. Johnson*, 2018 WL 2335805, at *3 (E.D. Mich. May 23, 2018); *Mich. State A. Philip Randolph Inst. v. Johnson*, 2018 WL 1465767, at *5 (E.D. Mich. Jan. 4, 2018); *Benisek v. Lamone*, 263 F. Supp. 3d 551, 553 (D. Md. 2017); *Jackson Municipal Airport Auth. v. Bryant*, 2017 WL 6520967, at *6 (S.D. Miss. Dec. 19, 2017); *City of Greensboro v. Guilford Cty. Bd. of Elections*, 2016 WL 11660626, at *7 (M.D.N.C. Dec. 20,

Contrary to the legislators' view, there are good reasons why the scope of state legislators' evidentiary privilege should be narrower than the scope of their immunity from suit.[2] The Supreme Court has repeatedly acknowledged that testimonial privileges "contravene the fundamental principle that 'the public . . . has a right to every man's evidence." *Trammel v. United States*, 445 U.S. 40, 50 (1980). Because privileges impede "the search for truth," their scope must be narrowly construed. *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see also Gomez v. City of Nashua*, 126 F.R.D. 432, 433 (D.N.H. 1989) (though prosecutors have absolute immunity from damages liability, that immunity does not, standing

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2016); *Nashville Student Organizing Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1070 (D. Ariz. 2014); *Hall v. Louisiana*, 2014 U.S. Dist. LEXIS 56165, at *25-26 (M.D. La. Apr. 23, 2014); *Bethune-Hill v. Va. State Bd. of Elecs.*, 114 F. Supp. 3d 323, 332-345 (E.D. Va. 2015); *N.C. State Conference of the NAACP v. McCrory*, 2014 WL 12526799, at *2 (M.D.N.C. Nov. 20, 2014); *Page v. Va. St. Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014); *Perez v. Perry*, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014); *Carver v. Nassau Cty. Interim Fin. Auth.*, 2012 U.S. Dist. LEXIS 190981, at *16-17 (E.D.N.Y. May 7, 2012); *Favors v. Cuomo*, 285 F.R.D. 187, 209-10 (E.D.N.Y. 2012); *Baldus v. Brennan*, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011); *E. End Ventures, LLC v. Inc. Vill. of Sag Harbor*, 2011 U.S. Dist. LEXIS 145472, at *11 (E.D.N.Y Dec. 19, 2011); *ACORN v. Cty. of Nassau*, 2009 U.S. Dist. LEXIS 82405, at *7 (E.D.N.Y. Sept. 10, 2009); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003); *United States v. Irvin*, 127 F.R.D. 169, 172-74 (C.D. Cal. 1989).

[2] A state legislator's privilege to refuse to participate in discovery should arguably be even narrower than the privilege against the use of evidence at trial. Only the latter was at issue in *Gillock*. *Cf. In re Grand Jury*, 821 F.2d 946, 958 (3d Cir. 1987) ("The speech or debate privilege [for state legislators] is at its core a 'use privilege' not a privilege of nondisclosure.").

alone "preclude [the prosecutor's] participation in the discovery process" as a third party).

In addition, legislator defendants have no way to protect themselves against lawsuits in the absence of an absolute immunity from suit. But in the discovery context, legislative privilege is not the only means of protecting legislators' interests. A third-party legislator may seek to modify a subpoena on undue burden grounds under ordinary discovery principles. *See* Fed. R. Civ. 45(d)(3)(iv); *cf. Fla. Ass'n of Rehabilitation Facilities, Inc. v. State of Fla. Dep't of Health and Rehabilitative Servs.*, 164 F.R.D. 257, 263 (1995) (courts may use protective orders to "prevent undue burden or disruption of legislative activities while still accommodating the need for the information"). That provision is inapplicable here, as the legislators' motion relies exclusively on their assertion of privilege. *See* Mot. 2.

B. Many Other Courts Have Recognized That Legislative Privilege Is Qualified Rather Than Absolute.

Since *Gillock*, numerous courts have concluded that state legislators enjoy only a qualified evidentiary privilege, including in the civil context. That includes the Eleventh Circuit, which expressly recognized that "a state lawmaker's legislative privilege *must yield* in some circumstances where necessary to vindicate important federal interests." *In re Hubbard*, 803 F.3d 1298, 1311–12 (11th Cir. 2015) (emphasis added). It also includes the Florida Supreme Court, *see League of*

Women Voters of Fla. v. Fla. House of Representatives, 132 So. 3d 135, 138 (Fla. 2013) (legislative privilege "is not absolute where, as in this case, the purposes underlying the privilege are outweighed by [a] compelling, competing interest"), and at least three other courts of appeals, *see Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021) (recognizing that the state legislative privilege is qualified and subject to a balancing test in civil cases); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) (acknowledging that there are some circumstances where "the privilege must yield to the need for a decision maker's testimony"); *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (noting that "the legislative privilege for state lawmakers is, at best, one which is qualified" and "must be strictly construed").

As noted, well over a dozen district courts across the country have similarly recognized that state legislators have only a qualified evidentiary privilege in civil cases. *See, e.g.*, *Benisek*, 263 F. Supp. 3d at 553 ("[T]he 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."); *Harris*, 993 F. Supp. 2d at 1070 ("State legislators do not have an absolute right to refuse deposition or discovery requests in connection with their legislative acts."); *Rodriguez*, 280 F. Supp. 2d at 95 ("[N]otwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at

depositions."); *supra* note 1. A substantial number of these cases involve voting rights, and courts have repeatedly noted the vital federal interests at stake in such cases. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *6 (rejecting absolute privilege in part because "[t]he federal government's interest in enforcing voting rights statutes is, without question, important"); *Irvin*, 127 F.R.D. 169, 174 (noting "the federal interest in enforcement of the Voting Rights Act weighs heavily in favor of disclosure"). Courts have likewise emphasized the uniquely important role that legislative intent plays in voting rights cases. *See Benisek*, 263 F. Supp. 3d at 553 (qualified privilege is "particularly appropriate" in redistricting cases "since judicial inquiry into legislative intent is specifically contemplated"); *Baldus*, 2011 WL 6122542, at *1 (because discriminatory intent is "relevant and extremely important" in Voting Rights Act cases, "any documents or testimony relating to how the Legislature reached its decision … are relevant to the plaintiffs' claims").

These well-reasoned decisions, along with the broad language in *Gillock*, squarely refute the legislators' position in this case. State legislators' evidentiary privilege is qualified not just in criminal prosecutions, but also in civil cases that implicate important federal interests, including cases like this one.

C. The Cases Cited by the Legislators Do Not Support an Absolute Legislative Evidentiary Privilege.

None of the cases cited by the legislators supports recognizing an absolute evidentiary privilege in civil cases that implicate important federal interests. The legislators rely heavily on *Hubbard*, but the narrowness of the court's actual holding makes the case all but irrelevant here. The question presented was whether state legislators could assert legislative privilege in a First Amendment challenge to a statute that was constitutional on its face. The court held that the plaintiffs could not state a cognizable First Amendment claim based on legislators' subjective motivations in passing the statute. *Hubbard*, 803 F.3d at 1312. That brought an end to the matter; because the legislators' testimony was not relevant to any cognizable claim, there was no possibility that an "important federal interest at stake" could "justify intruding upon the lawmakers' legislative privileges." *Id.* at 1313; *see also id.* at 1312 n.13 (explaining that the opinion did not decide "whether, and to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim"). Here, by contrast, the Court has already found that Plaintiffs *have* stated cognizable intentional discrimination claims. *See FRT* ECF 201 at 48-58 (denying motion to dismiss intentional discrimination claims); *NAACP* ECF 249 at 47-55 (same).

The First and Fourth Circuit decisions cited by the legislators do not support their position either. The First Circuit in *American Trucking* expressly found that

the privilege is qualified in civil cases; it proceeded to balance the competing interests and concluded that evidence of the state legislators' subjective motivations was not sufficiently important to the plaintiffs' dormant Commerce Clause challenge to overcome the privilege. *See Am. Trucking*, 14 F.4th at 88. Here, by contrast, the legislators' testimony is likely to be highly probative of key issues in the case. *See infra* pp. 14–15, 17–18. The Fourth Circuit's decision has even less to do with this case. The court *upheld* a subpoena issued by the EEOC to a public utility that engaged in a restructuring partially achieved through the legislative budgeting process. *See EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 182 (4th Cir. 2001). The court found it was "simply too early" to "address speculative claims of legislative privilege." *Id.* at 177. The court's discussion of the scope of the legislative privilege was thus almost entirely dicta.

Finally, the legislators place significant weight on two voting rights cases that allowed state legislators to invoke legislative privilege despite allegations of racially discriminatory intent: the Ninth Circuit's decision in *Lee* and Judge Hinkle's decision in *Florida v. United States*, 886 F. Supp. 2d 1301 (N.D. Fla. 2012). Neither case endorses the legislators' view that the evidentiary privilege is absolute in civil cases. *See Lee*, 908 F.3d at 1187 (recognizing that the legislative privilege is a qualified privilege that "must yield" in certain circumstances); *Florida*, 886 F. Supp. 2d at 1303–04 ("To be sure, a state legislator's privilege is

qualified, not absolute."). The courts instead concluded that nothing about *those particular cases* justified compelling the deposition testimony of state legislators. At most, the cases stand for the proposition that allegations of racially discriminatory intent do not, standing alone, overcome the legislative privilege. But even if the Court agrees with that position, the circumstances of this particular case—where key legislators involved in drafting the bill communicated extensively about the subject of the legislation with third-party groups and where additional circumstantial evidence raises a particularly strong inference of discrimination—provide a compelling basis for allowing the depositions to proceed, not least because any legislative privilege does not extend to communications with third parties. *See infra* pp. 22–23. Thus, neither *Lee* nor *Florida* provides a basis for allowing the legislators to assert the privilege here.

There are additional reasons why this Court should not follow the decision in *Florida*. *First*, the court was under the impression that there was no "case—under the Voting Rights Act or in any other context—in which a state legislator who has not agreed to testify at a trial has been compelled to sit for a deposition addressing legislative functions." *Florida*, 886 F. Supp. 2d at 1303. That is not correct; numerous courts before and after *Florida* have required depositions over claims of legislative privilege. *See Mich. State A. Philip Randolph Inst.*, 2018 WL 1465767, at *5; *Benisek*, 263 F. Supp. 3d at 553; *Nashville Student Organizing*

Comm., 123 F. Supp. 3d at 969; *Harris*, 993 F. Supp. 2d at 1070; *Perez*, 2014 WL 106927, at *2 (discussing prior order); *Baldus*, 2011 WL 6125542, at *2 (legislative aide); *E. End Ventures*, 2011 U.S. Dist. LEXIS 145472, at *11.

Second, the *Florida* court recognized that "the case for recognizing a federal privilege would be weaker" if a state "did not recognize a privilege for its own legislators." *Florida*, 886 F. Supp. 2d at 1303. As discussed above, after Judge Hinkle's decision, the Florida Supreme Court held that the Florida legislature's privilege is qualified and can be outweighed by a compelling, competing interest. *See League of Women Voters of Fla.*, 132 So. 3d at 138. Had that decision been available earlier, the *Florida* court may well have reached a different conclusion. *Third*, even though the court acknowledged that the legislative privilege is qualified, it provided no analysis of when the privilege might be overcome. *See Florida*, 886 F. Supp. 2d at 1304. The court summarily stated that there was "nothing unique" about voting rights cases, *id.*, but that statement does not explain either (i) why allegations of discriminatory intent are insufficient to overcome the legislative privilege, or (ii) what it would take to find the privilege overcome.

Finally, the parties seeking depositions in *Florida* sought to pierce the legislative privilege merely because legislative purpose was relevant to Florida's request for judicial preclearance under Section 5 of the Voting Rights Act. *See* 886 F. Supp. 2d at 1302–03. Here, Plaintiffs' complaints include detailed allegations

about the legislative process that support a strong inference that the legislators most closely associated with S.B. 90 were motivated, at least in part, by discriminatory intent. These include, for example, extreme aberrations in the legislative process; the legislators' knowledge that S.B. 90 would likely have a disparate impact on Black and Latino voters; their rejection of amendments that would have reduced the racially discriminatory impact; and their lack of any meaningful justification for pushing the challenged provisions. *See FRT* Am. Complaint ¶¶ 81–104; *NAACP* Complaint ¶¶ 134–136. In light of the strong inference of discrimination raised by these allegations, Plaintiffs should be permitted to probe these issues at depositions of key legislators.

II. THE LEGISLATIVE PRIVILEGE IS OVERCOME IN THIS CASE.

Because the legislative privilege is qualified in civil cases, the key question for the Court is whether the privilege "must yield" in this case. *Gillock*, 445 U.S. at 373. Most courts considering claims of legislative privilege apply one of two frameworks. Some courts, including the Northern District of Florida, have balanced the need to protect confidential legislative deliberations against the requesting party's need for the information. *See Fla. Ass'n of Rehabilitation Facilities, Inc.*, 164 F.R.D. at 267; *In re Grand Jury*, 821 F.2d at 959. Other courts have applied a five-factor balancing test first announced in *Rodriguez v. Pataki*,

280 F. Supp. 2d 89 (S.D.N.Y. 2003).[3] Under either approach, the Court should find the legislative privilege overcome in this case. The legislators' testimony is highly relevant to the critical question whether S.B. 90 was motivated by racially discriminatory intent, and the Court can order appropriate protective measures to safeguard future legislative deliberations.

A. Plaintiffs Have a Substantial Interest in Obtaining Evidence of Legislative Intent.

As noted, this case implicates federal interests of the greatest possible importance to our democracy. The legislators seek to minimize this case as a "private civil suit" devoid of any federal interests, since the United States itself is not a party. Mot. 9–10 n.8, 17. But that characterization ignores the fundamental nature of the case. Plaintiffs are not seeking to vindicate purely private rights, as might be in the case in, for example, an employment dispute involving a state legislator's office. Plaintiffs are instead asserting the federal interest in eradicating racial discrimination in our nation's elections—an interest that is no less vital in the context of private enforcement than it is when the government files similar suits. *See Comm. for a Fair & Balanced Map.*, 2011 WL 4837508, at *7 ("Voting

[3] The five factors are: "(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*, 280 F. Supp. 2d at 100.

rights cases, although brought by private parties, seek to vindicate public rights. In this respect they are akin to criminal prosecutions."); *cf. Fla. Ass'n of Rehabilitation Facilities, Inc.*, 164 F.R.D. at 267 (finding legislative privilege qualified under *Gillock* in a case involving "the enforcement of a federal statute against a state agency which has accepted federal Medicaid funds," even though the plaintiffs in that case were private parties).

Unlike in other cases upholding legislative privilege claims,[4] evidence of Florida lawmakers' subjective intent is likely to be highly probative of core issues in the case. Defendants agree that *Arlington Heights* provides the governing standard for Plaintiffs' intentional discrimination claims, and the legislators' depositions are likely to yield relevant testimony on several of the *Arlington Heights* factors. Plaintiffs, for example, seek to explore the information available to legislators about the potential impact of S.B. 90, in order to assess both "the foreseeability of the [law's] disparate impact" and the extent of legislators' "knowledge of that impact." *Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1321-22 (11th Cir. 2021). Plaintiffs also seek general information about the legislative process—including the use of strike-all amendments and the

[4] *See Hubbard*, 803 F.3d at 1312 (noting that First Amendment challenge to a statute cannot be "based on the subjective motivations of the lawmakers who passed it"); *Am. Trucking Ass'ns*, 14 F.4th at 88-89 (noting that dormant Commerce Clause violation is unlikely to be based on discriminatory purpose).

limits typically imposed on public testimony—in order to assess whether the "procedural and substantive departures" during the legislature's consideration of S.B. 90 justify an inference of discriminatory intent. *Id.*

The legislators contend that deposition testimony is not likely to be relevant because courts are reluctant to rely on a "single legislator's testimony on the legislature's own purpose." Mot. 15. But courts, including the courts that the legislators cite, conclude that such testimony is plainly relevant, noting, for example, that states seeking preclearance under the Voting Rights Act "routinely offer[ed]" and courts "routinely admit[ted]" legislator testimony. *Florida*, 886 F. Supp. 2d at 1302; *see also Cooper v. Harris*, 137 S. Ct. 1455, 1468–69 (2017) (finding that the statements of key decision-makers, such as the challenged law's sponsors, are indicative of intent); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1552 (11th Cir. 1987) (inferring discriminatory intent from the fact that the sponsor of the challenged law had previously made a racist speech about a different voting bill); *cf. Stout v. Jefferson Cnty. Bd. of Educ.*, 2018 WL 827855, at *13 (11th Cir. 2018). Here, the testimony of seven legislators who sponsored or were otherwise intimately involved in drafting and amending S.B. 90 is plainly relevant.

Nor can document discovery adequately take the place of a deposition, *cf.* Mot. 17, especially in a case turning on proof of discriminatory intent. As courts

have recognized, legislators are unlikely to have admitted to intentional discrimination in emails or other records. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 235 (5th Cir. 2016) ("In this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence."). Depositions are essential to allow Plaintiffs to determine whether legislators' stated justifications for S.B. 90 were in fact a pretext for discrimination. Indeed, the Supreme Court has indicated in a different context that in cases "where motive and intent play leading roles," key witnesses should be "present and subject to cross-examination" so that "their credibility . . . can be appraised." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *cf. Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 134 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it can be quite persuasive."). Thus, documents alone are not adequate to assess whether the legislature acted with discriminatory intent; Plaintiffs must be able to explore the basis for the statements that appear in those documents and whether legislators were merely "dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 134.

B. Plaintiffs' Interest in Obtaining This Evidence Outweighs the Legislators' Interests

On the other side of the balance, courts often consider the potential consequences for legislative deliberations if legislators can be compelled to disclose information about the legislative process. *See Rodriguez*, 280 F. Supp. 2d at 100. Any such consequences are minimal here. Florida law already makes a wide swath of legislative materials available to the public. The additional disclosures associated with depositions are not likely to meaningfully "chill" or impede legislative deliberations (*cf.* Mot. 19), particularly since the parties could agree to reasonable protective measures to safeguard any information that legislators consider highly confidential. For example, the parties could designate as highly confidential any portions of the transcripts that discuss confidential legislative deliberations; if so, the parties would need to seek the Court's permission before disclosing such material in court filings or elsewhere.

The legislators' interest in avoiding the "distraction" associated with depositions is similarly minimal. To be sure, the legislators will be required to prepare for their depositions, but the fact that they have already collected documents responsive to Plaintiffs' discovery requests should substantially reduce the amount of preparation time. In addition, the depositions will be limited to the particular issues raised by Plaintiffs' claims and thus will largely address S.B. 90 and the events leading up to the enactment—issues with which all seven legislators

have considerable familiarity. Although the legislators offer generalities about interference with legislative priorities, Mot. 19–20, they offer no serious contention that spending seven hours or less each in their depositions in this case would meaningfully distract from legislating or other activities.

II. EVEN IF THE LEGISLATIVE PRIVILEGE APPLIES, IT DOES NOT BAR ALL OF THE EVIDENCE REQUESTED BY PLAINTIFFS.

In any event, even if the Court concludes that the legislators can invoke legislative privilege in this case, it should permit the depositions to proceed given that several topics to be covered at the depositions fall outside the privilege's scope.

A. The Legislative Privilege Applies Only to Communications Among Legislators and Staff Members about Legislative Decisions.

Assuming the legislative privilege applies here, the Supreme Court has squarely rejected the notion that the privilege covers *all* matters involving legislative goals or the legislative process. Addressing the Speech or Debate Clause protections for federal legislators, the Court held that the privilege can extend to "matters beyond pure speech or debate in either House, but *only* when necessary to prevent indirect impairment of [the] deliberations" of the legislature. *Gravel*, 408 U.S. at 625 (emphasis added); *Fla. Ass'n of Rehabilitation Facilities*, 164 F.R.D. at 267 (noting that the purpose of the legislative privilege is "to protect

the confidentiality of communications with the office-holder involving the discharge of his or her office").

Consistent with these principles, another judge of this Court held that the legislative privilege is limited to communications between legislators and their "personal staff members involving opinions, recommendations or advice about legislative decisions." *Fla. Ass'n of Rehabilitation Facilities*, 164 F.R.D. at 267. That means "[f]actual matter collected for the information and use of legislators should not be privileged." *Id.* 267–68; *id.* at 264 ("factual summaries" prepared either for informational purposes or to advise on legislation not privileged). Many courts have also found the privilege inapplicable to legislators' communications with third parties, including consultants, lobbyists, associations, and members of the public. *See, e.g.*, *Baldus*, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) (consultants); *Favors*, 285 F.R.D. at 212 (lobbyists); *League of Women Voters of Mich.*, 2018 WL 2335805, at *6 (third parties).

The legislators rely principally on a district court case suggesting that the legislative privilege would be "no more" if it did not apply to third-party communications. *Pulte Home Corp. v. Montgomery Cnty. Md.*, 2017 WL 2361167, at *8 (D. Md. May 31, 2017); *see* Mot. 23. But that makes little sense. Unless overcome in a particular case, the privilege would continue to apply to the legislator's own deliberations and any actions taken in *response* to discussions with

constituents and other third parties. In any event, *Pulte* involved a lawsuit seeking "private damages" arising from land use legislation; the court acknowledged that applying such a broad legislative privilege would be "questionable" in cases where "a strong public interest is present," including in cases that "go[] to the heart of our representative democracy." *Pulte*, 2017 WL 2361167, at *8.

The legislators also cite three circuit cases for the proposition that legislative privilege bars testimony about communications with outsiders. Mot. 21–22. But those cases did not involve legislative privilege at all. Rather, the question in each case was whether legislators were entitled to *immunity* for acts undertaken "in the sphere of legitimate legislative activity." *See Almonte v. City of Long Beach*, 478 F.3d 100, 106-07 (2d Cir. 2007); *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980); *Kalinoski v. Lackawanna Cnty.*, 511 F. App'x 208, 213 (3d Cir. 2013). As explained, legislative privilege and legislative immunity are distinct concepts. The courts' conclusion that communications with interested third parties can be "legislative acts" says nothing about the relevant question here—namely, whether requiring legislators to testify about those communications would impair the legislature's confidential deliberations. *Fla. Ass'n of Rehabilitation Facilities*, 164 F.R.D. at 267. Because communications with third parties are, by definition, not confidential, the answer to that question is clearly no.

B. Plaintiffs Seek a Substantial Amount of Deposition Testimony That Is Not Covered by Legislative Privilege.

Although Plaintiffs do intend to ask questions about the legislators' decisionmaking process if the Court agrees the privilege does not apply, several other topics to be covered at the depositions do not implicate the privilege at all. These topics include the legislators' communications with individuals other than their staff and other legislators. For example, Plaintiffs should also be allowed to explore legislators' interactions with third-party groups like Heritage Action and the James Madison Institute. *See Baldus*, 2011 WL 6122542, at *2.

Plaintiffs should also 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. Those commissions have pushed for reforms to curtail alleged voter fraud, including limitations on the use of drop boxes for returning absentee ballots—a proposal ultimately adopted in S.B. 90. The information about their work on the commissions (*i.e.*, non-legislative bodies) cannot possibly be subject to legislative privilege.

Finally, as explained above, Plaintiffs should also be permitted to ask factual questions about the ordinary legislative process and the underlying data that informed legislators' judgments about the proposed bill and its potential impact. *See supra* p. 22. Not all of that information is necessarily public; Plaintiffs could ask, for example, what these particular legislators' practices are with respect to

strike-all amendments and limitations on witness testimony. To ensure that Plaintiffs are able to access this critical, non-privileged information, the Court should deny the legislators' motion to quash the deposition subpoenas in their entirety and instead address *specific* privilege issues if and when they arise.

CONCLUSION

For the foregoing reasons, this Court should deny the motion to quash.

Dated: October 28, 2021

Respectfully submitted,

s/ *Kira Romero-Craft*

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LOCAL RULE 7.1(F) CERTIFICATION

Pursuant to Local Rule 7.1(F), this memorandum contains 5,853 words, excluding the case style, table of authorities, table of contents, signature blocks, and certificate of service.

s/ *Kira Romero-Craft*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served on all counsel of record through the Court's CM/ECF system on the 28th of October, 2021.

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