

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, *et al.*,

Defendants.

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Case No. 3:21-cv-00259
[Lead Case]

**STATE DEFENDANTS' AND LEGISLATIVE SUBPOENA RECIPIENTS'
NOTICE OF SUPPLEMENTAL AUTHORITY**

The Eleventh Circuit has issued a new opinion regarding the scope of the legislative privilege, which bears directly on the legislative privilege motions pending before this Court. *See Pernell v. Fla. Bd. of Governors of the State Univ.*, —F.4th—, 2023 WL 7125049 (11th Cir. Oct. 30) (Pryor, C.J.). In *Pernell*, plaintiffs challenged a Florida law for having a racially discriminatory purpose in violation of the Equal Protection Clause. *Id.* at *1. They subpoenaed 14 legislators for documents. *Id.* at *1-2. The district court required disclosure of “documents containing factually based information.” *Id.* at *2. The Eleventh Circuit reversed, rejecting arguments that the United States and Private Plaintiffs have also made in their pending motions and supplemental briefing.

The Eleventh Circuit rejected the distinction between “purely factual documents” and legislatively privileged documents. *Id.* at *3. The United States and Private Plaintiffs have tried drawing the same distinction here. *See* ECF 706, at 5-7; ECF 707, at 8-13; ECF 722, at 7-8; ECF 725, at 4-5. The Eleventh Circuit explained that “the subpoena’s purpose was to uncover the legislators’ motives in passing the law.” *Pernell*, 2023 WL 7125049, at *3. As such, courts “do not take a ‘document-by-document’ approach,” and “the privilege applies with its usual force against the discovery of even the factual documents in the ... legislators’ possession.” *Id.*; accord ECF 731, at 5-10; ECF 720, at 13-24.

The Eleventh Circuit also rejected that the legislative privilege should yield for plaintiffs' racial discrimination claims. *Pernell*, 2023 WL 7125049, at *3. The United States and Private Plaintiffs have similarly argued that legislative privilege should yield here too. *See* ECF 706, at 14-20; ECF 707, at 18-21; ECF 721, at 9-10; ECF 725, at 11-12. Quoting *United States v. Gillock*, 445 U.S. 360, 3737 (1980), the Eleventh Circuit acknowledged that the Supreme Court has "left open the possibility" that the privilege "may yield 'where important federal interests are at stake, as in the enforcement of federal criminal statutes.'" *Pernell*, 2023 WL 7125049, at *3-4. But the Eleventh Circuit declined to extend *Gillock*, involving a federal criminal trial, to plaintiffs' intentional discrimination claims, civil claims arising under 42 U.S.C. §1983. *Id.* (citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (explaining Congress did not covertly abrogate legislative privilege for §1983 claims)). And the Eleventh Circuit rejected "manipulable balancing test," also pressed by the United States and Private Plaintiffs here, that "links the derogation of the legislative privilege to a subjective judgment of the case's importance," and "simply mirror[s] the general standard for discovery of non-privileged material." *Id.* at *4.

The *Pernell* decision joins a chorus of courts that have agreed the legislative privilege, "so well grounded in history and reason," *Tenney*, 341 U.S. at 376, bars litigants from subpoenaing legislators for documents or testimony. *See Pernell*, 2023 WL 7125049, at *4 (collecting recent decisions). These courts have done so without "manipulable balancing test[s]" or false distinctions between "factual documents" and privileged documents. *Id.* at *3-4. And those courts did so specifically in the context of a VRA claim (Fifth Circuit), a racial gerrymandering claim (Ninth Circuit), and VRA redistricting litigation (Eighth Circuit). *Id.* at *4. Plaintiffs are wrong to suggest in their recent letter that the recent Fifth Circuit decision, *In re Landry*, 83 F.4th 300, 307-08 (5th Cir. 2023), is a basis for piercing that privilege when that decision had nothing to do with legislative privilege. The United States' and Plaintiffs' discovery requests be denied.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on November 3, 2023, and that all counsel of record were served by CM/ECF and email.

/s/ Taylor A.R. Meehan

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