IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., *et al*.,

Plaintiffs,

Case No. 2022-CA-000666

v.

CORD BYRD, in his official capacity as Florida Secretary of State, *et al*.,

Defendants.
_____/

ORDER ON MOTION FOR PROTECTIVE ORDER PREVENTING DEPOSITIONS OF INDIVIDUAL LEGISLATORS AND STAFF

This case came on for hearing on October 20, 2022, on a motion for protective order filed on behalf of six legislators[1] and five current and former legislative staff members[2] (the "Individual Legislators and Staff"), all non-parties who have been noticed by Plaintiffs for videotaped depositions. Upon consideration of the Motion, responses, replies, and the presentations by counsel, the Court hereby finds as follows:

In this case, Plaintiffs bring constitutional challenges to the congressional district map passed by the Legislature as Senate Bill 2-C on April 21, 2022, and signed by the Governor on April 22, 2022. Ch. 2022-265, Laws of Fla. As part of their discovery, Plaintiffs are seeking to depose the Individual Legislators and Staff to gain insight into the drawing of the

[1] Speaker Chris Sprowls; Representatives Thomas Leek and Tyler Sirois; and Senators Ray Rodrigues, Aaron Bean, and Jennifer Bradley

[2] Mathew Bahl (Chief of Staff to Speaker Sprowls), Leda Kelly (former Staff Director, House Redistricting Committee), Jason Poreda (Chief Map Drawer, House Redistricting Committee), Jay Ferrin (Staff Director, Senate Committee on Reapportionment), and Thomas Justin Eichermuller (Legislative Analyst, Senate Committee on Reapportionment)

congressional district map. The Individual Legislators and Staff seek a protective order preventing their deposition in this case under the legislative privilege[3] and the apex doctrine (Fla. R. Civ. P. 1.280(h)).

Legislative Privilege

In *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013) (*"Apportionment IV"*), the Florida Supreme Court "decide[d] for the first time that Florida should recognize a legislative privilege founded on the constitutional principle of separation of powers" in a case arising from last decade's redistricting. The Court found the privilege exists but is "not absolute and may yield to a compelling, competing interest." *Id.* at 143. The Court also found that the "compelling interest in [that] case [was] ensuring compliance with article III, section 20(a), which specifically outlaws improper legislative 'intent' in the congressional reapportionment process." *Id.* at 147. It also held that the case presented "a compelling competing interest against application of an absolute legislative privilege." *Id.* at 150. Finally, the trial court's balancing approach that the "legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions... revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to

[3] *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013) ("*Apportionment IV*"). The parties agreed at the hearing that this Court is bound by the majority ruling in *Apportionment IV* (to the extent that it may apply in this case), and that the language used in the Individual Legislators and Staff's motion and argument regarding any alleged errors in that opinion are solely to preserve the issue for appeal.

testify…concerning any other information or communications pertaining to the…reapportionment process" was adopted by the Court. *Id.* at 154.

In this case, Plaintiffs have alleged that the Governor (through his staff) drew the congressional district map that was ultimately enacted into law. *Compl. at ¶ 74-76. See also,* Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 6. They have alleged that the map violates the Fair Districts Amendment. *See,* Fla. Const. art III sect. 20. Accordingly, they seek to depose the Individual Legislators and Staff about the reapportionment map-drawing process as was done under *Apportionment IV*. The Individual Legislators and Staff argue that this case differs from the trial posture seen in *Apportionment IV* in that Plaintiffs have conducted no 3rd party discovery to date.[4] This Court will note the only real difference between this case and the trial posture addressed in *Apportionment IV* is that the Office of the Governor is now alleged to be the conduit through which the alleged partisan political organizations and political consultants are reaching the legislators. *See, e.g.* Pl.'s Notice of Supplemental Ex. 9., Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 6., and Compl. at ¶ 77. Any directed sequence of discovery appears to give this Court unfettered discretion in controlling the application of the privilege. While this Court has great concerns about allowing Plaintiffs to intrude into the internal processes of a separate co-equal branch of government, the binding precedent of *Apportionment IV* provides little relief to the Individual Legislators and Staff other than

[4] Plaintiffs are seeking to depose a member of the Governor's staff which is subject to a separate motion in this case. *See*, Governor and J. Alex Kelly's Mot. to Quash & for Protection from Subpoena Duces Tecum for Dep.

protection from revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators.[5]

Apex Doctrine

Several of the Individual Legislators and Staff have also asserted that the apex doctrine shields them from deposition. *See,* Fla. R. Civ. P. 1.280(h). These individuals include Speaker of the House Chris Sprowls, President Pro Tempore of the Florida Senate Aaron Bean, Chair of the Select Committee on Congressional Reapportionment Senator Jennifer Bradley, Chair of the House Congressional Redistricting Subcommittee Tyler Sirois, Chair of the House Redistricting Committee Thomas J. Leek, Chair of the Committee on Reapportionment Senator Ray Rodrigues, and Chief of Staff to the Speaker of the House Mathew Bahl. Each of them has submitted an affidavit attesting to the fact that each lack unique, personal knowledge of the issues being litigated. Each generally reiterate that they hold leadership positions within the Legislature and fulfill leadership duties, relying on the expertise of legislative staff and, as it relates to the drawing of the map at issue in this case, the expertise of members of the Governor's staff. During the hearing on this matter, the Court took judicial notice of the fact that Senator Rodrigues actually sponsored Senate Bill 2-C that created the congressional districts in this case. *See also*, Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 6.

[5] The Court notes that *Apportionment IV* allows legislators to be questioned regarding the reapportionment process despite recognition of a legislative privilege. This Court, in fashioning relief in this case, attempts to set "objective rules that can be applied without the suggestion that the coordinate branch's privilege is subject to diminishment or abrogation through the unfettered discretion of judges." *Apportionment IV*, 132 So. 3d at 160 (Canady, J., dissenting).

Apportionment IV does not address the apex doctrine as applied under the common law. The apex doctrine has since been codified as part of Fla Rule of Civ. Pro. 1.280(h). *In re Amend. to Fla. Rule of Civ. Pro. 1.280*, 324 So. 3d 459, 461 (Fla. 2021). In this case, each of the individuals asserting the apex doctrine, save one, have shown the doctrine applies as to the internal process by which the legislation moved from introduction to enrollment. Senator Rodrigues, by contrast, has shown the apex doctrine only applies as to his function as chair of the Committee on Reapportionment. However, the Court cannot find the apex doctrine to shield him from questioning regarding the introduction of the bill. Nor can this Court, in light of the holding of *Apportionment IV*, find that the apex doctrine shields any individual legislator as to information he or she received prior to voting. Whereas this Court respects the role of each constitutionally elected legislator, it cannot find all 160 legislators to be an apex officer not subject to deposition as to legislation they introduce or vote on. That notion is not supported by the text of the Constitution itself which says that "Each house…shall biennially choose its officers." Fla. Const. art. III sect. 2. The Constitution also specifies that "On the fourteenth day following each general election the legislature shall convene for the exclusive purpose of organization and selection of officers." Fla. Const. art. III sect. 3. There is no requirement that a legislator be an officer to introduce legislation, nor to vote.

The affidavits of each legislator asserting the apex doctrine show a reliance on information provided by staff members and the Governor's Office as to the map drawing. Because this Court is constrained by the holding in *Apportionment IV* as to legislators being deposed regarding map-making, this Court finds that the apex doctrine shields Chief of Staff Bahl and each legislator from questions regarding the process by which the bill moved through each respective chamber. The apex doctrine does not protect any individual legislator or Chief of Staff Bahl from information he or she received related to the drafting of the bill or drawing of the map.

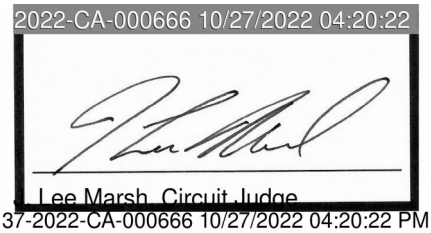
Relief

This Court finds the balancing test applied in *Apportionment IV* not to be directly applicable in this case. In *Apportionment IV,* "the challengers uncovered communications between the Legislature and partisan political organizations and political consultants" and the use of that information in map-drawing. 132 So. 3d at 141. In this case, based on the affidavits already submitted, the information regarding redistricting and map-drawing came from the Governor's office. Therefore, drawing the line between "thoughts or impressions of legislators" and "`objective' information and communications" within the respective chamber is unnecessary and does not strike the proper balance between the privilege and the compelling competing interest. The appropriate line in this case is where the doors to the House and Senate meet the outside world. Accordingly, each legislator and legislative staff member may be questioned regarding any matter

already part of the public record and information received from anyone not elected to the Legislature, their direct staff members, or the staff of the legislative bodies themselves. They may not be questioned as to information internal to each Legislative Body that is not already public record (e.g., their thoughts or opinions or those of other legislators).

For the foregoing reasons, the Motion for Protective Order Preventing Depositions of Individual Legislators and Staff is **GRANTED in part and DENIED in part.** The motion for protective order as to all Individual Legislators and Staff is granted to the extent that they may not be questioned as to information internal to each Legislative Body that is not already public record (e.g., their thoughts or opinions or those of other legislators). The motion is denied in that they may be questioned only as to any matter already part of the public record and information received from anyone not elected to the Legislature, their direct staff members, or the staff of the legislative bodies themselves. This includes the identity of or sources of information outside of the groups identified in this paragraph.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this Thursday, October 27, 2022.



J. LEE MARSH
CIRCUIT JUDGE

Copies furnished to:

All Counsel of Record