**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF KENTUCKY**
**FRANKFORT DIVISION**

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| SAMANTHA WIGGINTON, *et al*.,<br>Plaintiffs,<br>v.<br>COMMONWEALTH OF KENTUCKY, *et al*.,<br>Defendants. | Civil Action No. 3:26-cv-00035-CHB<br><br>**PLAINTIFFS' POSITION STATEMENT REGARDING LEGISLATIVE DISCOVERY** |

Plaintiffs request a focused production from LRC and the House and Senate custodians under this Court's *Glowgower* framework. Senate Bill ["SB"] 185's adoption itself is challenged. CPE confirmed warning Senator McDaniel that SB 185's admissions restrictions would reduce Black student access to KSU. KSU is also the only public institution subject to those restrictions. Discovery confined to SB 185's implementation cannot establish what the legislature received, evaluated, or did in response. Plaintiffs seek the contemporaneous institutional record, nonprivileged material, and adjudication of specific protections—not an unrestricted examination

## I. CPE's testimony identifies the warning and the missing legislative evidence.

CPE confirmed advising Sen. McDaniel that a 2.5 GPA and 18 ACT, not imposed upon any other public institution, would disparately impact Blacks. Asked about the response, he answered: "I don't recall exactly, but obviously, it stayed in the bill." CPE Rule 30(b)(6) Dep., 130:5–16, 131:13–16. CPE confirmed concern that fewer African American students could attend KSU -- although those students could attend all other Kentucky institutions because they were not being subjected to the HBCU restrictions. *Id.* 283:9–21. CPE compared Black averages with the overall population and expressed concern regarding disparate impact. *Id.* 130:17–131:2.

CPE proposed broader alternative admissions because applicants could succeed with support; performed no comparable admissions-impact assessment; and neither identified nor sought an institution with comparable financial and accreditation problems against which to test the restrictions. *Id.* 126:2–4, 126:19–127:8. Asked for contemporaneous written justification for

their duration, CPE explained, "they're not our restrictions. **They're the General Assembly's**," and identified none. *Id.* 127:14–22. [Emphasis added]. *See also* 285:22-25.

CPE also recalled warning that proposed changes to KSU's name, identity, sororities and fraternities, and 1890 designation would concern the Black community, and confirmed legislative meetings outside committee proceedings. *Id.* 40:13–18, 42:3–19. These are development-stage proposals, not representations of SB 185's enacted terms. They, however, reinforce the need for the complete sequence and recipients of legislative communications; public hearings and implementation testimony cannot be presumed to capture those exchanges.

Rule 26(b)(1) expressly considers relative access to information and the discovery's importance in resolving the issues. CPE's (and perhaps other yet-to-be-identified entities) warning and proposal identify concrete exchanges. The legislative recipients' disposition remains unanswered. Public bill history may establish that an amendment occurred; it **cannot** establish which impact materials accompanied it, who received them, or whether alternatives were evaluated. Additional implementation testimony cannot cure that deficiency. This demand targets a demonstrated evidence gap, rather than an unrestricted search for improper motives.

## II. *Fordice* and *Arlington Heights* make adoption and alternatives material.

*U.S. v. Fordice*, 505 U.S. 717, 728–32, 733–41 (1992), requires examination of policies traceable to the former dual system, continuing segregative effects, sound educational justification, and practicable elimination. Facial neutrality does not end that inquiry. Its analysis specifically addressed admissions standards, mission assignments, and unnecessary program duplication, including their combined effects. *Id.* at 733–41. The relevant records therefore include historical policy antecedents, comparative admissions data, educational and fiscal rationales, and evaluations of workable alternatives.

Plaintiffs must establish traceability; policies without those historical antecedents remain subject to the discriminatory-purpose requirement. *Id.* at 733 n.8. *Fordice* prescribes substantive

inquiries. Discovering whether pertinent analyses exist within the legislature is necessary to test justification and practicability. The legislature cannot be treated as irrelevant: *Fordice* itself **described legislative refusal to fund the desegregation plan adequately**. *Id.* at 723.

*Village of Arlington Heights v. Metro. Hsg. Dev. Corp.*, 429 U.S. 252, 265–68 (1977), likewise directs attention to impact, historical background, the sequence preceding adoption, procedural and substantive departures, **and contemporaneous legislative history**. Information before decisionmakers, minutes, reports, and contemporaneous statements bear directly on purpose. *Id.* at n.18, n.20. Whether educational or fiscal criteria supported an available alternative, yet the legislature selected a more exclusionary course, is critical to that context.

Filed alternatives included identical admissions criteria used for all other public institutions, CPE certification ending exigency, and non-elimination of academic areas. SB 185, HFA 7, 10, 11 (2026). Filing establishes available proposals, not each member's consideration or rejection. Plaintiffs need the accompanying analyses, circulation, revisions, and responses to determine what actually occurred. Once racial motivation is established, the same-decision inquiry also makes contemporaneous justification material. *Arlington Heights* at n. 21. Plaintiffs must distinguish a legitimate policy adopted despite adverse effects from discriminatory selection; implementation witnesses **cannot** supply the legislature's contemporaneous record.

## III. Title VI abrogation and legislative privilege are distinct questions.

Congress expressly removed Eleventh Amendment immunity for covered Title VI suits and authorized legal and equitable remedies. 42 U.S.C. § 2000d-7(a)(1)–(2). *Franks v. Kentucky. School for the Deaf*, 142 F.3d 360, 362–63 (6th Cir. 1998), upheld that provision's § 5 abrogation for Title IX, listed alongside Title VI. *See Doe v. University of Kentucky*, 111 F.4th 705, 724 (6th Cir. 2024). Judge Boom addressed the Title VI counts as presenting "**no blanket immunity**," applying Rule 26(c) while preserving coverage and merits. ECF#102, 15:13–16:8.

The claim here concerns Commonwealth policy governing a federally assisted public higher-education system. *See* 42 U.S.C. § 2000d-4a(2)(A). The Court, in *Mick v. Gibbons*, 171 F.4th 1097 (8th Cir. 2026), distinguished disruptive organizational testimony from minimally disruptive document discovery and rejected categorical immunity from all third-party subpoenas. Plaintiffs propose narrowed legislative discovery expressly related to adoption of SB 185.

While abrogation does not automatically extinguish legislative privilege, state legislative privilege in this federal-question action follows federal common law. *Fed. R. Evid.* 501; *U.S. v. Gillock*, 445 U.S. 360, 366–74 (1980). Kentucky's legislative protections cannot replace that inquiry. *See Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992). *Gillock's* criminal holding does not decide this civil dispute; this Court's ruling, in *Glowgower v. Bybee-Fields*, 2022 WL 4042412 (E.D. Ky. Sept. 2, 2022), however does supply the applicable discovery framework.

## IV. *Glowgower's* factors support focused disclosure and specific adjudication.

In *Glowgower*, this Court required Legislative responses informed by institutional resources and a detailed privilege log, distinguished immunity from privilege, and adopted qualified-privilege balancing. As set forth therein, an undifferentiated immunity label cannot substitute for an institutional response and an assessable privilege claim.

All five factors favor the proposed process. Relevance is direct because adoption is challenged. Alternative evidence is incomplete because no other state agency can establish the chambers' receipt, evaluation, and disposition of its warning(s). This litigation concerns racial equality in public higher education, reinforced by Congress's express remedy against States. Government's role is central because the Commonwealth imposed the policy. Chilling and burden concerns are addressed through existing records, identified custodians, specific privilege rulings, and limited testimony. This is a concrete evidentiary showing, not reliance on the importance of civil rights in the abstract. *See id.* at 15–16.

*Nashville Student Organizing Committee v. Hargett*, 123 F. Supp. 3d 967, 969–72 (M.D. Tenn. 2015), applied qualified privilege in a civil challenge to legislation and permitted protected discovery, reserving disclosure and admissibility. Its use of *in camera* review and restrictions illustrates how the Court can protect legislative interests while developing the necessary record.

Plaintiffs recognize the broader protection in *Pernell v. Florida Board of Governors*, 84 F.4th 1339, 1343–45 (11th Cir. 2023). Neither the word "factual" nor communication with an outsider automatically defeats privilege. But even *Jackson Municipal Airport Authority v. Harkins*, 98 F.4th 144 (5th Cir. 2023) required a privilege log while rejecting blanket third-party waiver. The Court should apply *Glowgower* to identified materials; alternatively, it should order nonprivileged production and the log before deciding the reach of disputed protection.

WHEREFORE, Plaintiffs request that the Court ORDER: (1) identification of LRC, House, Senate, committee, and staff custodians; (2) reasonable searches of responsive repositories; (3) production within each recipient's possession, custody, or control of (a) SB 185's earliest development through enactment; (b) older antecedents; (c) warnings, agency communications and attachments, data, comparator and impact analyses, educational and fiscal assessments, alternatives, receipt and distribution records, and records of mitigation or responsive revision; (d) a log identifying authors, recipients and roles, dates, subject matter, protection invoked. Plaintiffs further request that the Court resolve disputes through specific submissions, targeted *in camera* review if necessary, and appropriate protective restrictions; allow institutional testimony necessary to explain production, searches, custody, and remaining nonprivileged topics. Additionally, LRC's oversight of implementation remains relevant because the General Assembly retains authority to end exigency on CPE's recommendation and LRC receives statutory reports. 2026 Ky. Acts ch. 120, §§ 1(2), 1(3)(b)1, 3(4)(b).

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CERTIFICATE OF SERVICE

I certify that on October 20, 2026, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice to all counsel of record.

*/s/ James M. Morris*
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