UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

CIVIL ACTION NO. 3:26-CV-00035-CHB-EBA

SAMANTHA WIGGINTON, *et al.*, PLAINTIFFS,

v.

COMMONWEALTH OF KENTUCKY, *et al.*, DEFENDANTS.

POSITION STATEMENT OF *AMICUS CURIAE* SPEAKER DAVID W. OSBORNE AND ON THE DISCOVERY DISPUTE BETWEEN PLAINTIFFS AND THE LEGISLATIVE RESEARCH COMMISSION

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Interest of *Amicus Curiae* and Summary

Plaintiffs seek documents and depositions to examine "the intent of the members" of the General Assembly in enacting Senate Bill 185. David W. Osborne, Speaker of the Kentucky House of Representatives, presides over the House whose members' deliberations are at issue. They agree with LRC that legislative immunity bars this discovery and do not repeat LRC's arguments. He writes to answer question: if the Court treats this dispute, as it did in *Glowgower v. Bybee-Fields*, 2022 WL 4042412, at *8–9 (E.D. Ky. Sept. 2, 2022), as one of legislative *privilege*, what standard governs?

The answer is not the five-factor balancing test of *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y. 2003). The Speaker does not ask the Court to retreat from *Glowgower*'s recognition that a state legislator's privilege is qualified. The question is what it takes to overcome it. The privilege yields only in "extraordinary instances" where "important federal interests are at stake, as in the enforcement of federal criminal statutes." *La Union del Pueblo Entero v. Abbott*

("*LUPE*"), 68 F.4th 228, 237–38 (5th Cir. 2023) (quoting *United States v. Gillock*, 445 U.S. 360, 373 (1980)). A private civil action challenging a state statute is not such a case.

1. *Glowgower* did not adopt *Rodriguez* as a rule of decision, and the law has moved since.

Glowgower described the *Rodriguez* factors, from a New York district court that other district courts had used, but resolved the motion to compel on other grounds without weighing those factors. The dispute there concerned the Chief Clerk's contracts and the costs of an impeachment committee, not the deliberations of members in enacting a statute, which lie at the core of the privilege.

Since *Glowgower*, three more courts of appeals have rejected *Rodriguez*-style balancing in civil cases. *LUPE*, 68 F.4th at 235–40; *In re N.D. Legis. Assembly*, 70 F.4th 460, 465 (8th Cir. 2023), *vacated as moot*, 144 S. Ct. 2709 (2024) (mem.); *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1344–45 (11th Cir. 2023). They joined the First and Ninth Circuits. *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187–88 (9th Cir. 2018). As the Eleventh Circuit put it, "[n]one of our sister circuits have subjected the privilege to such a test, and at least four of them have rejected this approach." *Pernell*, 84 F.4th at 1345. The Sixth Circuit has not adopted *Rodriguez*, and the district decisions in this Circuit that applied it predate this authority. Federal common law governs privilege "in the light of reason and experience," Fed. R. Evid. 501, and that experience now points one way.

2. *Rodriguez* rests on a premise that does not fit a private civil suit.

Rodriguez took its premise, that a state legislator's privilege "must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides," from *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987). *Rodriguez*, 280 F. Supp. 2d at 95. This illustrates the tension in the application of the legislative privilege: outside the context of criminal

law (and even there only in limited circumstances), this question is *not* a supremacy clause issue. The privilege predates our Constitution and our Republic and is an inherent function of government – inextricably an essential part of the legislative function. *Rodriguez* was a federal grand-jury investigation, and its reasoning rested on federal supremacy when the national government enforces its criminal law. *In re Grand Jury*, 821 F.2d at 954. That is the *Gillock* exception, and *Gillock* itself reaffirmed that "a state legislator's common-law absolute immunity from civil suit survived the passage of the Civil Rights Act of 1871." 445 U.S. at 372. "[F]or purposes of the legislative privilege, there is a fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government." *In re Hubbard*, 803 F.3d 1298, 1311–12 (11th Cir. 2015). *Rodriguez* carried a rule built for the federal sovereign into private civil litigation without accounting for that difference. *See Coads v. Nassau Cnty.*, 84 Misc. 3d 813, 836–37 (N.Y. Sup. Ct. 2024). *Rodriguez*, however, was *wrong* - at least when applied to the context of civil litigation or statutory challenges. The privilege extends from Parliament to Congress to the Kentucky General Assembly to the city council of tiny Concord, Kentucky – it is not a state versus federal question, it is a question of a legislative body not yielding to an executive or judicial body, pre-dating even the time when the judicial and legislative functions were separated.

This case sits at the civil end of that line. Plaintiffs are private litigants, and the General Assembly and its members are not parties. The privilege has been held not to yield even to the United States enforcing the Voting Rights Act, because such a suit is "fundamentally disanalogous to a sovereign enforcing its criminal laws." *League of United Latin Am. Citizens v. Abbott*, 708 F. Supp. 3d 870, 884 (W.D. Tex. 2023). A private action has a weaker claim still. The Sixth Circuit, too, recognizes that the Supreme Court "generally ... equate[s]" state legislators' protection with

the Speech or Debate Clause, "uses the relevant case law interchangeably," and applies it to prospective relief as well as damages. *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 364 (6th Cir. 2022).

3. The *Rodriguez* factors collapse into ordinary discovery and would swallow the privilege.

The first two factors, relevance and the availability of other evidence, "simply mirror the general standard for discovery of non-privileged material." *Pernell*, 84 F.4th at 1345. The third and fourth, the "seriousness" of the litigation and the government's role, favor disclosure in every constitutional or civil-rights challenge to a state statute. That leaves one factor for the privilege, outvoted four to one before any facts are considered. A privilege that yields whenever material would otherwise be discoverable is no privilege. That is why the Eleventh Circuit refused to adopt "a manipulable balancing test ... that links the derogation of the legislative privilege to a subjective judgment of the case's importance." *Id.* at 1344–45.

The problem is acute where, as here, the stated aim of discovery is legislative intent. "The claim of an unworthy purpose does not destroy the privilege," *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), "even when constitutional rights are at stake," *LUPE*, 68 F.4th at 238. An exception for intent claims would render the privilege "of little value." *Lee*, 908 F.3d at 1188 (quoting *Tenney*, 341 U.S. at 377). For intent claims, the Supreme Court directs litigants to the public record and cautions that legislators' testimony "frequently will be barred by privilege." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). And one member's views prove little, because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

4. The governing standard, applied, and a workable order.

Under the correct standard, Plaintiffs' suit is not an extraordinary case: it is a private suit to enforce individual rights, not one resembling a federal criminal prosecution. *See LUPE*, 68 F.4th at 238–39; *LULAC*, 708 F. Supp. 3d at 884. Even under *Rodriguez* the result would be the same. The public record (bill versions, votes, House and Senate Journals, committee minutes and video, and fiscal notes) is available, and the chilling effect is concrete. Members rely on candid exchanges with House and LRC staff to draft and evaluate legislation. Exposing those exchanges whenever an enactment is challenged would change how that work is done.

The Speaker proposes that the Court: (1) decline to compel depositions of members or legislative staff, including LRC staff, about legislative acts, deliberations, or motives; (2) limit document discovery to the public legislative record and administrative records outside the legislative process; and (3) enter a Federal Rule of Evidence 502(d) order that no production waives any member's or chamber's privilege.

Conclusion

The Speaker asks the Court to decline to apply the *Rodriguez* balancing test, to hold that the legislative privilege bars the discovery Plaintiffs seek from the legislative branch, and to resolve the dispute consistent with the framework above.

Respectfully submitted,

s/ D. Eric Lycan
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