IN THE CIRCUIT COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

PAMELA MOSES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. CT-1579-19**
	)	**Division I**
	)	
	)	**Judge Felicia Corbin-Johnson**
MARK GOINS, TRE HARGETT, and JONATHAN SKRMETTI, in their official capacities,	)	**Judge Suzanne S. Cook**
	)	**Judge Barry Tidwell**
	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF NON-PARTY OFFICE OF LEGAL SERVICES' MOTION TO QUASH AND FOR A PROTECTIVE ORDER

Non-Party Office of Legal Services ("OLS") has moved to quash Plaintiff's subpoena *duces tecum* and for a protective order. OLS submits this reply to Plaintiff's response to that motion. OLS has explained, and the record establishes, that it is entitled to legislative immunity granted under the Speech or Debate Provision ("Provision") of the Tennessee Constitution, Tenn. Const. art. II, § 13, because all of its duties and functions fall within the sphere of legitimate legislative activity. (OLS Mem. in Support of Mot. to Quash, at 5-11.)[1] Therefore, OLS is entitled

[1] Plaintiff asserts that this evidentiary privilege should be phrased as "legislative privilege" rather than "legislative immunity." (Pl.'s Resp. at 1 n.1.) But courts have used the terms "immunity" and "privilege" "interchangeably" in discussing evidentiary protections granted by constitutional speech or debate provisions. *See Am. Trucking Ass'ns., Inc. v. Alviti*, 14 F.4th 76, 86 n.6 (1st Cir. 2021). Further, Plaintiff references "legislative privilege" in an apparent effort to conflate the Provision's protections with the related, but limited, protections under the common law. *Id.*; (Pl.'s Resp. at 1 n.1, 10-12).

to absolute protection from being compelled to produce documents. The Court should grant OLS' motion to quash and for a protective order.

ARGUMENT

The Court Should Grant Non-Party OLS' Motion to Quash and for a Protective Order.

To begin, Plaintiff concedes two points. First, she does not dispute that the Provision's protections apply to OLS as a staff, aide, or alter ego of members of the General Assembly. (OLS' Mem. in Support of Mot. to Quash, at 8-10.) Second, she does not dispute that the evidence before the Court demonstrates that OLS only provides legal services to General Assembly members within the sphere of legitimate legislative activity. (*Id.* at 1-3, 9-11.) With those points in mind, the Court should grant OLS' motion.

I. The Tennessee Constitution Provides Absolute Protections to the General Assembly for Legitimate Legislative Activities.

Plaintiff asserts that the Provision does not include an evidentiary privilege, that any evidentiary privilege does not apply to the production of documents, and that the privilege is otherwise qualified. (Pl.'s Resp., at 3-7, 10-12.) She is wrong on all fronts.

A. The Speech or Debate Provision protects legislators from suit and from compulsory evidentiary process.

Plaintiff says that the Provision provides only "a limited immunity from liability, not an evidentiary privilege." (Pl.'s Resp. at 3-4.) Not so. In relevant part, the Provision provides that "Senators and Representatives . . . shall not be questioned in any other place" "for any speech or debate in either House." Tenn. Const. art. II, § 13. As OLS previously discussed, the Provision is "'almost identical'" to its Article I, Section 6, Clause 1 counterpart in the United States Constitution (the "Speech or Debate Clause" or the "Clause"), and so cases interpreting the Clause "'are particularly helpful' in construing" the Provision. (OLS Mem. in Support of Mot. to Quash,

at 6 (quoting *Mayhew v. Wilder*, 46 S.W.3d 760, 774 (Tenn. Ct. App. 2001).) The Supreme Court has also recognized that the Provision provides an "evidentiary privilege" in Tennessee court proceedings. *See United States v. Gillock*, 445 U.S. 360, 368 (1980) (noting that the privilege does not apply in federal prosecutions).

In applying the Clause, federal courts have recognized that it protects legislators from compulsory production of evidence—including subpoenas from private parties seeking legislative documents. *Gravel v. United States*, 408 U.S. 606, 615-16 (1972); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995); *see also Alviti*, *supra*, 14 F.4th at 86 ; *Howard v. Office of Chief Admin. Officer of U.S. House of Representatives*, 720 F.3d 939, 946 (D.C. Cir. 2013); *SEC v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 235 (S.D.N.Y. 2015). State courts ruled likewise in interpreting their state constitutions. *Edwards v. Vesilind*, 790 S.E.2d 469, 526 (Va. 2016); *Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1098 (Ariz. Ct. App. 2003); *accord Smith v. Iowa Dist. Court*, ---- N.W.3d ----, 2024 WL 737318, at *5 (Iowa Feb. 23, 2024). In sum, "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011).

Plaintiff provides no reason to treat the Provision any differently. That Provision mirrors the federal Clause, *see Mayhew*, 46 S.W.3d at 774, and both federal and state courts have concluded that the Clause and its counterparts enshrine an evidentiary privilege for protected parties. Further, Tennessee courts "will not interpret a state constitutional provision differently than a similar federal constitutional provision unless there are sufficient textual or historical differences, or other grounds for doing so." *Phillips v. Montgomery Cnty.*, 442 S.W.3d 233, 243

(Tenn. 2014). While Plaintiff points to various Tennessee Court of Appeals decisions involving defamation actions against local legislators to claim that the Provision only grants "immunity from liability for defamation" (Pl.'s Resp. at 4-5 (emphasis omitted)), none of those decisions involved a subpoena to produce documents, much less one to the General Assembly. Under Plaintiff's view, the Provision would not apply to a member of the General Assembly outside of actions for defamation since the Court of Appeals has only addressed legislative immunity in that context to date. But *Mayhew* involved an action against General Assembly members regarding "the fundamental structure of our state government," so Plaintiff is wrong at the start. 46 S.W.3d at 765-66, 774-76.

In any event, the Tennessee Supreme Court has warned that the lack of "[a prior] occasion to" address a constitutional issue "does not suggest that [the Tennessee Constitution] *should* be interpreted as affording less protection" than its federal counterpart. *Phillips*, 442 S.W.3d at 244. That warning applies here, since Plaintiff identifies no cases—Tennessee or federal— supporting her view, and she otherwise concedes that *Mayhew* cuts against her. (Pl.'s Resp. at 5 n.3.) Since Plaintiff identifies no basis to "place Tennessee at odds with the vast majority" of federal or state courts, this Court should reject her view. *Phillips*, 442 S.W.3d at 244.

B. The Provision does not limit its evidentiary privilege.

Plaintiff contends that the Provision's evidentiary privilege should not bar disclosure of documents, only their use in court proceedings. (Pl.'s Resp. at 4-7.) She relies on a rule derived from the Third Circuit's holding that the Clause provides a privilege "of nonevidentiary use, not of non-disclosure." *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978); (Pl.'s Resp. at 4-7). Both the Provision's meaning and its purpose require rejecting that rule here.

First, the Provision contains no such limitation. Analysis of a constitutional provision "must begin with the language of the instrument" because it "offers a fixed standard for ascertaining" its meaning. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022) (quotations omitted). The Provision provides that legislators "shall not be questioned in any other place" for "any speech or debate in any House." Tenn. Const. art. II, § 13. And the "term 'questioned' should be understood broadly to mean 'subjected to examination by another body.'" *Edwards*, 790 S.E.2d at 477 (citing *Gravel*, 408 U.S. at 616). The plain meaning of the Provision thus prohibits the examination of the General Assembly's legitimate legislative activities "in any other place." It does not limit this examination to nonevidentiary use, court proceedings or to "members or their aides . . . personally." *Brown & Williamson*, 62 F.3d at 420-21 (concluding same under the federal Clause). The "absoluteness" and "sweep" of the Provision's terms protect legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). In sum, under the Provision's plain meaning, a private party "is no more entitled to compel congressional testimony—or production of documents—than it is to sue" legislators. *Brown & Williamson*, 62 F.3d at 420-21.

Second, the underlying purposes for the Provision undercut the Third Circuit's rule. As with its federal counterpart, the Provision is designed "to protect legislative independence" and bar "intrusion by the Executive or Judiciary into the affairs of a coequal branch." *Gillock*, 445 U.S. at 369; *see also Mayhew*, 46 S.W.3d at 774-75. "It also serves the public good by allowing lawmakers to focus on their jobs rather than on motions practice in lawsuits." *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 237 (5th Cir. 2023) (quotations omitted). And it bars a co-equal branch from requiring legislators to "divert their time, energy, and attention from their legislative

tasks to defend the litigation" thereby "delay[ing] and disrupt[ing] the legislative function." *Eastland*, 421 U.S. at 503.

Against this backdrop, most courts conclude that legislative protections "extend[] . . . to the compelled discovery of documents" involving legitimate legislative activities. *In re North Dakota Legislative Assembly*, 70 F.4th 460, 463-64 (8th Cir. 2023); *see also La Union Del Pueblo*, 68 F.4th at 235; *Alviti*, 14 F.4th at 88; *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015); *EEOC*, 631 F.3d at 180-81. Otherwise, the judiciary's enforcement of a subpoena requesting "documents that fall within the sphere of legitimate legislative activity" would "constitute[] interference with the legislative process," "present[] a significant risk of intimidation," "upset[] the checks and balance the Framers envisioned and put in place," *SEC*, 161 F. Supp. 3d at 242 (quotation omitted), and "'chill' legislators from freely engaging" in acts integral to the legislative process, *Ariz. Indep.*, 75 P.3d at 1098-99 & n.10. And again, the record establishes that OLS' functions and duties are inextricably bound to "the sphere of legitimate legislative activity" and go no further. *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quotations omitted); (OLS' Mem. in Support of Mot. to Quash, at 1-3, 9-11); *see also Edwards*, 790 S.E.2d at 483 & n.13 (concluding that legislative privilege "cover[ed] all delegated legislative work within" OLS' Virginia counterpart). The Provision provides an "absolute bar to interference" with OLS' functions and duties. *Eastland*, 421 U.S. at 503 (quotations omitted).[2]

[2] Plaintiff says that she requests documents that fall outside the legitimate legislative sphere and that OLS must disclose all communications with third-parties. (Pl.'s Resp. at 12-14.) Nonsense. The *only* evidence before the Court establishes that OLS provides legal services in the "formulation, proposal, and enactment of legislation" in aid of the discharge of a legislator's official legislative duties; OLS is not authorized to do more. (OLS Mem. in Support of Mot. to Quash, at 1-3, 9-11, & Exs. 1-2.) That Plaintiff requests materials falling outside of those duties and functions does not somehow change OLS' actions that plainly fall within the legitimate

C. The Provision's protections are absolute.

Plaintiff asserts that the Provision provides only a "qualified privilege" that is "overcome in this case by compelling interests" involving her allegations of discriminatory intent in the enactment of her challenged statutes. (Pl.'s Resp. at 10-11.) But caselaw forecloses that assertion because the Provision's federal counterpart provides "an absolute evidentiary privilege," *Alviti*, 14 F.4th at 86, and Plaintiff provides no basis to depart from that conclusion, *see Phillips*, 442 S.W.3d at 243-44. Additionally, Plaintiff's reliance on *League of Women Voters of Fla. v. Fla. House of Representatives* is misplaced because, unlike the Tennessee Constitution, "the Florida Constitution does not include a Speech or Debate Clause." 132 So. 3d 135, 143 (Fla. 2013).[3]

II. Plaintiff's Subpoena Requested Information at the Heart of the Provision's Protections and Obviated the Need for a Privilege Log.

Finally, Plaintiff asserts that OLS' motion to quash is unripe because it did not produce a privilege log. (Pl.'s Resp. at 7-9.) She contends that "[u]nderstanding how and why the challenged permanent disenfranchisement statues were proposed and enacted is critical" to her claims that they were enacted with discriminatory intent. (Pl.'s Resp. at 11.) And Plaintiff further asserts that her requested documents likely "bear directly on whether" they were enacted "in whole or in part[] to target Black Tennesseans." (*Id.* at 9.)

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legislative sphere. Further, OLS can only provide legal services in aid to the General Assembly, not to third parties. In any event, third-party communications discussing "issues that bear on . . . legislation" fall within the sphere of legislative activity are protected. *La Union Del Pueblo*, 68 F.4th at 235-36 (5th Cir. 2023) (quotations omitted).

[3] Plaintiff also accuses OLS of attempting a "sword and shield" argument because "Defendants" argued in their motion to dismiss that her allegations are conclusory and inadequate to support a claim. (Pl.'s Resp., at 11.) While Plaintiff's allegations remain conclusory, OLS is a non-party that was not involved in the motion to dismiss.

But Plaintiff's subpoena improperly "strikes at the heart of the legislative privilege." *In re Hubbard*, 803 F.3d at 1310. The "Clause protects against inquiry into acts that occur in the regular course of the legislative process and *into the motivation for those acts*." *United States v. Brewster*, 408 U.S. 501, 525 (1972) (emphasis added). As Plaintiff concedes, the only purpose for her subpoena was "to support [her] lawsuit's inquiry into the motivation behind" the challenged statutes. *In re Hubbard*, 803 F.3d at 1310. To reiterate, OLS only has authority to provide legal services in the discharge of a General Assembly member's official, legislative duties in the formulation, proposal, and enactment of laws. So "none of the information [Plaintiff] sought could have been outside the privilege," and OLS had "no need . . . to peruse the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied to those documents." *In re Hubbard*, 803 F.3d at 1311; *see also Metzger v. Am. Fidelity Assur. Co.*, No. CIV-05-1387-M, 2007 WL 895141, at *3-4 (W.D. Okla. Mar. 22, 2007) (holding no privilege log required where the subpoena requested documents "clearly within the purview of the legislative privilege"); *Edwards*, 70 S.E.2d at 478-79 (noting that a detailed privilege log is not required when a legislator otherwise describes "the function of the evidence requested" and "why the privilege would apply"). In precisely these circumstances, "insist[ing] on unnecessary detail and procedures" in producing a privilege log "would undermine a primary purpose of the legislative privilege—shielding lawmakers from the distraction created by inquiries into the regular course of the legislative process." *In re Hubbard*, 803 F.3d at 1311.

CONCLUSION

For the reasons stated herein and in its Memorandum in Support, the Court should grant non-party OLS' Motion to Quash and for a Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 1st day of March, 2024, a true and exact copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing report. Parties may access this filing through the Court's electronic filing system. Additionally, a copy of the foregoing has been electronically mailed to the following:

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