MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA CONSERVATION VOTERS; JOSEPH LAFROMBOISE; NANCY HAMILTON; SIMON HARRIS; DONALD SEIFERT; DANIE HOGAN; GEORGE STARK; LUKAS ILLION; and BOB BROWN, Plaintiffs, v. CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State, Defendant.	Cause No.: DDV-2023-702 **OPINION AND ORDER ON MOTION TO QUASH**

Montana State Senator Keith Regier, represented by Christian B. Corrigan and Brent Mead, has moved to quash a subpoena and subpoena *duces tecum* served on him on May 29, 2024. Defendant Christi Jacobsen, represented by Michael D. Russell, Thane Johnson, Alwyn Lansing, and Emily Jones, do not

object. Plaintiffs, represented by Constance Van Kley, Dimitrios Tsolakidis, and Rylee Sommers-Flanagan, oppose the motion.

The motion is fully briefed and ready for decision. For the reasons that follow, the motion to quash will be granted in part and denied in part.

BACKGROUND

This case is a partisan gerrymandering challenge to Senate Bill 109 (SB 109), which redistricted the Public Service Commission (PSC) following a federal three-judge panel ruling that the previous legislative districting scheme for the PSC violated the "one-man, one-vote" rule. Senator Keith Regier (representing Senate District 3) sponsored both SB 109 and the primary amendment to SB 109 that ultimately became law.

Earlier this year, the Court denied Secretary of State Christi Jacobsen's motion to dismiss. The Court tentatively (in the context of a preliminary injunction motion) endorsed applying the analysis for evaluating racial gerrymandering claims in *Shaw v. Reno*, 509 U.S. 630 (1993) to political gerrymandering cases brought under Article II, Section 4 of the Montana Constitution. (Op. & Or. on Mots., Dkt. 29 at 40–41.) Under this approach, the challenger must "show either circumstantially or through direct evidence" that political discrimination prohibited by Article II, Section 4 was "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." (*Id.* at 40 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).)

One aspect of Plaintiffs' case is the process and timing by which SB 109 was amended which they offer as evidence of a discriminatory motive. In response, the Secretary has identified statements by Senator Regier in committee

purporting to explain his reasoning for the districting scheme and denying a purpose to gerrymander on the basis of political belief. (*Id.* at 8.) This Court declined at the pleadings stage to second-guess Senator Regier's statements, but the Court noted that "he is but 1 of 150 legislators, and he is only 1 of the 95 legislators who ultimately voted to enact SB 109 as amended." (*Id.* at 42.)[1] The Court also observed that "the record contains no information about who assisted Senator Regier in drafting the maps and what motivations they may have harbored. And as always, legislative history must be viewed with care." (*Id.* at 42.) The Court did not express an opinion on the extent to which that information is discoverable or admissible.

Discovery is currently ongoing in this matter, with trial set for December. As part of their efforts to plumb the motivations behind enactment of SB 109, Plaintiffs have requested the "junque file"[2] from the Legislature, but the file contains no correspondence or other background materials that would shed light on legislative intent for the districts adopted. (Pls.' Br. in Opp. to State Sen. Keith Regier's Mot. to Quash, Van Kley Aff. ¶¶ 3–4, Dkt. 50 at 23; Ex. A, Dkt. 50 at 25–45.) Plaintiffs have served Jacobsen with discovery requests, but Jacobsen has generally responded by stating she was not involved in the drafting process and does not possess any responsive information or documents. (Van Kley Aff. ¶ 5; Ex. B, Dkt. 50 at 47–53.)

On May 16, 2024, Plaintiffs served a subpoena *duces tecum* on Senator Regier along with a subpoena to appear and testify at a deposition.

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[1] This Court is not the only one to observe that a single legislator's motives do not necessarily reflect the motivations of the whole body. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) ("an isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body"); *Holmes v. Farmer*, 475 A.2d 976, 989 (1984) (Kelleher, J., concurring).

[2] The junque file contains bill drafts, bill drafting requests, background material, and correspondence with the legislative staffers tasked with drafting a bill. *See* Montana Legislative Services Division, 2022 Montana Bill Drafting Manual § 1-6(5), Available: https://leg.mt.gov/content/Publications/2022-bill-drafting-manual.pdf

(Van Kley Aff., ¶ 7.) After some back-and-forth with Senator Regier's counsel, Plaintiffs issued the current amended subpoena and subpoena *duces tecum* on May 29, 2024. (Van Kley Aff., ¶¶ 8–9.) The subpoena sets a deposition for August 12, 2024, and includes a list of documents to be produced one week earlier. (Mead Decl. Ex. A, Dkt. 49 at 4–5.) The subpoena commands the production of materials in Senator Regier's possession pertaining to, among other things, documents and communications related to redistricting criteria, the maps incorporated into the various submitted drafts of SB 109, any other proposed or draft maps, communications with other legislators, officials, and outside persons and groups about SB 109, and any information related to partisanship or voter tendencies. (*Id.* at 6.) On May 30, 2024, Senator Regier objected to the amended subpoena. (Mead Decl. Ex. B, Dkt. 49 at 12–15.)

The instant motion to quash followed.

STANDARDS

Rule 45 of the Rules of Civil Procedure permits a party to compel a non-party to attend a deposition and "produce designated documents, electronically-stored information, or tangible things in that person's possession." Mont. R. Civ. P. 45(a). Such a subpoena may be quashed if, among other things, the subpoena "requires disclosure of privileged or other protected matter, if no exception or waiver applies." *Id.* 45(d)(3)(A)(iii).

DISCUSSION

Federal courts have recognized the United States Constitution as guaranteeing members of Congress a legislative privilege. This privilege is traditionally rooted in two sources: (1) the separation of powers implied from the structure of the Constitution; and (2) the Speech of Debate Clause found at

Article I, Section 6, Clause 1 of the United States Constitution. *See Smith v. Iowa Dist. Ct.*, 3 N.W.3d 524, 531 (Iowa 2024). Legislative privilege is widely recognized as having three components: (1) immunity from suit or prosecution for a member of Congress's legislative acts; (2) a privilege against the introduction of legislative acts into evidence in a judicial proceeding; and (3) a privilege against compelled testimony about a member's legislative acts. *In re Sealed Case*, 80 F. 4th 355, 365 (D.C. Cir. 2023).

Federal courts have also recognized a common law privilege that protects state legislators who are haled into federal court. *See Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186–1187 (9th Cir. 2018); *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021). The common law privilege draws on many of the same policies that drive the constitutional privilege, but there are important differences. While the constitutional privilege provides absolute protection to members of Congress where it applies, the privilege protecting state legislators in federal court is generally viewed as qualified. *See Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 334–336 (E.D. Va. 2015). Specifically, the common law privilege is qualified "when it stands as a barrier to the vindication of important federal interests and insulates against effective redress of public rights" and legislators are not facing personal liability. *Bethune-Hill*, 114 F. Supp. 3d at 335. Likewise, the common law privilege does not confer the same immunity against federal criminal prosecution that a member of Congress would enjoy. *See United States v. Gillock*, 445 U.S. 360, 373 (1980).

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This, of course, is not a case brought in federal court, and Senator Regier is not a defendant in this action. Rather, Senator Regier argues that the Montana Constitution confers on him the same legislative privilege against compulsory testimony and production of documents that the United States Constitution provides to members of Congress. Plaintiffs dispute the existence of this privilege under the Montana Constitution and argue that any such privilege is qualified and must yield to the state's interests in enforcing the right to know and the right against political discrimination. The question for the Court, therefore, is to determine the existence and scope of legislative privilege[3] under the Montana Constitution, and whether it protects, in whole or part, against (a) compulsory testimony; and (b) compulsory production of materials in connection with legislative acts.

1. Compulsory Testimony

Although it has rarely come up in Montana courts, the Montana Supreme Court also recognizes legislative privilege, and it similarly grounds the privilege in an analogue to the Speech or Debate Clause as well as the principle of separation of powers. *See Cooper v. Glaser*, 2010 MT 55, ¶¶ 10–14, 355 Mont. 342, 228 P.3d 443.

Unlike the United States Constitution, the Montana Constitution has an express provision governing the separation of powers. *See* Mont. Const. art. III, § 1.[4] Like the United States Constitution, the Montana Constitution expressly provides for legislative immunity:

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[3] The various components of "legislative privilege" are sometimes broken down into distinct "privileges" and "immunities." *E.g., Alviti*, 14 F.4th at 86 n.6. Even these divisions are not clean: for example, the evidentiary privilege is characterized by some cases as a "privilege," *In re Sealed Case*, 80 F.4th at 365, and in some cases as a form of "use immunity," *In re Fattah*, 802 F.3d 516, 528 (3d Cir. 2015). Rather than dwell on the semantics of these distinctions, the Court will refer to "privilege" to refer to all three forms of recognized privilege.

[4] Notably, two states that lack an analogue to the Speech or Debate Clause in their state constitutions have nevertheless found a legislative privilege that is implied in part from their constitutional provisions guaranteeing

> **Immunity.** A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.

Mont. Const. art. V, § 8. This was adopted with virtually no debate at the 1972 Constitutional Convention and is substantially similar to the protections afforded in the 1889 Constitution, which provided:

> The members of the Legislative Assembly shall, in all cases, except treason, felony, violation of their oath of office and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

1889 Mont. Const. art. V, § 15. The 1889 guarantee was itself taken almost verbatim from the Speech or Debate Clause from the United States Constitution:

> The Senators and representatives. . . . shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

U.S. Const. art. I, § 6, cl. 1.

Indeed, the concept of legislative privilege has even "deep[er] historical roots" than that. *See Lee v. City of Los Angeles*, 908 F.3d 1175, 1186 (9th Cir. 2018). As the Supreme Court has often recounted, legislative privilege originated from conflict between the English Parliament and the Tudor

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separation of powers. *See Smith v. Iowa Dist. Ct.*, 3 N.W. 3d 524, 534–535 (Iowa 2024); *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 145–146 (Fla. 2013).

and Stuart monarchies during the sixteenth and seventeenth centuries, a conflict that culminated in the English Civil War and then the Glorious Revolution. *See United States v. Johnson*, 383 U.S. 169, 178 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). Amid these tensions, the Crown would seek to cow Parliament's assertion of authority by using "the criminal and civil law to suppress and intimidate critical legislators." *Johnson*, 383 U.S. at 178. From these conflicts and the Parliamentary victory that resulted, the legislative privilege emerged. Using words remarkably similar to those found in its modern counterparts, the English Bill of Rights of 1689 provided: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, c. II.

The Framers of our country shared these concerns with use of legal proceedings to invade legislative independence. Prior to independence, recognition of the legislative privilege for colonial assemblies was regarded by colonists "as a fundamental privilege without which the right to deliberate would be of little value." Steven F. Huefner, The Neglected Value of the Legislative Privilege in State Legislatures, 45 Wm. & Mary L. Rev. 221, 231 (2003) (quoting Mary Patterson Clarke, Parliamentary Privilege in the American Colonies 97, 121–131 (1943)). At least eight colonies recognized legislative privilege prior to independence. *Id.* at 230–231 n.22. Likewise, early state constitutions and the Articles of Confederation recognized the legislative privilege as essential to the ability of the people's representatives to deliberate. *See id.* at 231–232. Thomas Jefferson and James Madison explained its purpose and importance, stating that "to put the representative into jeopardy of criminal prosecution, of *vexation, expense, and punishment* before the Judiciary, if his communications, *public or*

private, do not exactly square with their ideas of fact or right" would be to endanger the separation of powers and undermine representative democracy. *Id.* at 232 (quoting 8 Works of Thomas Jefferson 322–323 (1797), reprinted in 2 The Founders' Constitution 336 (Kurland & Lerner eds., 1987)) (emphasis added).

Historically, the privilege has been read to apply more broadly than its bare text would suggest. An oft-cited passage from an early case on the meaning of the legislative privilege, *Coffin v. Coffin*, 4 Mass. 1, 27 (Mass. 1808) (Parsons, C.J.), held:

> These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

The United States Supreme Court has followed suit. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (the legislative privilege is not limited to "words spoken in debate," but also extends to written committee reports, resolutions, votes, and "things generally done in a session of the House by one of its members

in relation to the business before it"); *Doe v. McMillan*, 412 U.S. 306, 312–313 (1973) (the Speech or Debate Clause protects members of Congress and their aides from liability "for their actions within the 'legislative sphere'" (quoting *Gravel v. United States*, 408 U.S. 606, 624–625 (1972))); *Johnson*, 383 U.S. at 180 ("the legislative privilege will be read broadly to effectuate its purposes").

The privilege is also not confined to immunity from suit or prosecution in connection with a legislator's legislative acts. The text of the Clause—carried forward to Montana's Constitution—provides that members of the legislative branch may not "be questioned in any other place." Mont. Const. art. V, § 8. This language—characterized by the United States Supreme Court as absolute and sweeping—is read broadly to protect "legislators acting within the sphere of legitimate legislative activity" from "'not only. . . the consequences of litigation's results but also from the burden of defending themselves.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

Thus, the United States Supreme has recognized a testimonial privilege that legislators may invoke to protect against compelled testimony about their legitimate legislative acts. In *Gravel v. United States*, 408 U.S. 606 (1972), the Supreme Court held that neither a United States Senator nor his staffer could be compelled to testify before a grand jury regarding legislative acts. *Gravel*, 408 U.S. at 615–616. The Court emphasized again that the "fundamental purpose" of the Speech or Debate Clause is to "free[] the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Id.* at 618. In a contemporaneously decided case, *United States v. Brewster*, 408 U.S. 501, 525 (1972), the Supreme Court reiterated that it

"is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."

By the time of the Montana Constitutional Convention and the ratification of the Constitution it produced, the principles of legislative immunity from suit or arrest and privilege against compelled testimony regarding a legislator's legitimate legislative acts were firmly embedded in the landscape of American law. It is against the foregoing background that the Montana Constitution was drafted and ratified. *See Nelson v. City of Billings*, 2018 MT 36, ¶¶ 14–15, 390 Mont. 290, 412 P.3d 1058 (courts should evaluate constitutional intent "in light of the historical and surrounding circumstances under which the Framers drafted the Constitution"); *Grossman v. Mont. Dep't of Natural Res.*, 209 Mont. 427, 682 P.2d 1319 (1984) (the Constitution "assumes the existence of a well understood system of law which is still to remain in force and to be administered, but under constitutional limitation"). And what little discussion of Article V, Section 8 occurred at the Convention evinced an intent to carry over the similar 1889 guarantee with some cosmetic upgrades and minor tweaks. Const. Convention proceedings, Verbatim Tr. 595 (Del. Robinson) ("Section 8 is almost exactly like Section 15 in Article V of our present Constitution."). There is no suggestion that the Convention delegates intended to modify the traditional scope of the legislative privilege in any way.

By contrast, the right to know was substantively debated at the Convention. The right is now codified in the Constitution as follows:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the

> demand of individual privacy clearly exceeds the merits of public disclosure.

Mont. Const. art. II, § 9. The right to know—a provision unique to Montana's constitution—reflects a broad commitment by the Framers and the public to transparency and public accountability in government. *Shockley v. Cascade County*, 2014 MT 281, ¶ 20, 376 Mont. 493, 336 P.3d 375. Nevertheless, the right is not absolute. It also does not represent a general abrogation of governmental privileges. To the contrary, the Framers disclaimed any intention "to abolish, supersede, or alter preexisting legal privileges applicable to government proceedings and documents." *Nelson v. City of Billings*, 2018 MT 36, ¶¶ 20–22, 390 Mont. 290, 412 P.3d 1058. Thus, privileges "ingrained in Montana's legal landscape at the time the 1972 Montana Constitution was drafted and ratified" are not abrogated or limited by the right to know. *See Nelson*, ¶ 27. This includes established prerogatives of the branches of government and is why, for example, the right to know does not alter the tradition of secrecy in judicial and jury deliberations. *Nelson*, ¶ 21; *see also McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 48 & n.9, 405 Mont. 1, 493 P.3d 980.[5]

Plaintiffs argue the Court must interpret the scope of Article V, Section 8 in light of the right to know. They emphasize that nothing in the limited Convention record on this provision suggested an intention for legislative

[5] This Court has in several recent cases rejected assertions of various forms of executive privileges. *See O'Neill v. Gianforte*, Cause No. CDV-2021-951, Or. on Cross Mots. for Summ. J., Dkt. 17 at 8–15 (Dec. 14, 2022) (on appeal) (executive and deliberative process privileges); *Mont. Env. Info. Ctr. v. State*, DDV-2022-209, Op. & Or. on Pending Mots. & Writ of Mandate, Dkt. 72 at 12–17 (June 23, 2023) (on appeal) (pending litigation privilege). In both cases, however, the basis for rejection of the asserted privileges—none of which are mentioned in the Constitution—was the failure to establish the provenance of the privileges in Montana law prior to 1972. By contrast, the legislative privilege is both textual and part of a centuries-old legal tradition. Thus, these cases are of no assistance here.

immunity to create an exception to the right to know. In this Court's view, Plaintiffs have the analysis exactly backwards. The Supreme Court declined in *Nelson* to infer that the Framers intended the right to know to abrogate the attorney-client and work-product privileges for public bodies "without a single acknowledgment of such an intention during the convention debate." *Nelson*, ¶ 28. As the sheer number of Supreme Court decisions on the subject indicate, the early 1970s were a busy time in the field of legislative privilege, including the very public fights over the publication of the Pentagon Papers (the subject of *Gravel*). *See* Huefner, *supra*, at 250 (recounting the relatively large number of Supreme Court decisions on the scope of the legislative privilege between 1966 and 1979). It is not reasonable to suggest that the Convention delegates or ratifying public (to the extent they thought about it at all) intended to circumscribe the meaning or scope of an express legislative immunity provision that was nearly a cut-and-paste of its 1889, 1789, and 1689 forebears without a single word on the subject.

Thus, the Court concludes that like its federal analogue, Article V, Section 8 guarantees legislators a privilege against testifying in connection with their legislative acts. Montana has not addressed the question[6], and so the Court looks to federal authority to understand the scope of the testimonial privilege.

The testimonial privilege first explicitly recognized in *Gravel* was expressed in absolute terms: "We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting." *Gravel*, 408 U.S. at 616. Two years later, the Supreme Court reiterated the

[6] The only case brought under Article V, Section 8 is *Cooper v. Glaser*, 2010 MT 55, 355 Mont. 342, 228 P.3d 443, and it concerned immunity from suit, not compelled testimony. Noting the paucity of Montana cases on the subject, it notably looked to federal law for guidance. *Cooper*, ¶¶ 11–12.

absolute nature of the protection, noting the "absoluteness of the terms 'shall not be questioned' and the sweep of the terms 'in any other Place.'" *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975). Numerous Supreme Court opinions have since emphasized that the subjective motivations of legislators deserve particular protection. *Eastland*, 421 U.S. at 508; *Brewster*, 408 U.S. at 525; *Johnson*, 383 U.S. at 180; *Tenny*, 341 U.S. at 377 ("The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial. . . or to the hazard of a judgment against them based upon a jury's speculation as to motives."). Lower federal courts applying the testimonial privilege have accorded it absolute or near-absolute status. *See, e.g., Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 86 (1st Cir. 2021); *United States v. Renzi*, 769 F.3d 731, 749 (9th Cir. 2014) [*Renzi II]* (holding that the testimonial privilege is absolute and is not subject to weighing against a defendant's right to present a defense); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418 (D.C. Cir. 1995).

Plaintiffs contend that the "clear majority of federal circuit cases" view "privilege as qualified, not absolute." (Br. in Opp. to Regier's Mot. to Quash, Dkt. 50 at 10.) But the citations they offer are from cases discussing the scope of the federal common law privilege, which does not provide the same degree of protection. *See Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 531 (7th Cir. 2011); *United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980). As discussed earlier, federal courts have generally not afforded absolute protection where the common law evidentiary and testimonial privileges apply. *Doe v. Pittsylvania County*, 842 F. Supp. 2d 906, 920 (W.D. Va. 2012); *Alviti*, 14 F.4th at 87; *Gillock*, 445 U.S. at 374 (noting that in federal court in a

federal question case, the common law privilege, and not the state constitution's speech or debate clause, governed the privilege that could be claimed by a state legislator). These cases do not answer how a state court should address an assertion of privilege brought under the state constitution. Nor can the Court find refuge in *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013) (adopting a qualified privilege under the Florida Constitution), because the Florida Constitution does not have a Speech or Debate Clause.

This Court is bound by *Nelson.* Thus, this Court's charge is not to interpret the Montana Constitution with a particular outcome in mind, but rather to interpret it according to the Framers' intent, considering "not only the plain meaning of the language used, but also. . . the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter they faced, and the objective they sought to achieve." *Nelson*, ¶ 14. A careful and neutral review faithful to the analysis prescribed in *Nelson* makes plain that the Framers intended Article V, Section 8 of the Montana Constitution to follow its federal counterpart. The text, history, and surrounding circumstances thus compels but one conclusion: as a matter of first principles, Article V, Section 8 of the Montana Constitution confers an absolute testimonial privilege for state legislators regarding their legislative acts.

There is little doubt that the information sought implicates the legitimate legislative acts of Senator Regier. The Montana Supreme Court has recognized that "a legislative body has power to secure needed information in order to legislate" and that this "power of inquiry. . . is an essential and appropriate auxiliary to the legislative function." *McLaughlin v. Mont. State*

Legislature, 2021 MT 178, ¶ 6, 405 Mont. 1, 493 P.3d 980. This conclusion holds equally true under federal law. *See Eastland*, 421 U.S. 491, 504 (1975) ("[T]he power to investigate is inherent in the power to make laws because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."). Thus, legislative fact-finding is part of the "sphere of legitimate legislative activity" protected by legislative privilege. *Id*. at 506. The communications and documents sought all relate directly to the information Regier gathered and relied upon in drafting legislation. These are all core legislative actions well within the scope of the privilege.

Plaintiffs indisputably seek to depose Senator Regier about legislative acts—in particular, the fact-finding underlying SB 109 and his communications with others, including legislators, in the process of getting SB 109 passed and enacted into law. The effort to compel Senator Regier to sit for a deposition on these matters will therefore be quashed.

2. Production of Documents

The story gets somewhat more complicated when it comes to requests for production of documents. The question whether legislative privilege includes a privilege against compulsory document production lacks the same historical pedigree as does the classical testimonial privilege. No Supreme Court decision before or since 1972 has expressly answered the question. *See United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 659 (D.C. Cir. 2007). The first federal appellate decisions this Court could locate addressing such a privilege arose in 1978, when the Third Circuit rejected a nondisclosure privilege in the context of a federal grand jury investigation. *In re Grand Jury*

Investigation, 587 F.2d 589, 597 (3d Cir. 1978). That court declined to extend the privilege beyond direct questioning, reasoning that the Speech or Debate Clause "is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy." *Id.* at 597. In a federal criminal case, the Ninth Circuit similarly declined to recognize a nondisclosure privilege where the member of Congress where the underlying cause of action is not itself precluded by legislative immunity and other legitimate governmental interests outweigh the purposes behind extending privilege. *United States v. Renzi*, 651 F.3d 1012, 1036 (9th Cir. 2011) [*Renzi I*].

Nevertheless, the majority of cases to address the issue have recognized a privilege against compulsory production of documents, either under the Constitution or under the comparatively limited common law privilege. *See e.g., In re Sealed Case*, 80 F. 4th 355, 365 (D.C. Cir. 2023) (recognizing a "limited" nondisclosure privilege under Speech or Debate Clause); *La Union del Pueblo Entero v. Abbott*, 68 F.4th 228, 236 (5th Cir. 2023) (recognizing a qualified nondisclosure privilege under common law state legislative privilege); *In re Hubbard*, 803 F.3d 1298, 1310–1311 (11th Cir. 2015) (common law state legislative privilege); *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (common law state legislative privilege); *SEC v. Comm. on Ways & Means*, 161 F. Supp. 3d 199, 242 (S.D.N.Y. 2015); *Smith v. Iowa Dist. Ct.*, 3 N.W.3d 524, 537 (2024) (implied privilege from Iowa Constitution's separation of powers); *In re 2022 Legislative Districting of the State*, 282 A.3d 147, 193–200 (Md. 2022) (recognizing qualified privilege under Maryland Constitution); *Edwards v. Vesilind*, 790 S.E.2d 469, 478 (Va. 2016) (recognizing nondisclosure privilege under Virginia Constitution); *Ariz. Indep.*

Redistricting Comm'n v. Fields, 75 P.3d 1088, 1098–1099 (Az. Ct. App. 2003) (recognizing nondisclosure privilege under Arizona Constitution). The majority position's reasoning is best summed up by the district court in *SEC v. Committee on Ways & Means*:

> A question is a request for information, and a subpoena constitutes an effort to compel the disclosure of information. Whether an Executive Branch subpoena seeks testimony from a Member concerning a "legislative act" or documents that fall "within the sphere of legitimate legislative activity" is, in this Court's view, immaterial under the Speech or Debate Clause. The Executive Branch's issuance of such a subpoena, and the Judiciary's enforcement of it, constitutes interference with the legislative process forbidden by the Speech or Debate Clause. The issuance of such subpoenas, and a judicial practice of enforcing them, also presents a significant risk of intimidation, and upsets the checks and balances the Framers envisioned and put in place.

Comm. on Ways & Means, 161 F. Supp. 3d at 242. Like other forms of official privilege, nondisclosure fosters vigorous fact-finding and provision of candid advice in the legislative process by ensuring legislators gathering information are not "forced to consider at every turn whether evidence received. . . would subsequently have to be produced in court." *United States v. Peoples Temple of Disciples of Christ*, 515 F. Supp. 246, 249 (D.D.C. 1981).

As a general matter, the Court agrees with the majority position that the testimonial privilege embraces at least a limited privilege against compulsory non-disclosure. As a functional matter, requests for production carry the same potential to disrupt the work of the legislature and chill legislative inquiry. To be sure, requests for documents lack the direct confrontation incident to a deposition with a hostile interlocutor. At the same time, a deposition,

however unpleasant, typically only lasts one day. *See* Mont. R. Civ. P. 30(d)(1). By contrast, as any anyone familiar with modern civil practice knows, requests for production are where the meat of the burden and expense in modern civil discovery lies. If a legislator knows that undertaking factfinding or proposing a bill will down the road require them to fork over every scrap of paper (or digital record) they touched in that process, that potential chills legislative activity just as surely as being brought before an adverse tribunal for questioning.

Additionally, as a formal matter, the Constitution says that members of the legislature "shall not be questioned" for their legislative acts. A question—that is, "a query directed to a witness," Black's Law Dictionary 1503 (11th ed. 2019)—is simply a request for information. Just as written expression is no less entitled to protection under the First Amendment than oral "speech," a question does not cease to be a question because it is asked or answered in writing.

That leaves the question of what falls within the scope of the nondisclosure privilege. The District of Columbia Circuit has characterized it as a "limited" protection against compelled disclosure. *See Sealed Case*, 80 F.4th at 365. Importantly, it is generally not recognized to apply to all documents generated in the legislative process. Rather, it protects only against disclosure of "confidential documents concerning intimate legislative activities," *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 U.S. Dist. LEXIS 117656, at *32, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), that "contain[] or involve[] opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." *Hall v. Louisiana*, 2014 U.S. Dist. LEXIS 56165, at *30, 2015 WL 1652791 (M.D. La. Apr. 23, 2014)). It also applies to "information that would reveal such opinions

and motives." *Id.* at *31. The touchstone for protection in these cases is the extent to which the documents require disclosure of legislative deliberations and motivations, consistent with the core precept of the Speech or Debate Clause that legislators may not be required to answer to others about why or how they have legislated. *Johnson*, 383 U.S. at 184–185. This suggests a natural dividing line consistent with these principles: A party may not compel the production of nonpublic documents that contain a legislator's deliberations and motivations or would be tantamount to questioning the legislator about their deliberations and motivations.

Recognition of a privilege so limited is consistent with the Montana Constitution and *Nelson*. While the Framers and the public may have been well aware of the judicial activity surrounding the federal Speech or Debate Clause in the late 1960s and early 1970s, it is not obvious they would have had cause to contemplate the extent to which the privilege would encompass documentary evidence, and thereby run up against the Framers' broad recognition in Article II, Section 9, of a fundamental right to examine the documents of public bodies.

Moreover, the Supreme Court has consistently recognized that the legislative branch is subject to the right to know. *See Willems v. State*, 2014 MT 82, ¶ 16, 374 Mont. 343, 325 P.3d 1204 (Redistricting and Apportionment Commission, an agency primarily located in the legislative branch, is subject to the right to know); *Associated Press v. Usher*, 2022 MT 24, ¶¶ 11–22, 407 Mont. 290, 503 P.3d 1086 (analyzing applicability of open meeting requirements of legislative gatherings under the rubric of Article II, Section 9). Moreover, the legislature itself has long considered itself subject to

the right to know. For many years, it has allowed public access to junque files (which include correspondence with legislative staff and bill drafts), fiscal notes, and even legal review notes. The legislature has also included itself among the public bodies that owe a duty under Montana's public records disclosure statutes. *See* Mont. Code Ann. §§ 2-6-1002(10) (defining "public agency" to include the legislative branch of government), 2-6-1012(1)(d) (designating legislative council as responsible for management of legislative records). Indeed, the legislature even created a cause of action to enforce public records requirements without exempting itself from judicial enforcement. *See id.* § 2-6-1009(3).

Thus, recognition of a legislative nontestimonial privilege does not imply that the legislature is exempt from the right to know or the public records statutes of the state. At the same time, the right to know does not abrogate a legislator's protection from being "questioned" outside the legislature about the legislator's deliberations, thoughts, or motives underlying the drafting, sponsorship, amendment, support, or opposition to legislation. That the privilege permits inquiry of a legislator about their motivations was well-established at the time the Montana Constitution was adopted. *See Brewster*, 408 U.S. at 525 ("It is beyond doubt that the Speech of Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts."); *Johnson*, 383 U.S. at 169, 173–177 (disallowing prosecution predicated on inquiry into the authorship and motivations underlying a speech in Congress); *Tenney*, 341 U.S. at 377 (1951) (forbidding civil suit against state senator predicated on allegedly invidious motives for holding a hearing); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (holding the judiciary's lack of competence to regulate the motives of legislators). Accordingly, the right to

know does not give a member of the public, the executive branch, or this Court license to demand that a legislator come forth and explain their motivation or thought process associated with core legislative functions. The right to know likewise does not permit the compelled production of documents that is tantamount to questioning a legislator about their motivations and deliberations as to core legislative acts.

Plaintiffs have urged the Court to treat any privilege against disclosure of documents as a qualified privilege that may be overcome by other important interests. The Court disagrees. The constitutional prohibition on subjecting a legislator to questioning about their motivations in connection with legislative acts is an absolute protection. *Eastland*, 421 U.S. at 509 n.16 ("The speech or debate protection provides an absolute immunity from judicial interference."). Plaintiffs observe that gerrymandering cases pose special problems, and the Court agrees: gerrymandering cases are the rare cases where a claim is squarely predicated on the subjective motivations of a legislative body. The Court also concurs that legislative privilege makes those claims more difficult to prove, at least insofar as Plaintiffs seek to prove intent using direct evidence. Christopher Asta, *Note: Developing a Speech or Debate Clause Framework for Redistricting Litigation*, 89 N.Y.U.L. Rev. 238, 260–261 (2014). The Court cannot create an exception, however, just to cure this problem. The Court also cannot adopt the framework urged by Asta, for his framework rests heavily on *Gillock*, which in turn rested heavily on a vertical federalism analysis that has no application when the issue is the balance of power between coequal branches of government at the same level of government. *See* Asta, *supra*, at 252; *Gillock*, 445 U.S. at 369–370. Indeed, another law student commentator, equally

concerned with the problems of gerrymandering, echoed the foregoing criticisms of a *Gillock*-like balancing test and argued that such an approach would undermine separation of powers. *See* J. Pierce Lamberson, *Note: Drawing the Line on Legislative Privilege: Interpreting State Speech or Debate Clauses in Redistricting Litigation*, 95 Wash. U.L. Rev. 203, 219 (2017).

Indeed, just as the attorney-client privilege sometimes frustrates the search for truth, the federal Speech or Debate Clause has frustrated efforts to prosecute corrupt members of Congress, a result the Supreme Court has acknowledged. *See, e.g., Johnson*, 383 U.S. at 180–184. Likewise, even though legislative privilege might sometimes enable members of Congress to use their investigative powers to harass private entities or chill the exercise of their free expression, the Court has nevertheless struck the balance in favor of Congress. *Eastland*, 421 U.S. at 508–511. To take a more salient example, in *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018), a gerrymandering case, the Ninth Circuit affirmed the denial of depositions for city officials on grounds of common law privilege. Observing the special issues posed by racial gerrymandering cases, the Ninth Circuit nevertheless declined to find an exception to privilege, noting that "a categorical exception whenever a constitutional claim directly implicates the government's intent" would "render the privilege of little value." *Lee*, 908 F.3d at 1188.

In sum, the Court will find requests for production to be barred by legislative privilege where the request seeks nonpublic information that necessitates disclosure of a legislator's motivations or deliberations or is tantamount to questioning the legislator about their motivations and deliberations.

The Court applies this standard to the requests in Plaintiffs' subpoena as follows:

a. "All documents reviewed by you in preparation for this deposition."

Because the Court is granting the motion to quash the deposition, this request will likewise be quashed.

b. "All documents or communications related to criteria for redistricting the Public Service Commission ("PSC") districts as codified in Senate Bill 109 ("SB 109")."

This request effectively requires Senator Regier to disclose the substance of his fact-finding and investigation underlying his drafting of SB 109. It also bears directly on his motivations for drafting and introducing SB 109 and its subsequent amendments. This is therefore an inquiry into confidential legislative acts and is tantamount to requiring him to be "questioned" in another place about his legislative acts. This request will be quashed.

c. "All documents or communications related to draft or proposed SB 109 maps."

This request effectively requires Senator Regier to disclose the substance of his factfinding, investigation, thought process, deliberations, and motivations. It will therefore be quashed.

d. "All documents or communications that you or your staff relied on, in any way, to evaluate the draft or proposed SB 109 redistricting plans, including, but not limited to, the final plan adopted and codified in § 69-1-104, MCA."

This request effectively requires Senator Regier to disclose the substance of his factfinding, investigation, thought process, deliberations, and

motivations. It will therefore be quashed.

e. "All documents or communications regarding your deliberation of SB 109, including, but not limited to, correspondence with other legislators."

This request directly implicates Senator Regier's deliberations in the legislative process that are protected by legislative privilege. It also implicates the privilege enjoyed by other legislators. This request will therefore be quashed.

f. "Any legislative documents, materials, or reports in your possession regarding SB 109, PSC redistricting, or gerrymandering."

Although this request is phrased somewhat differently, disclosing the documents that Senator Regier has retained implicitly communicates the types of information he relied on, the types of information he considered important enough to keep, and allows for the absence of documents from certain sources to create negative inferences about what he did not regard as important to his decision-making process. This is therefore tantamount to questioning him about his motivations and deliberations. This request will be quashed.

g. "Any documents, materials, or reports you reviewed related to your deliberation of SB 109, including, but not limited to, documents, materials, or reports displaying partisanship data or voter tendencies."

This request directly implicates Senator Regier's deliberations in the legislative process that are protected by legislative privilege. This request will therefore be quashed.

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h. "Any emails, text messages, including on platforms such as Signal or Snapchat, materials, or other correspondence with non-legislative entities related to SB 109, including, but not limited to, members of the Montana District and Apportionment Commission, PSC, or special interest groups."

Communications with non-legislative, nongovernmental persons are generally protected by legislative privilege. Courts are split on the question of whether and when third-party disclosures waive privilege. There is no controversy that a legislator waives privilege by voluntarily disclosing otherwise protected information in a deposition, in testimony, or a public setting outside the legislature[7]. *See, e.g., Gov't of Virgin Islands v. Lee*, 775 F.2d 514, 520 n.7 (3d Cir. 1985); *Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995). There is less unanimity on the question whether legislators waive privilege merely by communicating with third parties, at least in settings not traditionally exposed to public view. Many courts have found that third-party communications, either with constituents or lobbyists, waive privilege. *See, e.g., Favors v. Cuomo*, 285 F.R.D. 187, 211–212 (E.D.N.Y. 2012) (common law state legislative privilege).

The better reasoned position is found in cases like *Pulte Home Corp. v. Montgomery County*, 2017 U.S. Dist. LEXIS 82935, at *20–*22, 2017 WL 2361167 (D.Md. May 31, 2017). That court noted that communication with lobbyists and constituents, which typically occurs outside public view, is "part and parcel of the modern legislative process." *Id.* at *20. The court observed: "The legislative privilege is principally framed to ensure that legislators are free

[7] Because Article V, Section 8 specifically protects "speech or debate," it follows that a legislator's public statements in legislative debates or proceedings cannot be the basis for finding waiver.

to make difficult decisions on controversial issues without fear that their decision-making process will be later scrutinized or that their time will be consumed with responding to discovery requests in litigation." *Id.* at *22. *Pulte* recognizes that legislators must necessarily interact with lobbyists, constituents, interest groups, and other lawmakers when legislating, and a construction of waiver that exposes that process to outside scrutiny would necessarily erode the protections the legislative privilege is meant to afford. Additionally, producing these communications would necessarily convey information about whom Senator Regier chose to consult in drafting legislation and whose advice he gave weight to, which effectively discloses his subjective motivations.

The same holds true for communications with members of the Redistricting and Apportionment Commission. The Redistricting and Apportionment Commission is a public body subject to the right to know. *See Willems v. State*, 2014 MT 82, ¶ 16, 374 Mont. 343, 325 P.3d 1204. At the same time, it operates as an adjunct of the legislature that, while independent of the legislature, performs a legislative function and makes law. *See Willems*, ¶ 29. The legislative nature of its work and its need for independence both suggest that the same policies that underlie the Article V, Section 8 protection for legislators themselves apply with equal force to the redistricting commissioners. *See Ariz. Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1096–1097 (Ariz. Ct. App. 2003). The federal Speech or Debate Clause protects legislative aides acting on behalf of members of Congress. *See Gravel*, 408 U.S. at 622. The Court sees little reason not to extend this protection to a body that is intended, just like the legislature, to be independent, to be deliberative, and to produce enactments with

the force of law. Thus, the Court is not persuaded that communications between Regier and members of the Redistricting Commission that otherwise fall within the scope of legislative privilege have been waived.

With respect to the Public Service Commission, however, the Court reaches a different conclusion. The PSC is an executive branch agency subject to the right to know and the public records statutes of the state. Unlike the Redistricting and Apportionment Commission, the PSC is not shielded by legislative privilege and is the sort of bureaucratic agency that is at the core of what the Framers wanted subject to scrutiny under the right to know. Senator Regier would know that his communications to members of the Public Service Commission may well be public records once they reach a PSC commissioner's inbox and subject to public disclosure pursuant to the public records statutes. Moreover, the purpose of the privilege is to shield Senator Regier's lawmaking activities from inquiry by the executive and judicial branches. Where Senator Regier has voluntarily participated in conversations with members of those branches (including local public officials), he has demonstrated a knowing and intentional relinquishment of his privilege. Accordingly, to the extent Regier communicated with the Public Service Commission or its members, the Court finds that legislative privilege was waived. To the extent Regier wishes to assert another objection or privilege to resist production, Regier must produce a detailed privilege log.

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i. "Any emails, text messages, including on platforms such as Signal or Snapchat, materials, or other correspondence with the Secretary of State's office, other executive branch offices, or county election officials regarding the implementation of SB 109."

For the same reasons as provided above, the Court concludes that communications between Senator Regier and other governmental bodies and non-legislative public officials are not protected by legislative privilege because his engagement with executive branch officials and public officials who would have their own duty to produce his communications pursuant to a public records request necessarily relinquishes the protections of the privilege. If Senator Reger wishes to assert other objections or privileges to production of these communications, Senator Regier will be required to assert those with a detailed privilege log.

In sum, the Court will quash the subpoena *duces tecum* on grounds of legislative privilege except to the extent it command Senator Regier to disclose communications with state and local executive branch officials. To the extent Regier seeks to claim other bases for resisting disclosure, he must prepare a detailed privilege log.

3. Attorney Fees

Finally, Senator Regier seeks his attorney fees, citing Rule 45(d)(1). The Court declines to do so. First, Plaintiffs have prevailed in part, at least to a limited extent. Second, there is little caselaw on this subject, and Plaintiffs have presented a well-developed, nonfrivolous, and good faith argument for an extension of the law that was substantially justified even if ultimately rejected. Moreover, time is of the essence in this case, and so Plaintiffs

must press their claims diligently. Plaintiffs have not engaged in sanctionable conduct and will therefore not be sanctioned.

CONCLUSION

For the reasons stated above,

IT IS ORDERED:

1. Senator Regier's Motion to Quash Subpoena and Subpoena *Duces Tecum* (Dkt. 46), filed June 6, 2024, is **GRANTED** in part and **DENIED** in part as set forth in this Opinion and Order.

2. Senator Regier's request for attorney fees or sanctions is **DENIED**.

DATED this 12th day of July 2024.

/s/ Christopher D. Abbott
CHRISTOPHER D. ABBOTT
District Court Judge

cc: Constance Van Kley, via email
Dimitrios Tsolakidis, via email
Rylee Sommers-Flannagan, via email
Austin M. Knudsen, via email
Christian B. Corrigan, via email
Brent Mead, via email
Emily Jones, via email
Austin James, via email
Michael D. Russell, via email
Alwyn T. Lansing, via email
Thane P. Johnson, via email

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