IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TENNESSEE STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. WILLIAM B. LEE, in his official capacity as Governor of the State of Tennessee, *et al.*, Defendants.	Case No. 3:23-cv-00832 Judge Eric Murphy Judge Eli Richardson Judge Benita Pearson

SUBPOENA RECIPIENTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL, MOTION TO QUASH AND FOR A PROTECTIVE ORDER, AND MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules and Regulations

Other Authorities

INTRODUCTION

Plaintiffs insist that race-based discrimination, not partisan aims, unlawfully drove Tennessee's 2022 redistricting process. But Plaintiffs cite no facts showing that racial considerations predominated over political ones—and indeed agree that race and party preference highly correlate. So now, to suss out alleged secret motives, Plaintiffs seek sweeping discovery into legislative officials' files, internal communications, drafts and memoranda, and much more. Dkt. 59-1 at 12-19. And they seek to probe legislators' and a House lawyer's mental states in a series of depositions. Dkt. 59-5 at 7-8. Plaintiffs' discovery aim is clear: They want insight into "the impetus, rationale, background, or motivation for the Redistricting Plans" held by each legislator. Dkt. 59-1 at 12. The hope is that such fishing will result in a stray statement or a confused response that saves this doomed case.

The legislative privilege absolutely bars Plaintiffs from the discovery they seek. Since well before the Founding, legislative immunity has "protect[ed] the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). In Tennessee, legislative immunity dates back to the State's first Constitution in 1796. *See* Tenn. Const. art. II, § 13. A series of recent circuit-level decisions highlight how the attendant legislative privilege applies: Where, as here, a private plaintiff seeks material about legislative acts and the motivations for those acts, the privilege precludes discovery from legislative actors. *E.g.*, *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1343-44 (11th Cir. 2023). This Court should follow the far more persuasive decisions of these recent circuit courts and eschew the dated and cavalier approach to this serious issue represented by the authorities Plaintiffs rely upon.

Plaintiffs' Motion to Compel does not meaningfully contest that much of what Plaintiffs seek is heartland legislative-privilege material. Instead, they say that the privilege should yield to the types of claims in this case. But the self-assessed significance of Plaintiffs' claims is not what controls whether the privilege yields. The privilege only yields for civil cases so extraordinary they are

tantamount to a federal criminal prosecution and so rare that they would not destroy the privilege. *La Union del Pueblo Entero v. Abbott* (*"Abbott"*), 93 F.4th 310, 323-24 (5th Cir. 2024). Plaintiffs also misunderstand the scope of the privilege, which encompasses the third-party communications they seek. Nor are Plaintiffs right that legislators must proffer privilege logs. As courts of appeals have recently concluded, subjecting legislators to that burdensome process largely defeats the principles underlying legislative-privilege protections. *Pernell*, 84 F.4th at 1343-44.

In short, the legislative privilege applies to the 20 document and deposition subpoenas at issue and forecloses Plaintiffs' proposed intrusion into lawmakers' legislative functions. And another doctrine that protects high-ranking governmental actors from depositions—the *Morgan* Doctrine—further bars the nine deposition subpoenas of the legislators. *Morgan v. United States*, 313 U.S. 409 (1941). This Court should deny Plaintiffs' Motion to Compel compliance with the subpoenas and instead grant the Subpoena Recipients' Motion to Quash the Subpoenas and for a Protective Order on the grounds of legislative privilege and the *Morgan* Doctrine.

BACKGROUND

Plaintiffs are a collection of organizations and individuals who have challenged the constitutionality of Tennessee's 2022 redistricting maps. *See* Dkt. 1 ¶¶ 15-45, 156-83. The federal congressional map in relevant part splits Davidson County into three districts. *Id.* ¶ 113. By doing so, the map flipped a longstanding Democratic-held congressional seat in CD-5 to the Republican party.[1] The state Senate map, for its part, drew more favorable political lines in Senate District 31 that protected Republican interests.[2]

[1] Adam Friedman, Republican Andy Ogles wins race for Tennessee's 5th Congressional District, The Tennessean (Nov. 8, 2022), https://bit.ly/48vx3Ud.

[2] Adam Friedman, Tennessee senators approve new congressional, Senate districts; House to vote Monday, The Tennessean (Jan. 20, 2022), https://bit.ly/46sx6yN.

Lawmakers finalized the maps in January 2022 following a process that was the most transparent in Tennessee's redistricting history. *See* Dkt. 43 at 20-21. All organizational plaintiffs provided input, *see* Dkt. 1 ¶¶ 15, 19, 21, 23, 25, 27, 29-30, 32-33. All then waited 18 months—well after the 2022 election came and went—to sue over racially discriminatory redistricting that, if successful, would not affect any districts until 2026.

Plaintiffs do not dispute that race and partisan affiliation are highly correlated. Nor does the Complaint dispute the maps' patent partisan ramifications. Still, Plaintiffs say that the redistricting process stemmed from illegal and intentional racial discrimination, not permissible political considerations. In particular, Plaintiffs allege that the General Assembly racially gerrymandered Congressional Districts 5, 6, and 7, along with Senate District 31. *Id.* at ¶¶ 156-67. They also say those same districts were drawn to discriminate against racial minorities. *Id.* at ¶¶ 168-83.

Plaintiffs cite no direct evidence of legislators' alleged race-based decision-making—indeed, they nowhere allege that race rather than politics predominated the redistricting process. *See* Dkt. 1 ¶¶ 1-10. Nor have Plaintiffs proffered an alternative map (one showing that the partisan objectives could have been achieved without the observed racial results they decry) supporting their race-not-politics theory. Instead, Plaintiffs generally argue that the new maps split minority voters in Davidson County (who overwhelmingly vote Democrat) into three districts, which allegedly had a disproportionate impact on minority voters (and flipped a congressional seat from the Democrats to the Republicans). *See* Dkt. 1 ¶¶ 109-33. They raise the same argument for the newly drawn Senate District 31. *See id.* ¶¶ 134-55. Plaintiffs describe perfectly lawful behavior, then exclaim "but you did it because of race" to provide the pushpins and yarn for their conspiracy board.

Citing Plaintiffs' pleading failure, among other legal defects like lack of standing, delay, and application of sovereign immunity, Defendants moved to dismiss the Complaint in October 2023. Dkts. 42, 43. That motion remains pending and is set for argument on May 24, 2024. Dkt. 55.

Now, five months into discovery, and three months after the January 15 start-date when Plaintiffs were allowed to begin scheduling depositions, Dkt. 47, at 4, Plaintiffs have served subpoenas duces tecum on nine state Senators and Representatives—Chairwoman Patsy Hazlewood, Chairman Gary Hicks, Deputy Speaker Curtis Johnson, Senate Majority Leader Jack Johnson, House Majority Leader William Lamberth, Chairman Pat Marsh, Chairman Paul Rose, Chairman Kevin Vaughan, and Sen. Dawn White—as well as House Ethics Counsel Doug Himes ("the Subpoena Recipients"), Dkt. 59-1.[3] Plaintiffs have also subpoenaed each of these officials for depositions scheduled in mid-May 2024. Dkt. 59-5.[4]

The document subpoenas request wide-ranging discovery of state legislative materials with any conceivable link to the state senate or congressional maps, with production to begin on April 22, 2024, and continue to the "time of trial." Dkt. 59-1 at 2, 10, 12-19. Among other things, Plaintiffs seek:

- "All documents Relating to any redistricting proposal … at any stage," including "the impetus, rationale, background, or motivation for the Redistricting Plans," "all drafts in the development or revision of any of the Redistricting Plans," and "all documents Relating to negotiations regarding any of the Redistricting Plans," *id.* at 12 ¶ 1.b-c, e;
- "All Documents Relating to the Redistricting process," including "all correspondence with Legislators Relating to the Redistricting Plans" and with "any" "consultant, expert, [or] law firm," *id.* at 14 ¶ 2.a, d;
- "All Documents Relating to any legislation discussed, considered, or passed Relating to … race, racism, critical race theory, the history of slavery, or the treatment and discussion of racial minorities including those who identify as white, Anglo, Caucasian, or European-American," *id.* at 16 ¶ 3; and

[3] The document subpoenas, Dkt. 59-1, are substantively identical. Thus, while this brief only quotes from the first document subpoena, the same demands are contained in all ten.

[4] The deposition subpoenas, Dkt. 59-5, are also substantively identical, so this brief will cite the first.

- "All Documents Relating to Redistricting … exchanged between, among, with, or within the Tennessee General Assembly [or] any Legislator," *id.* at 16-17 ¶ 5.

Without exception, each of the 38 categories and subcategories stresses production of "all" responsive documents or correspondence. *Id.* at 12-19 ¶¶ 1-10.

The pool of personnel and communications swept in is likewise expansive. Materials potentially exchanged between at least 194 individuals and entities are covered, including any "correspondence" and even the most immaterial of documents like "calendar invitations," "scheduling emails," and "call logs." *Id.* at 14-18 ¶¶ 2.a-e, 5-7. At a minimum, Plaintiffs expect production from the Subpoena Recipients' "past or present employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, or agents; and any other persons or entities acting or purporting to act on [their] behalf or subject to [their] control." *Id.* at 5 ¶ 1.

The deposition subpoenas are wide ranging too. First up for discussion will be the "factual" background for all "public statements" the Subpoena Recipients have made about redistricting. Dkt. 59-5 at 7 ¶¶ 1-2. Other questions will probe internal thought processes, including the Subpoena Recipient's "awareness and understanding of public comments . . . concerning the Redistricting Plan" and their "knowledge and/or understanding of the requirements of . . . the United States and Tennessee Constitutions." *Id.* at 7 ¶¶ 3, 6-8. As for scope, Plaintiffs plan to examine the Subpoena Recipients conversations with the Governor, with their own attorneys, and with "any other" third party person or entity. *Id.* at 7 ¶¶ 4-5.

In response to the twenty subpoenas, counsel for the Subpoena Recipients have informed counsel for Plaintiffs of various objections and defenses to the requests. All individual subpoena duces tecum recipients submitted written objections on April 8, 2024, which was two weeks after the legislators accepted service and one week after Counsel Himes accepted service. *See generally* Dkt. 59-2 (objections and responses of Subpoena Recipients); Dkt. 59-4 at 4, 7 (emails accepting service).

Those objections and defenses include that the documents sought are subject to legislative privilege and may be covered by attorney-client privilege and work-product doctrine. *E.g.*, Dkt. 59-2 at 8-17.

Counsel for the Subpoena Recipients and Plaintiffs' counsel discussed these objections and the issue of legislative privilege through written objections, email correspondence, and in two meet and confers. The parties agreed on a schedule to brief the issue of legislative privilege, which this Court entered by order on April 19, 2024. Dkt. 58. Plaintiffs have moved to compel compliance with the subpoenas. Dkt. 59. The Subpoena Recipients now oppose Plaintiffs' Motion to Compel, and further move to quash all of the subpoenas and for a protective order preventing further demands for discovery from the Subpoena Recipients or any persons or entities acting or purporting to act on their behalf or subject to their control.

LEGAL STANDARD

Under Rule 26, discovery is restricted in both form and content. *See Grae v. Corr. Corp. of Am.*, 326 F.R.D. 482, 485 (M.D. Tenn. 2018) ("Understandable curiosity . . . is not the standard for discoverability . . . ."). A court may, for good cause, prohibit discovery or disclosure of certain matters, such as when the desired information is irrelevant or when disclosure would subject a person to annoyance or undue burden. Fed. R. Civ. P. 26 (c)(1)(A), (D); *Anwar v. Dow Chem. Co.*, 876 F.3d 841, 854 (6th Cir. 2017). While parties may move to compel compliance with a subpoena, Fed. R. Civ. P. 37(a), a court "must" quash or modify a subpoena that that "subjects a person to undue burden" or that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 45(d)(3)(A).

Under these rules, courts routinely quash subpoenas that demand privileged information. *See Equal Emp. Opportunity Comm'n v. Whiting-Turner Contracting Co.*, No. 2:21-cv-00753, 2022 WL 3206388, at *2, *6 (M.D. Tenn. Aug. 8, 2022); *Nutrien Ag Sols., Inc. v. Johnson-Knapp*, No. 3:19-CV-00861, 2019

WL 7756080, at *1-2 (M.D. Tenn. Oct. 31, 2019). And they issue protective orders to guard against disclosure of protected materials. *Edwards v. Whitaker*, 868 F. Supp. 226, 230 (M.D. Tenn. 1994).

ARGUMENT

The legislative privilege has for centuries protected the independence of the legislative process from intermeddling by private parties' discovery demands. As applied here, the legislative privilege shields the Subpoena Recipients from Plaintiffs' intrusive requests for documents and depositions. This protection warrants quashing the subpoenas in their entirety and entering a protective order against similar discovery missteps. The privilege also precludes subjecting the Subpoena Recipients to Plaintiffs' other burdensome and deliberation-chilling demands like generating extensive privilege logs or sitting for depositions wherein Plaintiffs' counsel to probe legislators' thought processes for hours on end. And the *Morgan* Doctrine, which protects high-ranking officials from being deposed, likewise precludes the depositions of the nine subpoenaed legislators.

Plaintiffs' Motion to Compel does not contest the legislative privilege's lengthy pedigree or important purpose. Nor do Plaintiffs dispute that the legislative privilege protects state legislators and legislative staff from federal-court process. Instead, Plaintiffs seek set aside or narrow the privilege in this case, so they may still obtain discovery of the sought-after legislative documents and communications. But Plaintiffs' proposed exception (at 13) for discriminatory-intent cases would swallow the legislative privilege rule. Plaintiffs urge this Court to set aside the privilege entirely in this and other cases alleging discriminatory intent. And accepting their claim (at 14) that legislative privilege "does not apply" to communications with third parties or any public documents would gut the privilege by subjecting legislators and their agents to burdensome discovery. Nor, finally, should this Court accept and apply Plaintiffs' five-factor test (at 16-17) to assess the applicability of the privilege. This test reflects an outdated approach that several recent circuit cases have rejected and that would defeat the purpose and predictability of the privilege's application.

In short, the legislative privilege does not fold whenever it inconveniences private plaintiffs. This protection is fundamental for legislative function, the separation of powers, and federal-state comity. The legislative privilege, alongside the *Morgan* Doctrine, requires quashing these subpoenas.

I. Legislative Privilege Precludes Plaintiffs' Discovery of Legislative Documents.

The legislative privilege does not permit Plaintiffs' document demands to the Subpoena Recipients. The privilege is a complete barrier to discovery where, as here, Plaintiffs bring a standard constitutional challenge and seek information from legislative actors about the legislative process. It is available in all federal civil cases. And it is particularly significant in cases like this one, which turn on legislative intent. While Plaintiffs may desire access to documents possessed by the Tennessee legislature, courts have repeatedly rejected attempts to balance party interests against the legislative privilege. And if a balancing test were applied, it would favor the Subpoena Recipients.

A. Legislative privilege safeguards the legislative process, the separation of powers, and comity.

Legislative privilege, which has roots dating back five hundred years, is crucial to legislative function. Both immunity and privilege protect state legislators from the burdens of federal litigation. The Speech or Debate Clause creates immunity for federal legislators, U.S. Const. art. I, § 6, cl. 1, but that is not the origin of legislative immunity. *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th 359, 361-62 (6th Cir. 2022). "The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). So, this longstanding immunity also covers state legislators. *Id.* at 376-78.

Legislative immunity includes a legislative privilege preventing discovery. The privilege emerged from the understanding that "legislators engaged 'in the sphere of legitimate legislative activity,' should be protected not only from the consequences of litigation's results but also from the

burden of defending themselves." *Supreme Ct. of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732 (1980) (emphasis added). The privilege "'extends to discovery requests' because 'complying with such requests detracts from the performance of official duties.'" *Pernell,* 84 F.4th at 1343 (citation omitted). And it "'applies whether or not the legislators themselves have been sued.'" *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015) (citation omitted).

The privilege crucially aids legislative function, as well as furthers principles of separation of powers and comity.

Legislative Function. The privilege shields legislators from both the burdens of discovery and the chilling effect that public disclosure of private conversations would have on internal deliberations. It allows lawmakers "to focus on their jobs rather than on motions practice in lawsuits." *Abbott*, 93 F.4th at 317 (citation omitted); *In re N. Dakota Legis. Assembly*, 70 F.4th 460, 463-64 (8th Cir. 2023), pet. writ. cert. filed sub nom. *Turtle Mountain Band of Chippewa Indians v. N. Dakota State Legis. Assembly*, No. 23-847 (U.S. Feb. 2, 2024); *Am. Trucking Associations, Inc. v. Alviti*, 14 F.4th 76, 86-87 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *In re Hubbard*, 803 F.3d at 1310; *see also Bagley v. Blagojevich*, 646 F.3d 378, 396-97 (7th Cir. 2011) (finding that legislative immunity spared a governor from the burden of a deposition about his legislative actions). The privilege also safeguards private deliberations because "mere disclosure" of documents could deter legislators from "freely engaging in the deliberative process necessary to the business of legislating." *Edwards v. Vesilind*, 790 S.E.2d 469, 478 (Va. 2016) (quoting *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1098 (Ariz. Ct. App. 2003)); *Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 3:20-CV-01023, 2021 WL 5882653, at *2-3 (M.D. Tenn. Dec. 13, 2021).

Separation of Powers. Along with protecting legislative function, legislative privilege is "a bulwark in upholding the separation of powers." *Lee v. Virginia State Bd. of Elections*, No. 3:15-cv-357, 2015 WL 9461505, at *2 (E.D. Va. Dec. 23, 2015) (citation omitted); *see Smith v. Iowa Dist. Ct. for Polk*

Cnty., 3 N.W.3d 524, 534 (Iowa 2024). It "preserve[s] the constitutional structure of separate, coequal, and independent branches of government" by preventing a "risk" of "intrusion" by "the Judiciary into the sphere of protected legislative activities." *United States v. Helstoski*, 442 U.S. 477, 491 (1979) (finding legislative immunity barred admission of evidence about legislative acts in a criminal prosecution). And while the Supreme Court has deemed "federal criminal prosecutions" of state legislators outside the privilege's separation-of-powers rationale, *United States v. Gillock*, 445 U.S. 360, 370 (1980) (emphasis added), separation of powers is still foundational for the privilege in federal *civil* litigation, *Supreme Ct. of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732-33 (1980).

Comity. Finally, the legislative privilege promotes comity by granting Tennessee legislators in federal court the same respect they should receive in state court. *See Mayhew v. Wilder*, 46 S.W.3d 760, 774 (Tenn. Ct. App. 2001) (describing legislative immunity as "sweeping and absolute"); *see also Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996) ("[T]he policy decisions of the States bear on the question of whether federal courts should . . . amend the coverage of an existing [privilege].").

B. Legislative privilege bars the document discovery Plaintiffs seek.

To effectively further its multiple purposes, legislative privilege must protect all aspects of the legislative process. This rule plainly encompasses the documents Plaintiffs seek, which by definition reveal legislators' deliberations and communications made in the course of lawmaking.

1. From the start, courts have "liberally" construed legislative immunity to cover any actions taken "in the sphere of legitimate legislative activity." *Kent*, 33 F.4th at 363 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)); *Tenney*, 341 U.S. at 376). Likewise, the legislative privilege "is necessarily broad" in scope. *La Union Del Pueblo Entero v. Abbott* ("*Hughes*"[5]), 68 F.4th 228, 236 (5th Cir. 2023).

[5] This decision is often referred to as *Hughes* because Senator Hughes was the first-named non-party legislator appellant who was claiming legislative privilege.

Courts have confirmed that the privilege protects a range of actions, communications, and information undertaken, made, and reviewed by legislators in the course of their duties.

Covered Actions. There is little dispute that legislative privilege "extends well beyond the act of voting for or against a particular piece of legislation." *League of United Latin Am. Citizens v. Abbott* ("*LULAC v. Abbot II*"), No. 21-cv-00259, 2023 WL 8880313, at *2 (W.D. Tex. Dec. 21, 2023), not. app. filed, No. 24-50128 (5th Cir. Feb. 27, 2024). "It covers material prepared for a legislator's understanding of legislation, lobbying conversations encouraging a vote on pending legislation, and even materials the legislator possesses related to potential legislation—i.e., 'all aspects of the legislative process.'" *Id.* (citing *Hughes*, 68 F.4th at 235); *see also Kent,* 33 F.4th at 363-65 (noting the many actions covered by legislative immunity); *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (same). The privilege must reach all these activities to secure legislative function. *Almonte*, 478 F.3d at 107; *cf. Kilbourn v. Thompson*, 103 U.S. 168, 204-05 (1880) (hypothesizing that legislative immunity would not apply if a legislature acted outside of its legislative function by, for example, "assuming the function of a court for capital punishment").

Covered Communications. Recent judicial consensus confirms that the legislative privilege includes communications not only within the legislature, but also by or with "persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents." *Hughes*, 68 F.4th at 236 (citation omitted). This coverage of third-party communications is not limited to those persons "acting as the [l]egislators' agents." *Smith*, 3 N.W.3d at 535-36 (adopting the "reasoning of the federal courts"). The privilege extends to "unsolicited" communications or acts by a third party, regardless of their identity. *Id.* That is for good reason. "Meeting with 'interest' groups" and other external third parties "is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider." *Hughes*, 68 F.4th at 236 (citation omitted). So, an exemption that fails to protect such communications would

"swallow the [privilege] almost whole." *Id.* Properly understood, it is the "subject of the communication" that "provides the limiting principle" for applying legislative privilege—not the identity of the speaker. *Smith,* 3 N.W.3d at 536. If a communication to a legislator is about the legislative process, it is privileged—even if "unsolicited." *Id.*

Covered Information. The privilege further applies to all categories of documents or recordings relating to the legislative process. That is, the privilege covers "purely factual documents," in addition to those containing a legislator's "motivations and mental impressions." *Pernell*, 84 F.4th at 1343; *LULAC v. Abbott II*, 2023 WL 8880313, at *2-3. The upshot of this rule is that "the purpose of a subpoena, not what the subpoena seeks . . . determine[s] if the legislative privilege applies." *Pernell*, 84 F.4th at 1343. If a subpoena's "purpose was to support the lawsuit's inquiry into the motivation behind" passing a statute, then a court should quash the subpoena because that "inquiry that strikes at the heart of the legislative privilege." *Id.* (citation omitted).

Again, this rule reasonably reflects legislative reality. "[D]isclosing that [a] legislator relied on or considered some facts, and not others, would inevitably indicate the legislator's deliberations." *LULAC v. Abbot II*, 2023 WL 8880313, at *3. Thus any "material the legislator obtained, or declined to obtain, in the decision-making process is privileged" because revealing such information would "inevitably reveal the [legislator's] deliberations." *Id.* (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)); *see id.* at *3 n. 2 (noting that "so long as disclosure of factual material by the legislator would add a brick to the plaintiffs' wall, it falls within the scope" of information that would "inevitably reveal the [legislator's] deliberations").

2. The document subpoenas should be quashed for seeking privileged information. Where—as here—the entire case is about legislative intent, the only information the Panel needs before quashing these subpoenas is that Plaintiffs have subpoenaed legislative officials for information

about the legislative process. Comparing Plaintiffs' voluminous requests with their bare-bones allegations reenforces that the privilege properly shields the Subpoena Recipients.

Applicability of Privilege. The Subpoena Recipients are all members or staff of the General Assembly and thus covered by the privilege. *See In re N. Dakota Legislative Assembly*, 70 F.4th at 463. Plaintiffs demand information about the General Assembly's redistricting process; legislation discussing race or similar topics; legislative rules, memos, or guidelines; demographic information; payments to third-parties related to redistricting; and voting districts. Dkt. 59-1 at 12-19 ¶¶ 1-10.) All of this (if it exists) would have been obtained or created as part of the legislative process and is therefore covered by the privilege. *In re N. Dakota Legislative Assembly*, 70 F.4th at 463-64.

Furthermore, the racial-gerrymandering and race-discrimination claims turn exclusively on legislative intent. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995) (explaining that racial-gerrymandering claims focus on whether "race was the predominant factor motivating the legislature's [redistricting] decision"); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (explaining that a race-discrimination claim focuses on whether the defendant acted with a "discriminatory intent or purpose"). And the legislative privilege applies with even greater force in civil lawsuits that require such proof. To find otherwise would render the privilege "of little value" and expose legislators to "the cost and inconvenience and distractions of a trial" based solely on the "conclusion of the pleader." *Tenney*, 341 U.S. at 377; *Hughes*, 68 F.4th at 238; *Lee*, 908 F.3d at 1188; *In re Hubbard*, 803 F.3d at 1310-11.

Nor, contrary to Plaintiffs' argument (at 24), does legislative privilege support requiring the Subpoena Recipients to compile burdensome privilege logs. Because Plaintiffs' core claims turn on legislative intent, "none of the information sought could have been outside the privilege." *See In re Hubbard*, 803 F.3d at 1311 (rejecting privilege-log request). Moreover, the log's itemized list would show the documents that individual legislators and staff retained as part of the legislative process,

which would impermissibly and "inevitably reveal the [legislator's] deliberations." *LULAC v. Abbot*, 2023 WL 8880313, at *3 & n.2. (quoting *In re Sealed Case*, 121 F.3d at 737). Plaintiffs' privilege-log argument errs by analogizing the legislative privilege to the attorney-client privilege. Dkt. 59 at 24. This is a faulty comparison because, "the legislative privilege is distinct from other recognized privileges in that, as discussed, its animating purpose is not limited to the maintenance of confidentiality." *Mi Familia Vota v. Hobbs*, 682 F.Supp.3d 769, 2023 WL 4595824, at *8 (D. Ariz. July 18, 2023). Indeed, forcing the Subpoena Recipients to produce a privilege log would "work against one of the primary purposes of the privilege": to protect the legislative process from the time drain of discovery. *Mississippi State Conf. of NAACP v. State Bd. of Election Commissioners*, No. 3:22-cv-734, 2023 WL 8360075, at *4 (S.D. Miss. Dec. 1, 2023).

Need for Privilege. Plaintiffs' litigation conduct confirms the urgent need to apply legislative privilege. Plaintiffs have acknowledged that discovery of legislators can be an "extreme burden." Dkt. 34, 46:22-25. But that awareness is not reflected in their requests, which insist on production of documents and communications exchanged between at least 194 people on no less than 38 categories and subcategories of information. Dkt. 59-1 at 12-19.

Plaintiffs also assert that federal pleading standards allow them to ignore obvious alternative explanations for the challenged maps—like partisanship—and thus eschew their burden of plausibly alleging racial discrimination and predominance at the motion-to-dismiss stage. Instead, Plaintiffs' Complaint offers only a handful of unrelated actions by the General Assembly and individual legislators that they cast as evidence of some unstated racial motive in redistricting:

- Penalties a prior General Assembly placed on organizations conducting voter registration activities, Dkt. 1 ¶ 102, which a court preliminary enjoined on grounds unrelated to race, *Tennessee State Conf. of NAACP v. Hargett*, 53 F.4th 406, 409 (6th Cir. 2022), *cert. denied sub nom. Hargett v. Tennessee State Conf. of the NAACP*, 143 S. Ct. 2609 (2023);

- Votes by a "handful" of legislators against a joint resolution to amend the Tennessee constitution in order to prohibit involuntary servitude or slavery, even though Plaintiffs acknowledge that at least one of the votes was prompted by concerns about whether prisoner might sue under the amended constitution, Dkt. 1 ¶ 103;

- A law enacted by a prior General Assembly that prohibits schools from teaching their students that individuals should be treated poorly or as inferior due to their race, *Compare* Dkt. 1 ¶ 104, *with* Tenn. Code Ann. § 49-6-1019;

- An overturned law reducing the size of Davidson County Metro Council, Dkt. 1 ¶ 105, which had nothing to do with race, Dkt. 43-1;

- Votes to expel members of the General Assembly who disrupted the General Assembly's proceedings even though these votes came long *after* the redistricting, Dkt. 1 ¶ 106; and

- Comments by two legislators that, if poorly phrased, did not advocate for any form of race-based discrimination, Dkt. 1 ¶¶ 107-8.

Plaintiffs who see bias around every corner should not be given unfettered access to the internal workings of the General Assembly. Indeed, if the legislative privilege bars anything, it is Plaintiffs' attempt to backfill their pleading failures with discovery of legislative motive.

The subpoenas should be quashed.

C. Plaintiffs' efforts to escape legislative privilege fail.

Plaintiffs' Motion advances two chief reasons why the legislative privilege is no impediment to their subpoenas. *First*, Plaintiffs argue that the privilege should yield because they have alleged important federal claims about discriminatory legislative intent. *Second*, Plaintiffs assert that some of their requests encompass third-party communications. Neither argument for narrowing the privilege works, for reasons recent appellate decisions explain.

1. Plaintiffs principally ask this Court to decline to apply the privilege because their case implicates civil-rights claims that turn on legislative intent. Dkt. 59 at 13. Such cases, Plaintiffs argue, qualify as "important federal interests" and warrant setting aside the privilege. *Id.* at 13, 16-17. But the closest Supreme Court analog to this case—the race-based equal protection challenge in *Village Of*

Arlington Heights, 429 U.S. at 268 & n.18—rejected setting aside the privilege. And Plaintiffs' arguments further conflict with recent developments in federal appellate courts, would open the floodgates to broad legislative discovery, and explode principles supporting a privilege of predictable scope and applicability.

Federal Appellate Guidance. Circuit decisions have rejected Plaintiffs' reasoning for a civil-rights-case exception to legislative privilege, including very recently. In February, the Fifth Circuit concluded that a lawsuit alleging a Texas voter registration law to be motivated by racial animus was not an extraordinary circumstance that would breach legislative privilege. *Abbott*, 93 F.4th at 323. In reaching this conclusion, the court set out three elements that could make a civil case extraordinary: (1) "the civil case must implicate important federal interests beyond a mere constitutional or statutory claim"; (2) "the civil case must be more akin to a federal criminal prosecution than to a case in which a private plaintiff seeks to vindicate his own rights"; and (3) "the civil case cannot be brought so frequently that it would, in effect, destroy the legislative privilege." *Id.* at 323-24. The racial animus lawsuit in Texas satisfied none of these elements. *Id.* at 325. The Ninth Circuit has similarly found that it lacked "sufficient grounds" to treat claims of racial gerrymandering as "'extraordinary instances' that might justify an exception to the [legislative] privilege." *Lee*, 908 F.3d at 1188; *see Fla. v. Byrd*, No. 4:22-cv-109, 2023 WL 3676796, at *2 (N.D. Fla. May 25, 2023) (finding "allegations of racial gerrymandering" were not "extraordinary"); *Mississippi State Conf. of NAACP*, 2023 WL 8360075, at *4 (same). Those considerations counsel rejecting Plaintiffs' proposed exception.

Overbreadth of Plaintiff's Position. Plaintiffs' approach would render legislative privilege a dead letter in a "legion" of cases pressed by private plaintiffs. *Abbott*, 93 F.4th at 325. After all, if the "mere assertion of a federal claim" were enough to override the privilege, "the privilege would be pretty much unavailable largely whenever it is needed." *Alviti*, 14 F.4th at 88; *Abbott*, 93 F.4th at 323-24. Nor

would closing the circle around intentional-discrimination claims solve the problem: Such allegations abound in Tennessee, as in other States.[6]

And recent shifts from partisan to racial gerrymandering lawsuits will only lead to more cases like this one. Due to the Supreme Court closing the gate on federal partisan gerrymandering lawsuits, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019), the losing party to a state's a partisan redistricting has one obvious path to court: allege that the partisan redistricting was racially motivated. Little work is needed to mischaracterize a partisan redistricting. "[R]ace and political affiliation are highly correlated." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (describing North Carolina). So, a losing party can portray a state's constitutional redistricting as racist simply by relying on that correlation and, in doing so, transform "federal courts . . . into weapons of political warfare." *Cooper v. Harris*, 581 U.S. 285, 335, (2017) (Alito, J., concurring in part and dissenting in part). Plaintiffs have done exactly this. Dkt. 1 ¶ 1 (characterizing the 2022 redistricting as unlawfully motivated by race without mentioning partisanship). Given how easily a party can bootstrap partisan redistricting into racial-bias allegations, excepting racial-animus redistricting cases from legislative privilege would derail an important (if decennial) legislative function.

[6] *See, e.g.*, *Simon v. DeWine*, No. 23-3910, 2024 WL 1522329 (6th Cir. Apr. 9, 2024); *Michigan State A. Philip Randolph Inst. v. Johnson*, 749 F. App'x 342 (6th Cir. 2018); *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016); *Spurlock v. Fox*, 716 F.3d 383 (6th Cir. 2013); *Friends of Georges, Inc. v. Mulroy*, 675 F. Supp. 3d 831 (W.D. Tenn. 2023); *Blount Pride, Inc. v. Desmond*, ---F.Supp.3d----, 2023 WL 5662871 (E.D. Tenn. Sept. 1, 2023); *Amber Reineck House v. City of Howell, Michigan*, No. 20-cv-10203, 2022 WL 17650471 (E.D. Mich. Dec. 13, 2022); *Plain Loc. Sch. Dist. Bd. of Educ. v. DeWine*, 464 F. Supp. 3d 915 (S.D. Ohio 2020); *Bellant v. Snyder*, 338 F. Supp. 3d 651 (E.D. Mich. 2018); *League of Women Voters of Michigan v. Johnson*, No. 17-14148, 2018 WL 2335805 (E.D. Mich. May 23, 2018); *Tri-Cities Holdings LLC v. Tennessee Health Servs. & Dev. Agency*, No. 2:13-CV-305, 2017 WL 3687846 (E.D. Tenn. Aug. 25, 2017), *aff'd sub nom. Tri-Cities Holdings LLC v. Tennessee Admin. Procs. Div.*, 726 F. App'x 298 (6th Cir. 2018); *Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967 (M.D. Tenn. 2015); *Bassett v. Snyder*, 59 F. Supp. 3d 837 (E.D. Mich. 2014); *Phillips v. Snyder*, No. 2:13-CV-11370, 2014 WL 6474344 (E.D. Mich. Nov. 19, 2014), *aff'd*, 836 F.3d 707 (6th Cir. 2016).

Principled Application of Privilege. On top of all that, this Court should reject any test that requires courts to rank which cases are sufficiently "important" or "extraordinary." Such an approach would be "unadministrable," since "there is 'no principled basis' for conducting such ranking." Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 Harv. L. Rev. F. 112, 126 (2020) (citation omitted). To some, Second Amendment claims would clearly count. Others would include religion-based claims. Still others would insist that targeting political speech should trigger protection. But "[d]eciding among" these different constitutional rights "poses basic questions that are political, not legal." *Rucho*, 139 S. Ct. at 2499-500. Plaintiffs offer no good reason why the availability of legislative privilege should toggle based on this unreliable test or political salience.

This lawsuit is not extraordinary. It is just the type of case the privilege is designed to restrict. So, the allegations of discriminatory legislative intent do not block legislative privilege.

2. Plaintiffs also argue the legislative privilege "does not apply" to "Legislators' communications with third parties such as constituents, lobbyists, and consultants." Dkt. 59 at 14-15. They also say the privilege is "waived" whenever "Legislators shared documents that would otherwise be privileged with third parties or the public at large." *Id.* This argument relies on an outdated line of district court cases that misapply legislative-privilege principles.[7] *Id.* at 15-16. This Court should instead follow more recent guidance clarifying that, because the main point of the privilege is to remove burdens from the legislative process, it is irrelevant whether documents have been disclosed to third parties or publicly. *Smith,* 3 N.W.3d at 536; *see Hughes*, 68 F.4th at 236; *In re N. Dakota Legislative Assembly*,

[7] The General Assembly's disclosure of certain third-party communications during a 2022 state-court case reflected the caselaw's then-limited understanding of the privilege's scope. Dkt. 59 at 9, 15. This disclosure was not a waiver of the privilege. Subpoena Recipients' position here aligns with more recent circuit court guidance that third-party communications are protected by the privilege. *See Hughes*, 68 F.4th at 236-37; *In re N. Dakota Legislative Assembly*, 70 F.4th at 464. Nonetheless, if the state-court disclosure is treated as a waiver, the waiver should be limited to *only* those documents that were previously produced. *See Hughes*, 68 F.4th at 236-37.

70 F.4th at 464. Instead, the relevant inquiry is whether the documents were disclosed as part of the legislative process. *Smith,* 3 N.W.3d at 536.

As for waiver, the legislative privilege is not waived when legislators disclose documents. *Hobbs*, 2023 WL 4595824, at *7-8. Rather, waiver occurs when legislators formally and voluntarily insert themselves into a lawsuit. *See Mi Familia Vota v. Fontes*, No. CV-22-00509, 2023 WL 8183557, at *2 (D. Ariz. Sept. 14, 2023), *aff'd sub. nom. In re Toma*, No. 23-70179, 2023 WL 8167206 (9th Cir. Nov. 24, 2023). The "legislative privilege's animating purpose is 'to allow duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box,' and 'minimize[e] the distraction of diverting their time, energy, and attention from their legislative tasks to defend the litigation.'" *Id.* (quoting *Lee*, 908 F.3d at 1187). So legislators who intervene in a lawsuit "forgo that 'protection' in pursuit of an opportunity to defend in court their decisions as legislators." *Id.* (quoting *Singleton v. Merrill*, 576 F. Supp. 3d 931, 941 (N.D. Ala. 2021)). The Subpoena Recipients have not intervened in this lawsuit. Therefore, they have not waived legislative privilege. *Id.*

D. This Panel should reject some courts' legislative-privilege balancing test, which Plaintiffs fail in all events.

Against the weight of recent authority recognizing the bright-line nature of legislative privilege, some district courts have previously employed a multi-factor balancing test to weigh whether legislative privilege should apply in a given case. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100-01 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); *Nashville Student Org. Comm.*, 123 F. Supp. 3d at 969-70. Under this approach, courts faced with a legislative-privilege dispute must evaluate: (1) relevancy, (2) availability of other evidence, (3) seriousness of litigation, (4) role of government in litigation, (5) purposes of the privilege. *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 337-38 (E.D. Va. 2015). Plaintiffs also rely on this test. Dkt. 59 at 16. This Court should reject Plaintiffs' proposed balancing-of-the-interests approach, or else hold that it bars discovery here.

1. The Panel should reject *Rodriguez*'s contentless multi-factor approach to assessing legislative privilege. To start, such a balancing test conflicts with Supreme Court guidance and uniform circuit authority, which have not overridden legislative privilege outside the criminal context. *See supra* Part I.B; *United States v. Gillock*, 445 U.S. 360, 372-73 (1980). Indeed, every circuit court to consider the *Rodriguez* test—or balancing more generally—has rejected it. *Pernell*, 84 F.4th at 1344-45; *In re N. Dakota Legislative Assembly*, 70 F.4th at 464-65; *Hughes*, 68 F.4th at 237-40 (disregarding the *Rodriguez* test even though the district court had applied it below); *see also Lee*, 908 F.3d at 1188 (rejecting a categorical exception to the privilege in cases implicating governmental intent).

In addition, *Rodriguez*'s balancing approach is unpredictable at best and "manipulable" at worst. *Pernell*, 84 F.4th 1339, 1344 (11th Cir. 2023). And "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1206 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)); *Jaffee*, 518 U.S. at 18 (same). The reason? The confidence to communicate freely only exists if legislators remain free from even "the apprehension that a court might order their confidential communications involuntarily disclosed." *In re Itron, Inc.*, 883 F.3d 553, 561 (5th Cir. 2018) (citation omitted). Thus, the Panel should join with other courts in finding the "*Rodriguez* analysis is no longer relevant." *Mississippi State Conf. of NAACP*, 2023 WL 8360075, at *4.

2. Even if *Rodriguez*'s approach applied, Plaintiffs' discovery should not proceed:

Relevancy. Much of the information Plaintiffs demand is irrelevant.

First, Plaintiffs seek documents that might reveal the Subpoena Recipients' "motivation" either directly in writing and public statements or indirectly by their communications with others, research, negotiations, and meetings. Dkt. 59-1 at 12-18 ¶¶ 1-2, 5-7. Plaintiffs exclusively focus on these requests in arguing that they seek relevant information. Dkt. 59 at 17-19.

But for two of the subpoenaed senators—Chairman Rose and Sen. White—it is unclear what relevant information about motivation Plaintiffs think they would possess. While Plaintiffs say that all the subpoenaed legislators were "part of the redistricting committees in 2021," Dkt. 59 at 19, neither Chairman Rose nor Sen. White were on the Senate committee, *see* Tennessee General Assembly, Senate Ad Hoc Committee on Redistricting, capitol.tn.gov, https://bit.ly/44la6kU. Plaintiffs also concede that the House attorney, Doug Himes, drew the state House map, which is not at issue here. Dkt. 59 at 19. But Plaintiffs still subpoenaed him, speculating that he might know something about the motives of those who drew the Senate and Congressional district maps. *Id.*

At any rate, proof of the Subpoena Recipients' individual intent says nothing about the General Assembly's intent as a whole. While Plaintiffs say such evidence is relevant, Dkt. 59 at 17-18, the Sixth Circuit has long expressed "wary[ness] of relying on individual legislator's statements" as establishing legislative intent "because individual statements are often contradicted or at least undermined by other statements in the legislative record." *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784-85 (6th Cir. 2003). Nor can one attribute the intent of one legislator to the entire legislative body. *United States v. O'Brien*, 391 U.S. 367, 384 (1968); *In re N. Dakota Legislative Assembly*, 70 F.4th at 464-65.

Second, Plaintiffs demand *all* rules, procedural memos, and guidelines for the House Public Service Subcommittee, House State Government Committee, and Senate Judiciary Committee. Dkt. 59-1 at 16 ¶ 4. But these committees have duties that go far beyond redistricting.[8]

Third, Plaintiffs seek, "for any time period," all documents exchanged with the parties to this litigation related to "other litigation challenging the redistricting plans." *Id.* at 19 ¶ 10. Documents about

[8] House Subpcommittee Public Service, Adopted Amendments, captiol.tn.gov, https://perma.cc/Y6Q8-JJES; House State Government Committee, Calendar, capitol.tn.gov, https://perma.cc/2WXY-V5MP; Senate Standing Committee Judiciary, capitol.tn.gov, https://perma.cc/33X3-PS8J.

other lawsuits having nothing to do with racial bias, particularly lawsuits involving completely different redistricting cycles, are obviously irrelevant.

Availability of Other Evidence. Plaintiffs want documents that are available from other sources. Yet as Plaintiffs acknowledge, Dkt. 59 at 20-21, Plaintiffs can look to public websites, public legislative discussions, public comment, and members of the public identified in the public record for information relating to redistricting proposals; the General Assembly's redistricting process; legislation related to race; committee rules, memos, and guidelines; demographic information; and voter districts.

Plaintiffs argue that they require additional evidence only available from the Subpoenaed Legislators because, thus far, the evidence they have obtained from other sources does not show "direct evidence of discriminatory intent." Dkt. 59 at 20. Such reasoning would perversely grant the broadest discovery to Plaintiffs with the sparsest support for discriminatory-intent claims.

Finally, Plaintiffs say that they could not obtain any of the documents requested in their subpoenas from any source other than the General Assembly. But this dynamic only underscores that what Plaintiffs seek is discovery probing core legislative deliberations and functions—the documents legislative privilege protects the most. Dkt. 59 at 21.

"Seriousness" of Litigation. No constitutional challenge can be taken lightly. But this lawsuit does not contain any of the three elements—unique federal interests, similarity to criminal prosecution, and rare allegations—that might result in a lawsuit so extraordinary that legislative privilege must yield. *See supra* I.C.1; *Abbott*, 93 F.4th at 323-24. First, Plaintiffs allege no federal interests beyond mere constitutionality. Dkt.1 ¶¶ 156-83. Second, this standard suit by private plaintiffs has no similarity to a criminal prosecution. *Id.* at ¶¶ 15-45. Third, claims of this kind are *far* from infrequent. *See supra* I.C.1; *Abbott*, 93 F.4th at 323. It would be premature to treat such a commonplace case as extraordinary when the Supreme Court and circuit courts have yet to do so. *See Gillock*, 445 U.S. at 373; *Abbott*, 93 F.4th at 323; *Lee*, 908 F.3d at 1188.

Role of Government. This factor is "somewhat neutral" given the many ways courts can spin it to work for or against the parties. *Hobbs*, 2023 WL 4595824, at *12. Some courts have declared this factor "inapt in the legislative privilege context" because "there would be no point in deposing . . . the Legislators" if the state were not involved. *Id.* (citation omitted). Some treat this factor as favoring state defendants if it is a "private lawsuit." *Cuomo v. New York State Assembly Judiciary Comm.*, ---F.Supp.3d----, 2023 WL 4714097, at *13 (E.D.N.Y. July 21, 2023). By that standard, because this is a private lawsuit with no governmental plaintiff, this factor should weigh against Plaintiffs.

Plaintiffs say this factor weighs in their favor because they are not "targeting random individual legislators." Dkt. 59 at 22. It is hard to see how that is that case, at least as to Chairman Rose, Sen. White, and Counsel Himes. *Supra* p. 20. Regardless, if Plaintiffs' proffered civil-rights exception to the privilege is right, there would be no limit to their ability to target any legislators of their choosing.

Purpose of the Privilege. Forcing the Subpoena Recipients to comply with Plaintiffs' discovery demands would disrupt all the purposes of the privilege. *See supra* Part I.A. It would burden the legislative process. *Hobbs*, 2023 WL 4595824, at *12. It would "chill future witnesses' willingness to participate in important legislative inquiries." *Cuomo*, 2023 WL 4714097, at *13; *Hobbs*, 2023 WL 4595824, at *12. It would improperly subject the legislative branch to "judicial scrutiny." *Virginia State Bd. of Elections*, 2015 WL 9461505, at *2. And it would ignore the "sweeping" protections that Tennessee's constitution affords state legislators. *Mayhew*, 46 S.W.3d at 774.

Plaintiffs argue that this factor weighs in their favor because district courts "in this Circuit" have determined that a private plaintiff's need for discovery outweighs the need to protect the legislative process. Dkt. 59 at 22. But the single opinion from within the Sixth Circuit that Plaintiffs cite to support this assertion, *League of Women Voters of Michigan*, 2018 WL 2335805, at *6, was issued without the guidance of multiple recent circuit court opinions ruling precisely the opposite, *See Abbott,*

93 F.4th at 323-25*; In re N. Dakota Legis. Assembly,* 70 F.4th at 463-65; *Pernell*, 84 F.4th at 1345*; Lee*, 908 F.3d at 1187-88.

Legislative privilege bars Plaintiffs' document subpoenas in their entirety. The subpoenas should be quashed, and a protective order should be issued preventing further demands for discovery.

II. Legislative Immunity and Privilege, as Well as the *Morgan* Doctrine, Preclude Plaintiffs' Deposing Legislators and Their Aides.

The deposition subpoenas are also a substantial intrusion on the legislative process and must be quashed. As Plaintiffs' counsel acknowledged, "to require legislators to — prior to running, to have to sit for a deposition . . . that is an extreme burden on them." Dkt. 34 at 46:22-25.[9] The legislative privilege bars legislator depositions for this and other reasons, as does the *Morgan* Doctrine.

A. Legislative privilege bars the deposition subpoenas.

Legislative privilege blocks the deposition subpoenas for the same reasons that it blocks the document subpoenas. Legislative privilege, as an offshoot of legislative immunity, applies with equal force to deposition subpoenas. *In re N. Dakota Legislative Assembly*, 70 F.4th at 464-65. A subpoena that directs a legislator or an agent of the legislative branch to testify about the legislative process violates the multiple purposes of the privilege. *Id.*; *see Bagley*, 646 F.3d at 396-97 (finding legislative immunity precludes depositions); *supra* Part I.A and I.B.1. The topics to be addressed at the deposition all focus on the legislative redistricting process and interests surrounding it, Dkt. 59-5 at 7-8, and thus fall squarely within the privilege's territory.

Despite acknowledging the extreme burden of the depositions, Plaintiffs offer little

[9] Plaintiffs counsel made this statement in the context of explaining the dates in their proposed scheduling order. Dkt. 34 at 46:19-47:6. Yet, Plaintiffs still waited over three months after the January 15 start-date in the scheduling order to begin issuing subpoenas. Dkt. 47 at 4. And they now seek to depose six legislators—Chairwoman Hazlewood, Chairman Hicks, House Majority Leader Lamberth, Chairman Marsh, Chairman Rose, and Chairman Vaughan—who are actively campaigning for re-election on the August 1, 2024 ballot. *See* Tennessee Secretary of State, Candidate List for General Assembly, sos.tn.gov, https://perma.cc/3Q5S-7TXB.

compromise. They suggest legislators' counsel could object based on legislative privilege at the deposition and the deposition transcripts might be filed under seal for in camera review. Dkt. 59 at 23. (Plaintiffs routinely propose this absurd procedure, and some courts have allowed it. What it does is place the legislative privilege in a decidedly second-class status. Imagine a deposition of an attorney where all questions about client work had to be answered subject to later resolution of attorney-client privilege objections. "Absurd" is perhaps too kind a word.) A "proposal to order a deposition during which a legislator could 'invoke legislative privilege' does not sufficiently appreciate that compulsory process constitutes a 'substantial intrusion' into the workings of a legislature that must 'usually be avoided.'" *In re N. Dakota Legislative Assembly*, 70 F.4th at 465 (quoting *Arlington Heights*, 429 U.S. at 268 n.18). It is not simply the contents of a deposition that poses a problem under the legislative privilege, it is the deposition itself that violates the privilege by burdening the legislative process. Thus, these subpoenas should be quashed.

B. The *Morgan* Doctrine Bars the Nine Legislator Deposition Subpoenas.

The Supreme Court's landmark decision in *Morgan v. United States*, 313 U.S. 409 (1941), is an additional insurmountable barrier to Plaintiffs' subpoenas for deposition testimony from nine state senators and representatives. The *Morgan* Court held that it was improper for the district court to permit the deposition and trial testimony of the Secretary of Agriculture. *Id.* at 422. The Court noted that "it was not the function of the court to probe the mental processes" of this high ranking official. *Id.* Or, as the Sixth Circuit later put it, a plaintiff may not "depose [a high-ranking official] in order to probe his mind as to exactly why he saw fit to exercise his discretion as he did." *Warren Bank v. Camp*, 396 F.2d 52, 56 (6th Cir. 1968). Progeny of *Morgan* have thus recognized that "high-ranking government officials are not subject to deposition absent extraordinary circumstances." *Washington v. GEO Grp., Inc.*, No. 3:17-cv-05806, 2018 WL 8922002, at *1 (W.D. Wash. Aug. 27, 2018); *Dep't of Com.*

v. New York, 139 S. Ct. 2551, 2564 (2019) (noting that the Court blocked an attempt to depose then-Secretary of State Wilbur Ross).

1. Each of the subpoenaed legislators are high-ranking elected officials whom the *Morgan* Doctrine protects. "Whether an official is a 'high ranking governmental officer' under *Morgan* is determined on a 'case-by-case basis.'" *McNamee v. Massachusetts*, No. CIV.A. 12-40050, 2012 WL 1665873, at *2 (D. Mass. May 10, 2012). To decide if subpoena recipients are high-ranking officials, courts will look at whether the officials are at the top of their agency and at whether other courts have treated similar officials as high ranking. *Sec. & Exch. Comm'n v. Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 250 (S.D.N.Y. 2015). The Subpoenaed Legislators are elected constitutional officers who lead the legislative branch. *See* Tenn. Const. art. II, § 3. And other courts have found similar legislative officials to be high ranking. *See League of United Latin Am. Citizens v. Abbott* ("*LULAC v. Abbott I*"), No. 21-cv-259, 2022 WL 2866673, at *1 (W.D. Tex. July 6, 2022) (noting it was uncontested that a Texas representative was high ranking), *not. app. filed on other grounds sub. nom. LULAC v. Hunter*, No. 24-50128 (5th Cir. July 20, 2022); *see also McNamee v. Massachusetts*, No. CIV.A. 12-40050-FDS, 2012 WL 1665873, at *2 (D. Mass. May 10, 2012) (finding that the chief of staff for a member of Congress was high ranking). Indeed, courts have recognized that the *Morgan* Doctrine applies with equal force when the legislative privilege is asserted and for similar reasons. *See LULAC v. Abbott I*, 2022 WL 2866673, at *2-3 (W.D. Tex. July 6, 2022) (collecting cases).

2. Plaintiffs have not established extraordinary circumstances requiring the subpoenaed testimony. Extraordinary circumstances exist if the party seeking the deposition shows that "the proposed deponent (1) has information 'essential' to the case (2) that 'is not obtainable from another source.'" *Burgess v. United States*, No. 17-11218, 2022 WL 17725712, at *4 (E.D. Mich. Dec. 15, 2022) (quoting *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999)). Plaintiffs do not meet this requirement for three reasons.

First, Plaintiffs argue that the depositions "may" show "whether race was the predominant motivation behind the challenged redistricting." Dkt. 59 at 20. Their use of "may" is key. Plaintiffs do not know whether the challenged redistricting was racially discriminatory—they are seeking to depose multiple legislators based on pure speculation. *Second*, the legislators' knowledge is not "essential" to this case because the knowledge and intent of individual legislators cannot be attributed to the entire legislative body. *See O'Brien*, 391 U.S. at 384*; In re N. Dakota Legislative Assembly*, 70 F.4th at 464-65*; Isle Royale Boaters Ass'n*, 330 F.3d at 784-85; *supra* p. 20-21. *Third*, as Plaintiffs concede, part of the information they seek in these depositions can be obtained from other sources. Dkt. 59 at 20-21.

Plaintiffs have not carried their burden to show extraordinary circumstances. Thus, the deposition subpoenas of the nine Tennessee legislators should be quashed.

III. Other Privileges and Doctrines May Also Restrict the Subpoenas.

Along with legislative privilege, attorney-client privilege and the work-product doctrine likely cover many of the subpoenaed documents and deposition topics. Attorney-client privilege applies to communications relating to legal advice between an attorney and client. *United States v. Roberts*, 84 F.4th 659, 670 (6th Cir. 2023), *cert. denied*, No. 23-6479, 2024 WL 675226 (U.S. Feb. 20, 2024). The work-product doctrine encompasses documents created by attorneys as part of their legal representation and in anticipation of litigation. *In re Grand Jury Subpoenas*, 454 F.3d 511, 520 (6th Cir. 2006). During the 2022 redistricting, attorneys oversaw the map drawing process in both the House and the Senate to ensure the maps were constitutional and defensible in court. Thus, the subpoenaed documents will be rife with attorney-client communications and work product. Indeed, Plaintiffs have outright subpoenaed a House attorney for documents. Dkt. 59-1 at 116-33. While they claim not to require anything protected by attorney-client privilege from the House attorney, Dkt. 59-1 at 125 ¶ 35, they repeatedly demand that *all* Subpoena Recipients produce documents created by or containing communications with attorneys. Dkt. 59-1 at 5-6, 8 ¶¶ 1-2, 4, 19-21; *id.* at 14, 16-18 ¶¶ 2.b, 5, 7-8. And

Plaintiffs similarly demand deposition testimony about the Subpoena Recipients' conversations with their lawyers. Dkt. 59-5 at 7 ¶ 4. The Subpoena Recipients reserve the right to assert attorney-client privilege and work-product doctrine over the subpoenaed documents or at any depositions should discovery progress to the point that this is required.

CONCLUSION

For these reasons, the motion to quash should be granted, and the legislature should be spared the intrusion of Plaintiffs' broad demands for discovery. Additionally, a protective order should be issued to prevent future demands of the Subpoena Recipients or their past or present employees, staff, interns, representatives, designees, attorneys, advisors, consultants, contractors, or agents; and any other persons or entities acting or purporting to act on their behalf or subject to their control.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2024, the undersigned filed the foregoing document via this Court's electronic filing system, which sent notice of such filing to the following counsel of record:

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Adam K. Mortara Lawfair LLC 40 Burton Hills Blvd., Suite 200 Nashville, TN 37215 (773) 750-7154 mortara@lawfairllc.com Whitney D. Hermandorfer Director of Strategic Litigation Miranda H. Jones Senior Assistant Attorney General Ryan Nicole Henry Assistant Attorney General Philip Hammersley Assistant Solicitor General Office of the Tennessee Attorney General P.O. Box 20207 Nashville, Tennessee 37202 (615) 532-2935 whitney.hermandorfer@ag.tn.gov miranda.jones@ag.tn.gov ryan.henry@ag.tn.gov philip.hammersley@ag.tn.gov	Defendants William B. Lee, in his official capacity as Governor of the State of Tennessee, Tre Hargett, in his official capacity as Secretary of State of the State of Tennessee, Mark Goins, in his official capacity as Coordinator of Elections for the State of Tennessee, the State Election Commission, and Donna Barrett, Judy Blackburn, Jimmy Eldridge, Mike McDonald, Secondra Meadows, Bennie Smith and Kent Younce, in their official capacities as members of the State Election Commission

/s/ Miranda Jones
Counsel for Subpoena Recipients