UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

WILLIAM WHITFORD, et al.

Plaintiffs,

v.

Case No. 3:15-CV-00421-jdp

BEVERLY R. GILL, et al.,

Defendants;

and

THE WISCONSIN STATE ASSEMBLY,

Intervenor-Defendant.

SPEAKER ROBIN J. VOS'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

Act 43 became law nearly eight years ago. Since then, Wisconsin redistricting litigation has involved no fewer than 13 depositions of legislative aides and consultants, production of the very computers used to create the redistricting maps, two trials, and one Supreme Court appeal.

Only now—after eight years of fact gathering—Plaintiffs ask this Court to compel the Speaker of the Wisconsin State Assembly to submit to a deposition and produce documents. But Speaker Robin Vos is not a party to this action. He is a sitting legislator protected by legislative immunity and legislative privilege. Nor do extraordinary circumstances warrant deposing a high-ranking public official like Speaker Vos. Any information he might have is duplicative or cumulative of information Plaintiffs already have, could be found elsewhere, or is irrelevant. Plaintiffs' motion should be denied.

BACKGROUND

The Wisconsin Constitution tasks the Legislature, comprising the Wisconsin State Assembly and Wisconsin State Senate, to "apportion and district anew the members of the senate and assembly" after each census. Wis. Const. Art. IV, § 3. In accordance with that power, the Legislature began redistricting after the 2010 census. In July 2011, the Legislature passed Act 43, along with related congressional redistricting legislation. The Governor signed both bills into law in August 2011. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 846 (E.D. Wis. 2012).

That summer, a group of voters filed suit in the Eastern District of Wisconsin and alleged that the redistricting legislation violated state and federal law. So began the *Baldus* litigation. After expedited discovery, the *Baldus* plaintiffs tried their claims in February 2012. *See id.* at 847. The *Baldus* court held that two districts would need to be redrawn to comply with the Voting Rights Act but denied the remaining claims, including partisan gerrymandering claims. *See id.* at 847-48, 853-54, 859-60.[1]

There was extensive discovery in *Baldus*, which the *Whitford* Plaintiffs now possess. *See* Stip. Regarding 30(b)(6) Deps., ECF No. 96, *Whitford v. Gill*, No. 15-cv-421 (stipulating a procedure to authenticate *Baldus* documents for *Whitford* litigation). The *Baldus* discovery included "'any and all documents used by [legislative consultants or aides] or members of the Legislature to draw the 2011 redistricting maps.'" *Baldus v. Brennan*, Nos. 11-CV-562, 11-CV-1011, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8, 2011), *order clarified*, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011); *see also id.* (deciding "any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps" were discoverable).[2] The *Baldus* court ultimately

[1] The *Baldus* plaintiffs abandoned their claim that Act 43 was an unconstitutional partisan gerrymander at trial. *Baldus*, 849 F. Supp. 2d at 848. The congressional intervenors maintained their claim that congressional redistricting was an unconstitutional partisan gerrymander; the *Baldus* court rejected that claim after intervenors "fail[ed] to offer a workable standard." *Id.* at 854.

[2] The *Baldus* court rejected the Legislature's arguments that legislative privilege foreclosed plaintiffs from subpoenaing legislative aides and consultants. *See generally Baldus*, 2011 WL 6122542. That decision does not bind this Court and was not appealed. Moreover, the circumstances in *Baldus* were different than those here; the *Baldus* court never addressed whether plaintiffs could subpoena sitting legislators.

ordered the Legislative Technology Services Bureau to produce the hard drives from "the exact machines used by the Legislature and its counsel to create the redistricting maps," which were forensically examined and indexed by an expert under plaintiffs' direction. *Baldus v. Members of Wis. Gov't Accountability Bd.*, Nos. 11-CV-562, 11-CV-1011, 2013 WL 690496, at *1 (E.D. Wis. Feb. 25, 2013); *see also id.* at *2 (granting post-trial discovery access to "(1) documents post-dating the passage of Acts 43 and 44; (2) documents relating to the passage of Wisconsin Senate Bill 150 (SB 150); and (3) additional computer materials, such as registries, LNK files, and metadata"); *see also* Am. Lanterman Decl. ¶¶2-5, ECF No. 97, *Whitford v. Gill*, No. 15-cv-421 (Apr. 19, 2016) (describing forensic examination). The *Baldus* plaintiffs also deposed, re-deposed, and cross-examined legislative aides (Tad Ottman and Adam Foltz) and legislative consultants (Joseph Handrick and Keith Gaddie).[3] But not once in the *Baldus* trial was a sitting legislator compelled to sit for a deposition or to produce documents.

Plaintiffs then waited until July 2015 to file this lawsuit, alleging that Act 43 unconstitutionally diluted the votes of Democrats. *See Gill v. Whitford*, 138 S. Ct. 1916, 1923-24 (2018). During the discovery phase, the Wisconsin State Assembly, the Legislative Technology Services Bureau, and the *Whitford*

[3] Foltz was an aide to then-Speaker Jeff Fitzgerald and Ottman worked for Senate Majority Leader Scott Fitzgerald during redistricting. *See* Trial Tr. 46:11-15, May 24, 2016, ECF No. 147; Trial Tr. 5:25-6:2, May 25, 2016, ECF No. 148; *see also Baldus v. Brennan*, 2011 WL 6122542, at *1 (permitting depositions); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 961 (E.D. Wis. 2012) (permitting plaintiffs to reconvene depositions); Gaddie Dep., ECF No. 107 (Gaddie deposition transcript from *Baldus*).

Defendants agreed Plaintiffs could use the *Baldus* discovery, including the redistricting computer hard drives. *See* Stipulation, ECF No. 96. As part of that agreement, Plaintiffs' expert restored the data from the *Baldus* computers, which he had imaged and stored after the *Baldus* litigation ended. *See generally* Am. Lanterman Decl., ECF No. 97.[4] He also indexed and delivered "spreadsheets created, accessed or modified during the months of April, May, or June of 2011" from the redistricting computers to Plaintiffs pursuant to Plaintiffs' request. *Id.* at ¶¶ 6, 12, 15-16, 18-19 (identifying 199 "unique" spreadsheets). Meanwhile, Plaintiffs re-deposed one of the redistricting consultants (Gaddie), a Legislative Technology Services Bureau representative (Jeff Ylvisaker), and legislative aides (Foltz and Ottman). *See* ECF Nos. 105 to 121 (*Baldus* and *Whitford I* deposition transcripts); *see also Whitford v. Gill (Whitford I)*, 218 F. Supp. 3d 837, 858 n.116 (W.D. Wis. 2016) (noting that legislative consultant Joseph Handrick did not testify but that he "was deposed multiple times" in *Baldus* and "his depositions were admitted into the record" in *Whitford*). Additionally, Foltz and Ottman testified live at the four-day trial in May 2016. *Whitford I*, 218 F. Supp. 3d at 858.

[4] Each of the three redistricting computers produced in *Baldus* contained two internal hard drives and one external hard drive. *See* Am. Lanterman Decl. ¶ 4, ECF No. 97. The external hard drive associated with one of the three computers was damaged and could not be imaged in 2013. *Id.* Counsel for the *Baldus* and *Whitford* plaintiffs had numerous opportunities to discuss the damaged hard drive or any other alleged *Baldus* discovery deficiencies when they deposed Ylvisaker (Legislative Technology Services Bureau) and Foltz (a legislative aide) in *Baldus* in 2013. Ylvisaker Dep., Apr. 29, 2013, ECF No. 105; Ylvisaker Dep., Mar. 11, 2016, ECF No. 106; Foltz Dep., Apr. 30, 2013, ECF Nos. 111-112.

In *Whitford I*, both Plaintiffs and the Court extensively relied on these discovery materials and trial testimony. *See, e.g.*, Joint Final Pretrial Report ¶¶17-99, ECF No. 125 (referring to and authenticating various *Baldus* documents and testimony in joint statement of stipulated facts). Citing this evidence, this Court's opinion in *Whitford I* begins with a more than six-page discussion about the Act 43 drafting process. 218 F. Supp. 3d at 846-53; *see also id.* at 890-98 (discussing evidence underlying Court's finding of partisan intent). But not once in *Whitford I* was a sitting legislator deposed or required to produce documents.

In June 2018, the Supreme Court vacated *Whitford I* and remanded for Plaintiffs to establish standing. *See Gill*, 138 S. Ct. at 1934. For Plaintiffs' case to proceed, the Supreme Court instructed Plaintiffs to "prove concrete and particularized injuries using evidence … that would tend to demonstrate a burden on their individual votes." *Id.* The Supreme Court specifically considered the trial "evidence regarding the mapmakers' deliberations as they drew district lines" and stated this evidence of intent was not pertinent to Plaintiffs' standing: "[T]he question at this point is whether the plaintiffs have established injury in fact. That turns on effect, *not intent*, and requires a showing of a burden on the plaintiffs' votes that is actual or imminent, not conjectural or hypothetical." *Id.* at 1932 (emphasis added) (quotation marks omitted); *see also id.* at 1930 (emphasizing that the "injury is district specific"). In no uncertain terms, the Supreme Court also declined to endorse any First

Amendment theory of harm: "We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims….[T]he opinion of the Court rests on the understanding that we lack jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others." *Id.* at 1931.

Plaintiffs waited until September 2018 to file their amended complaint, adding new Plaintiffs and a new claim that Act 43 violates their First Amendment right to associate. *See* Am. Compl., ECF No. 201.[5] The Wisconsin State Assembly, described as "one of the two bodies comprising Wisconsin's bicameral legislative branch," then moved to intervene and dismiss the lawsuit. Br. in Supp. of Assembly's Mot. to Intervene at 2, ECF No. 210; *see* Assembly's Mot. to Dismiss, ECF Nos. 224-225. Unlike *Baldus*, no individual legislators moved to intervene. *Compare Baldus v. Members of Wis. Gov't Accountability Bd.*, Nos. 11-CV-562, 11-CV-1011, 2011 WL 5834275, at *1 (E.D. Wis. Nov. 21, 2011) (permitting congressmembers to intervene as plaintiffs and defendants). The Court granted the Assembly's intervention motion and denied its motion to dismiss without prejudice with instructions that the Assembly could renew its motions after the Supreme Court decides

[5] At the same time, the Assembly Democratic Campaign Committee filed a separate lawsuit against Defendants and also alleged that Act 43 violated the Committee's First Amendment right to associate. In January, this Court granted the Committee's motion to dismiss their lawsuit. *See* Compl., ECF No. 1 and Dismissal, ECF No. 45, *Wis. Assembly Democratic Campaign Comm. v. Gill*, No. 18-cv-763.

related redistricting cases *Rucho v. Common Cause* and *Lamone v. Benisek*. *See* Op. & Order Postponing Trial at 5, ECF No. 243.

Discovery is proceeding while the parties await the Supreme Court's decisions in *Rucho* and *Lamone*. *See id.* at 4. As part of Plaintiffs' renewed discovery efforts, Plaintiffs demand that Speaker Robin Vos—who has not intervened as an individual party in this litigation—submit to a deposition and produce documents. *See* Speaker Vos Subpoena, ECF No. 259-2.[6]

Plaintiffs seek two categories of information from Speaker Vos. First, they "seek to gather testimony from Speaker Vos as to the intent behind the drawing of each of the 29 districts challenged as diluting the vote of individual Plaintiffs." Br. in Support of Pls.' Mot. to Compel ("Plaintiffs' Br.") at 5, ECF No. 258. Second, they seek "testimony relating to their associational claims." *Id.*; *see also id.* at 3 (seeking "testimony relating to how the Legislature reached its decision on the boundaries for each district in the 2011 redistricting maps" and "testimony as to the predicted and actual associational effects of Act 43 on the Democratic Party, Democratic voters, the Republican

[6] The first Speaker Vos heard about Plaintiffs' plans to file a motion to compel was when Plaintiffs filed it. Soon after Plaintiffs attempted to serve the subpoena in February, Speaker Vos's counsel reached out to Plaintiffs' counsel to discuss their discovery requests. Counsel exchanged letters, the last of which asked Plaintiffs to help Speaker Vos's counsel understand why Plaintiffs' counsel believed Speaker Vos was a party and what information Plaintiffs were seeking regarding "associational" activities. *See* Letter from St. John to Greenwood, Mar. 5, 2019, ECF No. 259-6. Rather than respond, Plaintiffs' counsel instead cut off discussions and, without any notice, turned to the Court to resolve this discovery dispute (conveniently taking the dispute public). *See* Marley, *In Wisconsin gerrymandering case, Assembly Speaker Robin Vos refuses to testify*, Milwaukee Journal Sentinel (Mar. 20, 2019), *available at* https://www.jsonline.com/story/news/politics/2019/03/20/wisconsin-gerrymandering-case-speaker-robin-vos-refuses-testify/3222777002/.

Party, and Republican voters"). Plaintiffs also demand Speaker Vos's documents regarding these topics. *See* Speaker Vos Subpoena Ex. A (titled "Documents to be produced by Robin J. Vos") at 7-8, ECF No. 259-2.

ARGUMENT

Plaintiffs' motion to compel should be denied. Plaintiffs cannot compel a sitting legislator, who is not a party in this case, to sit for a deposition or produce documents. Plaintiffs' discovery requests transgress legislative immunity and privilege. They also exceed the scope of discovery permitted by the Federal Rules. *See* FED. R. CIV. P. 26(b)(1). They are burdensome, cumulative, meant to harass, and disproportionate to the needs of the case. As the Seventh Circuit has recognized, only extraordinary circumstances justify deposing high-ranking public officials. No such circumstances are present here.

I. Legislative immunity and privilege preclude Plaintiffs from compelling Speaker Vos to give testimony or produce documents in this case.

Contrary to Plaintiffs' repeated assertions, Speaker Vos has not waived legislative immunity or privilege. Contrary to Plaintiffs' arguments, Speaker Vos cannot be compelled to participate in discovery. The information Plaintiffs seek is privileged. For example, Plaintiffs seek information regarding Speaker Vos's "intent behind the drawing of each of the 29 districts challenged as diluting the vote of individual Plaintiffs," Plaintiffs' Br. 5, but "[a]n inquiry into a legislator's motives for his actions, regardless of whether those reasons

are proper or improper, is not an appropriate consideration for the court." *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997). Likewise, Plaintiffs seek "testimony relating to [Plaintiffs'] associational claims," Plaintiffs' Br. 5, which appears to cover privileged information relating to the legislative process, "inextricably intertwined with the legislative process," or otherwise "necessary and proper to the exercise of legislative authority," *Biblia Abierta*, 129 F.3d at 906; *see also Tenney v. Brandhove*, 341 U.S. 367, 377-78 (1951).[7] In particular, Plaintiffs are interested in legislators' testimony regarding the "predicted…associational effects of Act 43 on the Democratic Party, Democratic voters, the Republican party, and Republican voters." Plaintiffs' Br. 3. A request for legislators' "predictions" is merely an artful way of asking what motivated legislators to vote for Act 43. That information is also privileged, even under Plaintiffs' proposed five-factor test for legislative privilege.

A. Speaker Vos Has Not Waived Legislative Immunity or Legislative Privilege.

Plaintiffs have various theories about why Speaker Vos has waived the right to assert legislative privilege or immunity. None has merit.

1. Speaker Vos is not a party to this lawsuit.

Plaintiffs assert that "Assembly members, including Speaker Vos, have waived any claim to legislative immunity in this case by intervening as a

[7] Counsel for Speaker Vos repeatedly asked Plaintiffs' counsel to clarify what this vaguely defined category might include so that counsel could better assess Plaintiffs' discovery request. Instead of responding to counsel's last letter, Plaintiffs filed this motion.

defendant and actively participating in the litigation…." Plaintiffs' Br. 5-6. The Assembly intervened as a body, not its individual members. Plaintiffs have no authority for the proposition that the legislative body's intervention waives the individual members' legislative immunity or privilege. If that were so, Plaintiffs could examine every Assembly member about his or her core legislative functions.

Plaintiffs' cited authority is inapplicable. *See id.* at 6 (citing *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001)). In *Powell*, individual legislators both intervened and asserted legislative immunity. 247 F.3d at 522-23, 525. But here, the Wisconsin State Assembly is the intervening party, not individual members like Speaker Vos. *See* Br. in Supp. of Assembly's Mot. to Intervene at 2, ECF No. 210 (describing the Assembly as "one of the two bodies comprising Wisconsin's bicameral legislative branch"). The distinction matters. *Cf. Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 (2015) (assessing legislative standing and distinguishing *Raines v. Byrd*, 521 U.S. 811 (1997), on the ground that "six *individual Members* of Congress" filed suit in *Raines*, not a House of Congress (emphasis in original)).

The Assembly's intervention to defend the constitutionality of Act 43 does not waive the legislative privilege or immunity of each of its members, just as the U.S. Congress's intervention to defend the constitutionality of federal law would not waive its 535 members' legislative privilege or immunity. Legislative "privilege is a *personal* one and may be waived or

asserted by each *individual* legislator." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) (emphasis added). "[A] legislator cannot assert or waive the privilege on behalf of another legislator." *Favors v. Cuomo*, 285 F.R.D. 187, 211 (E.D.N.Y. 2012). So too here, the State Assembly may not waive the privilege held by its individual members.

Moreover, even if Speaker Vos were a party to the lawsuit (he is not), Plaintiffs' suggestion that a party waives *all* legislative privilege does not follow. Legislators "enjoy the benefits of legislative immunity and legislative privilege regardless of whether they are named as parties to the underlying lawsuit." *Lee v. Va. State Bd. of Elections*, No. 3:15-CV-357, 2015 WL 9461505, at *3 (E.D. Va. Dec 23, 2015) (citing *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1988) ("The purpose of the doctrine [of legislative immunity] is to prevent legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves.")); *cf. Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (legislative privilege protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves").

2. Neither legislative aides nor consultants can waive Speaker Vos's legislative privilege.

For similar reasons, Speaker Vos did not waive his legislative privilege when legislative staff members Adam Foltz and Tad Ottman testified. Neither staff member worked for Speaker Vos during redistricting, and Plaintiffs

called both as adverse witnesses.[8] These staffers can no more waive the privilege personally possessed by Speaker Vos than the Democratic minority leader could waive Speaker Vos's privilege. While Plaintiffs argue that "the Assembly 'cannot invoke the privilege as to themselves yet allow others to use the same information against the plaintiffs,'" Plaintiffs' Br. 7, Plaintiffs gloss over the fact that (1) Speaker Vos, not the Assembly, is asserting his personally possessed privilege and (2) there is no plan to use Speaker Vos's privileged testimony "to the prejudice of other parties." *Favors*, 285 F.R.D. at 212.

Finally, Plaintiffs assert that legislators waive legislative privilege when they involve non-legislators in the legislative process. *See* Plaintiffs' Br. 7-8. It is unclear whether Plaintiffs believe that the involvement of outside consultants (ubiquitous in redistricting) results in the wholesale waiver of legislative privilege in subsequent redistricting litigation. To the extent Plaintiffs are making that argument, no authority supports it. None of Plaintiffs' cited cases holds that a legislator may be compelled to testify because the legislator communicated with consultants or others (such as constituents) about proposed legislation. If that were the rule, then it is hard to imagine when legislative privilege could ever be asserted. Such a rule would reward insular legislative behavior—keeping legislators from constituents or

[8] Plaintiffs state that the Defendants called Foltz and Ottman as witnesses, Plaintiffs' Br. 6-7, but Defendants conducted direct examinations of both Foltz and Ottman *after* Plaintiffs called both witnesses adversely. Trial Tr. 45:23-46:6, ECF No. 147 (calling Foltz adversely); Trial Tr. 5:10-18, ECF No. 148 (calling Ottman adversely).

experts—and could very well "chill zealous representation" in an effort to avoid "the burden of defending themselves" in private lawsuits. *Biblia Abierta*, 129 F.3d at 903 (quotation marks omitted).

Plaintiffs' cited authorities—none of which binds this Court—stand at most for the modest proposition that particular documents generated by outside consultants are no longer privileged, or that a legislator may not invoke legislative privilege to prevent others from testifying about such communications. In *Committee for a Fair & Balanced Map*, for example, the district court concluded there was no legislative privilege for outside consultants' documents: "[T]o the extent that Non-Parties [legislators] relied on reports or recommendations generated by outside consultants to draft the 2011 Map, they waived their legislative privilege *as to these documents*." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-c-5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) (emphasis added); *see also Lee*, 2015 WL 9461505, at *6-7 (similar). Applying that modest rule here, Plaintiffs already have access to legislative consultants' documents and testimony from *Baldus*.[9] *See Baldus*, 2011 WL 6122542, at *1-2 (authorizing

[9] Plaintiffs have now identified additional third-party communications—those with "various national Republican entities including the Redistricting Majority Project (REDMAP) and the Republican National Committee." Plaintiffs' Br. 8. Discussed in Part I.B, Speaker Vos is immune from these discovery requests. But even if not, and as discussed in Parts II and III, it does not appear Plaintiffs have made any attempt to request these communications (assuming they exist) from those third parties, instead of burdening a high-ranking public official like Speaker Vos. Additionally, this requested information is not "relevant to any party's claim or defense," "proportional to the needs of the case," or sufficiently important in resolving the issues. FED. R. CIV. P. 26(b)(1). Communications with "various national Republican entities" or individuals is far afield from the Supreme Court's instruction to Plaintiffs to prove a cognizable injury-in-fact, requiring evidence of Act 43's effect on Plaintiffs'

discovery of legislative staffers and consultants). Discussed above, Plaintiffs not only have the "exact machines" used in the redistricting process, they also have days' worth of deposition and live trial testimony from both consultants. *Baldus*, 2013 WL 690496, at *1; *see* Handrick and Gaddie Deps., ECF Nos. 107, 108, 119, 120, 121. Plaintiffs' cited authorities do not hold that Plaintiffs are entitled to any more than what they already have.

B. Legislative immunity and privilege are absolute.

Time and again, the Supreme Court has confirmed that state lawmakers cannot be hauled into federal court civil rights actions for acts done within "the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376.[10] In *Dombrowski v. Eastland*, for example, the Court stated 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." 387 U.S. at 85 (quoting *Tenney*, 341 U.S. at 376). Again

votes "that is actual or imminent, not conjectural or hypothetical." *Gill*, 138 S. Ct. at 1932 (quotation marks omitted).

[10] State law independently protects Speaker Vos from being subpoenaed. The Wisconsin Constitution states that members of the legislature shall not "be subject to any civil process"—interpreted by the Wisconsin Supreme Court to include subpoenas—"during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session." Wis. Const. Art. IV, § 15; *State v. Beno*, 341 N.W.2d 668, 676 (Wis. 1984); *see also* Wis. Const. Art. IV, § 16 ("No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate."). In the § 1983 context, the Seventh Circuit has acknowledged that state law can be relevant to the privilege analysis. *See Jaffee v. Redmond*, 51 F.3d 1346, 1356-57 (7th Cir. 1995) ("Although federal common law governs our recognition of privilege in this case, the law of privilege as developed by the states is not irrelevant…."); *see also Bagley v. Blagojevich*, 646 F.3d 378, 391 n.1 (7th Cir. 2011) (acknowledging state legislative immunity law might have some role); *Bogan v. Scott-Harris*, 523 U.S. 44, 49-51 (1998) (discussing state supreme court decisions regarding legislative immunity as evidence of common-law tradition in § 1983 suit); *Tenney*, 341 U.S. at 375 & n.5 (highlighting that "[f]orty-one of the forty-eight States now have specific provisions in their Constitutions protecting the [legislative] privilege").

in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, the Supreme Court stated, "[W]e generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." 446 U.S. 719, 733 (1980). And again in *Bogan*, a unanimous Supreme Court stated that "legislators are absolutely immune." 523 U.S. at 48.

Applying this rule, federal courts afford special protection to state lawmakers in federal civil rights lawsuits such as this one.[11] In *Tenney*, the Supreme Court affirmed the dismissal of a federal civil rights lawsuit against California state senators, who allegedly conspired to violate plaintiff's First Amendment rights. 341 U.S. at 369-71, 377-79.[12] Similarly in *Biblia Abierta*, the Seventh Circuit ruled Chicago aldermen had complete immunity in a

[11] Some courts analyze legislative immunity and legislative privilege as different concepts—immunity protecting legislators from liability and privilege protecting legislators from compelled testimony. *See, e.g.*, *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *5. Others discuss these protections as interchangeable or complementary concepts. Call it "immunity" or "privilege," legislators are protected not only from "the consequences of litigation's results," but also from "the burden of defending themselves," *Dombrowski*, 387 U.S. at 85, whether or not they are a party. *See, e.g.*, *Marylanders*, 144 F.R.D. at 297 & n.12 ("Legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege."); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) (similar). The latter view is consistent with the Supreme Court's discussion in *Tenney*, describing these protections as immunity from all "civil process," not only civil liability. 341 U.S. at 372. It is also consistent with the purpose of legislative immunity; as the Seventh Circuit has recognized, immunity is necessary to protect legislators from the burdens of litigation. *See Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015) (warning that strictly construing immunity "would make it nearly impossible for a legislature to function"). Those burdens arise not only when legislators are parties, but also when they are named in subpoenas. *See Marylanders*, 144 F.R.D. at 297-98 (citing *Tenney*, 341 U.S. at 372).

[12] No different from this case, the federal cause of action in *Tenney* was the Civil Rights Act of 1871 (or what we would now call a § 1983 suit). At the time, the Civil Rights Act of 1871 was codified in Title 8 of the U.S. Code and has since been recodified in Title 42. *See Tenney*, 341 U.S. at 369.

federal civil rights lawsuit alleging the aldermen violated plaintiffs' First and Fourteenth Amendment rights when the aldermen passed zoning ordinances prohibiting plaintiffs from using properties as churches. 129 F.3d at 901-02, 906. In *Bagley v. Blagojevich*, the Seventh Circuit affirmed that the former Illinois governor could not be deposed in a federal civil rights lawsuit alleging that his use of the line-item veto was First Amendment retaliation. 646 F.3d at 396-97. Just last year, the Ninth Circuit in *Lee v. City of Los Angeles* held that public officials involved in municipal redistricting could not be deposed, even though plaintiffs' "claims of racial gerrymandering involve[d] serious allegations" that public officials violated the Equal Protection Clause. 908 F.3d at 1187-88. And the Eleventh Circuit issued of writ of mandamus ordering the district court to quash a plaintiffs' subpoenas seeking files of the Speaker of the Alabama House of Representatives and other public officials in a federal civil rights lawsuit alleging First Amendment retaliation. *See In re Hubbard*, 803 F.3d 1298, 1301-02, 1312 (11th Cir. 2015).

Speaker Vos must be afforded the same protections here. Much like the above cases, Plaintiffs have brought a federal civil rights suit alleging a violation of their First and Fourteenth Amendment rights. And while federal law might provide them a cause of action, it does not permit scorched-earth discovery culminating in deposing and demanding documents from a sitting legislator. Compelling such discovery frustrates the principles animating legislative immunity and privilege. It takes the legislator away from his public

duties. *Compare In re Hubbard*, 803 F.3d at 1310; *Lee*, 908 F.3d at 1187 (similar). It puts a single legislator's motives or knowledge under the microscope, even though his motives or knowledge are not shared by or imputed to the body. *See United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."); *see, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (individual legislator's understanding of bill language was not controlling as to bill's meaning). And it inhibits "the exercise of legislative discretion" with the threat of "judicial interference" or "fear of personal liability." *Bogan*, 523 U.S. at 52; *see also Biblia Abierta*, 129 F.3d at 903 (legislative privilege ensures legislators may represent their constituents "without fear" (quotation marks omitted)); *Tenney*, 341 U.S. at 373-74 (similar).

Neither the Supreme Court nor the Seventh Circuit has endorsed Plaintiffs' narrow view of legislative immunity and privilege. According to Plaintiffs, voting rights cases are the exception to these binding authorities. *See* Plaintiffs' Br. 9. The only authority Plaintiffs can muster for that proposition is *United States v. Gillock*, 445 U.S. 360 (1980). *See* Plaintiffs' Br. 9-10.[13] But *Gillock* held that legislative privilege did not bar the introduction

[13] Plaintiffs cite various cases for the proposition that voting rights are "public right[s]." Plaintiffs' Br. 10. No Supreme Court or Seventh Circuit decision employs Plaintiffs' "public rights" versus "private rights" distinction to decide whether legislative immunity applies in federal civil rights suits. And the Ninth Circuit's decision in *Lee*, applying legislative privilege in a case involving alleged racial gerrymandering, contravenes that distinction. 908 F.3d at 1187-88. The Supreme Court, moreover, told Plaintiffs that they cannot bring their case on behalf of all Democrats and that Plaintiffs must instead allege individualized injuries. *See*

of evidence in a federal *criminal* prosecution for bribery against a state senator. 445 U.S. at 362, 373. Why? Because of "the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process." *Id.* at 373.

No analogous "important federal interest" trumps a legislator's immunity and privilege here. Alleged partisan gerrymandering is not tantamount to prosecuting public corruption. Indeed, *Gillock* itself distinguished federal civil rights actions (like this one) from federal criminal prosecutions. *See id.* at 372-73. Since then, neither the Supreme Court nor the Seventh Circuit has applied *Gillock*'s "important federal interest" exception in a civil case. *See, e.g.*, *Thillens, Inc. v. Cmty. Currency Exchange Ass'n of Ill., Inc.*, 729 F.2d 1128, 1131 (7th Cir. 1984) (finding legislative immunity applied in civil bribery suit); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (stating in dicta that there might be "extraordinary instances" requiring policy makers to testify about whether the "purpose of the[ir] official action" was racially motivated but that "even then such testimony frequently will be barred by privilege" (citing *Tenney*, 341 U.S. 367)).

Plaintiffs' framing—describing the important federal interest as "voting rights"—also treats all voting rights claims as the same. They are not. Surely,

---

Gill, 138 S. Ct. at 1933 (stating "the fundamental problem with the plaintiffs' case" was that Plaintiffs framed it as "a case about group political interests, not individual legal rights").

Plaintiffs would not contend that the alleged federal interest here is greater than that in *racial* gerrymandering cases, where at least the Ninth Circuit has not invoked *Gillock*'s exception to legislative privilege. *See Lee*, 908 F.3d at 1187-88. Whether Plaintiffs' particular "voting rights" claims are even justiciable is "unresolved." *Gill*, 138 S. Ct. at 1934; *see also Vieth v. Jubelirer*, 541 U.S. 267, 305-06 (2004) (plurality) (concluding partisan gerrymandering claims are nonjusticiable); *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring) (concluding Court had "no basis on which to define clear, manageable, and politically neutral standards" for partisan gerrymandering claims). So while enforcing the First and Fourteenth Amendments is clearly important, it is hardly clear Plaintiffs' particular and novel partisan gerrymandering claims further those interests. *See In re Hubbard*, 803 F.3d at 1312 (finding "[plaintiff's] subpoenas do not serve an important federal interest" because, "as a matter of law, the First Amendment does not support the kind of claim [plaintiff] makes here").

Relatedly, even assuming Plaintiffs' claims are justiciable, Plaintiffs cannot seriously contend that the interest served by requiring Speaker Vos to participate in discovery is analogous to *Gillock*. Here, Plaintiffs hope to find evidence of a sitting legislators' partisan intent in an endeavor that is "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285 (plurality). That evidence could well be innocuous. Some amount of partisan intent is lawful, and perhaps inevitable, in redistricting. *See id.*; *id.* at 307 (Kennedy, J.,

concurring) ("A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied."); *see also Gaffney v. Cummings*, 412 U.S. 735, 752 (1973) (rejecting the argument that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it"). That evidence is nothing like evidence of *verboten* race-based motivations, let alone criminal bribery. *See Vieth*, 541 U.S. at 285-86 (plurality); *cf. Vill. of Arlington Heights*, 429 U.S. at 268. Even if *Gillock*'s "important federal interests" exception could apply in civil litigation—something that neither the Supreme Court nor the Seventh Circuit has held—it stretches the imagination that this case implicates any such interest. Evidence that a lawmaker acted with partisan intent (privileged in any other context) is consistent with what lawmakers have done since the Founding. *See Vieth*, 541 U.S. at 274-75 (plurality). It is not sufficiently important to require a sitting legislator to testify or produce documents about acts done "within the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376.

C. Even under Plaintiffs' preferred test, the information Plaintiffs seek is privileged.

Instead of grappling with the above Supreme Court and Seventh Circuit precedents, Plaintiffs invite this Court to apply a five-factor test applied by a handful of district courts in other redistricting cases. *See* Plaintiffs' Br. 10-11

("*Rodriguez* factors").[14] This Court should decline that invitation. The origin of Plaintiffs' preferred test is a case involving official information privilege (a qualified privilege for executive branch officials).[15] That test bears no resemblance—indeed, is contrary—to the decisions discussed above.

For example, the Supreme Court and Seventh Circuit have plainly stated that "unworthy purpose" or "the motive or intent of an official" does not negate legislative privilege. *Tenney*, 341 U.S. at 377 ("The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."); *Bogan*, 523 U.S. at 54 ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."); *see also Bagley*, 646 F.3d at 394 ("Perhaps the Governor harbored secret motives, but motives do not matter in determining whether the action is legislative."); *Biblia Abierta*, 129 F.3d at 905 ("An inquiry into a legislator's motives for his actions, regardless of whether those reasons are proper or improper, is not an appropriate consideration for the court."). But applying Plaintiffs' preferred

[14] The five factors are "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are voilable." *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (quotation marks omitted).

[15] The *Rodriguez* court adopted the five factors from *In re Franklin National Bank Securities Litigation*, a case involving official information privilege for intragovernmental communications between executive or administrative officers. 478 F. Supp. 577, 581-83 (E.D.N.Y. 1979) ("official information privilege is a qualified privilege; it is not absolute"). That decision makes no reference to *Tenney* or legislative privilege.

test in *Benisek v. Lamone*, the Maryland district court compelled sitting legislators to testify *because of* their motives. 241 F. Supp. 3d 566 (D. Md. 2017). The *Benisek* court ruled that the first *Rodriguez* factor (relevance) supported "depos[ing] the witnesses who were involved in drawing the map" because "plaintiffs may in discovery inquire into the witnesses' unexpressed thoughts with the purpose of obtaining admissible objective evidence of intent, which is a core issue in this litigation." *Id.* at 575. The *Benisek* court also ruled the second factor (availability of other evidence) favored plaintiffs because other evidence was "not a substitute for the ability to depose a witness and obtain *direct* evidence of motive and intent…." *Id.* at 576; *see also id.* at 577 (reasoning that restricting discovery of "conversations and communications [between legislators and their staff] could thus obscure important evidence of the purpose and intent of the legislative action."). That reasoning defies *Tenney* and progeny. A legislator cannot be compelled to testify about his legislative acts in a civil case, whatever his motive.

But even applying Plaintiffs' five-factor test, the information Plaintiffs seek is privileged.[16] *First*, Plaintiffs argue that evidence regarding legislators'

[16] Plaintiffs state that they seek "*direct* admissions as to the specific intent behind the chosen boundaries for the 29 districts in Act 43 challenged as diluting the vote [*sic*] of Plaintiffs." Plaintiffs' Br. 13 (emphasis added). They also suggest that they seek evidence that legislators were motivated by Act 43's "associational effects" on Democrats or Republicans. *Id.* at 3. To the extent Plaintiffs seek other information unrelated to legislative acts, such as information relating to Democratic fundraising or candidate recruitment, counsel agrees that information would not be privileged under Plaintiffs' five-factor test. But other reasons foreclose Plaintiffs from compelling that sort of information from Speaker Vos. *See* pp. 26-32, *infra*.

intent is relevant to partisan gerrymandering claims (factor 1). Plaintiffs' Br. 11. But that evidence is not relevant to Plaintiffs' principal task on remand: to prove that they have suffered a cognizable injury in fact. For Plaintiffs' case to proceed, they must marshal evidence about Act 43's "effect, not intent." *Gill*, 138 S. Ct. at 1932.

Second, Plaintiffs argue that the evidence they seek is not available elsewhere (factor 2). Plaintiffs' Br. 12. It is. And Plaintiffs used it in both *Baldus* and in *Whitford I*. *See* pp. 2-5, *supra*. Plaintiffs' only argument is that such evidence is only "circumstantial." Plaintiffs' Br. 12-13. According to Plaintiffs, they deserve "direct admissions" of intent, available only from Speaker Vos. *Id.*; *see also id.* at 14 (stating Speaker Vos is "uniquely able to provide direct evidence as to the specific intent behind the district boundaries in Act 43"). By Plaintiffs' logic, deposing legislators and demanding their documents would be justified in every case, lest plaintiffs not have "direct" evidence.

Third, Plaintiffs argue that the "rights at interest in this case are serious" (factor 3). Plaintiffs' Br. 14-15. For the reasons stated above, Plaintiffs' partisan gerrymandering claims—which may not even be justiciable—are not "sufficiently serious to abrogate claims of legislative privilege," *id.* at 14. Plaintiffs wrongly equate the seriousness of racial discrimination claims in *Bethune-Hill* and *Veasey* with their partisan gerrymandering claims. *See id.* at 15 (citing *Bethune-Hill v. Va. State Bd. of*

Elections, 114 F. Supp. 3d 323 (E.D. Va. 2015) and *Veasey v. Perry*, No. 2:13-cv-193, 2014 WL 1340077 (S.D. Tex. Apr. 3, 2014)). The other district court cases Plaintiffs cite are similarly unconvincing. In *Committee for a Fair & Balanced Map*, the district court *refused* to compel the very discovery Plaintiffs seek here: direct evidence of legislative intent. 2011 WL 4837508, at *11. In *Marylanders*, which Plaintiffs misread, it does not appear that the Maryland district court compelled the depositions of the senate president or speaker. *See* Plaintiffs' Br. 15 (citing *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1039 (D. Md. 1994)). The cited opinion instead indicates that the House *minority* leader and *minority* whip testified (presumably voluntarily) in support of plaintiffs' partisan gerrymandering claims. *See Marylanders*, 849 F. Supp. at 1039. In *Rucho*, Plaintiffs fail to mention that the deposed legislators expressly waived legislative privilege. *See* Lewis Dep. 7:1-5, ECF No. 108-3, Rucho Dep. 7:14-20, ECF No. 108-5, *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.). And *Benisek* is at odds with binding Supreme Court and Seventh Circuit precedent. *See* pp. 21-22, *supra*.

Finally, as Plaintiffs must acknowledge, the Assembly is the entity that intervened. Speaker Vos is not a party. Compelling discovery from an individual non-party legislator will chill future legislators' willingness to speak freely and openly about legislation (factors 4 and 5). Neither the Assembly's decision to intervene, nor earlier district court opinions' statements about "the motives of the lawmakers," Plaintiffs' Br. 16, are relevant to these final factors.

The Assembly's intervention, for example, does not waive Speaker Vos's legislative privilege any more than it would the minority leader's privilege.

Even courts applying Plaintiffs' preferred test have refused to require disclosure of the evidence Plaintiffs seek. In the Illinois redistricting case, for example, the district court ruled that "information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers" as well as "information concerning the identities of persons who participated in decisions regarding the [challenged] Map" were privileged. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10-11. That court permitted discovery only of "objective facts upon which lawmakers relied" or "identities of experts and/or consultants"—the very information Plaintiffs here already have. *Id.* at *11. Likewise in *Rodriguez*, the court denied plaintiffs' motion to compel "to the extent that the plaintiffs seek information concerning the actual deliberations of the Legislature—or individual legislators—which took place outside [the citizen-legislator redistricting committee]." 280 F. Supp. 2d at 103. And in *Marylanders*, plaintiffs could not "inquire into legislative motive if such an inquiry would necessitate an abrogation of legislative immunity." 144 F.R.D. at 297 n.12.[17] Here too, testimony or documents regarding Speaker Vos's deliberations or motives are privileged.

[17] Two judges in *Marylanders* concurred, stating that whether legislative members of a citizen-legislator redistricting committee could be deposed "should be deferred until a more complete factual record has been developed." *Marylanders*, 144 F.R.D. at 305 (Murnaghan, J., concurring). But those judges added that they would "flatly prohibit" depositions "as to any action which they took after the redistricting legislation reached the floor…" *Id.*

II. No extraordinary circumstances justify deposing Speaker Vos.

There is a separate and independent ground for denying Plaintiffs' motion to compel: a public official like Speaker Vos "should not be taken away from his work to spend hours or days answering lawyers' questions unless there is a real need." *Olivieri v. Rodriguez*, 122 F.3d 406, 409-10 (7th Cir. 1997); *see also Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Warzon v. Drew*, 155 F.R.D. 183, 185-86 (E.D. Wis. 1994) (noting public officials "must be allowed the freedom to perform their tasks without the constant interference of the discovery process"). The "settled rule across the circuits" is that high-ranking officials "may not be subject to depositions or called to testify regarding their official actions," "absent extraordinary circumstances." *Coleman v. Schwarzenegger*, No. CIV-S-90-0520, 2008 WL 4300437, at *2 (E.D. Cal. Sept. 15, 2008); *see also City of Fort Lauderdale v. Scott*, No. 10-61122-CIV, 2012 WL 760743, at *2-3 (S.D. Fla. Mar. 7, 2012) (collecting cases). The party seeking the deposition must establish that (1) the public official has relevant information, (2) that such information "is essential to that party's case," and (3) that such information is not "available through an alternative source or via less burdensome means." *Warzon*, 155 F.R.D. at 185; *see, e.g.*, *LaPorta v. City of Chicago*, No. 14-c-9665, 2016 WL 4429746, at *2 (N.D. Ill. Aug. 22, 2016) (asking why the introduction of other evidence was "insufficient to prove [plaintiff's] point? What more is he searching for in his quest to depose the Mayor? What specific reason does he have to believe that the deposition 'will produce or lead to admissible evidence?'"). In *Bogan*, for

example, the First Circuit ruled that a party could not compel a mayor's deposition because that party "did not pursue other sources to obtain relevant information before turning to the mayor." 489 F.3d at 424.

Applied here, Plaintiffs have not established that Speaker Vos has unique and relevant information, unavailable from another source or through less burdensome means. *See id.*; *Warzon*, 155 F.R.D. at 185-86. Indeed, Plaintiffs' motion concedes that the two categories of information they seek from Speaker Vos could be (or have been) obtained elsewhere.

With respect to Plaintiffs' voter dilution claim, Plaintiffs say they plan "to gather testimony from Speaker Vos as to the intent behind the drawing of each of the 29 districts challenged as diluting the vote of individual Plaintiffs." Plaintiffs' Br. 5. In addition to the privileged nature of such information, there are several other problems with Plaintiffs' plan. First, Plaintiffs do not need such testimony to establish they have suffered a cognizable injury in fact, which turns on evidence of Act 43's "effect, not intent." *Gill*, 138 S. Ct. at 1932. Second, even if evidence of intent were relevant, Plaintiffs' brief concedes that Speaker Vos does not uniquely possess the information. They identify Speaker Vos as "one of only two people who participated in meetings." *Compare* Plaintiffs' Br. 1, 17, *with Scott*, 2012 WL 760743, at *2-3 (official's "mere presence at meetings and his (alleged) personal knowledge do not alone justify his deposition"). They admit that he would "merely be providing additional information." Plaintiffs' Br. 17. After all, Plaintiffs have already deposed

(repeatedly) and cross-examined Foltz, the other person Plaintiffs say was present. Third, Plaintiffs already have access to extensive discovery materials from *Baldus* and *Whitford I*, including the very computers used in redistricting. *See Baldus*, 2013 WL 690496, at *1. Plaintiffs used that information without complaint to make their case about legislative intent in *Whitford I*. 218 F. Supp. 3d at 846-53; *see also id.* at 890-98. And fourth, to the extent Plaintiffs believe information is missing, Plaintiffs acknowledge that they can get that information elsewhere. For example, Plaintiffs state that they seek "communications between additional outsiders to the legislative process, specifically, various national Republican entities including the Redistricting Majority Project (REDMAP) and the Republican National Commitee [*sic*]." *See* Plaintiffs' Br. 8. It does not appear Plaintiffs have sought discovery from these third parties.

With respect to Plaintiffs' First Amendment claim, Plaintiffs vaguely state that they wish to "elicit testimony relating to their associational claims." Plaintiffs' Br. 5. It is not clear what unique and relevant information Plaintiffs' counsel believes Speaker Vos will have regarding those claims. Plaintiffs say only that he "is in a unique position" because of "his integral role in participating in the development of the districts included in Act 43 and as the current head of the Wisconsin Republican Assembly Campaign Committee." *Id.* And they claim "[a]ny knowledge" he has about these intended or actual

effects "is relevant." *Id.* at 11. Conclusory assertions that Speaker Vos has "unique" and "relevant" information does not make it so.

In particular, Plaintiffs seek to depose Speaker Vos regarding *Plaintiffs'* association with "like-minded Democrats" and other Democratic efforts. Plaintiffs' Br. 3. Surely Plaintiffs themselves have knowledge about their own alleged inability to associate with like-minded Democrats, their time spent campaigning, or their lobbying efforts. Likewise, Plaintiffs themselves and Democratic organizations (*e.g.*, the Assembly Democratic Campaign Committee) are the keepers of information about Democratic campaign activities, not Speaker Vos.

It also appears Plaintiffs seek to depose Speaker Vos regarding *Republican* campaign-related activities. Plaintiffs have not explained how such information would be "relevant," or "proportional to the needs of the case" in light of the "issues at stake." FED. R. CIV. P. 26(b)(1). Plaintiffs, avowed Democrats, claim that Act 43 burdened their efforts to associate in ways particular to each Plaintiff. Plaintiffs' claims cannot be predicated on the successes or failures of Democrats vis-à-vis Republicans; such a claim would run headlong into the Supreme Court's admonition that the judiciary "is not responsible for vindicating generalized partisan preferences" and that its "constitutionally prescribed role is" instead "to vindicate the individual rights of the people appearing before it." *Gill*, 138 S. Ct. at 1933. Finally, even if such information were relevant, Plaintiffs have made no effort to get this

information elsewhere. Speaker Vos cannot be Plaintiffs' first stop. *Scott*, 2012 WL 760743, at *4; *Bogan*, 489 F.3d at 424.

If "[a]ny knowledge Speaker Vos has" is discoverable, as Plaintiffs insist, then any plaintiff could require a high-ranking official to submit to a deposition in any lawsuit questioning the legality of legislation. *See* Plaintiffs' Br. 11. The Seventh Circuit rejects such litigation tactics. *See Olivieri*, 122 F.3d at 409. Plaintiffs cannot depose Speaker Vos absent extraordinary circumstances. No such circumstances are present here, especially when Plaintiffs all but concede that the information they seek is available "through an alternative source or via less burdensome means." *Warzon*, 155 F.R.D. at 185-86.

III. Plaintiffs' Document Requests Likewise Exceed the Scope of Permissible Discovery.

For all the foregoing reasons, Plaintiffs' demand that Speaker Vos produce various documents should also be denied. Plaintiffs' requests for "analyses" or "memos" or other documents relating to Republican campaign activities or Republican "preferred" legislation, among others, exceed Rule 26(b)(1)'s scope of discovery. *See* Speaker Vos Subpoena Ex. A at 7-8, ECF No. 259-2.

In particular, document requests 1 through 3, 6 through 9 and 15 (documents relating to the redistricting process) seek information that is either privileged or cumulative. For example, Plaintiffs demand "documents … concerning the … motives relied on" in the "planning, development,

negotiation, drawing, revision, or redrawing" of the current plan. *Id*. Similarly, requests 6 to 9 appear related to Plaintiffs' desire to gather evidence about what legislators "predicted" when passing Act 43. *See* Plaintiffs' Br. 3. But "inquir[ing] into a legislator's motives for his actions, regardless of whether those reasons are proper or improper, is not an appropriate consideration for the court." *Biblia Abierta*, 129 F.3d at 905; *see also Gill*, 138 S. Ct. at 1932 (stating evidence of intent was not pertinent to Plaintiffs' establishing an injury in fact). At the very least, these requests seek information that is cumulative or duplicative of what Plaintiffs already have, either through discovery in *Baldus* or earlier in this case. *See Baldus*, 2011 WL 6122542, at *1 (permitting discovery of "any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps"). For that reason alone, the burden of the additional discovery that Plaintiffs now seek exceeds any supposed benefit. *See, e.g.*, *Taylor v. Litscher*, No. 18-cv-63-jdp, 2019 WL 764688, at *2 (W.D. Wis. Feb. 21, 2019) (concluding burden of additional cumulative discovery outweighs any benefit).

Document requests 4 through 5, seeking open-records requests and responses related to the Wisconsin State Assembly's retention of Bartlit Beck LLP, are irrelevant to any party's claims or defenses in this litigation. "[I]n light of its limited relevance," such discovery "is out of proportion to the needs of this case." *Boehm v. Scheels All Sports, Inc.*, No. 15-cv-379-jdp, 2016 WL 1559183, at *2 (W.D. Wis. Apr. 15, 2016).

Plaintiffs' remaining demands are for documents regarding "recruiting Republican candidates," "solicit[ing] campaign contributions," "volunteer activities in support of Republican campaigns," "voter registration activities," and "advocating for or implementing legislative policies." Speaker Vos Subpoena Ex. A at 7-8, ECF No. 259-2. These requests about Republican campaign activities, in addition to Plaintiffs' aforementioned requests for communications with Republican organizations or associated individuals, are nothing more than a fishing expedition for information with little to no relevance to the issues to be tried. This is not a case about "the fortunes of the political parties." *Gill*, 138 S. Ct. at 1933. The judiciary is not responsible for refereeing such disputes. The burden of additional discovery regarding Republican campaign activities exceeds any possible benefit and is disproportionate to the needs of the case. *See, e.g.*, *Boehm*, 2016 WL 1559183, at *1-2 (refusing to allow "discovery into products and lines of business not at issue in this case").

CONCLUSION

Speaker Vos respectfully requests that this Court deny Plaintiffs' motion to compel.

April 3, 2019

BARTLIT BECK LLP

/s/ Adam K. Mortara
Adam K. Mortara, SBN 1038391
Joshua P. Ackerman
Taylor A. R. Meehan
54 W. Hubbard Street
Chicago, IL 60654
Ph. 312-494-4400
Fax 312-494-4440
adam.mortara@bartlitbeck.com
joshua.ackerman@bartlitbeck.com
taylor.meehan@bartlitbeck.com

BELL GIFTOS ST. JOHN LLC

/s/ Kevin St. John
Kevin St. John, SBN 1054815
5325 Wall Street, Suite 2200
Madison, WI 53718-7980
Ph. 608-216-7990
Fax 608-216-7999
kstjohn@bellgiftos.com

Attorneys for Speaker Robin J. Vos