No. 22-50407

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,

*Plaintiffs-Appellees*,

v.

GREG ABBOT, et al.,

*Defendants*,

RYAN GUILLEN, TEXAS HOUSE MEMBER, BROOKS LANDGRAF, TEXAS HOUSE MEMBER & JOHN LUJAN, TEXAS HOUSE MEMBER,

*Third-Party Movants-Appellants.*

On Interlocutory Appeal from or, Alternatively, Petition for Writ of Mandamus to the United States District Court for the Western District of Texas No. 3:21-cv-259-DCG-JES-JVB [Lead Case]

# EMERGENCY MOTION FOR STAY PENDING APPEAL OR, ALTERNATIVELY, PENDING *MERRILL* AND FOR TEMPORARY ADMINISTRATIVE STAY PENDING CONSIDERATION OF MOTION

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## CERTIFICATE OF INTERESTED PERSONS

(A) In the district court, this case is captioned as *League of United Latin American Citizens, et al. v. Abbott, et al.*, No. 3:21-cv-259-DCG-JES-JVB (lead case). In this Court, it is captioned as *League of United American Citizens, et al. v. Ryan Guillen, Texas House Member, Brooks Landgraf, Texas House Member & John Lujan, Texas House Member.*

(B) Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 26.1-1 and 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2. As counsel for Movants-Appellants, I have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Texas House Representative Ryan Guillen – Third-Party Movant-Appellant
2. Texas House Representative Brooks Landgraf – Third-Party Movant-Appellant
3. Texas House Representative John Lujan – Third-Party Movant-Appellant
4. Adam K. Mortara, Lawfair LLC – Counsel for Third-Party Movants-Appellants
5. J. Michael Connolly, Consovoy McCarthy PLLC – Counsel for Third-Party Movants-Appellants
6. Taylor A.R. Meehan, Consovoy McCarthy PLLC – Counsel for Third-Party Movants-Appellants
7. Frank H. Chang, Consovoy McCarthy PLLC – Counsel for Third-Party Movants-Appellants

8. Jeffrey S. Hetzel, Consovoy McCarthy PLLC – Counsel for Third-Party Movants-Appellants

9. League of United Latin American Citizens (LULAC) – *LULAC* Plaintiffs

10. Southwest Voter Registration Education Project – *LULAC* Plaintiffs

11. Mi Familia Vota – *LULAC* Plaintiffs

12. American GI Forum of Texas – *LULAC* Plaintiffs

13. La Union Del Pueblo Entero – *LULAC* Plaintiffs

14. Mexican American Bar Association of Texas – *LULAC* Plaintiffs

15. Texas Hispanics Organized for Political Education – *LULAC* Plaintiffs

16. William C. Velasquez Institute – *LULAC* Plaintiffs

17. Fiel Houston, Inc. – *LULAC* Plaintiffs

18. Texas Association of Latino Administrators and Superintendents – *LULAC* Plaintiffs

19. Emelda Menendez – *LULAC* Plaintiffs

20. Gilberto Menendez – *LULAC* Plaintiffs

21. Jose Olivares – *LULAC* Plaintiffs

22. Florinda Chavez – *LULAC* Plaintiffs

23. Joey Cardenas – *LULAC* Plaintiffs

24. Proyecto Azteca – *LULAC* Plaintiffs

25. Reform Immigration for Texas Alliance – *LULAC* Plaintiffs

26. Workers Defense Project – *LULAC* Plaintiffs

27. Jose Olivares – *LULAC* Plaintiffs

28. Paulita Sanchez – *LULAC* Plaintiffs

29. Jo Ann Acevedo – *LULAC* Plaintiffs

30. David Lopez – *LULAC* Plaintiffs

31. Diana Martinez Alexander – *LULAC* Plaintiffs

32. Jeandra Ortiz – *LULAC* Plaintiffs

33. Fatima L. Menendez, Mexican American Legal Defense and Educational Fund (MALDEF) – Counsel for *LULAC* Plaintiffs

34. Denise Hulett, MALDEF – Counsel for *LULAC* Plaintiffs

35. Samantha T. Serna, MALDEF – Counsel for *LULAC* Plaintiffs

36. Kenneth Parreno, MALDEF – Counsel for *LULAC* Plaintiffs

37. Nina Perales, MALDEF – Counsel for *LULAC* Plaintiffs

38. Roy Charles Brooks – *Brooks* Plaintiffs

39. Sandra Puente – *Brooks* Plaintiffs

40. Jose R. Reyes – *Brooks* Plaintiffs

41. Shirley Anna Fleming – *Brooks* Plaintiffs

42. Louie Minor, Jr. – *Brooks* Plaintiffs

43. Norma Cavazos – *Brooks* Plaintiffs

44. Felipe Gutierrez – *Brooks* Plaintiffs

45. Eva Bonilla – *Brooks* Plaintiffs

46. Clara Faulkner – *Brooks* Plaintiffs

47. Deborah Spell – *Brooks* Plaintiffs

48. Beverly Powell – *Brooks* Plaintiffs

49. Phyllis Goines – *Brooks* Plaintiffs

50. K. Scott Brazil, Brazil & Dunn – Counsel for *Brooks* Plaintiffs

51. Molly Elizabeth Danahy, Campaign Legal Center – Counsel for *Brooks* Plaintiffs

52. Chad W. Dunn, Brazil & Dunn – Counsel for *Brooks* Plaintiffs

53. Jesse Gaines – Counsel for *Brooks* Plaintiffs

54. Mark P. Gaber, Mark P. Gaber PLLC – Counsel for *Brooks* Plaintiffs

55. Sonni Waknin – Counsel for *Brooks* Plaintiffs

56. Damon James Wilson – Former Plaintiff (Dismissed 2/9/2022)

57. Richard Scott Gladden, Law Office of Richard Gladden – Counsel for Former Plaintiff Wilson (Dismissed 2/9/2022)

58. Voto Latino – *Voto Latino* Plaintiffs

59. Akilah Bacy – *Voto Latino* Plaintiffs

60. Orlando Flores – *Voto Latino* Plaintiffs

61. Marilena Garza – *Voto Latino* Plaintiffs

62. Cecilia Gonzales – *Voto Latino* Plaintiffs

63. Agustin Loredo – *Voto Latino* Plaintiffs

64. Cinia Montoya – *Voto Latino* Plaintiffs

65. Ana Ramon – *Voto Latino* Plaintiffs

66. Jana Lynne Sanchez – *Voto Latino* Plaintiffs

67. Jerry Shafer – *Voto Latino* Plaintiffs

68. Debbie Lynn Solis – *Voto Latino* Plaintiffs

69. Angel Ulloa – *Voto Latino* Plaintiffs

70. Mary Uribe – *Voto Latino* Plaintiffs

71. Rosalinda Ramos Abuabara – *Voto Latino* Plaintiffs

72. Abha Khanna, Elias Law Group LLP – Counsel for *Voto Latino* Plaintiffs

73. Aria C. Branch, Elias Law Group LLP – Counsel for *Voto Latino* Plaintiffs

74. David Fox, Elias Law Group LLP – Counsel for *Voto Latino* Plaintiffs

75. Francesa Gibson, Elias Law Group LLP – Counsel for *Voto Latino* Plaintiffs

76. Kevin J. Hamilton, Perkins Coie LLP – Counsel for *Voto Latino* Plaintiffs

77. Max Renea Hicks, Law Office of Max Renea Hicks – Counsel for *Voto Latino* Plaintiffs

78. Richard Alexander Medina, Elias Law Group LLP – Counsel for *Voto Latino* Plaintiffs

79. Kathryn E. Yukevich, Elias Law Group LLP - Counsel for *Voto Latino* Plaintiffs (Withdrawn on April 5, 2022)

80. Mexican American Legislative Caucus (MALC) – *MALC* Plaintiffs

81. George (Tex) Quesada, Sommerman McCaffity Quesada & Geisler LLP – Counsel for *MALC* Plaintiffs

82. Sean J. McCaffity, Sommerman McCaffity Quesada & Geisler LLP – Counsel for *MALC* Plaintiffs

83. Texas State Conference of the NAACP – *NAACP* Plaintiff

84. Brian Raphel, Dechert LLP – Counsel for *NAACP* Plaintiff

85. Ezra D. Rosenberg, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

86. Gary L. Bledsoe, The Bledsoe Law Firm, PLLC – Counsel for *NAACP* Plaintiff and Plaintiff-Intervenors

87. Jon M. Greenbaum, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

88. Lindsey Beth Cohan, Dechert LLP – Counsel for *NAACP* Plaintiff

89. Neil Steiner, Dechert LLP – Counsel for *NAACP* Plaintiff

90. Pooja Chaudhuri, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

91. Robert Stephen Notzon, Law Office of Robert Notzon – Counsel for *NAACP* Plaintiff

92. Sofia Fernandez Gold, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

93. Fair Maps Texas Action Committee – *Fair Maps* Plaintiffs

94. OCA-Greater Houston – *Fair Maps* Plaintiffs

95. North Texas Chapter of the Asian Pacific Islander American Public Affairs Association – *Fair Maps* Plaintiffs

96. Emgage – *Fair Maps* Plaintiffs

97. Turner Khanay – *Fair Maps* Plaintiffs

98. Angela Rainey – *Fair Maps* Plaintiffs

99. Austin Ruiz – *Fair Maps* Plaintiffs

100. Aya Eneli – *Fair Maps* Plaintiffs

101. Sofia Sheikh – *Fair Maps* Plaintiffs

102. Jennifer Cazares – *Fair Maps* Plaintiffs

103. Niloufar Hafizi – *Fair Maps* Plaintiffs

104. Lakshmi Ramakrishnan – *Fair Maps* Plaintiffs

105. Amatulla Contractor – *Fair Maps* Plaintiffs

106. Deborah Chen – *Fair Maps* Plaintiffs

107. Arthur Resa – *Fair Maps* Plaintiffs

108. Sumita Ghosh – *Fair Maps* Plaintiffs

109. Anand Krishnaswamy – *Fair Maps* Plaintiffs

110. Allison Jean Riggs, Southern Coalition for Social Justice – Counsel for *Fair* Maps Plaintiffs

111. Andre I. Segura, Law Office of Andre Ivan Segura – Counsel for *Fair Maps* Plaintiffs

112. Ashley Alcantara Harris, ACLU Foundation of Texas – Counsel for *Fair Maps* Plaintiffs

113. David A. Donatti, ACLU of Texas – Counsel for *Fair Maps* Plaintiffs

114. Hilary Harris Klein, Southern Coalition for Social Justice – Counsel for *Fair Maps* Plaintiffs

115. Jerry Vattamala, Asian American Legal Defense and Education Fund (AALDEF) – Counsel for *Fair Maps* Plaintiffs

116. Mitchell Brown, Southern Coalition for Social Justice – Counsel for *Fair Maps* Plaintiffs

117. Noor Taj, Southern Coalition for Social Justice – Counsel for *Fair Maps* Plaintiffs

118. Patrick Stegemoeller, AALDEF – Counsel for *Fair Maps* Plaintiffs

119. Susana Lorenzo-Giguere, AALDEF – Counsel for *Fair Maps* Plaintiffs

120. Thomas Paul Buser-Clancy, ACLU Foundation of Texas – Counsel for *Fair Maps* Plaintiffs

121. Yurji Rudensky, Brennan Center for Justice at NYU School of Law – Counsel for *Fair Maps* Plaintiffs

122. United States of America – Plaintiff

123. Daniel Joshua Freeman, U.S. Department of Justice – Counsel for United States

124. Holly Frances Balsley Berlin, U.S. Department of Justice – Counsel for United States

125. Jacki Lynn Anderson, U.S. Department of Justice – Counsel for United States

126. Jasmin Camille Lott, U.S. Department of Justice – Counsel for United States

127. Jaye Allison Sitton, U.S. Department of Justice – Counsel for United States

128. Michelle Christine Rupp, U.S. Department of Justice – Counsel for United States

129. Thomas Christian Herren, Jr., U.S. Department of Justice – Counsel for United States

130. Timothy F. Mellett, U.S. Department of Justice – Counsel for United States

131. Trey Martinez Fischer – Plaintiff

132. U.S. Representative Veronica Escobar – Plaintiff

133. Martin Anthony Golando, Law Office of Martin Golando, PLLC – Counsel for Plaintiffs Fisher and Escobar

134. Sheila Jackson Lee – Plaintiff-Intervenor

135. Alexander Green – Plaintiff-Intervenor

136. Jasmine Crockett – Plaintiff-Intervenor

137. Eddie Bernice Johnson – Plaintiff-Intervenor

138. State of Texas - Defendant

139. Governor Greg Abbott – Defendant

140. Lieutenant Governor Dan Patrick – Defendant

141. Texas Secretary of State John Scott – Defendant

142. Deputy Secretary of State Jose A. Esparza – Defendant

143. Texas House Speaker Dade Phelan – Former Defendant (dismissed 5/2/2022)

144. Edward L. Marshall, Assistant Attorney General, Texas Office of Attorney General – Counsel for Defendants

145. Jeffrey Michael White, Texas Office of Attorney General – Counsel for Defendants

146. Patrick K. Sweeten, Texas Office of Attorney General – Counsel for Defendants and Third-Party Movants-Appellants

147. William Thomas Thompson, Texas Office of Attorney General – Counsel for Defendants and Third-Party Movants-Appellants

148. Christopher D. Hilton, Texas Office of Attorney General – Counsel for Defendants

149. Courtney Brooke Corbello, Texas Office of Attorney General – Counsel for Defendants

150. Jack Buckley Disorbo, Texas Office of Attorney General – Counsel for Defendants and Third-Party Movants-Appellants

151. Kathleen Hunker, Texas Office of Attorney General – Counsel for Defendants

152. Texas Legislative Council – Neutral

153. Alyssa Bixby-Lawson, Texas Office of Attorney General – Counsel for Texas Legislative Council

154. Judge David C. Guaderrama – Member of Three-Judge District Court

155. Judge Jerry E. Smith – Member of Three-Judge District Court

156. Judge Jeffrey V. Brown – Member of Three-Judge District Court

Respectfully submitted this 19th day of May, 2022.

*/s/ Adam K. Mortara*
Adam K. Mortara

*Counsel for Legislators,*
*Third-Party Movants-Appellants*

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## INTRODUCTION AND NATURE OF EMERGENCY

Legislators Ryan Guillen, Brooks Landgraf, and John Lujan are members of the Texas House of Representatives and third parties to this redistricting litigation. Yesterday, the court below ordered them to sit for depositions next week, despite the legislators' invocation of legislative immunity and privilege.[1] Worse, they are ordered to answer every question posed to them—even those that would be off-limits in any other court in the country. The legislators "must appear and testify even if it appears likely that legislative privilege may be invoked in response to certain questions." Order 4 (attached as Exhibit A). Counsel may object but *cannot* instruct the legislator not to answer. Rather, the legislator "must then answer the question in full." *Id.* At that point, the proverbial "cat is out of the bag." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.). And the twin safeguards of legislative immunity and privilege—older than the country itself—are no safeguards at all.

The order defies historically rooted immunities and testimonial privileges for legislators—protections deemed "so essential for representatives of the people" that they were inscribed in nearly every State's constitution and the federal Constitution. *Tenney v. Brandhove*, 341 U.S. 367, 372-77 (1951). It is simply "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Id.* at 377. But without a stay, that is precisely what will transpire here. Further review is warranted.

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[1] *See* Order Denying Mot. to Quash, ECF 282 (attached as Exhibit A). All ECF numbers refer to docket in *LULAC v. Abbott*, No. 3:21-cv-259-DCG-JES-JVB (W.D. Tex.).

Since the first state constitutions, legislators have been "protected not only from the consequences of litigation's results, but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *see Tenney*, 341 U.S. at 372-75. Texas is no exception. *See, e.g.*, *In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001). Nor is redistricting. *See, e.g.*, *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018).

The legislators seek an emergency stay of their depositions pending their appeal or, alternatively, petition for writ of mandamus.[2] The depositions are set to proceed on May 24 and May 25, 2022. The United States and private plaintiffs (having issued the subpoenas) refuse to postpone. Accordingly, to prevent the depositions from proceeding absent this Court's review, while allowing sufficient time to request a stay pending appeal from the United States Supreme Court if necessary, the legislators respectfully request a decision on their request for an emergency stay **as soon as practicable and no later than Friday, May 20, 2022, at 8:00 p.m.** The legislators also request an administrative stay as soon as practicable while the Court considers this motion, which also includes a request in the alternative to stay legislators' depositions altogether until the Supreme Court decides *Merrill v. Milligan*, U.S.S.C. No. 21-1086, poised to fundamentally alter the legal redistricting landscape under which any permissible deposition would take place.

[2] The legislators immediately moved for a stay pending appeal in the district court, and the court permitted plaintiffs to file responses by 8 A.M. MT today. ECF 283, 285. The district court has not ruled on the motion. Given the exigency, the legislators file this motion for relief now and will immediately apprise the Court of any district court ruling.

A stay is warranted. Whether the legislators can be deposed despite their legislative immunity and privilege indisputably raises "serious legal question[s]." *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011). The order below is in derogation of Supreme Court precedent. It deepens a split of authority between courts of appeals and various trial courts. This Court's review is undoubtedly necessary before depositions proceed—depositions where legislators will be compelled provide answers under oath to whatever questions plaintiffs' counsel has about the legislators' otherwise privileged acts. The legislators have presented a "substantial case on the merits" and the balance of the equities, moreover, heavily favors a stay. *Id.*

## STATEMENT OF FACTS

**1.** In October 2021, Texas enacted legislation revising electoral districts for the State's congressional delegation, Senate, House, and the Board of Education based on 2020 Census data.[3] Plaintiffs sued, alleging the legislation violated §2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments.[4] The United States Department of Justice then joined the litigation, challenging congressional and House districts as §2 violations. There are now ten consolidated complaints.

Defendants have moved to dismiss every complaint for failure to state a claim and/or lack of standing. Despite the legislators' arguments to postpone depositions

[3] *See generally* Texas Redistricting, https://redistricting.capitol.texas.gov/.

[4] Mot. to Quash United States' Subpoenas 2, ECF 259 (attached as Exhibit B) (describing the United States' claims); Mot. to Quash Private Plaintiffs' Subpoenas 1-3, ECF 259 (attached as Exhibit F) (describing private plaintiffs' claims).

until the motions are resolved, absent a stay, depositions will proceed before then. All ten are pending before the district court.[5]

Defendants also moved to stay the litigation pending the Supreme Court's decision in *Merrill*, involving the legality of Alabama's congressional districts. *See* ECF 241. *Merrill* asks what §2 requires of States in redistricting (and what the Equal Protection Clause prohibits). *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of stay); *see also* Br. of Secretary Merrill, *Merrill v. Milligan*, U.S.S.C. No. 21-1086, https://bit.ly/39nC1Iy. Given the case schedule, any decision appealed in these redistricting suits is likely to be vacated and remanded by the Supreme Court in light of *Merrill*, consistent with its GVR practice. ECF 241 at 8. The district court denied the stay motion. ECF 246.

**2.** Discovery is now underway. The United States issued 27 third-party subpoenas *duces tecum* to legislative officials, including legislators and staff, and a legislative agency. (Some private plaintiffs later issued third-party subpoenas *duces tecum* to legislative officials, overlapping with those issued by the United States.) Subpoena recipients responded, producing non-privileged responsive documents and raising privilege objections as applicable. No motions to compel have been filed regarding any legislator's response to document subpoenas.

[5] ECF 82, 111, 181, 225, 233, 286, 287, 288, 289, 290.

Then the United States upped the ante. Before subpoenaing anyone else, the United States issued its very first deposition subpoenas to Texas legislators. The legislators moved to quash or modify the subpoenas on May 4, 2022.[6] Private plaintiffs then issued their own set of subpoenas, and the legislators immediately moved to quash those too.[7]

The depositions are noticed for May 24 and May 25, 2022; the discovery period does not end until July 15 or later by agreement of the parties.[8] Accordingly, counsel repeatedly requested that the depositions be postponed to permit adequate time for the courts' review. The United States refused; private plaintiffs refused.[9] And the district court declined to postpone the depositions while it considered the legislators' motions; it instead denied the motions outright in a 6-page order.

**3.** The district court's order rejected all of the legislators' arguments regarding the scope of legislative immunity and privilege. And while the court's order ended with the statement that "nothing in this Order should be construed as deciding any issue of state legislative privilege," Order 5, the order began by rejecting the legislators' arguments that legislative immunity and privilege should bar legislators' depositions

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6 Ex. B, Mot. to Quash, *supra*; United States' Opp'n to Legislators' Mot. to Quash, ECF 271 (attached as Exhibit C); Private Plaintiffs' Br. in Support of United States' Opp'n, ECF 272 (attached as Exhibit D); Reply in support of Legislators' Mot. to Quash, ECF 277 (attached as Exhibit E).

7 Ex. F, Mot. to Quash, *supra*.

8 Ex. A, Order 1; ECF 96, 109 (scheduling orders).

9 Ex. E, Reply 2-3.

entirely in this case at this time, *id.* at 2.[10] The court described the legislators' privilege as "'at best, one which is qualified'" and one that ought to be "'strictly construed.'" *Id.* (quoting *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (quoting *Perez v. Perry*, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014))). From there, the court announced that "the privilege is not so broad as to compel the Court to quash the deposition subpoenas, modify them, or enter a protective order prohibiting questions about topics that are not strictly within the public record." *Id.* at 2-3. It stated privilege could be assessed only question-by-question (alongside privileged answer-by-answer). *Id.* at 3. Even then, the court's willingness to enforce "privilege may be limited." *Id.* (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003)). And deposing legislators (before anyone else) was also warranted because legislators "may have relevant, non-privileged information about topics 'such as political behavior, the history of discrimination, and socioeconomic disparities.'" *Id.* at 4.

The order concluded with a "procedure" for depositions: Legislators must "appear and testify even if it appears likely that legislative privilege may be invoked in response to certain questions." *Id.* Counsel may object to a question as privileged. But the legislators "must then answer the question in full." *Id.* Meaning, counsel for the

[10] The order never acknowledged the legislators' related request that the parties be required to undertake alternative discovery before taking the extraordinary step of deposing legislators at the very outset. Similarly, with respect to the legislators' arguments about Federal Rule 45's limitations on unduly burdensome third-party discovery, the court said only that it "does not think" the legislators' burden outweighs the benefit to the United States and plaintiffs. Order 4.

United States and all private plaintiffs may ask the legislators whatever they wish, and the legislators must answer over their own legislative privilege objection. Where privilege objections are made, those portions of the transcript will be designated confidential. *Id.* at 5. Plaintiffs can then move to "compel" the privileged answers—answers that the legislators will have already given—by submitting deposition transcripts to the court under seal for the court (the fact-finder here) to read and then decide whether the already-given answers should be made part of the public record. *Id.*[11]

The order issued on May 18, 2022. Within hours, the legislators immediately moved to stay depositions in the district court and timely filed a notice of appeal.[12] Given the exigency, the legislators now file this motion seeking an emergency stay pending appeal.

## JURISDICTION

This Court has the power to stay the depositions in aid of its jurisdiction over the legislators' forthcoming appeal or, alternatively, petition for writ of mandamus. Fed.R.Civ.P. 8(a)(2); 28 U.S.C. §§1291, 1651(a); *see Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The order requiring the legislators—third parties involuntarily

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[11] The order states that procedure was "*originally* used by the last three-judge court to hear Texas redistricting cases," Order 4 (emphasis added), but omits that the procedure was then revised to permit legislators not to answer. *See Perry*, 2014 WL 106927, at *3. And described herein, any "procedure" and the treatment of privilege more broadly that relies on those Texas redistricting cases, evading review, is an outlier.

[12] ECF 283, 284. The stay motion remains pending, and counsel will apprise this Court of any ruling, *supra* n.2.

subpoenaed—to sit for depositions and provide answers to questions irrespective of privilege is an immediately appealable order. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 367-69 (5th Cir. 2018) (third-party interlocutory appeal of discovery order); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 879 (5th Cir. 1981); *see also, e.g.*, *In re Hubbard*, 803 F.3d 1292, 1305 (2015) (immediate appeal for governmental assertion of privilege). Alternatively, this Court would have jurisdiction to first stay and then construe the appeal as a petition for writ of mandamus. *See S. Pac. Transp. Co. v. San Antonio*, 748 F.2d 266, 270 (5th Cir. 1984); *see, e.g.*, *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 379-81 (2004); *In re Kellogg*, 756 F.3d at 756.

Finally, even though the order comes from a three-judge district court in a redistricting case, 28 U.S.C. §2284, the nature of the order makes it appealable first to this Court, not the Supreme Court. The Supreme Court has appellate jurisdiction to review only those orders granting or denying interlocutory or permanent injunctions. 28 U.S.C. §1253; *Abbott v. Perez*, 138 S. Ct. 2305, 2319-21 (2018). This Court retains jurisdiction to consider all other orders, including the order requiring the legislators' depositions here. *See, e.g.*, *Watkins v. Fordice*, 7 F.3d 453, 455 & n.2 (5th Cir. 1993) (fee award); *League of Women Voters v. Johnson*, 902 F.3d 572, 576-77 (6th Cir. 2018) (denial of motion to intervene in redistricting case); *Vos*, 2019 WL 4571109, at *1 (discovery order in redistricting case).

## ARGUMENT

### I. A Stay of the Depositions Pending Appeal Is Warranted.

Courts consider four factors for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Those factors are not applied "in a rigid, mechanical fashion." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). "[W]here there is a serious legal question involved and the balance of the equities heavily favors a stay ... the movant only needs to present a substantial case on the merits." *Weingarten*, 661 F.3d at 910; *see, e.g.*, *Baylor*, 711 F.2d at 40 (granting stay in case presenting "serious legal question that could have a broad impact upon federal/state relations" and "this Court[] would want to make a detailed and in depth examination of this serious legal issue" before parties took further action); *Whole Woman's Health*, 896 F.3d at 367 (noting Court granted third party's stay pending appeal of "important and very novel issues"); *Vine v. PLS Fin. Servs., Inc.*, 226 F. Supp. 3d 708, 718 (W.D. Tex. 2016) (granting stay of order raising issue "of first impression"). Applying those factors here, a stay of the legislators' depositions pending appeal is warranted.

### A. The Legislators Raise Serious Legal Questions and Are Substantially Likely To Prevail on the Merits

**1.** The legislators' immunity and privilege arguments undoubtedly entail "serious legal question[s]" compelling a stay. *Weingarten*, 661 F.3d at 910.

**a.** Ordering the legislators to sit for depositions—and then deliver answers irrespective of privilege—deepens a split of authority about the scope of legislators' immunity and privilege. There is every reason to think that if the legislators' motions to quash had been before the First, Ninth, or Eleventh Circuit Courts of Appeals, those courts would have refused to order the legislators to sit for depositions, much less provide testimony despite objections on grounds of legislative privilege. The First Circuit has quashed subpoenas to depose legislators, explaining that depositions would cross the bounds of legislative immunity and privilege and admonishing that the "Supreme Court has warned against relying too heavily" on evidence of "individual lawmakers' motives to establish that the legislature as a whole [acted] with any particular purpose." *Am. Trucking Ass'n, Inc. v. Alviti*, 14 F.4th 76, 86-90 (1st Cir. 2021). Likewise, the Ninth Circuit has refused to make legislators sit for depositions. In what context? A redistricting case that, just like here, included claims of impermissible legislative intent. *See Lee*, 908 F.3d at 1187-88; *accord Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299 (D. Md. 1992) (concluding legislative officials in redistricting dispute "deserve all of the protection the *Tenney* court extended to them" and "entirely barr[ing]" "*any* inquiry"). And the Eleventh Circuit has quashed subpoenas *duces tecum*

in a First Amendment challenge to Alabama legislation. The court applied the privilege categorically, refusing to burden legislators even with "perus[ing] the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied." *Hubbard*, 803 F.3d at 1307-08, 1315. Finally, it should have given the district court some pause that, if this case were before the Texas Supreme Court, the attempts to depose legislative officials would have been rejected. *See In re Perry*, 60 S.W.3d at 862 (concluding redistricting plaintiffs could not depose officials). Redistricting cases are not an exception to comity and constitutionally compelled respect for the interests of States.

The district court's order denying the legislators' motion to quash contradicts all of those authorities and principles. It quotes *dictum* from *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government*, 849 F.3d 615 (5th Cir. 2017), a case about municipal legislators where federalism interests are admittedly different. *Cf. Cutrer v. Tarrant Cnty. Loc. Workforce Dev. Bd.*, 943 F.3d 265, 269 (5th Cir. 2019), as revised (Nov. 25, 2019) (citing *Lincoln County v. Luning*, 133 U.S. 529 (1890)). *Jefferson*, for its part, only quotes a district court, for the proposition that legislative privilege "'must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" Order 2 (quoting *Jefferson*, 849 F.3d at 624 (quoting *Perez*, 2014 WL 106927, at *1 (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003)))). *Jefferson* ultimately assumed, without

deciding, that legislative privilege applied to local councilmembers involved in that case. 849 F.3d at 624. So the quoted language is pure *dictum*, and it's not even the Fifth Circuit's own prose. *Jefferson* had no occasion to consider whether state legislators could be made to sit for depositions and answer privileged questions. It did not unknowingly split with the above courts of appeals, *supra*. And, merely quoting another court, it did not purport to consider binding Supreme Court precedent on the subject. *See, e.g.*, *Tenney*, 341 U.S. at 377 (noting privilege is for "the public good").

The real origins for the district court's order are various trial court decisions employing a multi-factor balancing test to pierce legislative privilege. Order 2-3. The test is premised on the idea that legislative privilege can be pierced depending on factors including the "relevance of the evidence" or the "availability of other evidence" or the "'seriousness' of the litigation"—factors that merely resemble the general rules applying to all parties to limit all discovery. *Compare Rodriguez*, 280 F. Supp. 2d at 101 (listing factors), *with* Fed.R.Civ.P. 26(b)(1), 45(d)(1). This Court has never held that such a malleable, privilege-destroying test is the law of this Circuit, departing from other appellate courts. Nor has the Supreme Court ever qualified privilege in that way, *infra*.

**b.** The underlying subject—the scope of state legislators' immunity and privilege, particularly where the law of Texas and other courts would prevent these depositions—is undoubtedly serious, meriting "a detailed and in depth examination." *Baylor*, 711 F.2d at 40; *see, e.g.*, *Whole Woman's Health*, 896 F.3d at 367 (involving "important and very novel issues"); *Vine*, 226 F. Supp. 3d at 718 (issue of first impression). The legislators'

appeal raises substantial questions of federal-state relations of nationwide importance: When may litigants and courts in federal redistricting litigation ignore legislative privilege as it has been applied in other cases, require legislators to sit for depositions, and then testify over privilege objections? *Compare Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 723-33 (1983) ("equat[ing]" protections afforded to state legislators in §1983 litigation with those afforded to federal legislators); *Hubbard*, 803 F.3d at 1307-08 (prohibiting legislative discovery in First Amendment challenge); *Am Trucking*, 14 F.4th at 91 (prohibiting legislators' depositions in Dormant Commerce Clause challenge). The Supreme Court has described the privilege as "'indispensably necessary,'" "firmly established in the States," and "so essential" that it was inscribed into state constitutions and ultimately the federal Constitution. *Tenney*, 341 U.S. at 372-73 (quoting II Works of James Wilson 38 (Andrews ed. 1896)). Whether Texas legislators or redistricting are an exception to that historically rooted privilege are quintessentially "serious legal questions" warranting a stay pending this Court's further review. *Weingarten*, 661 F.3d at 910.

**2.** The legislators are substantially likely to prevail on the merits of that question, for all of the reasons detailed above. The U.S. Supreme Court, the courts of appeals, and the Texas Supreme Court have it right; the trial courts applying their bespoke test to force this discovery have it wrong. There is no Texas redistricting exception to legislative privilege in civil cases, no matter how much the Department of Justice wishes it to be so. *See In re Perry*, 60 S.W.3d at 862 (reversing denial of state officials' motion to

quash in redistricting dispute); *Lee*, 908 F.3d at 1187-88 (rejecting redistricting "Plaintiffs[']s call for a categorical exception whenever a constitutional claim directly implicates the government's intent," which "would render the privilege 'of little value'" (quoting *Tenney*, 341 U.S. at 377)); *see also, e.g.*, *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997) ("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.").

The twin safeguards of immunity and privilege protect legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85. They are necessary to "provide[] legislators with the breathing room necessary to make these choices in the public's interest"; they "reinforc[e] representative democracy" by allowing legislators "to focus on their public duties," "removing the costs and distractions attending lawsuits" and "shield[ing] them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." E.*E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). Legislators acting within the sphere of legitimate legislative activity may not be required to testify, "whether or not legislators themselves have been sued." *Hubbard*, 803 F.3d at 1308; *see Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 ("Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued.").

Contradicting all of that, the district court has concluded that privilege must be strictly construed and perhaps pierced altogether (Order 2-3)—something the Supreme Court has only ever said in federal criminal cases involving legislators. *United States v. Gillock*, 445 U.S. 360, 373 (1980) ("draw[ing] the line at civil actions"); *accord Gravel v. United States*, 408 U.S. 606, 627 (1972) (alleged violations of federal criminal statute); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 & n.18 (1977) (stating policymakers may be called to testify only in "extraordinary" circumstances and, *even then*, "such testimony frequently will be barred by privilege"). Of course, these redistricting cases are not criminal prosecutions. And neither the district court nor plaintiffs have offered any "extraordinary" circumstances warranting legislators' depositions from the start—or how, even in such an "extraordinary" case, privilege could be ignored. *Id.*; *Lee*, 908 F.3d at 1187-88 ("we have likewise concluded that the plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances'").

### B. Proceeding with the Depositions Will Cause Irreparable Harm.

The legislators will be irreparably harmed absent a stay. The very nub of the legislators' argument is that legislative immunity and privilege prevent the United States and private plaintiffs from calling the legislators to testify at this time. The district court not only rejected that argument; it ordered the legislators *to answer* any of plaintiffs' questions in next week's depositions, irrespective of privilege objections. Once that happens, "the cat is out of the bag." *In re Kellogg*, 756 F.3d at 761 (Kavanaugh, J.). If the

depositions proceed, the harm is done. *See, e.g.*, *id.* ("appeal after final judgment will often come too late because the privileged materials will already have been released"); *Whole Woman's Health*, 896 F.3d at 367-68 (explaining that third-party's appeal of "forced discovery … is 'effectively unreviewable' on appeal from the final judgment"); *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705 (9th Cir. 2022) ("the harm to [former Secretary] DeVos is the intrusion of the deposition itself, and so the harm is not correctable on appeal, even if her testimony is excluded at trial").

The depositions burden the legislators with defending themselves in litigation over legislation. *See Dombrowski*, 387 U.S. at 85 (relying on *Tenney*); *Lee*, 908 F.3d at 1187 (privilege "allow[s] duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box"); *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 (similar). And worse still, the district court's prescribed deposition procedure is an "inversion of … federalism principles," that itself constitutes irreparable harm. *Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016). Absent a stay, state legislators must sit for depositions and then have their otherwise privileged answers aired to all counsel and later to the district court; it contravenes any constitutionally adequate conception of legislative immunity and privilege.

### C. Postponing Depositions Will Not Harm Plaintiffs.

There is ample time for appellate review. The United States and private plaintiffs have not pursued alternative methods of discovery, instead seeking to probe the minds

of legislators first.[13] *But see, e.g.*, *In re Perry*, 60 S.W.3d at 861-62 (relying on *Arlington Heights*, noting that "plaintiffs have alternative information sources available" and that "plaintiffs have neither alleged nor demonstrated any extraordinary circumstance that might justify what would appear to be an almost unprecedented incursion into legislative immunity"). Discovery does not close in this case until July 15, 2022, or later by agreement of the parties. Indeed, counsel for the legislators even offered to extend discovery for purposes of these legislators' depositions should they be ruled permissible—with no response from the United States or private plaintiffs.[14] The time necessary for appellate review, which can be expedited, will not harm plaintiffs. *See Baylor*, 711 F.2d at 40 (concluding "a delay of the investigation pending appeal will not substantially harm the investigatory process").

**D. The Public Interest Favors a Stay.**

Finally, the public interest favors a stay. As the Supreme Court observed decades ago in *Tenney*, legislative privilege serves "the public good." 341 U.S. at 377. The privilege is necessary to safeguard legislative independence, *id.* at 372-77, to keep the legislators focused on the task of legislating, and to safeguard legislators from defending themselves in litigation, versus at the ballot box. *Dombrowski*, 387 U.S. at 85; *accord Cheney*, 542 U.S. at 382 (recognizing "public interest" in "protecting" government officials from litigation "that might distract [them] from the energetic performance of

[13] Ex. B, Mot. 6-7; Ex. E, Reply 1-2 & n.3.
[14] *See* Ex. E, Reply 2-3.

[their] constitutional duties" was strong enough to satisfy the demanding mandamus standard). These interests, undoubtedly present here, warrant a stay. Protecting the privilege protects the public good. *See also, e.g.*, *Whole Woman's Health*, 896 F.3d at 367 (staying denial of third-party motion to quash based on privilege claims); *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 182 (4th Cir. 2019) (injunction to protect privileged materials furthered the public interest); *In re Lott*, 139 F. App'x 658, 662-63 (6th Cir. 2005) (public interest in resolving question of privilege).

* * *

Presumably, plaintiffs will contend that all past is prologue when it comes to deposing Texas legislators. Time and again in Voting Rights Act disputes, Texas legislators have been ordered to sit for depositions as if those suits are somehow exempt from the ordinary protections of legislative immunity and privilege. *See* Order 3. For various reasons, those past disputes evaded review. Not this time. For all of the foregoing reasons, the legislators seek a stay of the depositions pending appeal so that the serious legal questions presented therein can finally receive this Court's long overdue review.

## II. Alternatively, a Stay of Legislators' Depositions Pending the Supreme Court's decision in *Merrill* Is Warranted.

Every one of the consolidated complaints—and consequently, the scope of discovery—will necessarily be affected by the Supreme Court's resolution of pending redistricting cases in *Merrill v. Milligan*, U.S.S.C. No. 21-1086, and *Caster*, U.S.S.C. No.

21-1087. *Merrill* requires the Supreme Court to resolve the interrelated questions of what §2 of the Voting Rights Act requires of States in redistricting and what the Equal Protection Clause prohibits *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of stay) (describing "the underlying question" as "whether a second-majority minority congressional district … is required by the Voting Rights Act and not prohibited by the Equal Protection Clause"). At the stay stage, multiple opinions called for clarifying the "notoriously unclear and confusing" §2 caselaw. *Id.* at 881; *id.* at 882–83 (Roberts, C.J., dissenting from grant of stay). *Merrill* will "resolve th[at] wide range of uncertainties" this coming Term. *Id.* at 883; *see also id.* at 889 (Kagan, J., dissenting) (describing the Court's intervention as based on the "view that the law needs to change"). Meanwhile, the United States and private plaintiffs here intend to depose legislators about that "notoriously unclear and confusing" *Gingles* standard, to discuss "political behavior, the history of discrimination, and socioeconomic disparities," along with whatever else allegedly motivated the legislation. Order 4.

Pressing ahead with legislators' depositions—with *Merrill* poised to clarify what the ground rules are for plaintiffs' very claims, claims that purportedly necessitate the depositions—presents substantial risk that deposing legislators now will prove itself to have been completely unnecessary after *Merrill*. Alternatively, it presents substantial risk that deposing legislators now will not be the last of it, should the Supreme Court clarify §2 in such a way that parties demand to depose legislators yet again in light of *Merrill*.

In such circumstances, this Court has stayed proceedings pending Supreme Court cases, in the interest of judicial economy and preserving parties' resources. *See, e.g.*, *DeOtte v. Nevada*, 20 F.4th 1055, 1063 (5th Cir. 2021); *United States v. Hines*, 850 F. App'x 269, 270 (5th Cir. 2021); *United States v. Martinez*, 670 F. App'x 885, 885 (5th Cir. 2016). The same considerations apply here—legislators' depositions should be stayed while the Supreme Court "resolve[s] the wide range of uncertainties" about the very standard governing the consolidated complaints. *Merrill*, 142 S. Ct. at 883 (Roberts, C.J., dissenting); *see, e.g.*, *Coker v. Select Energy Servs., LLC*, 161 F. Supp. 3d 492, 494-95 (S.D. Tex. 2015) (staying discovery when Fifth Circuit and Supreme Court "will soon consider matters that involve the same legal issues"). Indeed, that is the approach the Seventh Circuit took in the last redistricting cycle. When plaintiffs pressing partisan gerrymandering claims subpoenaed the Speaker of the Wisconsin Assembly, the Seventh Circuit stayed the Speaker's deposition pending *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and then ultimately vacated the motion to compel the Speaker's deposition as moot. *See Vos*, 2019 WL 4571109, at *1. The Court should take that approach here too, as an alternative to a stay pending appeal.

## CONCLUSION

The legislators respectfully request that the Court stay the depositions pending appeal or, alternatively, stay depositions pending *Merrill*.

Respectfully submitted,

Dated: May 19, 2022

/s/ *Adam K. Mortara*

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*Counsel for Legislators, Third-Party Movants-Appellants*

** Application for readmission forthcoming*

## CERTIFICATE OF CONFERENCE

On May 18, 2022, counsel for the legislators conferred with counsel for the United States and private plaintiffs, who confirmed that they oppose a motion to stay pending appeal.

Dated: May 19, 2022

*/s/ Adam K. Mortara*
Adam K. Mortara

*Counsel for Legislators,*
*Third-Party Movants-Appellants*

## CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d)(2) because it contains 5,172 words, excluding the parts that can be excluded. This motion complies with Rule 32(a)(5)-(6) and Fifth Circuit Rule 32.1 because it has been prepared in proportionally spaced Garamond 14-point font and 12-point footnotes.

Dated: May 19, 2022

*/s/ Adam K. Mortara*
Adam K. Mortara

*Counsel for Legislators,*
*Third-Party Movants-Appellants*

**CERTIFICATE OF SERVICE**

I filed this motion with the Court via ECF, which will electronically notify all parties who have appeared in this case. I further certify that I have electronically served this motion by emailing parties appearing in the consolidated district court proceedings. Any required privacy redactions have been made in compliance. The document has been scanned and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket Order No. 2020-3.

Dated: May 19, 2022

*/s/ Adam K. Mortara*
Adam K. Mortara

*Counsel for Legislators,*
*Third-Party Movants-Appellants*

**EXHIBIT A**

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

| | | |
|---|---|---|
| **LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,**<br><br>***Plaintiffs*,**<br><br>**EDDIE BERNICE JOHNSON, *et al.*,**<br><br>***Plaintiff-Intervenors*,**<br>**v.**<br><br>**GREG ABBOTT,** *in his official capacity as Governor of the State of Texas*, ***et al.*,**<br><br>***Defendants*.** | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | **EP-21-CV-00259-DCG-JES-JVB**<br>**[Lead Case]**<br><br>**&**<br><br>**All Consolidated Cases** |

**ORDER**

The United States and private Plaintiffs issued deposition subpoenas to certain State Representatives. Citing state legislative privilege, those State Representatives ask the Court to quash the deposition subpoenas, or issue a protective order that would limit the subject matter the United States and private Plaintiffs could inquire about. The Court concludes that issues of state legislative privilege are not yet ripe for decision. Concluding as much, the Court DENIES the motions and outlines procedures for depositions and assertions of legislative privilege.

## I. BACKGROUND

Both the United States and private Plaintiffs subpoenaed Texas Representatives Ryan Guillen, Brooks Landgraf, and John Lujan (the "Legislators") to testify at a deposition in this case. Dkts. 259 Exs. B–D and 271 Exs. A–C. The depositions are currently scheduled to take place on May 24 and 25. *Id.*; Dkt. 280 n.1. In response to those subpoenas, and after failed negotiations on the matter, Dkt. 259 Ex. A, the Legislators filed motions to quash or modify the deposition subpoenas or, in the alternative, for a protective order, Dkts. 259 and 278.

## II. DISCUSSION

No doubt state legislators enjoy broad immunity from suit for actions they take during the course of their legislative duties. *Tenney v. Brandhove*, 341 U.S. 367, 377–78 (1951). Such an immunity has long been recognized. *E.g.*, *id.* at 372–76; *Bogan v. Scott-Harris*, 523 U.S. 44, 54–55 (1998). But the questions confronting this Court are ones of state legislative privilege, not immunity.

State legislative privilege is a federal common law privilege, "applied through Rule 501 of the Federal Rules of Evidence." *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (quotation omitted). The privilege "is, at best, one which is qualified." *Id.* (quoting *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014)); *see also United States v. Gillock*, 445 U.S. 360, 373 (1980) (recognizing the privilege as limited in the context of a federal criminal prosecution). It "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jefferson Cmty.*, 849 F.3d at 624 (quoting *Perez*, 2014 WL 106927, at *1).

At this juncture, the Court is not positioned to rule on what information may or may not be the subject of state legislative privilege. Whether state legislative privilege attaches is fact- and context-specific; for the purposes of depositions, "it depends on the question being posed."[1] *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, Dkt. 102 at 5 (W.D. Tex. Aug. 1, 2011). Here, no questions have been asked, and no answers given. Suffice it to say, the privilege is not so broad as to compel the Court to quash the deposition subpoenas, modify them, or enter a protective

[1] It is worth noting that this is consistent with the manner in which depositions normally proceed. Questions are asked, objections are raised, answers are given. *E.g.*, Fed. R. Civ. P. 30(c)(2).

order prohibiting questions about topics that are not strictly within the public record. *See, e.g.*, *Veasey v. Perry*, No. 2:13-cv-193, Dkt. 341, at 1 (S.D. Tex. Jun. 18, 2014); *Texas v. Holder*, 1:12-cv-128-RMC-DST-RLW, Dkt. 84 (D.D.C. Apr. 20, 2012) (refusing to grant blanket protective order); *Perez*, No. SA-11-CV-360-OLG-JES, Dkt. 102.

With respect to questions about the Legislators' motive or intent, which the Legislators vehemently argue will seek information protected by state legislative privilege, *see generally* Dkts. 259 and 278, the Court is of the opinion that those issues are not yet directly raised. As said, state legislative privilege may be limited—that is, it is not coextensive with state legislative immunity. *E.g.*, *Jefferson Cmty.*, 849 F.3d at 624; *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 94–104 (S.D.N.Y. 2003). Whether state legislative privilege applies will depend on more detailed and nuanced facts than those currently before the Court.

It should also be said that the Court recognizes it should proceed with great caution when discussing the intent of *the legislature* through the actions of individual *legislators*. It is true, as the Legislators argue, that "[e]vidence of any one legislator's intent cannot be conflated with the legislature's purpose as a whole." Mot., Dkt. 278 at 9. Individual legislators often have different motivations for voting in favor of a bill. *See, e.g.*, *Brunovich v. DNC*, 141 S. Ct. 2321, 2349–50 (2021); *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968); *Am. Trucking Assocs., Inc. v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021). But that does not mean evidence of individual motive is necessarily irrelevant to the question of the legislature's motive. *Alviti*, 14 F.4th at 90; *LULAC v. Abbott*, No. 3:21-CV-259-DCG-JES-JVB, 2022 WL 1410729, at *22 n.13 (W.D. Tex. May 4, 2022). If evidence of intent were to come to light, and if it were not subject to state legislative privilege, the Court is well positioned to give that evidence whatever weight it is due. *See LULAC*, 2022 WL 1410729, at *22 n.13.

In any event, there are other purposes for deposing the Legislators. They may have relevant, non-privileged information about topics "such as political behavior, the history of discrimination, and socioeconomic disparities." Resp., Dkt. 271 at 11. They may have "firsthand knowledge of any number of issues—from discrimination within their home districts, to legislator responsiveness to communities of color, to the alternative maps considered during the redistricting process." Resp., Dkt. 272 at 6. Texas contends that even if the Legislators have relevant, non-privileged information, the burden imposed on the Legislators by having to sit for a deposition outweighs the benefit of obtaining that information. Reply, Dkt. 277 at 8 (citing Fed. R. Civ. P. 45(d)(3)(A)(iv)).

The Court is persuaded that there are likely to be relevant areas of inquiry that fall outside of topics potentially covered by state legislative privilege. Furthermore, the Court does not think the burden of having to sit for a deposition outweighs the relevant information the United States and private Plaintiffs may obtain. *Cf. United States v. Gillock*, 445 U.S. 360, 373 (1980) (citing *United States v. Nixon*, 418 U.S. 683 (1974)) ("We recognize that denial of a privilege to a state legislator may have some *minimal* impact on the exercise of his legislative function." (emphasis added)). There is no reason, at this time, to quash or modify the deposition subpoenas, or to issue a protective order placing limits on the subject matter.

Accordingly, the Court adopts the following procedure, originally used by the last three-judge court to hear Texas redistricting cases:

(1) Parties should proceed with depositions and the deponents must appear and testify even if it appears likely that legislative privilege may be invoked in response to certain questions.

(2) Deponents may invoke legislative privilege in response to particular questions, but the deponent invoking the privilege must then answer the question in full. The response will be subject to the privilege.

(3) The portions of deposition transcripts containing questions and answers subject to the privilege shall be deemed to contain confidential information and shall therefore be subject to the "Consent Confidentiality and Protective Order" (Dkt. 202) previously entered in this case.

(4) If a party wishes to use any portion of deposition testimony that is subject to legislative privilege, that party must seal those portions and submit them to the Court for *in camera* review, along with a motion to compel.[2]

(5) Any such motion to compel shall be filed by **August 1, 2022**. Though the Court sets this deadline, it encourages the parties to file earlier, if at all possible.

*Perez v. Perry*, No. SA-11-CV-360-OLG-JES, Dkt. 102 at 5–6 (W.D. Tex. Aug. 1, 2011).

**In adopting this approach, the Court warns the parties that *any* public disclosure of information to which a privilege has been asserted may result in sanctions, including the striking of pleadings. All counsel are ORDERED to spare no effort to ensure that no individual—whether they be counsel, court reporter, videographer, witness, or any other person hearing or having access to information subject to privilege—disseminates information subject to privilege to any person not permitted to handle that information or in any manner (*e.g.*, disclosure to media, posting on social media).**

Finally, nothing in this Order should be construed as deciding any issue of state legislative privilege. The Court will be better positioned to make decisions on state legislative privilege if the issue comes more squarely before the Court—that is, if the Court is presented with specific questions and specific invocations of state legislative privilege.

[2] A motion to compel shall be filed for the purpose of asserting why information, to which a privilege objection has been raised, should be disclosed because it is not subject to the privilege, the privilege has been waived, or the privilege should not be enforced.

## III. CONCLUSION

The Legislators' "Motion to Quash or Modify Deposition Subpoenas and Motion for Protective Order" (ECF No. 259) and "Motion to Quash or Modify Private Plaintiffs' Deposition Subpoenas and Motion for Protective Order" (ECF No. 278) are **DENIED**.

**So ORDERED and SIGNED this 18th day of May 2022.**

**DAVID C. GUADERRAMA**
**UNITED STATES DISTRICT JUDGE**

*And on behalf of:*

**Jerry E. Smith**
**United States Circuit Judge**
**U.S. Court of Appeals, Fifth Circuit**

*-and-*

**Jeffrey V. Brown**
**United States District Judge**
**Southern District of Texas**

**EXHIBIT B**

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

| | | |
|---|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,<br><br>*Plaintiffs,*<br><br>V.<br><br>GREG ABBOTT, *et al.*,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 3:21-cv-00259<br>[Lead Case] |
| UNITED STATES OF AMERICA,<br><br>*Plaintiff,*<br><br>V.<br><br>STATE OF TEXAS, *et al.*,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 3:21-cv-00299<br>[Consolidated Case] |

**LEGISLATORS' MOTION TO QUASH OR MODIFY DEPOSITION SUBPOENAS AND MOTION FOR PROTECTIVE ORDER**

## INTRODUCTION

The United States wants three sitting legislators to be its very first deponents. But legislators engaged "in the sphere of legitimate legislative activity" are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). It is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney*, 341 U.S. at 377. Redistricting cases are no exception. At the very least, the subpoenas to depose the legislators should be modified or a protective order entered that limits or stays the depositions. The United States' extraordinary discovery request also presents the opportunity for the Court to consider whether the subpoenas ought to be quashed altogether.

## BACKGROUND

In December 2021, the U.S. Department of Justice sued to invalidate Texas's newly enacted state house and congressional redistricting plans. Its only claim is that the redistricting legislation violates Section 2 of the Voting Rights Act. *See* Compl. ¶¶161-67, *United States v. Texas*, No. 3:21-cv-299, ECF 1. The United States is pursuing extensive third-party discovery, issuing more than 25 third-party subpoenas to legislators, staff members, other officials, and the Texas Legislative Council for all redistricting-related documents. *See generally* Ex. A. to Mot. to Quash TLC Subpoena, *LULAC v. Abbott*, No. 3:21-cv-259, ECF 219-1.

The United States now wishes to depose three sitting legislators "on topics pertinent to the Voting Rights Act enforcement action [it] ha[s] brought against the 2021 Texas House Plan." *See* Ex. A at 7 (4/28/2022 email from D. Freeman); *see also* Ex. B (Rep. Guillen deposition subpoena); Ex. C (Rep. Landgraf deposition subpoena); Ex. D (Rep. Lujan deposition subpoena). The complaint alleges the house redistricting legislation "results in a denial or abridgment" of voting rights "on account of

race…." Compl. ¶166 (quoting 52 U.S.C. §10301(a)). The complaint specifically challenges the following house districts:

- **House District 118:** The United States alleges that the San Antonio-area district "eliminates Latino voters' opportunity to elect representatives of their choice," while averring that the Hispanic Citizen Voting Age Population (CVAP) of the district is between 56.4 and 57.5 percent. Compl. ¶¶104, 111. The United States complains that the district elected a Latino Republican in 2016 and 2021 special elections—Representative John Lujan—and he is "not the Latino candidate of choice." *Id.* ¶108. Representative Lujan is one of the three legislators whom the United States now wishes to depose. *See* Ex. D (subpoena).

- **House District 31:** The United States alleges the South Texas district "reduces Latino population share," while averring that the Hispanic CVAP of the district is between 64.5 and 66.6 percent. Compl. ¶¶117, 123. The complaint states that Latino voters have "reelected their preferred candidate by a comfortable margin" but complains that he has now "switched parties." *Id.* ¶¶117, 120. That incumbent is Representative Ryan Guillen, whom the United States now wishes to depose. *See* Ex. B (subpoena).

- **El Paso and West Texas House Districts:** The United States alleges that the 2021 redistricting legislation removed a Latino opportunity district from El Paso County (existing District 76), and overpopulated other El Paso-area districts (deviating from ideal by roughly 4.25 percent). Compl. ¶¶131, 139.

The complaint does not allege that invidious discriminatory intent motivated the house redistricting legislation; the complaint is based on effects alone. *Compare* Compl. ¶166 (house districts), *with id.* ¶¶164-65 (alleging impermissible legislative "purpose" and effect of congressional districts); Opp'n to Mot. to Quash TLC Subpoena, ECF 227 at 11-12 (distinguishing congressional districts claims).

Texas moved to dismiss the United States' complaint and later moved to stay this litigation pending the Supreme Court's decision in *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1086. *See* ECF 111; ECF 241. The motion to dismiss, arguing that the complaint fails to state a Section 2 claim, is pending. The motion to stay, explaining that the Supreme Court will be considering anew what Section 2 requires of States in redistricting (and what the Equal Protection Clause prohibits),[1] has been denied. ECF 246.

[1] *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of stay); Merits Br. of Secretary Merrill, *Merrill v. Milligan*, No. 21-1086, bit.ly/39nC1Iy.

The United States now intends to subpoena Texas House Representatives Ryan Guillen, Brooks Landgraf, and John Lujan for depositions later this month—the first depositions that the United States seeks in this case. *See* Ex. B (noticing 5/19/2022 deposition for Rep. Guillen); Ex. C (noticing 5/24/2022 deposition for Rep. Landgraf); Ex. D (noticing 5/25/2022 deposition for Rep. Lujan). The legislators are not named defendants in any complaint, nor have they intervened. Their only connection to the litigation is as house members; two were in office when the State enacted the house redistricting legislation, while the third (Rep. Lujan) was not sworn into office until after the bill passed. The United States has already subpoenaed all redistricting-related documents from each of these representatives and two dozen other third parties. In response, subpoena recipients have produced non-privileged documents and invoked applicable privileges for others.

Counsel have met and conferred. The United States asserted that depositions could "encompass numerous matters over which"—according to counsel—"any common law state legislative privilege applicable in federal courts does not apply." Ex. A at 7 (4/28/2022 email from D. Freeman). Counsel later elaborated that it was entitled to depose the legislators about the *Gingles* standard,[2] including discussion of "population patterns, political behavior, the history of discrimination, socioeconomic disparities, campaign tactics, and other matters." *See* Ex. A at 1 (5/3/2022 email from D. Freeman). The legislators' counsel explained that there were alternative, less intrusive means for the United States to obtain whatever non-privileged, relevant material it believes it could obtain from deposing legislators. Ex. A at 8 (4/27/2022 email from P. Sweeten). In response, counsel for the United States said it was not open to alternatives at this time. *See* Ex. A at 2 (5/2/2022 email from W. Thompson).

[2] *See Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986) (discussing factors from 1982 Senate Report that "typically may be relevant to a §2 claim," though "neither comprehensive nor exclusive," including "history of voting-related discrimination," "racially polarized" voting, "exclusion of members of the minority group from candidate slating processes," or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process," among others).

## ARGUMENT

Legislative privilege and immunity safeguard the legislative process. They are safeguards older than the country itself. *See United States v. Johnson*, 383 U.S. 169, 178-82 (1966) (discussing history of English analog and importance of legislator independence). At the founding, legislative privilege and immunity were "deemed so essential" that these safeguards were "written into the Articles of Confederation and later into the Constitution." *Tenney*, 341 U.S. at 372. Still today, they protect legislators from inquiries about what motivated or informed their legislative acts, based on the elementary principle that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Id.* at 377; *see, e.g.*, *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997) ("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."); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018) (rejecting redistricting "Plaintiffs['] call for a categorical exception whenever a constitutional claim directly implicates the government's intent," which "would render the privilege 'of little value'" (quoting *Tenney*, 341 U.S. at 377)); *In re Hubbard*, 803 F.3d 1298, 1307-08, 1315 (11th Cir. 2015) (quashing subpoenas for legislators' documents); *Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015) (raising concerns that it would be "nearly impossible for a legislature to function" without privilege).

These protections are already well-known to this Court. Consistent with centuries of precedent, at the preliminary injunction stage, this Court already ruled that a legislator could testify about that "within the public record," but anything beyond the public record would require a waiver of legislative privilege. PI Tr. 152:1-5 (Vol. 5) ("Senator Huffman will be allowed to testify to everything within the public record; and if she goes outside the public record, she will waive her privilege."); *accord Tenney*, 341 U.S. at 373-77; *Dombrowski*, 387 U.S. at 85; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-74 (2019) (refusing to permit extra-record discovery, including deposition, of Commerce Secretary after staying order compelling deposition, *In re Dep't of Commerce*, 139 S. Ct. 16 (2018)); *In re*

*Stone*, 986 F.2d 898, 904 (5th Cir. 1993) (explaining that officials "could never do their jobs" if subject to such discovery because they would be less willing to explore all options before them, lest they "be subpoenaed for every case involving their agency"). The Court prohibited plaintiffs from questioning the testifying senator about her mental impressions or opinions regarding legislation, or what otherwise motivated or informed her or others during the legislative process. *See, e.g.*, PI Tr. 152:2-7 (Vol. 6); PI Tr. 25:6-10 (Vol. 7); PI Tr. 29:6-20 (Vol. 7).

Applying those protections again here, movants request that this Court quash or modify the subpoenas to depose sitting legislators. And should any depositions proceed, movants request that this Court enter a protective order prohibiting the United States from deposing legislators about privileged matters, including matters beyond the public record. Relatedly, movants request an administrative stay to postpone the depositions until this Court resolves this motion.

## I. At the very least, an order modifying the subpoenas or a protective order is warranted.

There is good reason to quash the subpoenas altogether, *infra* Part II. The United States has not been able to articulate any relevant, non-privileged information that it expects to obtain from the legislators' depositions that could warrant such intrusive and comity-frustrating discovery. Whatever "numerous matters" the United States envisions it could explore by deposing legislators, those matters are either privileged or discoverable through less intrusive means. At the very least, and in light of the obvious legislative immunity and privilege concerns raised by such depositions, the legislators request that the subpoenas be modified or a protective order issued as follows.

**A.** The legislators request that the Court require the United States to first exhaust less intrusive means to discover whatever it is that the United States hopes to discover regarding the house redistricting legislation before resorting to "extraordinary" depositions of legislators. *Vill. of Arlington Heights v. MHDC*, 429 U.S. 252, 268 & n.18 (1977). An extensive public record regarding the house

redistricting legislation and the resulting boundaries are readily available to all parties.[3] At this stage of the proceedings, it is implausible that it is necessary to depose Representatives Guillen, Landgraf, and Lujan (and presumably others to come) to answer questions to confirm that the public record says what the public record says.

Exhausting alternative means of discovery is especially warranted in light of counsel's stated purpose for the legislators' depositions. Counsel intends to depose the legislators regarding the house redistricting legislation. *See* Ex. A at 7 (4/28/2022 email from D. Freeman). The United States' allegations regarding that legislation are focused on effects (or "results" alone); the United States does not allege that the legislation was imbued with improper purpose. *See* Compl. ¶166; Ex. A at 4 (5/2/2022 email from D. Freeman) (describing "results claims"); ECF 227 at 10-11 (distinguishing intent-based claims for congressional districts). As pled, the legality of those districts will be largely left to expert opinion about their so-called "effects," to the extent relevant under the Voting Rights Act. There is no utility at this stage of the proceedings to depose sitting legislators about such results-based claims. *See, e.g.*, *Am. Trucking Ass'n, Inc. v. Alvitti*, 14 F.4th 76, 88-90 (1st Cir. 2021) (quashing subpoenas to depose state lawmakers because Dormant Commerce Clause claim was predominantly focused on effect of state law, not purpose). The United States has not and likely cannot articulate why already-

[3] *See, e.g.*, TX HB1, Texas Legislature Online, capitol.texas.gov/BillLookup/History.aspx?LegSess=873&Bill=HB1 (containing bill history for passage of Texas house districts, including committee report and relevant house journal excerpts); "Texas Redistricting," redistricting.capitol.texas.gov/ (landing page for redistricting materials, including redistricting process and recordings of and notices for all redistricting hearings); "DistrictViewer," dvr.capitol.texas.gov/ (containing more than 100 plans for house and congressional districts, publicly introduced or submitted by legislators or members of the public throughout the legislative process); "Capitol Data Portal," data.capitol.texas.gov/ (containing redistricting datasets, including datasets for enacted plans and proposed alternatives); Texas House Journal, journals.house.texas.gov/hjrnl/home.htm (record of events occurring in the Texas House); Texas House Redistricting Committee, house.texas.gov/committees/committee/?committee=C080 (committee webpage containing various public materials).

issued document subpoenas, an extensive public record, and forthcoming expert discovery are insufficient for such claims.

Deposing a legislator would be "extraordinary" in any case and ordinarily barred by legislative privilege. *Arlington Heights*, 429 U.S. at 268 & n.18. It is all the more extraordinary for the United States to demand the depositions of three legislators as its opening foray here. To the extent plaintiffs deem it necessary to further discuss that which is in the public record or to seek other non-privileged information, the United States can do so in ways far less intrusive than deposing a legislator. *See, e.g.*, *In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001) (relying on *Arlington Heights* for admonition that "all other available evidentiary sources must first be exhausted before extraordinary circumstances will be considered"); *Austin Lifecare, Inc. v. City of Austin*, 2012 WL 12850268 (W.D. Tex. Mar. 20, 2012) (quashing deposition notices based, in part, on finding that "Plaintiffs have alternative methods for discovering the information they seek," including the public record); *Harding v. Dallas*, 2016 WL 7426127, at *8-9 (N.D. Tex. Dec. 23, 2016) (finding no extraordinary circumstances warranted deposing county redistricting commissioners); *see also In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995) ("exceptional circumstances must exist before the involuntary depositions of high agency officials" (quotation marks omitted)). At this stage, the burdens of deposing legislators well outweigh any conceivable benefit to be gained by questions regarding the already-public record, the *Gingles* standard, or whatever other unenumerated non-privileged matters the United States intends to cover in a deposition.

**B.** The legislators further request that any legislative depositions be stayed until the Court decides Defendants' pending motion to dismiss the United States' complaint, which could affect the permissible scope of any depositions. *Cf. Hubbard*, 803 F.3d at 1304 (holding motions to quash in abeyance until motion to dismiss decided); *see also Bickford v. Boerne Indep. Sch. Dist.*, 2016 WL 1430063, at *1 (W.D. Tex. Apr. 8, 2016) (staying discovery pending the disposition of the motion to dismiss under the trial court's "broad discretion and inherent power to stay discovery until preliminary

question that may dispose of the case are determined"). The motion argues that that the United States has failed to state any Voting Rights Act claim regarding the house redistricting legislation, ECF 111 at 18-24—the intended topic of discussion at depositions, Ex. A at 4, 7 (4/28/2022 and 5/2/2022 emails from D. Freeman). If granted in whole or in part, the United States' asserted basis for deposing the legislators disappears in whole or in part.

**C.** Relatedly, especially in light of counsel's assertion that depositions are warranted to ask legislators about the Supreme Court's complex *Gingles* standard, Ex. A at 1-2, the legislators request that the Court stay or limit any depositions of legislators pending the Supreme Court's decisions in *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1087. Even though these cases will not be stayed altogether pending *Merrill*, the more specific question remains: should depositions of legislators in particular be permitted pending *Merrill*? It would be unusual to depose a legislator about *Gingles* in the ordinary case given that expert witnesses are typically deployed for such a task.[4] It is all the more unusual to depose a legislator about *Gingles* now given that the Supreme Court is considering when and how *Gingles* applies to cases involving single-member districts in a way that is consistent with the statutorily required showing that districts are "not equally open" based on the "totality of circumstances." 52 U.S.C. §10301(b). Further confirmed by Alabama's merits brief filed last week, the pendency of *Merrill* sows further doubt about what possible relevance, if any, legislators' depositions about the house districts could serve here. *See generally* Br. of Secretary Merrill at 42-52, 71-80, *Merrill v. Milligan*, No. 21-1086, bit.ly/39nC1Iy (interpreting statutory "totality of circumstances" terminology, arguing for clarification of *Gingles*, proposing race-neutrality as the §2 benchmark, and arguing in the alternative that §2 does not apply to single-member districts).

[4] *See, e.g.*, *Rose v. Raffensperger*, 2022 WL 205674, at *11 (N.D. Ga. Jan. 24, 2022) (discussing use of *Gingles* expert testimony in challenge to statewide election procedure).

In short, there is a substantial risk that deposing legislators now will prove itself to have been completely unnecessary after *Merrill*. Alternatively, there is substantial risk that deposing legislators now will not be the last of it, should the Supreme Court clarify §2 in such a way that the United States demands to depose legislators yet again in light of *Merrill*. Either way, such depositions would be premature and unduly burdensome at this time. *See, e.g.*, *Whitford v. Vos*, 2019 WL 4571109 (7th Cir. July 11, 2019) (staying deposition of Speaker of Wisconsin Assembly pending *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and then vacating district court's order compelling deposition in light of *Rucho*); *see also, e.g.*, Order, *Thomas v. Merrill*, 2:21-cv-1531 (N.D. Ala. Mar. 21, 2022), ECF 61 (staying VRA challenge to state-level districts pending *Merrill*).

**D.** In the alternative, if any depositions are to proceed, the legislators request a protective order limiting depositions to inquiring about non-privileged information within the public record. That limitation abides by this Court's prior ruling. *See* PI Tr. 152:1-5 (Vol. 5). As discussed throughout this motion, that ruling is consistent with binding precedent; civil discovery cannot probe the minds of legislators, their staff, or others acting in a legislative function about their legislative acts. *See infra* Part II.B. To the extent the "numerous matters" that the United States would like to discuss would in fact implicate privileged information, *see* Ex. A at 7 (4/28/2022 email from D. Freeman), the legislators request a protective order prohibiting such inquiries. And should the United States pursue such an inquiry anyway, the legislators request that the protective order confirm that deponents may invoke privilege and choose not to answer, after which the United States can decide whether to raise its disagreement about the scope of the privilege in a motion to compel. *Accord Perez v. Perry*, 2014 WL 106927, *3 (W.D. Tex. Jan. 8, 2014).

Relatedly, to the extent those "numerous matters" would include questioning Representative Guillen about the United States' allegation that he "switched parties," Compl. ¶117,[5] movants request a protective order excluding any such questions. In addition to implicating legislative and First Amendment privileges,[6] such an inquiry is irrelevant to the United States' §2 claim. Section 2 is about voting rights denied or abridged "on account of race," not politics. 52 U.S.C. §10301(a). Claims fail when the "animating issue … is partisan, not racial." *LULAC v. Abbott*, 369 F. Supp. 3d 768, 786 (W.D. Tex. 2019) (relying upon *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993)), *aff'd*, 951 F.3d 311 (5th Cir. 2020). "Section 2 is a balm for racial minorities, not political ones—even though the two often coincide." *Clements*, 999 F.2d at 853-54. It "does not guarantee that nominees of the Democratic Party will be elected, even if [minority] voters are likely to favor that party's candidates. Rather, §2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats." *Id.*

## II. Legislators cannot be called to testify about legislative acts absent extraordinary circumstances.

In light of Supreme Court precedent and recent decisions by other courts applying that precedent, there is good reason to quash the subpoenas altogether.

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[5] Representative Guillen currently represents House District 31, where Latino voters have repeatedly elected Representative Guillen as their candidate of choice, by the United States' own admission. Compl. ¶117. The United States' qualm is that Representative Guillen has "switched parties." *Id.*

[6] Such questions chill protected First Amendment conduct. For example, in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), the Ninth Circuit issued a writ of mandamus to prohibit subpoenas for defendant-intervenors' internal campaign communications. The Ninth Circuit explained that because such discovery could chill the First Amendment right to associate, the information must meet "a more demanding standard"—it must be "highly relevant" to the claims, "carefully tailored to avoid unnecessary interference with protected activities," and "otherwise unavailable." *Id.* at 1161; *accord In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 481 (10th Cir. 2011) (prohibiting discovery of lobbying communications). Here, political association should have no relevance; and even if it could be conceivably relevant, deposing a third-party legislator is a most extraordinary first step in seeking such discovery.

### A. Subpoenas compelling sitting legislators' testimony should be quashed based on legislative immunity and privilege.

**1.** State legislators are absolutely immune from civil suit. *Tenney*, 341 U.S. at 376-77; *see Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) ("It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities."); *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731-34 (1980) (same). That immunity protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85. It "provides legislators with the breathing room necessary to make these choices in the public's interest" and "reinforc[ing] representative democracy" by "allow[ing] them to focus on their public duties by removing the costs and distractions attending lawsuits" and "shield[ing] them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). Thus, a state legislator acting within the sphere of legitimate legislative activity may not be required to testify, "whether or not legislators themselves have been sued." *Hubbard*, 803 F.3d at 1308; *see Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 ("Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes…. Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued.").

Accordingly, courts have deemed state legislators absolutely immune from testifying about their legislative acts, including in depositions. And redistricting disputes are no exception. *See, e.g.*, *Lee*, 908 F.3d at 1186-87 (barring depositions of legislative actors in redistricting-related Equal Protection Clause case); *In re Perry*, 60 S.W.3d at 860-62 (canvassing state and federal law, explaining that "courts have affirmed that the doctrine generally shields legislative actors not only from liability, but also from being called to testify about their legislative activities," and concluding that it was an abuse of discretion to deny motion to quash depositions of redistricting board members); *Marylanders for Fair*

*Representation v. Schaefer*, 144 F.R.D. 292, 299 (D. Md. 1992) (finding "[w]ithout question" that Maryland House and Senate were "acting 'within the sphere of legitimate legislative activity' in failing to enact an alternative redistricting plan" such that legislators "deserve all of the protection the *Tenney* court extended to them" and "entirely barr[ing]" "*any* inquiry"); *see also, e.g.*, *Bagley v. Blagojevich*, 646 F.3d 378, 396-97 (7th Cir. 2011) (finding governor acted in legislative capacity and barring deposition); *M Sec. & Invs., Inc. v. Miami-Dade Cnty.*, 2001 WL 1685515, at *1-2 (S.D. Fla. Aug. 14, 2001) (quashing deposition subpoena of local legislator in Equal Protection Clause case). Here too, there is no basis for demanding that third-party legislators bear that burden of defending themselves in such depositions, *see Dombrowski*, 387 U.S. at 85, especially when plaintiffs haven't even attempted to get relevant, non-privileged discovery through other means, *supra*.

**2.** For the same reasons, legislative privilege, springing from legislative immunity, also counsels in favor of quashing the subpoenas. "[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and will be "frequently barred by privilege" except for "extraordinary circumstances." *Arlington Heights*, 429 U.S. at 268 & n.18. That privilege applies with "full force" even in cases where legislators' motives are at the "factual heart" of plaintiffs' claims. *Hubbard*, 803 F.3d at 1310-11.

Applied here, even if the Court finds that third-party legislators are not altogether immune from the deposition subpoenas, the subpoenas should be quashed as overly burdensome and for targeting privileged or protected information.[7] Any conceivable benefit of deposing the legislators cannot

[7] Counsel for the United States has stated that he does "not intend to delve into matters covered by *bona fide* assertions of legislative privilege," Ex. A at 4 (5/2/2022 email from D. Freeman), and that there are "numerous matters over which any common law state legislative privilege applicable in federal courts does not apply," *id.* at 7 (4/28/2022 email from D. Freeman). That beggars belief. The United States has chosen three legislators to be its first deponents; its complaint challenges legislation; and it intends to ask the legislators about that legislation. In all events, the United States' most recently filed brief on related privilege issues reveals that its view on "*bona fide* assertions of legislative privilege" is out-of-step with binding Supreme Court precedent, *infra* Part II.B.

outweigh the burdens of deposing them *See* Fed. R. Civ. P. 45(d)(1); Fed. R. Civ. P. 26(c)(1) (court may "issue an order to protect … [a] person from annoyance, embarrassment, oppression, or undue burden or expense"); *see, e.g.*, *W. Life Ins. v. W. Nat'l Life Ins.*, 2010 WL 5174366, at *2-4 (W.D. Tex. Dec. 13, 2010); *RE/MAX Int'l, Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910, 912 (D. Colo. 1994). Any relevant testimony will be privileged or available from other sources, making the deposition an unduly burdensome exercise poised to harass state legislators.

**B. There is no bespoke test for legislative privilege in voting rights cases.**

The legislators anticipate that the United States will argue that legislative privilege is so qualified that Voting Rights Act plaintiffs are free to depose sitting state legislators with few, if any, limitations. While federal courts have stated that legislative privilege is qualified in some circumstances, *Jefferson Cmty. Health Care Ctrs Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017), there is no basis for whittling the privilege down to nonexistent in redistricting cases.

The origins for qualifying legislative privilege are the Supreme Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), and other criminal cases. *See, e.g.*, *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 94 (S.D.N.Y. 2003) (relying on application of privilege in criminal case of *Trammel v. United States*, 445 U.S. 40, 51 (1980)). On its own terms, *Gillock* qualified legislative immunity and privilege for *federal criminal prosecutions*, not civil cases such as this one. 445 U.S. at 474; *accord Gravel v. United States*, 408 U.S. 606, 627 (1972) ("[W]e cannot carry a judicially fashioned privilege so far as to immunize *criminal conduct* proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a *federal criminal statute*." (emphasis added)); *Trammel*, 445 U.S. at 51 (qualifying spousal privilege in federal criminal prosecution); *In re Grand Jury*, 821 F.2d 946, 948 (3d Cir. 1987) (federal criminal grand jury investigation). *Gillock* itself distinguished criminal cases from civil cases: "in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line *at civil actions*." 445 U.S. at 373 (emphasis added). Whatever

important federal interests might justify a more qualified privilege in the enforcement of "criminal statutes," *id.*, they are absent here in this civil action.

But already in this litigation, the United States has transported the Supreme Court's qualification of legislative privilege in criminal matters to this civil matter—endorsing a multi-factor balancing test first deployed by a New York district court in a redistricting dispute. *See* ECF 227at 10-11 (citing *Rodriguez*, 280 F. Supp. 2d 89). To decide whether privilege applies, that test balances "(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 violable" in deciding whether privilege applies. *Id.*[8] It bears little resemblance to binding Supreme Court precedent regarding the scope of legislative immunity and privilege in civil cases, and applying it here to *abrogate* legislative privilege would be serious error.

**1.** As an initial matter, such a balancing test was not initially conceived as basis for *deposing* a sitting legislator who is a third-party to litigation. In *Rodriguez* itself, the court emphasized that plaintiffs were "*not* seeking any depositions of legislators or their staffs." 280 F. Supp. 2d at 96 (emphasis added). *Rodriguez* and other cases initially applying it involved document discovery. And even then, the privilege largely held. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *10-11 (N.D. Ill. Oct. 12, 2011) (refusing to compel privileged documents "concerning the motives, objectives, plans, reports and/or procedures used by lawmakers" or "the identities of persons who participated in decisions regarding the [challenged] Map"); *Rodriguez*, 280 F. Supp. 2d at 103 (denying

[8] *Jefferson Community Health Care Centers*, 849 F.3d at 624, *Veasey v. Perry*, 2014 WL 1340077, at *1 n.3 (S.D. Tex. Apr. 3, 2014), and *Perez*, 2014 WL 106927 at *2, cited *Rodriguez* favorably. *Jefferson Community* cited *Rodriguez* in dictum that privileges are not absolute. *Veasey* did not involve redistricting. Discussed *infra*, *Perez* did involve redistricting and applied *Rodriguez* to conclude that the case did not justify "discarding the privilege"—meaning a legislator's testimony could not be compelled. *Perez*, No. 5:11-cv-360 (W.D. Tex. July 11, 2014), ECF 1138 at 1-2.

motion to compel privileged documents "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]"); *Hall v. Louisiana*, 2014 WL 1652791, at *12 (M.D. La. Apr. 23, 2014) (applying *Rodriguez* but quashing legislator deposition subpoenas). It would be especially inappropriate to apply *Rodriguez* in this case to compel the *depositions* of legislators, when plaintiffs have already sought substantial document discovery from such legislators and when the United States has not otherwise explored alternative, less intrusive, less extraordinary discovery.

**2.** Lessons learned since last decennial's *Perez v. Perry* litigation are also instructive. The court cited *Rodriguez* in a dispute over legislative depositions. 2014 WL 106927 at *2.[9] The court's protocol was to permit deponents to "choose not to answer specific questions, citing the privilege," after which plaintiffs could choose to file a motion to compel. *Id.* at *3. Plaintiffs later filed a motion to compel one legislator's testimony, and the court applied *Rodriguez* as a *shield* the privileged testimony, not as a *sword* to require it. *See Perez*, No. 5:11-cv-360 (W.D. Tex.), ECF 1138 at 1-2.

Since *Perez*, courts have continued to limit legislative discovery, including in redistricting cases. In *Lee*, relying on the Supreme Court's decision in *Tenney*, the Ninth Circuit affirmed an order barring depositions of public officials acting in a legislative capacity, even though plaintiffs' claims were intent-based claims that race predominated in redistricting. 908 F.3d at 1187. Similarly, the Eleventh Circuit in *Hubbard* ordered a district court to quash subpoenas for legislators' documents relating to the passage of legislation, even though plaintiffs' claims were intent-based claims that the legislation was retaliatory. 803 F.3d at 1302-03, 1315. The Eleventh Circuit stated that privilege applied with "full

[9] Initially in *Perez*, the privilege dispute involved subpoenas for four legislative staff members. *Perez*, No. 5:11-cv-360 (W.D. Tex.), ECF 62 at 2 n.1. Defendants requested a protective order but did not ask to quash the depositions. *Id.* at 7. Opposing any protective order, plaintiffs endorsed *Rodriguez*'s balancing test, *e.g. id.*, ECF 87 at 6-7, and Defendants' later motion for reconsideration did not challenge the application of *Rodriguez*, *id.*, ECF 930.

force against requests for information about the motives for legislative votes and legislative enactments," even if such information was at the heart of plaintiffs' claim. *Id.* at 1310-11. The court refused to require "the lawmakers to peruse the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied to those documents" and ordered that the motion to quash be granted on remand. *Id.* at 1311, 1315; *see also, e.g.*, *Am. Trucking*, 14 F.4th at 89-90 (quashing legislator depositions). More recently in the census litigation, the Supreme Court refused to permit discovery beyond the administrative record, akin to the public record here, including refusing plaintiffs' request to depose the Secretary of Commerce. *See Dep't of Commerce*, 139 S. Ct. at 2573-74; *In re Dep't of Commerce*, 139 S. Ct. at 16-17. Finally, even though intent was at the heart of plaintiffs' claims in the *Gill v. Whitford* partisan gerrymandering litigation, the Seventh Circuit stayed and ultimately vacated an order compelling the deposition of the Speaker of the Wisconsin Assembly. *See Whitford*, 2019 WL 4571109 at *1.

The court in *Perez* ultimately concluded that redistricting claims were not a basis for ignoring legislative privilege. Other courts have since refused to permit plaintiffs to depose legislators. Here too, there is no basis for requiring legislators' depositions at this time.

**3.** Most fundamentally, any bespoke test curtailing legislative privilege in Voting Rights Act cases is at odds with binding precedent, *supra*. And to what end? The United States does not allege that the house redistricting legislation was imbued with any improper purpose. And even if it had, the Supreme Court has repeatedly held that, as a "principle of constitutional law," courts cannot "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). That is so even in cases turning on legislative purpose. *Id.* at 382-83 (rejecting that three Congressmen's statements in the legislative history established illicit congressional purpose). It is a "fundamental principle" that courts may not "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of

Congressmen said about it." *Id.* at 383-84; *see Arizona v. California*, 283 U.S. 423, 455 (1931) ("Into the motives which induced members of Congress to enact the [statute], this court may not inquire."); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."); *Am. Trucking*, 14 F.4th at 90 (quashing depositions and describing "inherent challenges of using [deposition] evidence of individual lawmakers' motives to establish that the legislature as a whole enacted [law] with any particular purpose"). Why? Because the Supreme Court has insisted that courts presume legislatures act with good intent and afford them a presumption of legislative good faith including in redistricting disputes. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995). The same rules apply in Voting Rights Act cases. *Id.*; *see Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018) (presumption "not changed by a finding of past discrimination"); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (legislators are not agents of one another; rather, each has "a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools").

## CONCLUSION

For the foregoing reasons, the legislators respectfully request that the Court stay the depositions until it resolves this motion. The legislators further request an order quashing or modifying the subpoenas. In the alternative, movants respectfully request a protective order prohibiting the depositions from probing the minds of legislators on privileged matters, including matters beyond the public record.

Date: May 4, 2022

Respectfully submitted,

*/s/ J. Michael Connolly*

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**CERTIFICATE OF CONFERENCE**

I certify that counsel conferred with counsel for the United States regarding the subject of this motion. Counsel for the United States indicated it opposed any motion to quash or modify the subpoena, which confirms opposition to the relief sought here.

*/s/ J. Michael Connolly*
J. MICHAEL CONNOLLY

**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 4, 2022, and that all counsel of record were served by CM/ECF.

*/s/ J. Michael Connolly*
J. MICHAEL CONNOLLY

**EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

| | |
|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), et al.,<br><br>Plaintiffs,<br><br>v.<br><br>GREG ABBOTT, et al.,<br><br>Defendants. | Civil Action No. 3:21-cv-259<br>(DCG-JES-JVB)<br>(consolidated cases) |

**UNITED STATES' OPPOSITION TO LEGISLATORS' MOTION TO QUASH DEPOSITION SUBPEONAS**

The United States has brought a claim here under the results test of Section 2 of the Voting Rights Act regarding Texas' 2021 State House redistricting plan and seeks to present the evidence required for an "intensely local appraisal of the design and impact" of challenged electoral districts "in the light of past and present reality, political and otherwise." *See Thornburg v. Gingles*, 489 U.S. 30, 78 (quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)). To that end, the United States has served deposition subpoenas on the individuals most recently elected from three challenged State House districts: Representative Ryan Guillen (HD 31), Representative Brooks Landgraf (HD 81), and Representative John Lujan (HD 118) (hereafter "Legislators"). Despite the federal courts having repeatedly permitted legislator depositions in statewide Voting Rights Act enforcement litigation in Texas, Legislators seek to quash their deposition subpoenas based on an evidentiary privilege that "is, at best, one which is qualified." *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (internal quotation marks and citation omitted). This Court should deny the motion to quash and clarify the limited scope of legislative privilege.[1]

## I. BACKGROUND

The United States alleges that Defendant the State of Texas violated Section 2 of the Act, 52 U.S.C. § 10301, by enacting and implementing the 2021 Congressional Redistricting Plan and 2021 State House Redistricting Plan. U.S. Compl. ¶¶ 162-167, *United States v. Texas*, No. 3:21-cv-299 (W.D. Tex. Dec. 6, 2021), ECF No. 1. With respect to the State House plan, the United

[1] The United States has also asserted discriminatory intent claims in this case under Section 2 regarding the redistricting plan for Congress that are not at issue in this round of depositions or the instant motion to quash, but they will potentially be at issue for future legislative depositions. The United States maintains here, as it has in past briefing on related issues, that the needs of the discriminatory intent claims in this case outweigh the qualified legislative privilege based on the five factors set forth in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003). *See* Resp. to Mot. to Quash TLC Subpoena at 11, ECF No. 227.

States specifically alleges that House District 118, in Bexar County; House District 31, in South Texas; and the districts in El Paso County and West Texas have discriminatory results. U.S. Compl. ¶¶ 104-146.

The United States served a subpoena on Representative Guillen April 20, seeking to depose the Representative on May 19. *See* Guillen Subpoena, ECF No. 262-2. The United States then served deposition subpoenas on Representative Landgraf and Representative Lujan on May 3, seeking to depose the Representatives on May 24 and May 25, respectively. *See* Landgraf Subpoena, ECF No. 262-3; Lujan Subpoena, ECF No. 262-4. Legislators moved to quash these subpoenas on May 5. *See* Mot. to Quash, ECF No. 262. The information that the United States seeks in the subpoenaed deposition testimony is highly relevant. All three of the representatives have run for office and been elected in challenged districts. Representative Guillen been elected nine times in District 31 and served on the House Redistricting Committee in the 87th Texas Legislature, which was responsible for enacting the challenged plans. Representative Landgraf has been elected four times in District 81—a majority Latino district adjacent to the El Paso/West Texas configuration—and also served on the House Redistricting Committee in the 87th Texas Legislature. Representative Lujan was elected in District 118 in November 2021 and January 2016 special elections, although he lost in the 2016 and 2018 general elections. Living in communities, campaigning, and representing constituents gives these individuals specific knowledge of community characteristics, political behavior, any localized history of discrimination, persistent socioeconomic disparities, and racial appeals in campaigns, all of which are relevant to a Section 2 claim. *See Gingles*, 478 U.S. at 37. Representative Guillen and Representative Landgraf's participation in the redistricting process and subsequent public statements are also relevant to whether policies underlying the House plan

are "tenuous." *Id.* at 37, 45; *see also, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 441 (2006) (indicating that redrawing lines based on political preferences may establish tenuousness); *cf. LULAC v. Abbott*, No. 3:21-cv-259, 2022 WL 1410729, at *4-5, 7, 19-23, 26-27 (W.D. Tex. May 4, 2002) (three-judge court) (relying on testimony of Senator Huffman and Senator Powell).

## II. LEGAL STANDARD

A party may serve a subpoena under Rule 45 to "command attendance at a deposition." Fed. R. Civ. P. 45(a)(1)(B). The recipient of a subpoena may move to quash only for one of four specific reasons, namely if the subpoena "(1) fails to allow a reasonable time for compliance; (2) requires a person who is not a party to travel more than 100 miles from where the person resides; (3) requires disclosure of privileged or protected matter; or (4) subjects a person to undue burden." *Tex. Keystone, Inc. v. Prime Nat. Res., Inc.*, 694 F.3d 548, 554 (5th Cir. 2012).[2] "The proponent of a motion to quash must meet the heavy burden of establishing that compliance with the subpoena would be unreasonable and oppressive," *SEC v. Reynolds*, 3:08-CV-0438, 2016 WL 9306255, at *2 (N.D. Tex. Apr. 29, 2016), and the oppressiveness of a subpoena "must be determined according to the facts of the case." *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). Thus, "a court should give a wider berth of discovery to subpoenas that concern substantial national, rather than merely parochial, interests." *In re Subpoenas to Plains All Am. Pipeline, L.P.*, No. 3:13-2975, 2014 WL 204447, at *3 (S.D. Tex. Jan. 17, 2014).

[2] Of these, Legislators appear to argue only the third—that legislator depositions are barred by legislative privilege. Although Legislators' motion references the "burden" of sitting for a deposition, the only concrete burden Legislators identify is ultimately grounded in their broad claims of legislative immunity. *See, e.g.*, Mot. at 1, 7, 11, 12. To alleviate any burdens related to travel, the United States repeatedly offered to conduct the depositions in any location convenient to each legislator. *E.g.*, Email from H. Berlin to P. Sweeten (May 3, 2022) (Ex. 1). Legislators have offered no alternative dates or locations for their depositions.

## III. ARGUMENT

"While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified." *Jefferson Cmty. Heatlh Care Ctrs.*, 849 F.3d at 624 (quoting *Perez v. Perry* (*Perez II*), No. 5:11-cv-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge court)). "This privilege 'must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Id.* (quoting *Perez II*, 2014 WL 106927, at *1). Thus, courts have uniformly denied Texas legislators' requests for blanket protective orders barring depositions in Voting Rights Act enforcement actions in the last decade. *See Perez v. Perry* (*Perez I*), No. 5:11-cv-360 (W.D. Tex. Aug. 1, 2011) (three-judge court), ECF No. 102 (Ex. 2); *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. Apr. 20, 2012) (three-judge court), ECF No. 84 (Ex. 3); *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex. June 18, 2014), ECF No. 341 (Ex. 4).

Much of Legislators' motion is based on an erroneous conflation of federal legislators' Speech or Debate Clause immunity, *see, e.g.*, Mot. at 1, 3, 11-12 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967)), state legislators' immunity from civil suit, *see, e.g.*, Mot at 1, 4, 11-12 (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)), and the qualified testimonial privilege applicable here. The Speech or Debate Clause of the U.S. Constitution, U.S. Const. art. I, § 6, cl. 1, shields federal legislators from any award of damages or prospective relief and provides an accompanying testimonial privilege, *see United States v. Gravel*, 408 U.S. 606, 614-15 (1972), but does not apply to state or local legislators, either directly or via incorporation in federal common law. *See United States v. Gillock*, 445 U.S. 360, 368-73 (1980). Whatever protections

eighteenth century law afforded to state legislators, Mot. at 4, "[t]here can be no doubt that [the Supreme Court] has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). And while motive is not typically relevant to the legality of legislation, *see* Mot. at 1, 4, 16-17, there is "a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *United States v. O'Brien*, 391 U.S 367, 383 n.30 (1968). In this case, the United States' claim requires this Court to determine whether the stated policies underlying the House plan are "tenuous." *Gingles*, 478 U.S. at 37.

The Legislators' motion also incorporates an overbroad conception of legislative privilege that somehow includes communications with executive branch officials and other outsiders, as well as purely factual information. *See* Mot. at 9-10. *Contra, e.g.*, *Jackson Mun. Airport Auth. v. Bryant*, No. 3:16-cv-246, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017). Moreover, staying deposition discovery pending the Supreme Court's decision in *Merrill v. Milligan,* No. 21-1086, or until the United States has exhausted discovery of the "public record," Mot. at 5-7, makes little sense. This Court should permit depositions to go forward and should direct legislators to answer all questions outside the scope of the legislative privilege.

### A. Federal Courts Have Repeatedly Refused to Grant Texas Legislators Blanket Protective Orders Barring Depositions in Voting Rights Cases.

The history of Texas's unsuccessful invocations of a blanket legislative privilege in voting rights cases shows why the Legislators' motion should be denied. In *Perez v. Perry*, prior statewide redistricting litigation in Texas under Section 2 of the Voting Rights Act, the State sought a protective order barring inquiries "on the issue of individual legislators' motives or purposes . . . if it is based on information or communications other than those contained in the

journals and publicly-available reports and acts of the 82nd Legislature." Mot. for Protective Order at 7, *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. July 21, 2011), ECF No. 62. The *Perez* Court concluded that "any sort of blanket protective order that would insulate witnesses from testifying would be inappropriate." *Perez I* at 5 (citing *In re Grand Jury*, 821 F.2d 946, 957-58 (3d Cir. 1987)). The Court further ruled as follows:

- First, it found "that the assertion of the privilege is premature." It thus refused to "provide blanket protection to every person who may choose to assert the privilege during the discovery process."

- Second, the Court directed the parties to "proceed with depositions and the deponents must appear and testify even if it appears likely that the privilege may be invoked in response to certain questions."

- Third, the Court decided that a deponent "may invoke the privilege in response to particular questions, but the deponent must then answer the question subject to the privilege."

- Finally, the Court announced that with respect to portions of the transcript that the deponent claimed were privileged, that they "may then be sealed and submitted to the Court for in camera review, along with a motion to compel, if the party taking the deposition wishes to use the testimony in these proceedings. In other words, the testimony will not be disclosed or used unless the Court finds that the privilege does not apply, has been waived and/or should not be enforced."

*Id.* at 5-6 (internal footnote omitted). The State later moved to modify this order, but the *Perez* Court denied the motion. *See Perez II*, 2014 WL 106927, at *1. Nonetheless, the Court afforded alternative procedures under which a deponent might "choose not to answer specific questions, citing the privilege," after which a plaintiff could "file a motion to compel and the Court [would then] determine whether the privilege has been waived or is outweighed by a compelling, competing interest." *Id.* at *3.[3]

[3] For example, in *Perez*, following a deposition in which a legislator "declined to answer numerous questions on the grounds of legislative privilege," private plaintiffs moved to compel but did not meet their "burden of establishing" that the privilege should be overcome in that instance. *Perez v. Perry* (*Perez III*), No. 5:11-cv-360 (W.D. Tex. July 11, 2014) (three-judge

Despite the deeply probative evidence yielded through legislative discovery in *Perez v. Perry* and *Texas v. United States* (the accompanying preclearance litigation under Section 5 of the Voting Rights Act)—or perhaps because of it—the State again sought a blanket protective order barring all legislative depositions in *Texas v. Holder*, preclearance litigation concerning a photographic voter identification law known as Senate Bill 14 (SB 14). *See* Mot. for Protective Order, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. Mar. 22, 2012), ECF No. 34.[4] Again, a three-judge court denied this request, ruling, that "[i]f any legislators assert the privilege in response to specific requests for depositions or to justify withholding the production of specific communications, Defendants can move to compel in the appropriate court and Texas can oppose the motion or renew its motion for a protective order." *Texas v. Holder*, *supra*, at 3. All legislators whom the U.S. Attorney General deposed in *Texas v. Holder* asserted privilege and declined to answer numerous questions during depositions. Because some of these objections went beyond the scope of state legislative privilege, the *Texas v. Holder* Court permitted the U.S. Attorney General to reopen key depositions. *See* Order at 15, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. June 5, 2014), ECF No. 167; Minute Order, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. June 8, 2012).

Undeterred, Texas legislators and legislative aides again sought to quash deposition subpoenas in *Veasey v. Perry*, a subsequent challenge to SB 14 under Section 2 of the Voting

court), ECF No. 1138 (Ex. 5). This illustrates that depositions may proceed without unnecessarily intruding on legislative privilege.

[4] *See also Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex. Mar. 19, 2012) (three-judge court), ECF No. 690 (relying on legislator testimony to find that the Texas Legislature "may have focused on race to an impermissible degree" when crafting the 2011 House plan); *Texas v. United States*, 887 F. Supp. 2d 133, 161 & n.32 (D.D.C. 2012) (three-judge court) (relying on email exchanged among state legislators to conclude that that the 2011 Congressional plan "was motivated, at least in part, by discriminatory intent"), *vacated on other grounds*, 133 S. Ct. 2885 (2013).

Rights Act. *See, e.g.*, Mot. to Quash, *Veasey v. Perry*, No. 2:13-cv-193 (S.D. Tex. May 27, 2014), ECF No. 290. The *Veasey* Court denied these motions and permitted depositions to proceed, while permitting legislators to adopt either the *Perez I* procedures or the *Perez II* procedures when asserting legislative privilege. *See Veasey*, *supra*.

The Legislators here have provided no basis for this Court to deviate from those decisions and impose an effective prohibition on plaintiff depositions in this case. *See Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error."). Legislators raise numerous decisions regarding legislative immunity, Mot. at 4, 11-12, despite conceding that Legislators "are not named defendants in any complaint," Mot. at 3.[5] They also point to decisions concerning apex depositions, Mot. at 4-5, 7, but the 181 members of the Texas Legislature are not "[t]op executive department officials" protected by the apex doctrine. *See In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (internal quotation marks and citation omitted).[6] Although some courts have foreclosed most requests to depose local officials solely concerning legislative intent, even those courts have recognized that legislative privilege may yield and have not prohibited depositions of legislators concerning unprivileged matters. *See Lee v. City of Los Angeles*, 908 F.3d 1175, 1186-88 (9th Cir. 2018). The mere possibility that a deposition may "wander into impermissible terrain is not sufficient reason to halt [an

[5] *See also Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015) (addressing legislative immunity); *Bagley v. Blagojevich*, 646 F.3d 378, 391-98 (7th Cir. 2011) (same); *Biblia Abierta v. Banks*, 129 F.3d 899 (7th Cir. 1997) (same); *cf. M. Se. & Invs., Inc. v. Miami-Dade Cnty.*, 2001 WL 1685515, at *1-2 (S.D. Fla. Aug. 14, 2001) (erroneously concluding that legislative immunity incorporates wholesale immunity from testimonial discovery).

[6] *See also In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993) (addressing "high-ranking officials of cabinet agencies")); *cf. Harding v. Cnty. of Dallas*, No. 3:15-cv-131, 2016 WL 7426127, at *7-8 (N.D. Tex. Dec. 23, 2016) (applying apex doctrine to county judge and a county commissioner).

otherwise] permissible inquiry." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 183 (4th Cir. 2011); *see also Fla. Ass'n of Rehabilitation Facilities, Inc. v. Florida*, 164 F.R.D. 257, 268 (N.D. Fla. 1995) (permitting depositions while noting narrow issues that may be privileged). Finally, because the State has already called a legislator to testify and named another legislator as a likely witness in this case, *see LULAC v. Abbott*, 2022 WL 1410729, at *7; Defs.' Initial Disclosures at 4-5 (Ex. 6), this matter is already one of the "extraordinary" few where legislators are "called to the stand at trial to testify." *Cf. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (addressing only testimony concerning legislative purpose). This Court should follow the path carved by *Perez*, *Texas v. Holder*, and *Veasey v. Perry* and continue to allow legislator depositions in statewide Voting Rights Act enforcement actions.

**B. Legislative Privilege Does Not Extend Beyond Confidential Legislative Acts.**

Legislators' motion proposes an expansive legislative privilege contrary to established law.[7] Legislative privilege applies only to "documents or information that contains or involves opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." *Jackson Mun. Airport Auth.*, 2017 WL 6520967, at *7. The privilege does not protect non-legislative or factual information. This leaves many areas of inquiry in this case that do not implicate legislative privilege.

As an initial matter, Representative Lujan holds no legislative privilege with respect to the 2021 House plan. Representative Lujan assumed office on November 16, 2021, "after the

[7] In this Court's preliminary injunction opinion and order in this case, the Court expressed concern that Defendants' broad conception of legislative privilege here would "raise serious questions about whether this Court (or any court) could ever accurately and effectively determine intent." *LULAC v. Abbott*, 2022 WL 1410729, at *27 n.14. In moving to quash legislator depositions now, Legislators here double down on the overbroad legislative privilege claims that Defendants pressed in the preliminary injunction proceedings.

date of [the] enactment." *League of Women Voters of Mich. v. Johnson*, No. 17-14148, 2018 WL 2335805, at *6 (E.D. Mich. May 23, 2018) (citation omitted). His current status as a legislator does not impart privilege retroactively, nor would it allow him to claim legislative privilege about his personal knowledge regarding the results of the 2021 House plan. *Cf. Jackson Mun. Airport Auth.*, 2017 WL 6520967, at *7 (addressing communications with legislative "outsiders").

The United States can question Representative Guillen and Representative Landgraf regarding a large range of topics not subject to bona fide privilege claims. Foremost, Representative Guillen and Representative Landgraf may be asked about knowledge gained as community leaders and candidates in challenged districts, a subject which lacks a direct relation to the legislative process. Counsel for State Defendants and Legislators have conceded that legislators may "testify as to some non-privileged matters, facts that don't go to legislative acts" and may so do "freely, as any other fact witness." *See* PI Tr. 152:6-16 (Vol. 5); *cf. United States v. Brewster*, 408 U.S. 501, 512 (1972) (explaining that "political" activities are not "legislative").[8] Representative Guillen and Representative Landgraf have also waived privilege regarding specific communications with legislative outsiders, including executive branch officials, Members of Congress, party leaders, and other members of the public. *See, e.g.*, *Perez*

[8] Legislators incorrectly seek to collapse the world of information to a false dichotomy between that which is privileged and that which appears in the public record. Mot. at 4-5. As the Court and State Defendants have recognized, many topics are neither privileged nor a part of the legislative record. *See* P.I. Tr. 152:17-22 (Vol. 5). For example, private conversations between Legislators and local officials or prospective candidates are neither privileged nor "in the public record." *See Favors v. Cuomo*, No. 11-CV-5632, 2015 WL 7075960, at *9 (E.D.N.Y. Feb. 8, 2015) (three-judge court) ("If individual defendants had a legislative privilege, it means they were entitled not to divulge their reasons for supporting or opposing legislation, and not to discuss such matters with outsiders. It does not mean they were entitled to discuss those matters with some outsiders but then later invoke the privilege as to others." (quotation marks and citation omitted)).

*v. Perry* (*Perez III*), No. 5:11-cv-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge court); *Gilby v. Hughs*, 471 F. Supp. 3d 763, 767 (W.D. Tex. 2020).[9] Nor does legislative privilege extend to matters "outside the legislative forum," such as draft press statements and public communications. *Favors v. Cuomo*, No. 11-CV-5632, 2015 WL 7075960, at *6-*7 (E.D.N.Y. Feb. 8, 2015) (three-judge court); *see also, e.g.*, *Texas v. Holder*, No. 12-128, 2012 WL 13070060, at *3 (D.D.C. June 5, 2012) (three-judge court). Finally, legislative privilege does not shield factual information. *See, e.g.*, *League of Women Voters of Mich.*, 2018 WL 2335805, at *6; *see also, e.g.*, *Doe v. Nebraska*, 788 F. Supp. 2d 975, 984-85 (D. Neb. 2011). Legislators cannot assert legislative privilege to avoid answering questions about facts related to their own districts—such as political behavior, the history of discrimination, and socioeconomic disparities—that are relevant to the United States' discriminatory results claim against the 2021 House plan. *See Gingles*, 478 U.S. at 37.

**C. Deposition Discovery Should Not Be Stayed.**

This Court denied Texas's request for a stay pending the Supreme Court's resolution of *Merrill v. Milligan*, No. 21-1086 less than three weeks ago. *See* Order, ECF No. 246. Nevertheless, with no intervening change in circumstances, Texas and counsel for legislators now ask this Court to stay legislator depositions for the very same reason. Mot. at 7-9. This Court should deny that motion. With little more than two months left in discovery, a stay

[9] Legislators suggest that questions about Representative Guillen's political party switch may implicate the First Amendment, *see* Mot. at 10 n.6, but there is no evidence that such questions would chill political participation. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (relying on declarations that created "a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression"). The First Amendment does not bar an inquiry into whether Representative Guillen took certain actions after enactment of the 2021 House plan because Anglo voters in the district would otherwise "defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

pending resolution of the motions to dismiss would endanger the trial schedule; a stay pending resolution of *Merrill* would render a September trial impossible.[10]

Legislators' separate request that depositions be stayed until the United States exhausts "less intrusive means" of discovery, Mot. at 5, bears no scrutiny. There is no legal basis to import exhaustion requirements from the apex doctrine to the discovery sought here. *See In re FDIC*, 58 at 1060. Even if such a requirement were appropriate, the Legislators have provided limited responses to document subpoenas; there are no "alternative means of discovery" left to exhaust with respect to their own knowledge of relevant facts. Mot. at 5-6.[11] "[T]he public record" is no substitute for the personal knowledge of successful candidates in challenged districts. And Legislators have not—and likely cannot—identify other individuals with the same knowledge that the United States might seek to depose first.

Ultimately, there is nothing "extraordinary" about deposing legislators regarding the characteristics and needs of their communities, their communications with non-legislators, and their experience representing their constituents, particularly when those Legislators' districts are being challenged for having racially discriminatory results. *Cf. Arlington Heights*, 429 U.S. at 268 (noting limitations only on testimony concerning legislative purpose). The United States—

[10] For similar reasons, the Court should not delay discovery while the motion to dismiss is pending.

[11] At the meet and confer regarding this motion, counsel for Legislators proposed deposing Legislators by written questions. However, "written depositions are inadequate" when, as here, the evidence sought "may be sufficiently nuanced to necessitate follow up questions." *Box v. Dallas Mex. Consulate Gen.*, No. 3:08-cv-1010, 2013 WL 12353107, at *2 (N.D. Tex. Mar. 4, 2013); *see also Sadowski v. Tech. Career Insts., Inc.*, No. 93 Civ. 455, 1994 WL 240546, at *1 (S.D.N.Y. May 27, 1994) (describing why "depositions on written questions are a generally inadequate substitute for an oral deposition"); 8A Fed. Prac. & Proc. Civ. § 2131 (3d ed.) (noting that a deposition on written question "is more cumbersome than an oral examination").

just like Texas—is entitled to non-privileged testimony from legislators "as any other fact witness." P.I. Tr. 152:12-16 (Vol. 5). It is unnecessary to delay Legislator depositions.

## IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Legislators' motion to quash deposition subpoenas.

Dated: May 11, 2022

PAMELA S. KARLAN
Principal Deputy Assistant Attorney General
Civil Rights Division

*/s/ Daniel J. Freeman*
T. CHRISTIAN HERREN, JR.
TIMOTHY F. MELLETT
DANIEL J. FREEMAN
JANIE ALISON (JAYE) SITTON
MICHELLE RUPP
JACKI L. ANDERSON
JASMIN LOTT
HOLLY F.B. BERLIN
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2022, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system, which will send notification of this filing to counsel of record.

*/s/ Daniel J. Freeman*
Daniel J. Freeman
Voting Section
Civil Rights Division
U.S. Department of Justice
daniel.freeman@usdoj.gov

# EXHIBIT

# 1

**West, Jennifer (CRT)**

| | |
|---|---|
| **From:** | Berlin, Holly (CRT) |
| **Sent:** | Tuesday, May 3, 2022 11:30 AM |
| **To:** | Patrick Sweeten; Eric Hudson; Jeff White; Jack DiSorbo; Will Thompson; taylor@consovoymccarthy.com |
| **Cc:** | Mellett, Timothy F (CRT); Freeman, Daniel (CRT); Sitton, Jaye (CRT); Anderson, Jacki (CRT); Lott, Jasmin (CRT); Rupp, Michelle (CRT); nperales@MALDEF.org; SMcCaffity@textrial.com; jgonzalez@malc.org; mark@markgaber.com; chad@brazilanddunn.com; noor@scsj.org; allison@southerncoalition.org; akhanna@elias.law; dfox@elias.law; robert@notzonlaw.com; erosenberg@lawyerscommittee.org; garybledsoe@sbcglobal.net; nas@naslegal.com; martin.golando@gmail.com; richscot1 @hotmail.com; Samantha Serna |
| **Subject:** | LULAC v. Abbott: Deposition Subpoenas for Representatives Landgraf and Lujan |
| **Attachments:** | Brooks Landgraf Deposition Subpoena_2022_05_03.pdf; John Lujan Deposition Subpoena_2022_05_ 03.pdf |

Counsel,

Attached are subpoenas compelling the deposition testimony of Representatives Landgraf and Lujan. We inquired about the Representatives' availability via email on April 27 and May 2, and we have not received any proposed dates from your office. Consequently, we have selected May 24 to depose Representative Landgraf and May 25 to depose Representative Lujan. We remain open to alternative dates between May 18 and May 27. We are also happy to discuss alternative locations if Austin is inconvenient for the Representatives.

Holly Berlin

Holly F.B. Berlin
Trial Attorney
Voting Section, Civil Rights Division
U.S. Department of Justice
(202) 532-3514

# EXHIBIT

# 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
AUG - 1 2011
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

SHANNON PEREZ; HAROLD DUTTON, JR.; GREGORY TAMEZ; SERGIO SALINAS; CARMEN RODRIGUEZ; RUDOLFO ORTIZ; NANCY HALL and DOROTHY DEBOSE

Plaintiffs

-and-

EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, and ALEXANDER GREEN, MEMBERS OF THE UNITED STATES CONGRESS

-and-

TEXAS LEGISLATIVE BLACK CAUCUS, TEXAS HOUSE OF REPRESENTATIVES

-and-

TEXAS STATE CONFERENCE OF NAACP BRANCHES; HOWARD JEFFERSON, JUANITA WALLACE and REV. BILL LAWSON

Plaintiff-Intervenors

v.

STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas

Defendants

CIVIL ACTION NO.
11-CA-360-OLG-JES-XR
[Lead case]

| | |
|---|---|
| MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC)<br><br>Plaintiffs<br>-and-<br><br>THE HONORABLE HENRY CUELLAR, Member of Congress, CD 28; THE TEXAS DEMOCRATIC PARTY and BOYD RICHIE, in his official capacity as Chair of the Texas Democratic Party; and LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) and its individually named members<br><br>Plaintiff-Intervenors<br><br>v.<br><br>STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives;<br><br>Defendants | CIVIL ACTION NO.<br>SA-11-CA-361-OLG-JES-XR<br>[Consolidated case] |
| TEXAS LATINO REDISTRICTING TASK FORCE, JOEY CARDENAS, ALEX JIMENEZ, EMELDA MENENDEZ, TOMACITA OLIVARES, JOSE OLIVARES, ALEJANDRO ORTIZ, AND REBECCA ORTIZ<br><br>Plaintiffs<br><br>v.<br><br>RICK PERRY, in his official capacity as Governor of the State of Texas<br><br>Defendants | CIVIL ACTION NO.<br>SA-11-CA-490-OLG-JES-XR<br>[Consolidated case] |

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|---|---|---|
| MARGARITA V. QUESADA; ROMEO MUNOZ; MARC VEASEY; JANE HAMILTON; LYMAN KING; and JOHN JENKINS<br><br>Plaintiffs<br><br>v.<br><br>RICK PERRY, in his official capacity as Governor of the State of Texas; and HOPE ANDRADE, in her official capacity as Secretary of State for the State of Texas<br><br>Defendants | ) | CIVIL ACTION NO.<br>SA-11-CA-592-OLG-JES-XR<br>[Consolidated case] |

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|---|---|---|
| JOHN T. MORRIS<br><br>Plaintiff<br>v.<br><br>STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; and HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas<br><br>Defendants | ) | CIVIL ACTION NO.<br>SA-11-CA-615-OLG-JES-XR<br>[Consolidated case] |

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|---|---|---|
| EDDIE RODRIGUEZ, MILTON GERARD WASHINGTON, BRUCE ELFANT, ALEX SERNA, SANDRA SERNA, BETTY F. LOPEZ, DAVID GONZALEZ, BEATRICE SALOMA, LIONOR SOROLA-POHLMAN; ELIZA ALVARADO; JUANITA VALDEZ-COX; JOSEY MARTINEZ; NINA JO BAKER; TRAVIS COUNTY and CITY OF AUSTIN<br><br>Plaintiffs<br><br>v. | ) | |

| | | |
|---|---|---|
| RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas; STATE OF TEXAS; BOYD RICHIE, in his official capacity as Chair of the Texas Democratic Party; and STEVE MUNISTERI, in his official capacity as Chair of the Republican Party of Texas<br><br>Defendants | ) | CIVIL ACTION NO.<br>SA-11-CA-635-OLG-JES-XR<br>[Consolidated case] |

# ORDER

Pending before the Court is Defendants' Motion for Protective Order (Dkt. # 62). The Texas Democratic Party (TDP) and Boyd Richie filed a response (Dkt. # 74). The Texas Latino Redistricting Task Force (LULAC) and its individuals members also filed a response (Dkt. # 88). The NAACP Plaintiff-Intervenors filed a response as well (Dkt. # 87).

In their motion, Defendants seek a protective order to "preserve the legislative privilege of witnesses called to testify in this case." (Dkt. # 62, p. 2). Defendants assert that their witnesses will likely face questioning on issues that are integral to the legislative process and that answering such questions will "invade the witnesses' legislative privilege." (Dkt. # 62, p. 2).

The TDP and Mr. Richie contend that a protective order is unwarranted. They claim that Defendants intend to use the privilege as both a sword and a shield and the privilege, if applicable, is qualified and may be waived. The LULAC Plaintiffs contend that the privilege does not apply or, alternatively, that it should be narrowly construed. The NAACP Plaintiffs contend that a blanket protective order would clearly be inappropriate, and if the Court makes any ruling, it should be based on the question being posed to each particular witness.

The Court understands that depositions will begin tomorrow; thus, it has reviewed the motion, response and applicable law in advance thereof. After such review, it clearly appears that any sort of blanket protective order that would insulate witnesses from testifying would be inappropriate. As an evidentiary and testimonial privilege, the legislative privilege is limited and qualified. In re Grand Jury, 821 F.2d 946, 957-58 (3rd Cir. 1987). The privilege may obviously be asserted by legislators and congressmen, who have a function and role in the legislative process. The privilege may also apply to staffers, aides or employees, with certain limitations. Gravel v. United States, 408 U.S. 606, 621-22, 92 S.Ct. 2614 (1972). However, the privilege does not apply to every person who may be deposed in this case, nor does it apply to every question that may be asked during deposition. The privilege is personal to each person who may be entitled to invoke it, and that person may choose to waive the privilege. Even if the deponent is entitled to invoke the privilege, the application of the privilege depends on the question being posed. Even if the privilege is asserted, it may be waived and/or the Court may find that it should not be enforced based on the information being sought and/or other circumstances that may not be readily apparent, such as whether the evidence is available from other sources.

For these reasons, the Court finds that the assertion of the privilege is premature.[1] The Court cannot provide blanket protection to every person who may choose to assert the privilege during the discovery process. Instead, the parties should proceed with depositions and the deponents must appear and testify even if it appears likely that the privilege may be invoked in response to certain questions. The deponents may invoke the privilege in response to particular questions, but the deponent must then answer the question subject to the privilege. Those portions of the deposition

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[1] Florida Association of Rehabilitation Facilities, Inc. v. State of Florida, 164 F.R.D. 257, 260 (N.D. Fla. 1995)(question as to whether privilege applied was not ripe when witnesses had not appeared and asserted privilege in the context of specific questions).

transcript may then be sealed and submitted to the Court for *in camera* review, along with a motion to compel, if the party taking the deposition wishes to use the testimony in these proceedings. In other words, the testimony will not be disclosed or used unless the Court finds that the privilege does not apply, has been waived and/or should not be enforced.

It is therefore ORDERED that Defendants' Motion for Protective Order (Dkt. # 62) is DENIED without prejudice.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

*And on behalf of:*

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeals, Fifth Circuit

*-and-*

Xavier Rodriguez
United States District Judge
Western District of Texas

# EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| **STATE OF TEXAS,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **Civil Action No. 12-128** **(DST, RMC, RLW)** |
| **ERIC H. HOLDER, JR., in his official Capacity as Attorney General, *et al.*** | ) | |
| **Defendants.** | ) | |

**ORDER**

The State of Texas seeks a protective order prohibiting the United States and the defendant-intervenors (collectively, "Defendants") from (1) compelling members of the Texas legislature to appear for depositions, and (2) seeking discovery of communications between state legislators, communications between legislators and their staff, and communications between legislators and their constituents. In Texas's view, all such discovery is barred by the state legislative privilege.

The state legislative privilege is well grounded in Supreme Court case law. *Cf. Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (describing legislative privilege to be free from arrest or civil process as "a tradition so well grounded in history" and holding that section 1983 did not "overturn" the privilege); *Vill. of Arlington Heights v. Metro. Hous. Dev.*, 429 U.S. 252, 268 (1977) (noting that "[i]n some extraordinary instances the members [of the legislature] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."). Although the contours of the

privilege remain somewhat uncertain, the Court's case law assumes that at least some of the privileges and immunities afforded to federal legislators by the Speech or Debate Clause are also afforded to state legislators. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980) ("Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." (citations omitted)). To be sure, the privilege may be abrogated in "extraordinary instances," *Arlington Heights*, 429 U.S. at 268, and may not be as broad as Texas asserts. However, we cannot agree with the United States that every litigated Section 5 case under the Voting Rights Act, 42 U.S.C. § 1973c, constitutes an "extraordinary instance" warranting a need to "intru[de] into the workings" of the state legislature, *see id.* at 268 n.18, and the United States' recent brief is insufficient on this point.

That said, we think it inappropriate to carve out the contours of such a privilege in a blanket protective order that preemptively shields legislators and their staffs from discovery requests. Such an order—which would put us in the uncomfortable position of deciding potential issues before we even know whether they will arise—strains our preference for adjudicating concrete issues as they come. At this point in the litigation, we have no indication that all of the legislators Defendants seek to depose will in fact invoke the privilege. Some legislators may choose to waive the privilege, as they have in other preclearance lawsuits, *see, e.g., Texas v. United States*, No. 11-cv-1303, 2012 WL 11241, at *6 & n.7 (D.D.C. Jan. 2, 2012), in which case Defendants may freely seek document discovery from and depose such legislators. Given this, we have no grounds for barring Defendants entirely from seeking discovery from legislators and their staffs. Moreover, whether and how the privilege applies may depend on whether Texas

chooses to rely on legislative testimony on the merits. For all of these reasons, we deny Texas's motion for a protective order without prejudice. The parties may seek discovery from those legislators who are willing to waive the legislative privilege. Furthermore, because Texas has sought only protection from "discovery of communications between members of the state legislature, communications between state legislators and their staff, and communications between state legislators and their constituents," (*see* Proposed Order at Dkt. # 34-4; Mot. at pp. 1-2), Texas will presumably produce responsive documents from any legislators or staff members that fall outside the scope of the aforementioned communications. If any legislators assert the privilege in response to specific requests for depositions or to justify withholding the production of specific communications, Defendants can move to compel in the appropriate court and Texas can oppose the motion or renew its motion for a protective order. At that point, the precise scope of the privilege can be determined. Accordingly, it is hereby:

**ORDERED** that Texas's motion for protective order [Dkt. #34] is **DENIED** without prejudice; and it is

**FURTHER ORDERED** that Texas shall identify, no later than **April 24, 2012**, those legislators from whom Defendants seek discovery who assert a legislative privilege.

Date: April 20, 2012

/s/
DAVID S. TATEL
United States Circuit Judge

/s/
ROSEMARY M. COLLYER
United States District Judge

/s/
ROBERT L. WILKINS
United States District Judge

# EXHIBIT

# 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

| | |
|---|---|
| MARC VEASEY, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>RICK PERRY, *et al.*,<br><br>Defendants. | Civil Actions No. 2:13-cv-193 (NGR); 2:14-cv-225 (NGR); 2:14-cv-237 (NGR); 2:14-cv-244 (NGR); 2:14-cv-245 (NGR); 2:14-cv-246 (NGR); 2:14-mc-632 (NGR) |

**ORDER**

Having reviewed the motions to quash deposition subpoenas filed by legislators and legislative aides, *see* No. 2:13-cv-193 (ECF Nos. 290, 296, 312, 313, 317); No. 2:14-cv-225 (ECF No. 1); No. 2:14-cv-237 (ECF No. 1); No. 2:14-cv-244 (ECF No. 1); No. 2:14-cv-245 (ECF No. 1); No. 2:14-cv-246 (ECF No. 1); 2:14-mc632 (ECF No. 1), and the United States' responses thereto, the motions are hereby **DENIED.** The legislators and legislative aides may invoke a legislative privilege in response to particular questions and then answer subject to the privilege. In that case, portions of the deposition transcript may then be sealed and submitted to the Court for *in camera* review, along with a motion to compel, if the party taking the deposition wishes to use the testimony in these proceedings. Alternatively, the deponent may choose not to answer specific questions, citing the privilege. In that event, Plaintiffs may thereafter file a motion to compel and the Court will thereafter determine whether the privilege has been waived

or is outweighed by a compelling, competing interest.

**SO ORDERED.**

June 18, 2014

Nelva Gonzales Ramos
United States District Judge

# EXHIBIT

# 5

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **SHANNON PEREZ, ET AL,** | § | |
| | § | |
| ***Plaintiffs*,** | § | |
| | § | |
| **v.** | § | **Civ. No. SA-11-CV-360-OLG-JES-XR** |
| | § | |
| **RICK PERRY, ET AL.** | § | |
| | § | |
| ***Defendant*.** | § | |
| | § | |

**ORDER**

On this day the Court considered Plaintiff-Intervenor African-American Congress members's (hereinafter "Plaintiff") motion to compel deposition testimony from Representative Drew Darby, Chairman of the Texas House Redistricting Committee. Doc. No. 1069. After careful consideration, the motion is GRANTED IN PART and DENIED IN PART.

**ANALYSIS**

On May 20, 2014, Plaintiff's counsel took Chairman Darby's deposition. Chairman Darby, acting on the advice of counsel, declined to answer numerous questions on the grounds of legislative privilege or attorney-client privilege. Thereafter, Plaintiff filed the instant motion to compel in which it contends that neither privilege applies. Doc. No. 1069.

Much of Plaintiff's questioning pertains to matters covered by legislative privilege. Plaintiff's queries focused largely on whether Chairman Darby had reviewed certain documents or whether he had taken certain steps to investigate certain minority group complaints. *See* Doc. No. 1084. Ex. 2 (Rep. Darby Depo). Another line of inquiry dealt with whether Chairman Darby had conversations with other legislators about the plans. *Id.* at 155:22 ("Did you -- did you have

a discussion with any other legislator about whether the map violated Section 2, C235?"). These questions are necessarily directed at eliciting responses that pertain to either Chairman Darby's thought processes or the communications he had with other legislators. Plaintiff argues that Chairman Darby refused to proffer sufficient facts to show that his responses would be privileged. However, the very nature of the questions posed to Chairman Darby indicates that any putative responses would pertain to privileged material. Finally, in a hearing on this motion Plaintiff's counsel raised in passing the argument that the legislative privilege should not apply here. Although the legislative privilege is a qualified one, Plaintiff has not met its burden of establishing that the factors outlined in *Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 304 (S.D.N.Y. 2003) weigh in favor of discarding the privilege in this case.

The same analysis does not apply to questions pertaining to the recess meeting that occurred between the Republican Caucus and a representative from OAG. Although Chairman Darby initially asserted the legislative privilege with respect to this line of questioning, he did not do so with respect to the follow-up questions. Rep. Darby Depo. at 138-40 (objecting on attorney-client privilege grounds only). With respect to the questions for which he did not assert legislative privilege, such a legislative privilege objection is considered waived. *See Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993); *see also United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (Noting that blanket assertions of privilege are disfavored and finding that "[t]he privilege must be specifically asserted with respect to particular documents").

That does not resolve the issue because Chairman Darby declined to answer the majority of these questions on the grounds of the attorney-client privilege. *See* Rep. Darby Depo at p. 137-140. In a prior segment of his deposition, Chairman Darby admitted that the Texas Office

of the Attorney General ("OAG") "is not the attorney for the Republican Caucus." Rep. Darby Depo at 108:6-9. This is consistent with OAG's long-standing position in this case that it does not represent all individual legislators. Nevertheless, the State contends that communications that occurred during the Republican Caucus meeting are covered by the common legal interest extension of the attorney-client privilege. Doc. No. 1084 at p. 7. Specifically, the State argues that the Republican Caucus "members had a common legal interest in seeing the maps upheld." *Id.*

It is well settled that the party asserting the privilege has the burden of establishing its applicability. *See Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985). "Disclosure of attorney-client communications to a third party who lacks a common legal interest waives the attorney-client privilege." *Ferko v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 134 (E.D. Tex. 2003) (citing *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992). Inasmuch as Chairman Darby does not recall who was physically present at the meeting, he has not established that the communications were sufficiently confidential such that attorney client privilege would apply on the basis of a common legal interest. Darby Depo. at 107:4-16 (Testimony that Chairman Darby lacked recollection of who was at the meeting). "The assertor of the privilege must have a reasonable expectation of confidentiality, either that the information disclosed is intrinsically confidential, or by showing that he had a subjective intent of confidentiality." *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997). Chairman Darby has not shown that all individuals present at the Republican Caucus meeting shared a common legal interest because he has not identified who was present. Notably, Chairman Darby could not even foreclose the possibility that a Democratic representative or staffer was present. *Id.* at 107:8-10 (testifying that there may have been a "small one [Democrat] the back or something").

Courts construe the attorney-client privilege narrowly. *See United States v. Pipkins*, 528 F.2d 559, 562 (5th Cir. 1976). It would be an undue extension of the privilege to apply the common legal interest doctrine where the party asserting the privilege has not demonstrated that everyone present shared such an interest. Stated differently, mere speculation that everyone at the meeting shared a cognizable common interest is insufficient to establish that the privilege applies. Consequently, Chairman Darby has not met his burden of establishing that the attorney-client privilege applies to the Republican Caucus meeting. The Court therefore ORDERS Chairman Darby to respond to questions pertaining to this meeting.

**CONCLUSION**

In light of the foregoing analysis, Plaintiffs' motion to compel is GRANTED with respect to questions pertaining to the Republican Caucus meeting. It is DENIED with respect to all other forms of questioning.

SIGNED this 11th day of July, 2014.

/S/

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE
[On behalf of the three judge panel]

# EXHIBIT 6

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

| | | |
|---|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>GREG ABBOTT, *et al.*,<br><br>*Defendants*. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 3:21-cv-259<br>[Lead Case] |

**DEFENDANTS' INITIAL DISCLOSURES**

**TO: The LULAC Plaintiffs (Case No. 3:21-cv-259), by and through their attorney of record, Nina Perales, Mexican American Legal Defense and Educational Fund, 110 Broadway Suite 300, San Antonio, TX 78205; Plaintiff Damon James Wilson (Case No. 1:21-cv-943), by and through his attorney of record, Richard Gladden, 1204 W. University Dr. Suite 307, Denton, TX 76201; the Voto Latino Plaintiffs (Case No. 1:21-cv-965), by and through their attorney of record, Renea Hicks, Law Office of Max Renea Hicks, P.O. Box 303187, Austin, TX 78703; the MALC Plaintiffs (Case No. 1:21-cv-988), by and through their attorney of record, George (Tex) Quesada, 3811 Turtle Creek Boulevard, Suite 1400, Dallas, TX 75219; the Brooks Plaintiffs (Case No. 1:21-cv-991), by and through their attorney of record, Chad W. Dunn, Brazil & Dunn, 4407 Bee Caves Road, Building 1, Ste. 111, Austin, TX 78746; Plaintiff Texas State Conference of the NAACP (Case No. 1:21-cv-1006), by and through its attorney of record, Lindsey B. Cohan, Dechert LLP, 515 Congress Avenue, Suite 1400, Austin, TX 78701; the Fair Maps Plaintiffs (Case No. 1:21-cv-1038), by and through their attorney of record, David A. Donatti, ACLU Foundation of Texas, Inc., P.O. Box 8306, Houston, TX 77288; Plaintiff United States of America (Case no. 3:21-cv-299), by and through its counsel of record, Daniel J. Freeman, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530; Plaintiff Trey Martinez Fischer (Case No. 3:21-cv-306) and Plaintiff Veronica Escobar, by and through their counsel of record, Martin Golando, The Law Office of Martin Golando, PLLC, 2326 W. Magnolia Ave., San Antonio, TX 78201; Intervenor Plaintiffs Lee, Green, Crockett, and Johnson (Case No. 3:21-cv-259), by and through their counsel of record, Gary Bledsoe, The Bledsoe Law Firm PLLC, 6633 Highway 290 East #208, Austin, Texas 78723.**

Governor Greg Abbott, Secretary of State John Scott, Speaker Dade Phelan, Lieutenant Governor Dan Patrick, each in their official capacities, and the State of Texas (collectively, "Defendants") submit these Initial Disclosures in accordance with Rule 26(a)(1) of the Federal

Rules of Civil Procedure and the Scheduling Order (ECF 96). Defendants make these disclosures subject to pending motions to dismiss and do not concede the viability of any claim against any of the Defendants. Nor does any Defendant waive any protections provided by the attorney work product protection, attorney–client privilege, or any other applicable privilege, protection, doctrine, or immunity. Defendants reserve the right to supplement these Initial Disclosures as additional discovery, investigation, and analysis may warrant. Defendants likewise do not waive the right to object, on any grounds, to (1) the evidentiary use of the information contained in these Initial Disclosures or (2) discovery requests relating to these Initial Disclosures.

Date: January 21, 2022

Respectfully submitted.

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Attorney General of Texas

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First Assistant Attorney General

*/s/ Patrick K. Sweeten*
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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing document was served on all parties via electronic mail on January 21, 2022.

*/s/ Patrick K. Sweeten*
PATRICK K. SWEETEN

## INITIAL DISCLOSURES

**I. The name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.**

Based on the information currently available to Defendants, Defendants may use the following individuals to support their claims or defenses in these consolidated cases. These individuals may have discoverable information on the identified subjects. This identification of individuals does not include those individuals who may be used solely for impeachment purposes.

### A. Redistricting Committee Chairs

In these cases, the relevant bills are (1) An Act Relating to the Composition of Districts for the Election of Members of the Texas House of Representatives, H.B.1, 87th Leg., 3d C.S. (2021), (2) An Act Relating to the Composition of Districts for the Election of Members of the Texas Senate, S.B.4, 87th Leg., 3d C.S. (2021), (3) An Act Relating to the Composition of Districts for the Election of Members of the United States House of Representatives from the State of Texas, S.B.6, 87th Leg., 3d C.S. (2021), and (4) An Act Relating to the Composition of Districts for the Election of Members of the State Board of Education, S.B.7, 87th Leg., 3d C.S. (2021). These are referred to collectively as "the challenged redistricting bills."

Senator Huffman is the Chair of the Senate Special Committee on Redistricting. She may have discoverable information on the passage of the challenged redistricting bills in the Senate. The other members of the Senate Special Committee on Redistricting may also have discoverable

information on the legislative process related to the passage of the challenged redistricting bills.[1] Senator Huffman may be contacted through her counsel, as provided below:

Senator Joan Huffman
c/o Patrick K. Sweeten
Office of the Attorney General
P.O. Box 12548 (MC-076)
Austin, TX 78711-2548
(512) 936-1414

Representative Hunter is the Chair of the House Redistricting Committee. He may have discoverable information on the passage of the challenged redistricting bills in the House. The other members of the House Redistricting Committee may also have discoverable information on the legislative process related to the passage of the challenged redistricting bills.[2] Representative Hunter may be contacted through his counsel, as provided below:

Representative Todd Hunter
c/o Patrick K. Sweeten
Office of the Attorney General
P.O. Box 12548 (MC-076)
Austin, TX 78711-2548
(512) 936-1414

Representative Phil King is the former Chair of the House Redistricting Committee. He may have discoverable information on the actions taken by the House Redistricting Committee regarding the 2020 Census and efforts to prepare for subsequent redistricting legislation. Representative King may be contacted through his counsel, as provided below:

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[1] For reference, the members of the Senate Special Committee on Redistricting may be found at the following website: https://senate.texas.gov/cmte.php?c=625.

[2] The members of the House Redistricting Committee may be found at the following website: https://house.texas.gov/committees/committee/?committee=C080.

Representative Phil King
c/o Patrick K. Sweeten
Office of the Attorney General
P.O. Box 12548 (MC-076)
Austin, TX 78711-2548
(512) 936-1414

**B. Texas Legislative Council**

The Texas Legislative Council is a nonpartisan legislative agency. Among other duties, it stores demographic data provided by the U.S. Census Bureau and houses publicly submitted redistricting maps on its *DistrictViewer* website. Members of the Texas Legislative Council may have relevant redistricting information and data.[3]

Texas Legislative Council
P.O. Box 12128
Austin, TX 78711-2128
(512) 463-6622

**C. Plaintiffs and Intervenor-Plaintiffs**

Defendants hereby incorporate by reference each of the individuals and entities identified in the plaintiffs' and intervenor-plaintiffs' initial disclosures. Those individuals and entities may have discoverable information regarding the allegations set forth in the plaintiffs' and intervenor-plaintiffs' complaints.

[3] Texas Legislative Council Redistricting Support: https://tlc.texas.gov/redistricting.

**II. A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.**

**A. Texas Legislative Council**

The Texas Legislative Council houses redistricting maps and data that may be relevant to these cases. These documents and data are available to the public. The following websites contain the following specific information:

a. *DistrictViewer*. This webpage houses proposed redistricting maps that are made available to the public. Website: https://dvr.capitol.texas.gov/.

b. Elections Data. This webpage houses election-results data for a number of elections from 2010 to 2021. Website: https://data.capitol.texas.gov/topic/elections.

c. Geography. This webpage houses several maps that describe the geographic location of several redistricting measurements, such as voting tabulation districts. Website: https://data.capitol.texas.gov/topic/geography.

d. Redistricting 2021. This webpage houses information—such as maps and data—concerning each publicly-available redistricting proposal. Website: https://data.capitol.texas.gov/topic/redistricting.

e. Redistricting Archive. This webpage houses information—such as maps and data—on prior redistricting proposals. Website: https://data.capitol.texas.gov/topic/redistricting-2010s.

f. Redistricting Application. The Texas Legislative Council also administers the Texas Redistricting Application, or "RedAppl." RedAppl houses various Census and other demographic data, including data compiled by the American Community Survey. Members of the public may request access to RedAppl by following instructions located at this website: https://redistricting.capitol.texas.gov/docs/public-access-policies.pdf.

**B. Texas Legislature Online**

The Texas Legislature Online is the website for the Texas Legislature. It provides information on legislation, committees, and the House and Senate generally. It houses information that may be relevant to the legislative history of the challenged redistricting bills, including previous drafts of the bills, committee meetings, and bill analyses. Information concerning a

specific bill may be found at this webpage: https://capitol.texas.gov/Home.aspx. Information concerning committees may be found at this webpage: https://capitol.texas.gov/MnuCommittees.aspx. This information is publicly available.

**C. Texas House and Senate Websites**

The Texas House of Representatives and Texas Senate maintain websites on which records are housed. These websites may contain information relevant to the legislative process by which the challenged redistricting bills were passed, and accompanying records. Records of the House Journal may be found at this webpage: https://journals.house.texas.gov/hjrnl/home.htm. Records of video broadcasts of House committee hearings or House floor debates may be found at this webpage: https://house.texas.gov/video-audio/. Records pertaining to the House Redistricting Committee may be found at this webpage: https://house.texas.gov/committees/committee/?committee=C080. Records of the Senate Journal may be found at this webpage: https://journals.senate.texas.gov/sjrnl/home.htm. Records of video broadcasts of Senate committee hearings or floor debates may be found at this webpage: https://senate.texas.gov/av-live.php. Records pertaining to the Senate Special Committee on Redistricting may be found at this webpage: https://senate.texas.gov/cmte.php?c=625.

**D. Texas Secretary of State Election Results**

The Office of the Texas Secretary of State administers a website that houses data on results of elections conducted in Texas. This website may contain information relevant to election results as they relate to the redistricting claims at issue in these cases. Website: https://www.sos.state.tx.us/elections/historical/index.shtml.

**III. A computation of each category of damages claimed by the disclosing party on which each computation is based, including materials bearing on the nature and extent of injuries suffered.**

Not Applicable.

**IV. Any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.**

Not Applicable.

**EXHIBIT D**

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

| | |
|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>GREG ABBOTT, et al.,<br><br>Defendants. | Civil Action No. 3:21-cv-259<br>(DCG-JES-JVB)<br>(Consolidated Action: Lead Case) |

**PRIVATE PLAINTIFFS' BRIEF IN OPPOSITION TO LEGISLATORS' MOTION TO QUASH OR MODIFY DEPOSITION SUBPOENAS AND MOTION FOR PROTECTIVE ORDER**

In every redistricting cycle in Texas for the past five decades, sitting legislators have participated in depositions. This cycle should be no different. But in response to three deposition subpoenas to three sitting Texas state house members, Representatives Ryan Guillen, Brooks Landgraf, and John Lujan ("Legislators"),[1] Legislators now request the Court rule that "legislative privilege and immunity" categorically protects them, and by extension other legislators, from sitting for any depositions at all. That view is unsupported by any precedent in this Circuit, including in the prior round of Texas redistricting, when the three-judge court required legislators to be deposed and emphasized, "[e]ven if the deponent is entitled to invoke it, the application of the privilege depends on the question being posed. *Perry v. Perez*, 2014 WL 106927, at *3 (W.D. Tex. Jan. 8, 2014). In fact, this Court recently remarked not only that it was "concerned about the

[1] Legislators are represented by private counsel and the Texas Office of the Attorney General ("OAG").

scope of state legislative privilege" as Defendants "conceive of it" but that, if Defendants' approach to legislative privilege were adopted, "it would raise serious questions about whether this Court (or any court) could ever accurately and effectively determine intent." Prelim. Inj. Opinion, Dkt. 258 at 50 n.14.

Private Plaintiffs[2] have a strong interest in the resolution of this motion, as they also subpoenaed Legislators for depositions and intend to depose other sitting legislators in connection with Private Plaintiffs' intent and Section 2 results claims.[3] Private Plaintiffs contend that taking the depositions of sitting legislators will directly shed light on important questions of the intent, the effect, and the background of this legislation—all of which heavily bear on Private Plaintiffs' intent and results claims. Thus, for the reasons stated below, Private Plaintiffs request that the Court deny Legislators' Motion to Quash or Modify the United States' Deposition Subpoenas and Motion for Protective Order.

## LEGAL STANDARD

The legislative privilege is qualified, not absolute. *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (citing *Perez*, 2014 WL 106927, at *1). Despite Legislators' claims to the contrary, "'the proposition that a legislative privilege is not absolute, particularly where another compelling competing interest is at stake, is not a novel one.'" *Perez*, 2014 WL 106927, at *2 (quoting *United States v. Gillock*, 445 U.S. 360, 373 (1980)).

[2] Private Plaintiffs are plaintiffs in each consolidated case, except for *United States v. Texas*, No. 3:21-cv-00299, as listed on the signature page of this brief, with signature by one counsel per group.

[3] On May 6, 2022, the LULAC Plaintiffs, on behalf of all Private Plaintiffs, served deposition subpoenas on Representatives Guillen, Landgraf, and Lujan seeking to depose them on the same dates as the United States. In response, Defendants invoked legislative privilege as the basis for their refusal to have the Representatives' depositions taken, noting that such privilege applied to the Private Plaintiffs' claims and the United States' claims alike.

Legislators must establish the applicability of the legislative privilege in order to quash or modify Private Plaintiffs' and the United States' subpoenas. *Hodges, Grant & Kaufmann v. IRS,* 768 F.2d 719, 721 (5th Cir. 1985) ("The burden of demonstrating the applicability of the privilege rests on the party who invokes it."); *see also Perez*, 2014 WL 106927, at *2. Critically, a court's assessment of the privilege is fact- and context-specific. *Perez*, 2014 WL 106927, at *1 (three-judge court). To make that assessment, courts in this Circuit use a fact-specific balancing test to determine, case by case, the applicability of the legislative privilege. *See, e.g.*, *Harding v. Cty. of Dallas*, 2016 WL 7426127, at *3 (N.D. Tex. Dec. 23, 2016) (applying the *Perez* test to each deposition topic individually); *Veasey v. Perry*, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014). To that end, courts in this Circuit consider five factors to determine whether the need for discovery, including oral depositions and written discovery, is outweighed by the legislative privilege. *Id.* Those five factors are (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Perez,* 2014 WL 106927, at *2. The privilege "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jefferson Cmty*., 849 F.3d at 624.

## ARGUMENT

### A. Legislators' Conception of Legislative Privilege and Its Scope Is Beyond What Courts in this Circuit and in Others Have Recognized.

Legislators make several unsupported and remarkable claims about the scope of legislative privilege that, if accepted by this Court, would mean no legislator would ever have to sit for a

deposition. Throughout their motion, Legislators contend that "deposing a legislator would be 'extraordinary' in any case and ordinarily barred by legislative privilege." Br. at 5; *see also* Br. at 7, 10, 12. This contravenes the last five decades of redistricting litigation, during which time legislators have consistently and routinely been deposed. Legislators cite footnote 18 in *Arlington Heights* to support that proposition. *Vill. of Arlington Heights v. MHDC*, 429 U.S. 252, 268 & n.18 (1977). But Legislators ignore what actually happened in *Arlington Heights*. There, the Court acknowledged that the plaintiffs already had an opportunity to question decisionmakers about intent, in particular, by "question[ing] Board members fully about materials and information available to them at the time of decision," both "during the discovery phase and at trial." *Id.* at 270 n.20. Thus, on its facts, *Arlington Heights* hardly can be construed as categorically shielding decisionmakers from testifying at depositions. Instead, *Arlington Heights* calls for courts to engage in a fact-specific inquiry based on the needs and circumstances presented in each case. Here, Legislators refuse to sit for depositions altogether, denying Plaintiffs any opportunity to question them in connection with this litigation.

Next, Legislators contend that the privilege protects them from all "inquiries about what motivated or informed their legislative acts." Br. at 4. As discussed above, that is not the standard. In intent cases, knowledge about what motivated a decisionmaker at the time of the decision is relevant and subject to discovery. *See, e.g.*, *Veasey*, 2014 WL 1340077, at *2–3. Legislators mischaracterize the approach this Court took during the hearing on the Brooks Plaintiffs' motion for preliminary injunction, suggesting that the Court "prohibited" plaintiffs from questioning Senator Huffman about "what otherwise motivated or informed her or others during the legislative process." Br. at 4. But the Court did no such thing. The Court certainly did not categorically prohibit questioning on intent during the hearing. Instead, it identified the outer limits of the

privilege, noting, "the scope of state legislative privilege as Senator Huffman and Defendants conceive of it" would effectively bar any court from "ever accurately and effectively determin[ing] intent." Dkt. 258 at 50 n.14. The Court said that even a legislator's refusal to answer a question may in and of itself "strengthen[] the inference" that previously stated reasons for redrawing a map were "at best, highly incomplete, and, at worst, disingenuous." *Id.* at 50.[4] In other words, this Court made clear in that hearing that Legislators are not unilaterally protected from *all* inquiries about intent.

Legislators also seem to suggest that the United States has less "utility" in deposing legislators because their claims are "results claims," not "intent claims." Br. at 6. Even if Legislators are correct as to cases that raise results claims—and they are not—this argument

[4] None of the cases to which Legislators cite, Br. at 4, 5, 6, 8, for the proposition that courts prohibit depositions of sitting legislators in redistricting cases involving intent-based claims, support that view. *Lee v. City of L.A.*, 908 F.3d 1175, 1188 (9th Cir. 2018) (refusing to allow depositions based on "the factual record in this case," where court found sufficient support that legislators whom plaintiffs sought to depose did act because of racial motivation, but that subsequent actions by others clearly showed that final maps were not product of that motivation); *Am. Trucking Ass'ns., Inc. v. Alviti*, 14 F.4th 76, 88–89 (1st Cir. 2021) (noting that some private civil cases would warrant setting legislative privilege to one side "because the case turns so heavily on subjective motive or purpose," but finding that proof of state lawmaker's subjective intent in dormant Commerce Cause case concerning tolls unlikely to be significant, because "it is difficult to conceive of a case in which a toll that does not discriminate in effect could be struck down based on discriminatory purpose. . . . [and] equally difficult to conceive of a toll that has a substantial discriminatory effect, yet is saved by the mere absence of proof that the effect was intended"); *In re Hubbard*, 803 F.3d 1298, 1312–13 (11th Cir. 2015) (finding subpoenas in question "d[id] not serve an important federal interest" because the statute in question did not implicate any constitutionally protected conduct and therefore plaintiffs did not present a cognizable First Amendment claim, but noting that its opinion should not be read as unilaterally deciding whether the privilege would apply in a different case with a different kind of constitutional claim); *In re Dep't of Commerce*, 139 S. Ct. 16, 17 (2018) (not addressing legislative privilege directly, but rather dealing with "bad faith" standard to justify deposition of Cabinet Secretary in review of administrative proceeding), *but see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2564 (2019) (relying on depositions of other sub-Cabinet officers for review of decision below); *Gill v. Whitford*, 2019 WL 4571109, at *1 (7th Cir. July 11, 2019) (not addressing legislative privilege directly, but rather denying the plaintiffs' request for deposition of the Speaker of the Wisconsin Assembly only after partisan gerrymandering claims were held to be nonjusticiable political questions and case was vacated).

undercuts Legislators' insistence that the privilege precludes questioning on intent by conceding that, at a minimum, parties with intent claims—such as many of Private Plaintiffs—have a basis for deposing Legislators. Moreover, Legislators cannot deny that lawmakers' firsthand knowledge of any number of issues—from discrimination within their home districts, to legislator responsiveness to communities of color, to the alternative maps considered during the redistricting process—is probative. In its opinion on Brooks Plaintiffs' motion for preliminary injunction, this Court acknowledged as much when it highlighted the relevance of Senator Kel Seliger's deposition, where he testified that the redrawing of SD 10 "violated the Constitution and the VRA." Dkt. 258 at 12. Thus, Legislators' deposition testimony is highly relevant to this Court's ability to adjudicate on a fulsome evidentiary record, intent claims and results claims alike.

Legislators also erroneously claim that this Court concluded that state legislators can only ever testify to facts "within the public record," and that anything beyond the public record would require a waiver of legislative privilege. Br. at 5, citing PI Tr. 152:1-5 (Vol. 5) ("Senator Huffman will be allowed to testify to everything within the public record; and if she goes outside the public record, she will waive her privilege."). In fact, the Court's statement was in response to the parties' argument over whether Senator Huffman waived her legislative privilege by testifying during the preliminary injunction hearing. PI Tr. 147:19-152:5 (Vol. 5). However, the issue here is not whether Legislators waive legislative privilege by being deposed; instead, the issue is whether the privilege shields legislators from being deposed at all and whether the privilege must yield to countervailing interests. Legislators fail to point to any binding authority that supports their position, and the cases they cite are inapposite.[5]

[5] *Tenney v. Brandhove*, 341 U.S. 373, 377 (1951) (citing to Federalist papers and discussing the supremacy of the legislative department in the States during the Revolution); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (involving a merits decision on a motion for summary judgment

Legislators also muddy the waters by conflating legislative immunity and legislative privilege. Br. at 4. To be clear, the two concepts are distinct. Legislative immunity is about whether legislators are liable for their legislative acts. *Consumers Union*, 446 U.S. 719, 732 (1980). Legislative privilege is the qualified testimonial privilege that, in certain instances, protects state legislators from compelled disclosure of documentary and testimonial evidence. At issue in the instant motion is Legislators' legislative privilege, and the immunity cases Legislators cite are therefore irrelevant. What is relevant, instead, is how best to balance Legislators' qualified privilege with plaintiffs' needs and the interests of justice.

### B. Private Plaintiffs' Need for Discovery to Prove Their Claims Outweighs Legislators' Interest in Application of the Legislative Privilege.

To the extent that any deposition testimony implicates legislative privilege, the five-factor *Perez* test adopted by the Fifth Circuit favors Private Plaintiffs' and the United States' positions. First, the evidence sought in legislator depositions is both relevant and vital to Private Plaintiffs' claims under the Voting Rights Act and the Constitution. Private Plaintiffs (and the United States) seek discovery relating to the issues at the core of this case: the intent of the legislators who drew and approved the 2021 redistricting maps, the extent to which race predominated in that map-drawing process, and the effect those maps will have on voters and communities across Texas. Legislators' involvement in, knowledge of, and intent during the legislative and map-drawing process are highly relevant to Private Plaintiffs' intent claims under Section 2 and the Constitution, just as their understanding of demographic patterns, political behavior, socioeconomic disparities,

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without mention of any discovery disputes, let alone testimony at depositions); *Dep't of Commerce*, 139 S. Ct. at 2573–74 (allowing extra-record discovery, noting "[w]e granted the Government's request to stay the Secretary's deposition pending further review, but we declined to *stay the Acting AAG's deposition or the other extra-record discovery* that the District Court had authorized") (emphasis added).

campaign tactics, and the like in their own districts and beyond are highly relevant to Private Plaintiffs' and the United States' results claims.

Second, the lack of alternative means to obtain evidence weighs in Plaintiffs' favor. Legislators' suggested alternatives—examination of the "public record" or "written questions—are hardly adequate substitutes for in-person depositions, given that officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Veasey*, 2014 WL 1340077, at *3 (quoting *Smith v. Town of Clarkton N.C.*, 682 F.2d 1055, 1064 (4th Cir.1982)). Indeed, this Court recently noted that even if "the legislature may at times have given pretextual reasons for its redistricting decisions" and the "the legislative history suggests that supporters of [SB4] were less than forthright about their motivations," Plaintiffs still must provide evidence that the legislators acted because of racial motivations, such as "secret correspondence." Dkt. 258 at 2, 42–43. Non-public statements of legislators thus may bear on the determination of discriminatory purpose, the effect of discriminatory practices, and the extent to which race played a role in redistricting decisions. Moreover, there is immense value in questioning Legislators in person to evaluate their demeanor in ways that are impossible through written questions and lawyer-mediated responses.[6] *See, e.g.*, Dkt. 258 at 49 (noting that "Senator Huffman's smirk" during her testimony "suggests that she may well have known" that SD 10 did not "need[] population.").

Third, the seriousness of the litigation and the issues involved weigh heavily in Plaintiffs' favor. "The importance of eliminating racial discrimination in voting—the bedrock of this

[6] In addition to unique information about legislative purpose, state legislators also have in-depth knowledge of the districts and voters they represent, the regions where they live, and the political landscape in which they operate. All of these topics would be most effectively explored through in-person depositions.

country's democratic system of government—cannot be overstated." *Veasey*, 2014 WL 1340077, at *2; *see also Harding*, 2016 WL 7426127, at *6 ("The federal government's interest in enforcing voting rights statutes is, without question, important."); *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 765 (S.D. Tex. 2011) ("There is a very strong federal interest in the enforcement of civil rights statutes that provide remedies for violations of the U.S. Constitution."); *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989) ("[T]he federal interest in enforcement of the Voting Rights Act weighs heavily in favor of disclosure. . . . This Act requires vigorous and searching federal enforcement."). Given the utmost importance of such claims involving the Fourteenth and Fifteenth Amendments and Section 2—which protect the right most fundamental to the functioning of our democracy—this factor weighs in Plaintiffs' favor.

Fourth, the role of these three legislators directly bears on Plaintiffs' claims concerning the districts these legislators represent and the process and procedure behind the plans' passage. The legislators may have had a significant role in designing the boundaries for their respective districts. For example, Representatives Guillen and Landgraf served on the house redistricting committee, which considered and voted to pass all four challenged maps. Representative Landgraf also served on the ten-member conference committee for the enacted congressional plan. Their assertion that "[t]here is no utility at this stage of the proceedings to depose sitting legislators" strains credulity.Br. at 6.

Fifth, there is no possible chilling effect on government employees; thus, this factor once again weighs in Private Plaintiffs' favor. After all, Texas legislators have participated in the discovery process—including through document production, depositions, and trial appearances—associated with redistricting challenges in dozens of cases for more than five decades of redistricting litigation. *See, e.g.*, *Bush v. Martin*, 251 F. Supp. 484, 495 (S.D. Tex. 1966); *Kilgarlin*

*v. Martin*, 252 F. Supp. 404, 423 (S.D. Tex. 1966); *Graves v. Barnes*, 343 F. Supp. 704, 714 (W.D. Tex. 1972); *Seamon v. Upham*, 536 F. Supp. 931, 1023 (E.D. Tex. 1982); *In re TXE Elec. Co.*, 2001 WL 688128, at *1 (Tex. App.—Dallas 2011, no pet. h.); *Texas v. Holder*, 888 F. Supp. 2d 113, 120–21 (D.D.C. 2012); *Perez* 2014 WL 106927, at *1. None of those courts prevented legislators from testifying altogether because of a hypothetical chilling effect, and indeed no chilling effect has resulted—including after the previous round of redistricting litigation, when the three-judge court there required that depositions proceed in full and allowed legislators to raise any privilege concerns after the deposition through in-camera review. *See Perez*, 2014 WL 106927, at *3. Thus, Legislators' suggestion that depositions disrupt "our scheme of government" is ill founded and false.

A final note on Legislators' critique of this balancing test is also warranted. Legislators erroneously argue that the *Perez* balancing test does not apply, incorrectly asserting that it was not "initially conceived as a basis for deposing a sitting legislator." Br. at 14. Citing *Rodriguez v. Pataki*, a case from the Southern District of New York that served as the foundation for the *Perez* court's balancing test, Legislators argue that the balancing test does not apply in this case. *Id.* at 14–15 (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003). But *Rodriguez* says no such thing. There, the court laid out the factors for the balancing test with language that applied equally to document discovery or depositions, noting factors such as "the relevance of the evidence sought to be protected" and "the availability of other evidence." *Rodriguez*, 280 F. Supp. 2d at 101. Indeed, the court began its opinion by noting, "notwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents *or testify at depositions*." *Id.* at 95

(emphasis added) (quoting *Arlington Heights*, 429 U.S. at 268).[7] Thus, the *Rodriguez* court made no effort to exclude the evaluation of deposition testimony from the scope of its five-factor test, and the Legislators are incorrect to assert as much.

### C. None of the Alternatives or Modifications Suggested by Legislators Can Be Adequate Substitutes for In-Person Depositions.

Here, Legislators' depositions are important to Plaintiffs' ability to develop their claims, and, ultimately, the evidentiary record before this Court. Given Legislators' unwillingness to engage on questions of intent during the legislative process and the State's refusal to provide meaningful information via document discovery, deposing Legislators is all the more important. As the Fifth Circuit recognized, "in this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence." *Veasey v. Abbott*, 830 F.3d 216, 235 (5th Cir. 2016) (en banc).[8] Furthermore, as noted in deciding

[7] Subsequent decisions, including ones cited by Legislators, apply the *Perez* balancing test to legislator depositions. *See Hobart*, 784 F. Supp. 2d at 766 (applying a modified version of the *Perez* and *Rodriguez* tests); *see also Harding*, 2016 WL 7426127, at *6; *Perez*, 2014 WL 106927, at *1 (same); *Hall v. Louisiana*, 2014 WL 1652791, at *12 (M.D. La. Apr. 23, 2014) (same).

[8] Courts have made the same observation in the context of employment, housing, and other forms of discrimination. *See, e.g.*, *Ports v. First Nat'l Bank of New Albany, Miss.*, 34 F.3d 325, 328 (5th Cir. 1994) ("Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence" to prove employment discrimination); *Rutherford v. Harris Cty., Tex.*, 17 F.3d 173, 180 n.4 (5th Cir. 1999) (same); *Boss v. Castro*, 816 F.3d 910, 916 (7th Cir. 2016) ("[A]n overt admission of discriminatory intent . . . is rare."); *Erwin v. Potter*, 79 F. App'x 893, 896–97 (6th Cir. 2003) (unpublished) ("Direct evidence of discrimination is rare because employers generally do not announce that they are acting on prohibited grounds."); *Smith.*, 682 F.2d at 1064 ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority."); *Boston All. of Gay, Lesbian, Bisexual and Transgender Youth v. U.S. Dep't. of Health & Human Servs.*, 557 F. Supp. 3d 224, 245 (D. Mass. 2021) ("[C]ourts have acknowledged that limiting the scope of review to the administrative record makes little sense in the context of an inquiry into illicit animus."); *Cook Cty. Ill. v. Wolf*, 461 F. Supp. 3d 779, 794 (N.D. Ill. 2020) ("Most people know by now that the quiet part should not be said out loud."); *Young v. Gutierrez*, 2018 WL 3443175, at *3 (S.D. Tex. July 17, 2018) ("Those engaging in race discrimination seldom announce their motivations."); *Jim Sowell Constr. Co., Inc. v. City of Coppell*, 6 F. Supp. 2d 542,

the preliminary injunction motion, this Court paid considerable attention to the facial expressions of legislators during the hearing to judge the credibility of justifications. Dkt. 258 at 42, 49. Again, facial expressions and demeanor cannot be gleaned from written testimony. Thus, there is no adequate substitute for in-person depositions.

Legislators further claim that sitting at depositions would be "intrusive" and that less intrusive "alternatives" are available. But they fail to provide any support for those assertions. Br. at 15. The representatives are public officials. They participated in the redistricting process. They have knowledge of facts specific to their districts. If anything, they should expect to have their depositions taken, as has been the custom in past redistricting cases. *See, e.g.*, *Perez*, 2014 WL 106927, at *3. Any burden on the Legislators' time is minor considering the importance of redistricting to their work and to their constituents. Nothing in the cases cited by Legislators, including prior redistricting cases, suggests that a "blanket privilege" for depositions applies and thereby eliminates any accountability for allegedly unlawful redistricting. And, again, none can, since Texas legislators have participated in depositions in every redistricting cycle for the last five decades. In *Perez*, the redistricting litigation from last cycle, the three-judge panel recognized that the court's protocol was to permit deponents to "choose not to answer specific questions, citing the privilege." 2014 WL 106927, at *3. But the *Perez* court never excused legislators from sitting for depositions altogether.[9]

550 (N.D. Tex. 1999) (members of decision making bodies "typically are not so bold or foolish . . . to announce publicly their intent to discriminate against a certain race").

[9] In *Veasey v. Perry*, the court came to a similar conclusion finding, in response to the defendants' refusal to allow legislators to sit for depositions, that the privilege could be invoked "in response to particular questions and then answer subject to the privilege." *See* Order, *Veasey v. Perry*, No. 2:13-cv-00193, Dkt. 341 (S.D. Tex. June 18, 2014).

Alternatively, Legislators ask the Court to stay the deposition subpoenas until after the Court adjudicates the State's motions to dismiss.[10] Br. at 7. But document discovery has moved forward for months since Defendants filed their various motions to dismiss. Changing course at this point would unnecessarily delay proceedings and deny Private Plaintiffs adequate discovery time before trial. The cases Legislators cite in support of this proposition involved determinations that turned on the specific facts of the case, and should not apply here. *See In re Hubbard*, 803 F.3d at 1298 (at the time document subpoenas issued, multiple appeals and a certified question to the Alabama Supreme Court were pending); *Bickford v. Boerne Indep. Sch. Dist.*, 2016 WL 1430063 (W.D. Tex. Apr. 8, 2016) (plaintiffs' right to conduct discovery was contingent upon court deciding the question of qualified immunity).

Legislators also request that the Court stay or limit the number of deposition subpoenas until the Supreme Court decides *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1087. Br. at 8. This argument is similarly unpersuasive, as neither of those cases involve questions of legislative privilege, let alone discovery issues. And, more important, this Court denied Defendants' earlier motion to stay this entire case until resolution of *Merrill*. *See* Order, Dkt. 246. This Court should similarly reject Legislators' motion here.

Finally, in the alternative, Legislators request the Court enter a protective order that limits the subject matter of the depositions to information in the public record. Br. at 9. There is no basis for such an order. Indeed, in the last round of Texas redistricting, the *Perez* court considered a similar motion regarding legislative privilege and rejected a similar limitation on depositions, ordering instead that depositions should proceed in full. *See* 2014 WL 106927, at *1. Citing to its

[10] Some Private Plaintiffs do not even have pending motions to dismiss after the filing of their amended complaints.

earlier ruling on the defendants' motion for a protective order, the *Perez* court noted that it had required deponents to appear and testify even if it appeared likely that the "privilege might be invoked in response to certain questions." *Id.* The court further found that the deponents could then invoke the privilege in response to particular questions but that they must answer the question. *Id.* The court went on, that those portions of the deposition "would be sealed and submitted for in camera review" and that the party taking the deposition could later file a motion to compel, if the party wished to use the testimony. *Id.* Other courts in this Circuit have since taken a similar approach to assessing legislative privilege. *See* Order, *Veasey*, No. Dkt. 341. Accordingly, in making its fact- and context-specific assessments regarding legislative privilege, Private Plaintiffs request that this Court similarly reject Legislators' attempts to avoid or categorically limit their depositions.

## CONCLUSION

For the reasons set out above, Private Plaintiffs request that this Court deny Legislators' Motion in its entirety.

Dated: May 11, 2022

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**EXHIBIT E**

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

| | | |
|---|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,<br><br>*Plaintiffs,*<br><br>V.<br><br>GREG ABBOTT, *et al.*,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 3:21-cv-00259<br>[Lead Case] |
| UNITED STATES OF AMERICA,<br><br>*Plaintiff,*<br><br>V.<br><br>STATE OF TEXAS, *et al.*,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 3:21-cv-00299<br>[Consolidated Case] |

**REPLY IN SUPPORT OF LEGISLATORS' MOTION TO QUASH OR MODIFY DEPOSITION SUBPOENAS AND MOTION FOR PROTECTIVE ORDER**

**REPLY**

All past is prologue—or at least that is what the United States and the private plaintiffs would have this Court believe. As they tell it, legislators have submitted to depositions in other cases; they must do so again in this case, lest "no legislator would ever have to sit for a deposition." Pls. Opp'n 3-4, ECF 272. The legislators' arguments, of course, are not so absolute.[1] They are particular to this dispute. Given the United States' effects-only claim regarding the house districts and its stated aims for depositions,[2] against the backdrop of Supreme Court precedent and recent courts of appeals cases, the subpoenaed legislators cannot be forced to sit for depositions at this time in this particular case. As the legislators' motion readily acknowledges, in "some extraordinary instances" (paradigmatically, federal criminal prosecutions) a decisionmaker might be called to testify; even then, "such testimony frequently will be barred by privilege." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951); *United States v. Nixon*, 418 U.S. 683, 705 (1974)); *see, e.g.*, *United States v. Gillock*, 445 U.S. 360, 373 (1980). But, of course, these redistricting cases are not criminal prosecutions. And no plaintiff has yet established that these cases present such extraordinary circumstances that could warrant third-party legislators sitting as the very first deponents.

For the reasons stated in the legislators' motion, at the very least, depositions must wait until motions to dismiss are decided and plaintiffs have exhausted alternative means of discovery. Mot. 5-8.[3] The extraordinary step of deposing a legislator, moreover, is unwarranted when the Supreme Court

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1 The legislators filed their motion on May 4, 2022, not on May 5, 2022—as misstated in the United States' opposition brief. *See* Mot., ECF 259 (filed May 4, 2022); *but see* U.S. Opp'n at 2, ECF 271.

2 The private plaintiffs emailed their own deposition subpoenas for Representatives Guillen, Landgraf, and Lujan on May 6, 2022. The legislators will imminently file a motion to quash those separate subpoenas. That motion will address the private plaintiffs' arguments regarding their intent claims, which they argue places them on different footing than the United States, as well as this Court's recently stated concerns about adjudicating intent in cases where privilege applies. *See* Pls. Opp'n 4-5.

3 The United States asserts that "Legislators have not—and likely cannot—identify other individuals with the same knowledge that the United States might seek to depose first." U.S. Opp'n 12. While it is not incumbent on third parties to provide a plaintiff with more permissible discovery strategies, counsel has made various

is currently considering "the wide range of uncertainties" regarding what §2 requires and what the Equal Protection Clause prohibits in redistricting. *See Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Roberts, C.J., dissenting); *id.* at 889 (Kagan, J., dissenting) (describing the stay in *Merrill* as based on the "view that the law needs to change"). Deposing legislators is a last resort, not a first resort. Mot. 10-17. The legislators do not rehash those arguments here but use this reply to briefly respond to evolving positions and new arguments in the opposition briefing.

**I. Interim relief is necessary while the motion is pending.** After the legislators filed their motion, the United States and private plaintiffs took the extraordinary position that the depositions must proceed on May 24 and May 25 even if there is no ruling from the Court. *See* Ex. A at 4 (5/10/22 email from D. Freeman); Ex. B at 2 (5/12/22 email from T. Meehan). So that this Court has the opportunity to fully consider this motion alongside the imminently forthcoming motion regarding the private plaintiffs' subpoenas to depose the same legislators, the legislators request an interim stay postponing the depositions until there is a decision. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (courts have "inherent" powers to "control … its docket with economy of time and effort for itself, for counsel, and for litigants"); *see, e.g.*, *MetroPCS v. Thomas*, 327 F.R.D. 600, 616 (N.D. Tex. 2018) (staying compliance with deposition subpoena pending decision on deponent's motion to quash).

The legislators' counsel has asked repeatedly why it would be appropriate for the depositions to proceed before the motions to quash are briefed and/or decided. That tack is an attempt to moot the issues before the Court, even though two months remain for discovery and without any effort to pursue alternative means of discovery including depositions of those outside the legislature. *See* Ex. A

suggestions: noticing a 30(b)(6) deposition for discussion of the non-privileged public record; deposing others living in the challenged districts, such as past candidates who are not sitting legislators; expert discovery, which will inevitably be center-stage for *Gingles*; making use of volumes of publicly available information regarding the districts from the public legislative record, publicly posted submissions by the public and by legislators, and the U.S. Census Bureau; and pursuing less intrusive discovery than depositions to seek non-privileged, relevant information from legislators themselves.

at 1, 3 (5/11/22 email from T. Meehan; 5/9/22 email from T. Meehan); Ex. B at 2 (5/12/22 email from T. Meehan). The only response has been timing. *See, e.g.*, Ex. A at 2 (5/10/22 email from D. Freeman). When pressed on timing, counsel stated that they believe a trial in another case demands that these legislators be deposed here and now in this case. Ex. B at 2 (5/12/22 email from T. Meehan). That is no response. Counsel's obligations in another case are not a reason to press ahead with a third-party legislator's deposition in this case, only to find that the deposition should not have occurred or will have to be reopened. *Cf.* Fed. R. Civ. P. 45(d)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."). The timing concerns also appear to be pretextual: Counsel has offered to discuss extending the discovery period by joint agreement so that legislator depositions could be postponed and alternative discovery pursued; as of this filing, the parties have not entertained that offer. *See* Ex. B at 1 (5/13/22 email from D. Fox) (confirming opposition to motion to quash).

Pressing ahead without a ruling transgresses Rule 45. The United States and private plaintiffs have an obligation to avoid undue burden and expense when it comes to third-party discovery. Fed. R. Civ. P. 45(d)(1). Pressing ahead also risks mooting the important legislative immunity and privilege issues, with all of the attendant federalism concerns, that are pending before this Court. The pending motion argues that the depositions should not proceed at all at this time. But the United States intends to press ahead anyway, order or no order, to depose legislators about the legislation, *i.e.*, "whether the policies underlying the House plan are 'tenuous.'" U.S. Opp'n 2-3. For perhaps the most egregious example, the United States confirms it intends to put one of the subpoenaed legislators under oath to ask him about switching parties—a legislator whom the United States concedes was the candidate of choice when affiliated with the Democratic party. U.S. Opp'n 11 n.9; *see* Compl. ¶117. That line of inquiry has no conceivable relevance to any constitutionally permissible version of the Voting Rights Act, implicates First Amendment associational privileges, and can only be meant to harass.

Accordingly, the legislators respectfully request that the Court issue an interim stay that postpones the depositions to allow the Court sufficient time to decide the legislators' motions.

**II. Legislative immunity and privilege hang together.** The United States and private plaintiffs wrongly fault the legislators for "conflating" immunity with privilege. Pls. Opp'n 7; U.S. Opp'n 5.[4] It would be serious legal error to deem legislative immunity irrelevant here. In *Tenney*, the Supreme Court described "[t]he privilege of legislators to be free from arrest *or civil process* for what they do or say in legislative proceedings." 341 U.S. at 372 (emphasis added). The American origins of that "privilege" began with the state constitutions. The Maryland Declaration of Rights, for example, declared that "'freedom of speech, and debates or proceedings in the Legislature ought not be impeached in any other court or judicature.'" *Id.* at 372 (quoting Md. Decl. of Rights art. VIII (1776)). Likewise, in New Hampshire: "'The freedom of deliberation, speech, and debate, in either house of the legislature is so essential to the rights of the people that it cannot be the foundation of *any action*, complaint, or prosecution….'" *Id.* at 374 (emphasis added) (quoting N.H. Const. Part I, art. XXX). Neither *Tenney* nor those constitutional origins distinguish between "immunity" and "privilege," much less deem principles of legislative immunity irrelevant. *Tenney*, and the privilege's constitutional foundations, apply equally to actions in which the legislator is himself a defendant and actions where the legislator is called to testify by power of a subpoena. The third-party legislators have no fewer protections here than the legislator who is sued as a defendant. Whether described as legislative immunity or privilege, they are twin safeguards. Subpoenaing a legislator to answer for his legislative acts poses the same

[4] They are likewise wrong to suggest that the principle that "legislators … should be protected not only from the consequences of litigation's results, but also from the burden of defending themselves," *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967), doesn't apply to state legislators. U.S. Opp'n 5. *Dombrowski* does not single out federal legislators; it relies on *Tenney*, a decision specific to legislative immunity and privilege for state legislators. 387 U.S. at 85; *see also Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 732-33 (1980) (relying on *Dombrowski*); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405 (1978) (reasoning regarding legislative immunity "is equally applicable to federal, state, and regional legislators"); *Reeder v. Madigan*, 780 F.3d 799, 805 (7th Cir. 2015) ("There is no reason to find that [state] legislators along with their aides are entitled to lesser protection than their peers in Washington.").

threats to legislative independence and imposes the same burdens on his office by "detract[ing] from the performance of official duties" as would serving a legislator as a defendant. *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015); *see also* Mot. 11 (citing *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011)).

**III. Evolving standards of privilege.** The crux of the parties' opposition appears to be that protections for state legislators have evolved (to seeming nonexistence). Quoting a Title VII case involving abrogation of state sovereign immunity, not legislative privilege, the United States argues that "[w]hatever protections eighteenth century law afforded state legislators," the Supreme Court "'has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States.'" U.S. Opp'n 4-5 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). That too contradicts what the Supreme Court has said about protections for state legislators. Time and again, the Court has explained that the Civil Rights Act of 1871, known today as §1983 and contemporaneous with the Reconstruction Amendments, did *not* abrogate the state legislators' common law immunity and privilege. *See Sup. Ct. of Va.*, 446 U.S. at 732-33 (generally equating immunity for state legislators in §1983 actions to that accorded to Congressmen under the Constitution); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (same).

**A.** Relatedly, the United States and private plaintiffs repeatedly quote favored *dictum* from *Jefferson Community Health Care Centers v. Jefferson Parish*, 849 F.3d 615 (5th Cir. 2017), while ignoring what actually happened in *Jefferson*, ignoring the Supreme Court rules actually binding on this Court, and ignoring recent decisions by the courts of appeals with far more analogous facts. *Jefferson* involved an eviction dispute against a Louisiana parish, including its councilmembers. Before reversing an injunction entered by the district court, the court addressed councilmembers' arguments that they could not be sued. *Id.* at 624. The United States' and private plaintiffs repeatedly quote *Jefferson*, which in turn only quotes *Perez v. Perry*, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014), which in turn relies on the flawed

decision in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003): privileges must be "strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Id.* They ignore that this *dictum* is contrary to *Tenney* and progeny: "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence *but for the public good*. One must not expect uncommon courage even in legislators." 341 U.S. at 377 (emphasis added); *accord Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018) ("we have likewise concluded that the plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances'"); *Hubbard*, 903 F.3d at 1310-11 (not qualifying privilege). And they ignore that the court in *Jefferson* ultimately assumed, without deciding, that privilege applied: "even assuming that the councilmembers' reasons for passing the revolutions are privileged in the sense that they cannot be directly compelled to disclose them, this evidentiary privilege cannot bar the adjudication of a claim" against the parish and local councilmembers. 849 F.3d at 624. *Jefferson* has no holding deciding any discovery issue, much less ordering depositions of state legislators.

**B.** Finally, the United States and private plaintiffs believe that because legislators were deposed in past Texas voting rights disputes, they must be deposed again here. U.S. Opp'n 6-8; Pls. Opp'n 1. That logic reduces legislative immunity and privilege to nothing. This is not a continuation *Perez*. Nor a continuation of *Texas v. United States*. Nor a continuation of *Veasey*. Since then, the Supreme Court has cast further doubt on the relevance of evidence regarding individual legislators, affirming that such testimony is not to be equated to evidence pertaining to "the legislature as a whole" in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2349-50 (2021). *See* Mot. 16-17; *accord Am. Trucking Ass'n v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021) (noting that the "Supreme Court has warned against relying too heavily on such evidence" of "individual lawmakers' motives to establish that the legislature as a whole [acted] with any particular purpose"). And courts of appeals have in the interim continued to

safeguard legislative privilege by quashing not only deposition subpoenas but also document subpoenas, in ways that cannot be reconciled with requiring legislator depositions at this stage of this case. *See* Mot. 15-16 (discussing First, Eleventh, and Ninth Circuit cases).

Most fundamentally, laser focus on past voting rights disputes leads the United States to ignore the particular question here: whether the United States may depose legislators, before anyone else, for their claim that house districts have a discriminatory effect under §2—a question ordinarily reserved for dueling expert witnesses. *See* Mot. 6-8. In the United States' words, it intends to ask legislators "whether the stated policies underlying the House plan are 'tenuous'" under the soon-to-be clarified *Gingles* framework. U.S. Opp'n 5 (quoting *Gingles*, 478 U.S. at 37). For the reasons stated in the legislators' motion, that inquiry is bound to implicate privileged testimony, probing what was really on the minds of legislators then and now about the reasons for the resulting district lines—expressly anticipated by Rule 45 as grounds for quashing the subpoenas. Fed. R. Civ. P. 45(d)(3)(A)(iii).[5]

[5] The United States argues that Representative Lujan "holds no legislative privilege with respect to the 2021 House plan" because he assumed office the month after the bill passed. U.S. Opp'n 9. For starters, that does not address the legislators' argument that deposing a sitting legislator is a last resort, not a first resort. *In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001) ("all other available evidentiary sources must first be exhausted before extraordinary circumstances will be considered"); *Austin Lifecare, Inc. v. City of Austin*, 2012 WL 12850268 (W.D. Tex. Mar. 20, 2012) ("Plaintiffs have alternative methods for discovering the information they seek," including the public record); *Harding v. Dallas*, 2016 WL 7426127, at *8-9 (N.D. Tex. Dec. 23, 2016) (finding no extraordinary circumstances warranted deposing county redistricting commissioners). And on the merits, it remains to be seen how the United States could unscramble the egg with respect to Representative Lujan's privilege now. Questioning Representative Lujan about the "effects" of enacted districts is tantamount to asking him to opine, under oath, on both existing legislation and to predecide future legislation including any possible remedial legislation ordered by this Court. *Cf. ACORN v. Cnty. of Nassau*, 2007 WL 2815810, at *6 (E.D.N.Y. Sept. 25, 2007) (barring discovery of legislators, who had not "pre-determined their positions" and sought ought information to "begin their deliberations"); *Gov't Suppliers Consolidating Servs., Inc. v. Bayh*, 133 F.R.D. 531, 535-36 (S.D. Ind. 1990) (finding post-decisional materials protected by deliberative process privilege). And it no less offends one of the privilege's principal purposes to ensure sitting lawmakers can "focus on their public duties" rather than be called to testify to defend the legislature in civil suits. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181; *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (protections ensure civil litigation will not cause members "to divert their time, energy, and attention from their legislative tasks to defend the litigation"). Legislative privilege safeguards "duly elected legislators" including Representative Lujan "to discharge their public duties without concern of adverse consequences outside the ballot box." *Lee*, 908 F.3d at 1187.

Even if privilege were parsed question-by-question, the burden of deposing the legislators to sit through hours of privileged questioning cannot outweigh any benefit of obtaining non-privileged, relevant (or irrelevant) information. Fed. R. Civ. P. 45(d)(3)(A)(iv) (quashing for burden). For example, the United States asserts that it is free to depose legislators to answer purportedly non-privileged questions that could be put to any fact witness, including questions about "political behavior, the history of discrimination, and socioeconomic disparities" in their districts. U.S. Opp'n 10-11. Even setting aside the ways in which such inquiries still "burden" legislators with "defending themselves" in lawsuits challenging legislative acts, *Dombrowski*, 387 U.S. at 85, the United States has no response to the legislators' argument that such information can be derived in alternative ways, *supra* n.3. In sum, the nature of that claim, the stated aims of the depositions, and the stage of proceedings makes this case nothing like previous instances in which legislators have testified, either because they waived privilege or otherwise chose not to move to quash or appeal adverse rulings. Mot. 14-16 & nn.8-9.[6]

**IV. Any adverse inference is improper.** Finally, to the extent the United States and private plaintiffs seek to use depositions as a face-to-face opportunity to pressure legislators to waive privilege, that is yet another reason for quashing the depositions altogether. Private plaintiffs suggest that they intend to ask privileged questions regarding intent and then pin legislators with an adverse inference if legislators invoke privilege. *See* Pls. Opp'n 5. They rely on the Court's recently issued preliminary injunction opinion for that assertion. *See id.* (stating that "refusal to answer a question may in and of itself 'strengthen[] the inference' that previously stated reasons for redrawing a map were 'at best, highly incomplete, and, at worst, disingenuous'" (quoting Op. 50, ECF 258)). Their threat of an

[6] The United States asserts that "Representative Guillen and Representative Landgraf have also waived privilege regarding specific communications with legislative outsiders, including executive branch officials, Members of Congress, party leaders, and other members of the public," without any further explanation or argument. U.S. Opp'n 10. The legislators have repeatedly invoked privilege. The United States' bald assertion without any supporting evidence or explanation is no basis for pressing ahead with depositions of legislators first and everyone else later.

adverse inference appears to derive from the opinion's observation that, "[t]hough courts may not draw negative inferences from a criminal defendant's assertion of his Fifth Amendment rights, no similar constraint binds our assessment of a civil witness's assertion of legislative privilege." ECF 258 at 49. To be sure, "*the Fifth Amendment* does not forbid adverse inferences against parties to *civil actions* when they refuse to testify in response to probative evidence offered against them," *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (emphasis added), and more generally privileges cannot be used as both a sword and shield. But any inferences stop there.

For purposes of this motion involving third-party legislators involuntarily subpoenaed for depositions, it would be serious legal error to draw any adverse inference from the invocation of longheld and historically rooted privileges, or for the United States government or private plaintiffs to threaten the same during any deposition. The proper analogy is to other privileges in civil disputes. Various courts have held that it is impermissible to draw an adverse inference when attorney-client privilege is invoked. *See, e.g.*, *In re WR Grace & Co.*, 729 F.3d 332, 348 (3d Cir. 2013) ("A negative inference should not be drawn against Grace merely because it chose to protect the privacy of attorney-client communications."); *Knorr-Bremse v. Dana Corp.*, 383 F.3d 1337, 1344 (Fed. Cir. 2004); *Parker v. Prudential Ins.*, 900 F.2d 772, 775 (4th Cir. 1990). Other privileges have been similarly safeguarded, without any threat of an adverse inference. *See, e.g.*, *Jaffee v. Redmond*, 51 F.3d 1346, 1344, 1358 (7th Cir. 1995) (remanding for new trial after trial court gave jury adverse inference instruction for invocation of psychotherapist-patient privilege); *Jewell v. Holzer Hosp. Found., Inc.*, 899 F.2d 1507, 1514 (6th Cir. 1990) (refusing to permit jury to draw adverse inference for invocation of physician-patient privilege); *Black v. Sheraton Corp. of Amer.*, 564 F.2d 550, 556 (D.C. Cir. 1977) (stating it was "dubious that an adverse inference can be drawn from a fully justified assertion of a privilege" by the Government and concluding, in any event, that "[i]t would be irrational and unfair to drawn an adverse inference against [the non-government defendant] for the government's assertion of privilege"). That is consistent with

the federal rules, permitting discovery of only "nonprivileged" information. Fed. R. Civ. P. 26(b)(1); *see Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979) (finding "no provision in the federal discovery rules which authorizes a court to impose sanctions on a party who resists discovery by asserting a valid claim of privilege").

The same rules apply for legislative privilege. It is no safeguard at all if legislators' mere invocation of privilege is sufficient to assume the worst in legislators. It would eviscerate the required presumption of legislative good faith. *But see Miller v. Johnson*, 515 U.S. 900, 915 (1995) (requiring presumption); *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018) (same). The Supreme Court's warning in *Tenney* remains as true today as when it was decided: "The privilege would be of little value if [legislators] 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." 341 U.S. at 377.

* * *

The root of the parties' disagreement is whether legislative privilege as prescribed by the common law and our constitutional structure governs here, or whether the United States and private plaintiffs' bespoke test for (non) privilege in redistricting disputes does. To require the third-party legislators to sit for depositions in this case at this time—with the parties having failed to pursue any alternative means of discovery, with motions to dismiss pending, and with the Supreme Court poised to resolve persistent confusion about the limits of the §2 claims here—would depart from Supreme Court precedent, it would depart from decisions by courts of appeals in analogous cases, and it would perpetuate the redistricting-is-different discovery fallacy that has long evaded appellate review. For these reasons and those in the pending and forthcoming motions, the legislators respectfully request that the Court issue an interim order postponing the depositions to allow adequate time to brief and decide these important issues of legislative privilege and then grant the legislators' motion.

Date: May 13, 2022

Respectfully submitted,

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**CERTIFICATE OF CONFERENCE**

I certify that counsel conferred with counsel for the United States regarding the subject of this motion. Counsel for the United States indicated it opposed any motion to quash or modify the subpoena, which confirms opposition to the relief sought here.

*/s/ Taylor A.R. Meehan*
TAYLOR A.R. MEEHAN

**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 13, 2022, and that all counsel of record were served by CM/ECF.

*/s/ Taylor A.R. Meehan*
TAYLOR A.R. MEEHAN

**EXHIBIT F**

**IN THE UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**EL PASO DIVISION**

| | | |
|---|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,<br><br>*Plaintiffs,*<br><br>V.<br><br>GREG ABBOTT, *et al.*,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 3:21-cv-00259<br>[Lead Case] |

**LEGISLATORS' MOTION TO QUASH OR MODIFY PRIVATE PLAINTIFFS' DEPOSITION SUBPOENAS AND MOTION FOR PROTECTIVE ORDER**

## INTRODUCTION

Private plaintiffs in these consolidated cases join the United States in the pursuit to depose three sitting legislators before deposing anyone else. The legislators already moved to quash or modify subpoenas served by the United States, or in the alternative for a protective order. ECF 259 ("Mot."); ECF 277 ("Reply"). For the same reasons, the legislators request the same relief for subpoenas served by the private plaintiffs, which seek to depose the same legislators on the same dates. *See* Ex. A (Rep. Guillen subpoena); Ex. B (Rep. Landgraf subpoena); Ex. C (Rep. Lujan subpoena). The legislators' privilege arguments are no more "remarkable"[1] than binding Supreme Court precedent on the subject or decisions by courts of appeals abiding by that precedent. Legislative privilege and immunity safeguard the legislative process—safeguards "so essential" that they were written into state and federal constitutions. *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). Legislators engaged "in the sphere of legitimate legislative activity" are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). For that reason, even in cases involving allegations of intentional discrimination, other courts of appeals have "concluded that the plaintiffs are generally barred from deposing legislators, even in 'extraordinary circumstances.'" *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018); *accord Am. Trucking Ass'n, Inc. v. Alvitti*, 14 F.4th 76, 90-91 (1st Cir. 2021); *In re Hubbard*, 803 F.3d 1298, 1315 (11th Cir. 2015).

## BACKGROUND

Private plaintiffs brought the following suits, since consolidated, to enjoin redistricting legislation for congressional, senate, house, and/or State Board of Education (SBOE) districts:

- **The LULAC plaintiffs** (3:21-cv-259) challenge congressional, senate, house, and SBOE redistricting legislation. LULAC Second-Am. Compl., ECF 237. Among other allegations, they allege that legislation violates §2 of the VRA and the Fourteenth Amendment for failing to maximize majority-Latino house and congressional districts in certain locales and for

[1] Pls. Opp'n to Legislator's Mot. to Quash United States' Subpoenas 2, ECF 272 ("Pls. Opp'n").

weakening Latino voting strength in HD 31, 37, 90, and 118. *Id.* ¶¶7, 134-40, 142-45, 163-68. Their complaint also includes a malapportionment claim for house districts in West Texas, while averring that the aggregate population deviation of the house plan is less than 10%. *Id.* ¶¶148-50, 182-85; *but see Brown v. Thomson*, 462 U.S, 835, 842 (1983) ("apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations"); *White v. Regester*, 412 U.S. 755, 764 (1973) ("we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9% when compared to the ideal district"). Defendants have until May 18, 2022, to answer or move to dismiss.

- **The MALC plaintiffs** (1:21-cv-988) challenge congressional, house, and SBOE redistricting legislation. MALC First-Am. Compl., ECF 247. With respect to congressional districts, MALC challenges CD 15 and 23, even though both districts exceed 50% HCVAP. *Id.* ¶¶156, 160. MALC also alleges that certain Dallas/Tarrant and Harris County districts should be redrawn to increase Latino voting strength. *Id.* ¶¶163-66. With respect to house districts, MALC challenges the failure to add opportunity districts in different locales and the configuration of El Paso house districts, mirroring the United States' allegations. *Id.* ¶¶89-97. MALC also challenges HD 31, 37, 80, 90, 118, and 145, all of which MALC avers maintain HCVAP exceeding 66%, 77%, 77%, 49%, 56%, and 55% respectively. *Id.* ¶¶101, 110, 117, 126, 131, 140; *see also id.* ¶120 (conceding that legislation "would *not* make HD 80 unwinnable by the Latino/Spanish language community candidate of choice" (emphasis added)). MALC further alleges that the number of majority-Latino congressional, house, and senate districts is disproportionate to the Latino citizen voting age population. *Id.* ¶¶167, 176-79; *but see* 52 U.S.C. §10301(b) ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). The complaint concludes that the congressional, house, and SBOE districts violate §2 and the Fourteenth and Fifteenth Amendments, *id.* ¶¶238-45, and that house districts are unconstitutionally malapportioned, *id.* ¶¶246-49. Defendants have until May 18, 2022, to answer or move to dismiss.

- **The Brooks plaintiffs** (1:21-cv-991) challenge changes to SD 10, as well as HD 54, 55, and 118, and congressional districts in Dallas/Fort Worth and Houston. Brooks First-Am. Compl., ECF 236. The complaint alleges that SD10, HD 54, HD55, and HD 118 violate §2 of the VRA and the Fourteenth and Fifteenth Amendments, *id.* ¶¶211-26, 236-52, and that the failure to create a congressional coalition district and another majority-Latino congressional district violates §2, *id.* ¶¶227-35. This Court denied plaintiffs' preliminary injunction motion regarding SD 10. ECF 176, 258. Defendants have until May 18, 2022, to answer or move to dismiss.

- **The Voto Latino plaintiffs** (1:21-cv-965) allege that congressional and house redistricting legislation violates §2. Voto Latino First-Am. Compl., ECF 235. The complaint does not include intentional discrimination claims. *Id.* ¶¶155-63. They challenge the resulting concentration of Latino voters in CD 15, 16, 20, 21, 23, 27, 28, 34, and 35 as either too high or too low. *Id.* ¶¶78-89. They fault the legislation for failing to create additional majority-minority or coalition districts in Dallas, Houston, and Tarrant County, *id.* ¶¶90-101, and for failing to disperse (and thereby maximize) Latino votes in Harris County, *id.* ¶¶102-06. Defendants have until May 18, 2022, to answer or move to dismiss.

- **The Texas State Conference of the NAACP** (1:21-cv-1006) has filed a complaint premised on the theory that redistricting legislation can violate §2 for failure to maximize voting strength

for "people of color" generally, or "POC CVAP." NAACP Compl. ¶¶27-28, No. 1:21-cv-1006, ECF 1. The complaint alleges in conclusory terms that "[t]he vast majority of voters of color in Texas vote cohesively" and that §2 prohibited "add[ing] more white voters" to districts. *Id.* ¶¶96, 101. Reciting the number of representatives by race, the complaint alleges that myriad senate, house, and congressional districts with majority "POC CVAP" are disproportionate to the overall population. *Id.* ¶¶106-204; *but see* 52 U.S.C. §10301(b) (disclaiming proportionality as basis for claim). The complaint concludes that senate, house, and congressional redistricting legislation violates §2 and the Fourteenth and Fifteenth Amendments, including for failure to create "minority coalition districts." *Id.* ¶¶205-30. Defendants' motion to dismiss, including for lack of standing and for failure to state a claim, is pending. *See* ECF 82, 107, 117.

- **The Fair Maps Texas Action Committee plaintiffs** (1:21-cv-1038) allege that the congressional, senate, and house redistricting legislation "discriminate[s] against voters of color by failing to create additional districts that afford opportunities for voters of color to elect their candidates of choice, whether by single racial or ethnic group or by voting in coalition…." Fair Maps Compl. ¶83, No. 1:21-cv-1038, ECF 1. The complaint describes "imbalance in representation" and states that "Black, Latino, and AAPI voters continue to be proportionality [*sic*] underrepresented in the Texas legislature and congressional delegation." *Id.* ¶¶85, 110, 112, 147; *but see* 52 U.S.C. §10301(b) ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). The complaint concludes that congressional, senate, and house redistricting legislation violates §2, including for failure to maximize majority-minority districts and for failure to create coalition districts, as well as the Fourteenth and Fifteenth Amendments. *Id.* ¶¶151-61. Defendants' motion to dismiss the complaint, including for lack of standing and failure to state a claim, is pending. *See* ECF 181, 191, 193.

- **Plaintiff Fischer** (3:21-cv-306) challenges only CD 35 as a violation of §2 and the Equal Protection Clause. *See* Fischer First-Am. Compl. ¶¶92, 139, ECF 217 ("Plaintiff is *only* challenging the enacted configuration of CD 35 in SB 6."). Defendants' motion to dismiss Rep. Fischer's amended complaint is pending. ECF 233, 260, 267.

- **The Escobar plaintiffs** (3:22-cv-22) challenges neighboring CD 16 and 23 as violating §2 and the Equal Protection Clause. Escobar Compl., No. 3:22-cv-22, ECF 1. After Defendants moved to dismiss the complaint, plaintiffs filed a motion to amend. ECF 223, 229. The motion has been granted but the amended complaint has not yet been re-docketed. Defendants have until May 18, 2022, to answer or move to dismiss.

- **Plaintiff-Intervenors** allege that CD9, 18, and 30 violate §2 and the Equal Protection Clause based in part on allegations of retrogression. Johnson First-Am. Compl., ECF 209. Defendants have moved to dismiss, including because the complaint does not allege that Black voters are unable to elect their candidate of choice in those congressional districts. ECF 225.

Until late last month, there was relatively little discovery of third-party legislators by the private plaintiffs. A few weeks ago, the LULAC plaintiffs issued subpoenas for legislative documents, and subpoena recipients will be producing non-privileged, responsive documents and invoking applicable

privileges for others. The NAACP has since issued similar subpoenas. Then last week—before the ink was dry on the document subpoenas and after the United States issued deposition subpoenas for Texas House Representatives Ryan Guillen, Brooks Landgraf, and John Lujan—the private plaintiffs issued their own deposition subpoenas for the same representatives. *See* Exs. A-C.

Counsel have met and conferred. Counsel for the legislators asked what basis there could be for deposing a sitting legislator now and whether plaintiffs would be open to alternatives. *See* Ex. D at 6-7 (5/9/22 email from J. DiSorbo). In response, Plaintiffs stated they believe depositions should proceed on May 24 and 25 even without a ruling from this Court, unless this Court issues an interim stay. *Id.* at 2 (5/12/22 email from T. Meehan). Plaintiffs further stated that they plan to ask legislators otherwise-privileged questions about what motivated them during the redistricting process, about the *Gingles* standard, and other topics that plaintiffs could not enumerate during the parties' meet and confer. *Id.* at 1-2 (5/12/22 email from T. Meehan; 5/13/22 email from D. Fox). Meanwhile, Plaintiffs filed a brief in support of the United States' opposition to the legislators' motion to quash the United States' deposition subpoenas. *See generally* Pls. Opp'n, ECF 272. In that brief, they distinguished their intent claims from the United States' effect claims, endorsed a non-binding multi-factor balancing test that has evaded appellate review, and suggested that an adverse inference would be appropriate if legislators invoke privilege. *Id.* at 4-5, 7-11.

## ARGUMENT

The legislators incorporate by reference the arguments made in their pending motion (ECF 259) and reply brief (ECF 277) regarding the United States' deposition subpoenas. As an initial matter, the legislators request interim relief postponing the depositions to allow for adequate time to brief and decide the pending motions. *See* Reply 2-3. Plaintiffs' insistence that depositions proceed even without a ruling from this Court transgresses Rule 45's requirement that they take reasonable steps to avoid undue burden and cost and risks mooting the issues pending before this Court. *Id.*

On the merits, the legislators have not asked for a categorical ban on legislator depositions for cases of all types and in all circumstances, contrary to plaintiffs' arguments (Pls. Opp'n 3-4). The legislators have instead moved for orders quashing or modifying the subpoenas in light of the particular circumstances here. *See* Reply 1-2. Among other reasons, plaintiffs must pursue alternative means of discovery before attempting the "extraordinary" step of deposing sitting legislators. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *see, e.g., Austin Lifecare, Inc. v. City of Austin*, 2012 WL 12850268, at *2 (W.D. Tex. Mar. 20, 2012) (quashing deposition subpoenas based, in part, because "Plaintiffs have alternative methods for discovering the information they seek," including the public record); *see In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001) (relying on *Arlington Heights* for requirement that "all other available evidentiary sources must first be exhausted"). Plaintiffs' first move cannot be legislator depositions. It remains to be decided whether certain plaintiffs have standing or whether certain plaintiffs have even stated a claim; Defendants haven't even had an opportunity to move to dismiss recently amended pleadings, *supra*, let alone know what the rules will be for plaintiffs' redistricting claims after the Supreme Court decides *Merrill v. Milligan*, No. 21-1086. *See* Mot. 7-9. At this time, quashing the deposition subpoenas altogether would be consistent with the practice of other courts abiding by the Supreme Court's privilege precedents. *Id.* at 10-17. At the very least, should any depositions proceed, the legislators request a protective order prohibiting deposing legislators about privileged matters, including matters beyond the public record. *Id.* at 9-10.

## I. Intent claims do not trump legislative privilege.

Plaintiffs contend that their allegations of intentional discrimination (as compared to the United States' effects-only claim) allow them to probe what motivated the legislators: "In intent cases, knowledge about what motivated a decisionmaker at the time of the decision is relevant and subject to discovery." Pls. Opp'n 4; *see also* Ex. D at 2 (5/12/22 email from T. Meehan). They wrongly suggest

that refusal to answer questions about intent warrants an adverse inference. Pls. Opp'n 5.[2] And they wrongly contend that if privilege were to bar intent-based inquiries, that "would effectively bar any court from 'ever accurately and effectively determin[ing] intent.'" *Id.* (quoting Op. 50 n.14, ECF 258).

**A.** Legislative privilege no less applies to intentional discrimination claims than it does to other claims. The privilege applies with "full force" even in cases where legislators' motives are at the "factual heart" of plaintiffs' claims. *Hubbard*, 803 F.3d at 1310-11, 1315 (quashing subpoenas). Plaintiffs' "categorical exception whenever a constitutional claim directly implicates the governments intent … would render the privilege 'of little value.'" *Lee*, 908 F.3d at 1188; *see Am. Trucking*, 14 F.4th at 90 (describing "inherent challenges of using [deposition] evidence of individual lawmakers' motives to establish that the legislature as a whole enacted [law] with any particular purpose"). That is consistent with the Supreme Court's repeated observation that courts generally must "equate[]" protections afforded to federal legislators with protections afforded to state legislators for constitutional claims brought under §1983, Plaintiffs' constitutional claims included. *Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 732-33 (1980); *see Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). While legislative privilege must bend for *federal criminal prosecutions*, the Supreme Court has never qualified state legislators' privilege as plaintiffs would in a civil matter such as this one. *See* Mot. 13-14 (discussing *Gillock*).

**B.** In these proceedings already, this Court rejected that privilege must bend to claims of intentional discrimination. The Brooks plaintiffs asked this Court to preliminarily enjoin SD 10 based on intentional discrimination claims. *See* Mot. for Prelim. Inj., ECF 39 at 24-43. At the hearing, this Court ruled that a state senator could testify about that "within the public record," but anything

[2] Fully explained in the legislators' reply brief in support of the motion to quash the United States' deposition subpoenas, any adverse inference would be legal error. Reply 8-10; *see, e.g.*, *In re WR Grace & Co.*, 729 F.3d 332, 348 (3d Cir. 2013) ("A negative inference should not be drawn against Grace merely because it chose to protect the privacy of attorney-client communications."); *Jaffee v. Redmond*, 51 F.3d 1346, 1358 (7th Cir. 1995) (remanding for new trial after erroneous adverse inference instruction).

beyond the public record would entail a waiver of legislative privilege. PI Tr. 152:1-5 (Vol. 5) ("Senator Huffman will be allowed to testify to everything within the public record; and if she goes outside the public record, she will waive her privilege."). The Court sustained objections to questions about the senator's mental impressions or opinions regarding legislation, or what otherwise motivated or informed her or others during the legislative process. *See, e.g.*, PI Tr. 152:2-7 (Vol. 6); PI Tr. 25:6-10 (Vol. 7); PI Tr. 29:6-20 (Vol. 7).

That ruling is consistent with Supreme Court precedent and the approaches taken by the courts of appeals in similar circumstances. *See Tenney*, 341 U.S. at 373-77; *Dombrowski*, 387 U.S. at 85; *see also In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993) (warning officials "could never do their jobs" if subject to such discovery because they would be less willing to explore all options before them, lest they "be subpoenaed for every case involving their agency"). For example, in a recent redistricting challenge involving allegations of race-based intent, the Ninth Circuit followed its general rule that legislators could not be deposed. *See Lee*, 908 F.3d at 1187-88. Similarly, the Eleventh Circuit refused to require legislators to turn over privileged documents precisely *because* the legislators' privileged subjective intent could not be disentangled from the plaintiffs' claim. *See Hubbard*, 803 F.3d at 1310-11; *accord Am. Trucking Ass'n*, 14 F.4th at 91 (quashing deposition subpoenas); *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997) ("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.").[3]

Plaintiffs disagree, based in part on a footnote in this Court's preliminary injunction opinion. *See* Pls. Opp'n 4-5. The Court recently said that it was "concerned about the scope of state legislative privilege" because "[s]tate legislative privilege in this context raises serious questions about whether this Court (or any court) could ever accurately and effectively determine intent." Op. 50 n.14.

[3] Plaintiffs have relied on the passing observation in *Jefferson Community Health Care Centers* that legislative privilege is strictly construed—inconsistent with Supreme Court precedent and straying from other appellate courts. That *dictum* does not require anything different of courts in the Fifth Circuit. *See* Reply 5-6.

The Supreme Court has answered those concerns. As a starting point, even "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 377. "The privilege would be of little value" if legislators could be subject to "the hazard of a judgment against them based upon … speculation as to motives." *Id.* There are instead alternative means for probing legislative purpose, detailed by the Supreme Court in *Arlington Heights*—a case also involving allegations of invidious intent. 429 U.S. at 267-68. Those alternatives include "[t]he historical background of the decision," the "sequence of events leading up to the challenged decision," or "legislative or administrative history" including "contemporary statements by members of the decisionmaking body"—all materials from the public record. *Id.* Importantly, the Supreme Court cautioned that proving legislative purpose did not entail probing the minds of decisionmakers except in extraordinary circumstances: "In some extraordinary instances, the members might be called to the stand to testify concerning the purpose of the official action, although *even then such testimony frequently will be barred by privilege.*" *Id.* at 268 (emphasis added); *accord Lee*, 908 F.3d at 1188 ("*Arlington Heights* itself also involved an equal protection claim alleging racial discrimination—putting the government's intent directly at issue—but nonetheless suggested that such a claim was not, in and of itself, within the subset of 'extraordinary instances' that might justify an exception to the privilege"). After all, such "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Arlington Heights*, 429 U.S. at 268 n.18. Simply put—the Supreme Court has already disclaimed that testimony from legislators is necessary to a court's truth-seeking mission regarding legislative purpose, versus other more reliable alternatives.[4]

[4] Plaintiffs have argued that *Arlington Heights* doesn't mean what it says because the decision elsewhere notes that board members were in fact questioned in discovery. Pls. Opp'n 4. *Arlington Heights* does not specify whether such discovery entailed depositions, whether public officials challenged or appealed any such discovery orders, whether there was any privilege waiver, or other relevant factors including whether the calculus would have been different had state legislators been the target of discovery. But here's what the Court's decision does say: the district court in *Arlington Heights* "forbade questioning Board members about their motivation at the time they cast their votes." 429 U.S. at 270 n.20. It is forbidden here too.

There is good reason that any one legislator's motivations or impressions are protected. The probative value is weak at best, while the affront to federalism and comity is at its zenith. Evidence of any one legislator's intent cannot be conflated with the legislature's purpose as a whole. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349-50 (2021); *accord Am. Trucking*, 14 F.4th at 90 (noting that the "Supreme Court has warned against relying too heavily on such evidence" of "individual lawmakers' motives to establish that the legislature as a whole [acted] with any particular purpose"). For "[w]hat motivates one legislator to make a speech about a statute," let alone his internal thoughts and impressions, "is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [courts] to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Evidence of legislative purpose is instead divined from the public record, *see Arlington Heights*, 429 U.S. at 267-68, alongside the presumption that legislatures act in good faith, *see Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018). Understood in that way, legislative privilege helps ensure that litigation remains focused on that which motivated the legislature as a whole, consistent with the obligation that courts not "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive" by one or a few. *O'Brien*, 391 U.S. at 383-84.

## II. The Court must reject Plaintiffs' balancing test.

Plaintiffs endorse the flawed balancing test employed by some district courts, which has largely evaded appellate review. *See* Mot. 13-17. It has never been endorsed by the Supreme Court, nor employed by courts of appeals in analogous cases including the Ninth Circuit's redistricting decision in *Lee*. Illustrated by plaintiffs' own application of that test, Pls. Opp'n 7-10, it is easily manipulated to reduce privilege to a nullity. Plaintiffs' balancing of benefits and burdens for deposing legislators looks little different than the balancing that would occur under Rule 45 and other generally applicable federal

discovery rules.[5] It makes no sense, in light of *Tenney* and progeny, that legislators would be entitled no greater protection than any other target of third-party discovery.

Plaintiffs, moreover, are wrong that *Rodriguez*, the district court decision first adopting the nebulous multi-factored legislative privilege test, used it to justify legislative depositions. Pls. Opp'n 10. Exactly the opposite: the court emphasized that plaintiffs were "*not* seeking any depositions of legislators or their staff." 280 F. Supp. at 96 (emphasis added); *see also id.* (noting legislators had not moved to dismiss). Even in *Veasey v. Perry*, the privilege dispute initially involved legislators' documents, not depositions. 2014 WL 1340077, at *1 (S.D. Tex. Apr. 3, 2014). And in *Perez*, the Court refused to apply *Rodriguez* in a way that pierced legislative privilege entirely, contrary to plaintiffs' demands here. *See* Mot. 14-15 & n.8. At this stage of the proceedings—with motions to dismiss yet to be filed, with the Supreme Court currently considering the metes and bounds of redistricting claims, and with all parties having failed to first exhaust other discovery alternatives, *see* Reply 2 n.3; Ex. D at 2 (5/12/22 email from T. Meehan)—it would be error on top of error to apply *Rodriguez* to justify legislator depositions, let alone depositions exploring legislators' motivations and impressions regarding redistricting legislation.

## CONCLUSION

The legislators respectfully request that the Court issue an interim order postponing depositions pending resolution of these related motions. The legislators further request that the Court quash or modify the subpoenas, or in the alternative enter a protective order.

[5] *Compare Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (first factor considers "relevance of the evidence sought to be protected,"), *with* Fed. R. Civ. P. 26(b)(1) (limiting "scope of discovery" generally to "relevant" material); *compare Rodriguez*, 280 F. Supp. 2d at 101 (second factor considers "availability of other evidence" and third factor considers "'seriousness' of the litigation and the issues involved"), *with* Fed. R. Civ. P. 45(d)(1) (requiring parties to avoid undue burden or expense when subpoenaing third parties), *and* Fed. R. Civ. P. 26(b)(1) (considering "importance of the discovery in resolving the issues").

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**CERTIFICATE OF CONFERENCE**

I certify that counsel conferred with counsel for plaintiffs regarding the subject of this motion. Counsel for plaintiffs indicated they oppose any motion to quash or modify the subpoena, which confirms opposition to the relief sought here.

*/s/ Taylor A.R. Meehan*
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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 13, 2022, and that all counsel of record were served by CM/ECF.

*/s/ Taylor A.R. Meehan*
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