No. 22-50407

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Plaintiffs-Appellees

v.

GREG ABBOTT, *et al.*,

Defendants

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

Third-Party Movants-Appellants

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

_____

APPELLEE UNITED STATES' OPPOSITION TO MOTION FOR A STAY PENDING APPEAL

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

INTRODUCTION

Texas State Representatives Ryan Guillen, Brooks Landgraf, and John Lujan ("the Legislators") seek an emergency stay of their depositions pending resolution of their appeal challenging a three-judge district court's order denying their motion to quash deposition subpoenas on legislative privilege grounds. Mot. 1-2.[1] Alternatively, the Legislators ask this Court to stay the depositions pending the Supreme Court's resolution of *Merrill* v. *Milligan*, No. 21-1086. Mot. 2. The district court declined to issue a stay pending appeal yesterday (Doc. 296), leaving the depositions to proceed as scheduled next week pursuant to a protective, well-established protocol for depositions and assertions of legislative privilege, as provided in the court's order denying the motion to quash (Doc. 282).

This Court, too, should deny the extraordinary relief the Legislators seek. First, the Legislators cannot satisfy the traditional, four-factor standard for granting a stay pending appeal established in *Nken* v. *Holder*, 556 U.S. 418 (2009). The Legislators are unlikely to succeed on the merits because they identify no precedent within this Circuit to support their position that they may be wholly excused from depositions based on a blanket assertion of legislative privilege. Nor

[1] "Mot. _" refers to the Legislators' Motion To Stay Pending Appeal; "Doc. _, at _" refers to the docket entry number and relevant pages of the filings in *LULAC* v. *Abbott*, No. 3:21-cv-00259 (W.D. Tex.).

have they identified other authorities addressing the scenario presented here that hold otherwise. Indeed, many courts have denied requests for blanket motions to quash deposition subpoenas in statewide Voting Rights Act enforcement actions. Importantly, the district court's calibrated safeguards will prevent the Legislators from suffering irreparable harm in the absence of a stay. Granting a stay, however, would harm the interests of the federal government and private plaintiffs by blocking a key aspect of the discovery process and endangering their ability to ready their cases for trial this September, and more broadly would frustrate the public interest in enforcement of the Voting Rights Act.

Second, the Legislators offer no good reason, legal or practical, for staying their depositions pending the Supreme Court's decision in *Merrill*. Although the outcome of *Merrill* may affect the plaintiffs' required showing in this case under Section 2 of the Voting Rights Act, the Legislators fail to explain how this possibility intersects with their legislative privilege claim. And such relief would make it impossible to meet the September trial date set by the district court.

FACTS AND PROCEDURAL HISTORY

The United States filed a complaint alleging that the State of Texas violated Section 2 of the Voting Rights Act, 52 U.S.C. 10301, by enacting and implementing the 2021 Congressional Redistricting Plan and 2021 State House Redistricting Plan. See generally U.S. Compl., *United States* v. *Texas*, No. 3:21-

cv-299 (W.D. Tex. Dec. 6, 2021), ECF No. 1. With respect to the State House, the complaint alleges that House District (HD) 118 in Bexar County; HD 31 in South Texas; and the districts in El Paso County and West Texas (including HD 81) have discriminatory results. U.S. Compl. ¶¶ 104-146. The United States' action was consolidated with several similar cases brought by private plaintiffs that are being heard by a three-judge court in the U.S. District Court for the Western District of Texas, *LULAC* v. *Abbott*, No. 3:21-cv-00259 (W.D. Tex.). Doc. 83.

On April 20, 2022, the United States served a subpoena for the deposition testimony of Representative Ryan Guillen, who represents HD 31. Doc. 262-2. On May 3, 2022, the United States served two additional subpoenas for the deposition testimony of Representative Brooks Landgraf, who represents HD 81, and Representative John Lujan, who represents HD 118. Docs. 262-3, 262-4. The depositions are scheduled for May 24 and 25.

After failed negotiations, the Legislators moved to quash the deposition subpoenas entirely on legislative privilege grounds. Doc. 262. The district court denied the request. Doc. 282. The court acknowledged that state legislators "enjoy broad immunity from suit for actions they take during the course of their legislative duties." Doc. 282, at 2 (citing *Tenney* v. *Brandhove*, 341 U.S. 367, 377-378 (1951)). But the court recognized that "the questions confronting this Court are ones of state legislative privilege, not immunity." Doc. 282, at 2. That

privilege "is a federal common law privilege, 'applied through Rule 501 of the Federal Rules of Evidence,'" and is "at best" a "qualified" privilege that "must be strictly construed." Doc. 282 (quoting *Jefferson Cmty. Health Care Ctrs. Inc.*, v. *Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017)). Legislative privilege, as the court emphasized, "may be limited" and is "not coextensive with state legislative immunity." Doc. 282, at 3.

The district court further explained that it was "not positioned to rule on what information may or may not be the subject of the state legislative privilege," because the privilege's application is "fact- and context-specific" and "'depends on the question being posed.'" Doc. 282, at 2 (quoting *Perez* v. *Perry*, No. SA-11-CV-360, ECF No. 102 at 5 (W.D. Tex. Aug. 1, 2011) (*Perez I*)). The court held that "the privilege is not so broad as to compel the [c]ourt to quash the deposition subpoenas, modify them, or enter a protective order prohibiting questions about topics that are not strictly within the public record." Doc. 282, at 2-3 (collecting cases).

In rejecting the Legislators' blanket motion to quash, the district court explained that the Legislators may have relevant, non-privileged information about topics including "political behavior, the history of discrimination, and socioeconomic disparities," as well as "firsthand knowledge" of issues such as "discrimination within their home districts," "legislator responsiveness to

communities of color," and "alternative maps considered during the redistricting process." Doc. 282, at 4. Ultimately, the court concluded that "there are likely to be relevant areas of inquiry that fall outside of topics covered by state legislative privilege," and that this was not outweighed by the "burden of having to sit for a deposition." Doc. 282, at 4 (citations omitted).

Accordingly, the district court ordered the depositions to proceed, following the procedure "originally used by the last three-judge court to hear Texas redistricting cases." Doc. 282, at 4 (citing *Perez I*, No. SA-11-CV-360, ECF No. 102 at 5-6. That five-part protocol requires deponents to appear and testify but orders that the Legislators' answers to deposition questions "will be subject to the [legislative] privilege," if invoked. Doc. 282, at 4. It directs that the relevant portions of the deposition transcripts be placed under seal unless and until a party moves to unseal specific testimony. Doc. 282, at 5. The order also admonishes that "*any* public disclosure of information to which a privilege has been asserted may result in sanctions, including the striking of pleadings," and directs "all counsel" to "spare no effort to ensure that no individual * * * disseminates information subject to privilege." Doc. 282, at 5. In so ruling, the court emphasized that "nothing in this Order shall be construed as deciding any issue of state legislative privilege" and that the court would make decisions based on

"specific questions and specific invocations of state legislative privilege." Doc. 282, at 5.

The Legislators appealed and moved the district court for a stay pending appeal. Docs. 283, 284. While that stay motion was pending, the Legislators moved for a stay in this Court. The district court denied the stay yesterday. Doc. 294.

ARGUMENT

I

THE COURT SHOULD DENY THE LEGISLATORS' MOTION FOR A STAY PENDING APPEAL

In considering whether to grant a stay, this Court considers: "(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." *Freedom from Religion Found., Inc.* v. *Mack*, 4 F.4th 306, 311 (5th Cir. 2021) (quoting *Nken* v. *Holder*, 556 U.S. 418, 426 (2009)). Under this "traditional standard," the first two factors "are the most critical." *Nken*, 556 U.S. at 434. The last two factors "merge when the [federal] Government is the opposing party." *Id.* at 435. The Legislators bear the burden of showing that a stay is justified. *Id.* at 433-434.

Perhaps recognizing that they cannot make a "strong showing" that they are likely to succeed on the merits, the Legislators invoke an alternative standard requiring only a "substantial case on the merits" in cases "[w]here there is a serious legal question involved and the balance of equities heavily favors a stay." Mot. 9-10 (quoting *Weingarten Realty Inves.* v. *Miller*, 661 F.3d 904, 910 (5th Cir 2011)). Although common-law privileges are important, the Legislators offer no authority showing that the *question* presented here—whether legislative privilege affords them blanket protection from testifying at depositions—is a serious or unsettled one, at least in this Circuit. See Mot. 9. Nor do they offer any authority suggesting that this is the kind of case in which the equities "heavily" favor a stay (see Mot. 9); to the contrary, as discussed below, they favor prompt proceedings in the district court.

Regardless of the standard applied, however, the discussion that follows demonstrates that the Legislators cannot show either a "strong" or "substantial" case on the merits and that they face an "irreparable" injury, given the robust privilege protections already afforded by the district court.[2]

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[2] For the reasons given in the private plaintiffs' brief (at 5-13), it is in serious doubt whether this Court has jurisdiction over the Legislators' appeal at this time. As the legislative privilege is a "qualified," "evidentiary" privilege, *Jefferson*, 849 F.3d at 624 (citation omitted), and as the district court ordered any objected-to information sealed until the court rules on privilege objections, Doc. 282, at 4-5, any appeal is likely premature unless and until the district court

A. The Legislators Are Unlikely To Succeed On The Merits Because Legislative Privilege Does Not Bar Deposing Them

1. This Court Has Made Clear—And Courts Within This Circuit Have Repeatedly Confirmed—That Legislative Privilege Is Qualified And Does Not Bar Deposing Legislators

In denying the Legislators' motion to quash, the district court properly recognized that "[t]here is no reason, at this time, to quash or modify the deposition subpoenas." Doc. 282, at 4. This follows from the general principle that "[i]t 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." *Salter* v. *Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *see also, e.g.*, *Southwestern Bell Tel., L.P.* v. *UTEX Commc'ns Corp.*, No. 1:07-cv-435, 2009 WL 8541000, at *2-3 (W.D. Tex. Sept. 30, 2009); *Bucher* v. *Richardson Hosp. Auth.*, 160 F.R.D. 88, 92 (N.D. Tex. 1994).

This backdrop alone casts serious doubt the Legislators' claim that they are entitled to a protective order wholly barring their depositions. And yet, their claim becomes even less plausible once this Court's characterization of legislative privilege is taken into consideration: "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. Health Care Ctrs.* v. *Jefferson*

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entertains and overrules specific legislative privilege objections to the admission of statements given during the depositions.

Parish Gov't, 849 F.3d 615, 624 (5th Cir. 2017) (emphasis added) (quoting *Perez* v. *Perry*, No. 5:11-cv-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (*Perez II*) (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.'" *Ibid.* (quoting *Perez II*, 2014 WL 106927, at *1).

The Legislators' efforts to undercut this Court's statements in *Jefferson*—on grounds that they are dicta that draw "only" on a district court decision—are unpersuasive. *Jefferson* is a precedential opinion that reflects this Court's clearest statement on the privilege's contours. The Legislators identify no case in this Circuit that holds otherwise or grants the relief they seek. Mot. 10-11. Further, *Jefferson* bears precisely on the question here, and in doing so relies on the three-judge court's decision in *Perez II*, another Voting Rights Act case in which Texas legislators sought unsuccessfully to avoid depositions on legislative privilege grounds.

Not surprisingly, then, courts within this Circuit (and elsewhere) have uniformly denied Texas legislators' requests for blanket protective orders barring depositions in Voting Rights Act enforcement actions in the last decade. See *Perez I*, No. 5:11-cv-360 (W.D. Tex. Aug. 1, 2011) (three-judge court), ECF No. 102;

Texas v. *Holder*, No. 1:12-cv-128 (D.D.C. Apr. 20, 2012) (three-judge court), ECF No. 84; *Veasey* v. *Perry*, No. 2:13-cv-193 (S.D. Tex. June 18, 2014), ECF No. 341. And, indeed, many cases even outside the voting rights context have relied on *Jefferson* and *Perez II* in analyzing legislative privilege claims. See, *e.g.*, *Gilby* v. *Hughes*, 471 F. Supp. 3d 763, 766-767 (W.D. Tex. 2020); *TitleMax of Tex., Inc.* v. *City of Dall.*, No. 3:21-cv-1040, 2022 WL 326566, at *5-6 (N.D. Tex. Feb. 3, 2022); *Jackson Mun. Airport Auth.* v. *Bryant*, No. 3:16-cv-246-CWR-FKB, 2017 WL 6520967, at *6 (S.D. Miss. Dec. 19, 2017). The Legislators present no reason (much less a strong showing) that this Court should chart a new course in this case.

2. The Limited Scope Of Legislative Privilege, Coupled With The Many Non-Privileged Areas Of Inquiry Available Here, Further Undercuts The Legislators' Challenge To Their Depositions

The district court's recognition of both limited circumstances in which legislative privilege may yield[3] and lines of questioning that do not implicate the heart of the privilege (Doc. 282, at 3-4), further underscores that past practice in this Circuit is correct in denying blanket motions to quash subpoenas on legislative

[3] In *Perez II*, the three-judge court acknowledged that courts may "balance the interests of the party seeking the evidence against the interests of the individual claiming the privilege" to determine if disclosure is proper despite of a valid privilege claim. 2014 WL 106927, at *2. The court pointed to the five-factor test in *Rodriguez* v. *Pataki*, 280 F. Supp. 2d 89, 100-101 (S.D.N.Y.2003), which incorporates considerations of relevance and availability of evidence, the seriousness of the litigation and issues, the government's role, and adverse impacts on government employee confidentiality. *Ibid.*

privilege grounds. Because "no questions have been asked, and no answers given," the court properly concluded that it could not construe the qualified legislative privilege as "so broad as to compel the Court to quash the deposition subpoenas, modify them, or enter a protective order." Doc. 282, at 2-3.

As the district court acknowledged, the United States and the private plaintiffs may properly pursue many types of information from the Legislators. Indeed, 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 (citation omitted). Communications with legislative outsiders, including executive branch officials, Members of Congress, party leaders, and other members of the public, all fall outside the scope of the privilege. *See, e.g.*, *Perez II*, 2014 WL 106927, at *2; *Gilby*, 471 F. Supp. at 767 (W.D. Tex. 2020). Relatedly, the privilege does not 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). Nor does it shield purely factual information. *See, e.g.*, *League of Women Voters of Mich.* v. *Johnson*, No. 2017-14148, 2018 WL

2335805, at *6 (E.D. Mich. May 23, 2018); *see also, e.g.*, *Doe* v. *Nebraska*, 788 F. Supp. 2d 975, 984-985 (D. Neb. 2011).[4]

Consistent with this limited scope—which centers on conduct and communication internal to the legislature and to the offices of individual legislators—the district court noted in particular that plaintiffs might seek "relevant, non-privileged information" regarding "political behavior, the history of discrimination, and socioeconomic disparities" within the Legislators districts. Doc. 282, at 4 (quoting Doc. 271, at 11). The court also identified as the proper subject of non-privileged testimony "firsthand knowledge" of issues including "discrimination within [the Legislators'] home districts," "legislator responsiveness to communities of color," and "the alternative maps considered during the redistricting process." Doc. 282, at 4 (quoting Doc. 272, at 6).

In short, the relief the Legislators seek in blocking their depositions altogether is overbroad, as many topics relevant to the litigation will not implicate legislative privilege at all.

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[4] Importantly, one of the Legislators, Representative Lujan, holds no legislative privilege with respect to the 2021 House plan, as he assumed office on November 16, 2021, "after the date of [the] enactment." *League of Women Voters of Mich.*, 2018 WL 2335805, at *6. 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.

3. The Other Authorities On Which The Legislators Rely Are Inapposite

In the absence of any binding authority supporting their position and in the face of a wave of cases reflecting contrary consensus, the Legislators invoke the decisions of other circuits faced with scenarios dissimilar to this case: where the information sought fell squarely within the scope of the legislative privilege and the basis for overcoming that privilege was lacking.

For example, in *American Trucking Association, Inc.* v. *Alviti*, 14 F.4th 76 (1st Cir. 2021), state officials sought to quash subpoenas for document discovery relating to discrimination against interstate commerce in the charging of bridge tolls. As an initial matter, the First Circuit noted that "no party disputes" that the subpoenas in question "sought evidence" of "legislative acts and underlying motives," or that "if the legislative privilege applies, the discovery requested by those subpoenas falls within its scope." *Id.* at 87. Here, in contrast, questioning is likely to include many topics plainly outside the scope of the privilege. Further, the First Circuit emphasized that the federal government was not a party and had asserted no interest in overriding the assertion of legislative privilege. *Id.* at 88. Here, of course, the opposite is true.

Moreover, in *Lee* v. *City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018), cert. denied, 139 S. Ct. 2669 (2019), a redistricting case, the Ninth Circuit declined to adopt the plaintiffs' broad argument for a "categorical exception

whenever a constitutional claim directly implicates the government's intent"—an argument the United States and private plaintiffs do not make here. But it acknowledged that there are some cases in which the privilege may be overborne. *Ibid.* Nevertheless, the court held that the "factual record in this case [fell] short of justifying" an "exception to the privilege." *Ibid.* Similarly, in *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015), the Eleventh Circuit reversed the district court's denial of a motion to quash subpoenas for which their "sole reason for existing was to probe the subjective motivations of the legislators who supported [the] Act"—"an injury that strikes at the heart of the legislative privilege." *Id.* at 1310. The court identified no "important federal interest"—as opposed to the plaintiffs' private interests—that justified overbearing the privilege. *Id.* at 1312.

None of these decisions considered a blanket bar on deposition testimony sought in a case in which the United States is the party seeking the discovery, and where several undisputedly non-privileged topics of inquiry are relevant and important.

B. The Legislators Will Not Be Irreparably Injured Absent A Stay

The Legislators also fail to meet *Nken*'s second prong. Both of their arguments regarding irreparable harm—that their depositions will let the proverbial "cat out of the bag" and that the depositions will impose the distraction of

defending oneself in litigation—again miss the mark, as they are untethered to the realities of this case.

The Legislators' first flawed argument is that an injury will arise merely from having to answer "any of plaintiffs' questions," because "[o]nce that happens, 'the cat is out of the bag.'" Mot. 15 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.)). But simply sitting for a deposition will not result in irreparable harm. First, while *Kellogg* concerned the release of documents protected by the attorney-client privilege, here the Legislators possess a broad range of "relevant, non-privileged information" that is not subject to legislative privilege. See Doc. 282, at 4. Not every question posed or answer given reasonably may be considered a "cat."

Second, the district court has adopted the same protective procedures that prior three-judge courts within this Circuit have adopted to address matters potentially subject to legislative privilege (Doc. 282, at 4-5), thus tightly cinching the "bag." Per the district court's order, the privilege applies wherever it is invoked, and portions of deposition transcripts containing such material are "deemed to contain confidential information" and thus subject to the operative confidentiality and protective order in this case. Doc. 282, at 5 (citation omitted). And before using any part of the deposition testimony that is subject to legislative privilege, a party "must seal those portions and submit them to the [c]ourt for *in*

camera review, along with a motion to compel." Doc. 282, at 6. The order also warns counsel that they may be sanctioned for the unapproved public dissemination of any part of the deposition testimony over which privilege is asserted. Doc. 282, at 6. Thus, there is no real risk of harm—much less "irreparable" harm—in the absence of a stay.

The Legislators' second irreparable harm argument fares no better. They complain that being forced to testify is akin to "defending themselves in litigation over legislation." Mot. 16 (citing, *inter alia*, *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967)). But *Dombrowski* addresses the absolute legislative immunity from suit afforded to Members of Congress, not the qualified common-law legislative privilege afforded to state legislators. Nor are the legislators being asked to "defend" themselves, as they are not defendants here. And, as the district court recognized, there are many proper, non-privileged topics on which they Legislators may testify—such as inquiries about the districts they represent—that are purely informational, not defensive, in nature.

Moreover, being deposed for a single day would not be burdensome or distract from the Legislators' public duties—one of the concerns animating the legislative immunity doctrine—especially because the next regular session of the Texas Legislature is not until January 2023. See Tex. Gov. Code § 301.001 (2019). Even if the discovery sought here were burdensome, however, that would

still not be sufficient to prove irreparable injury. See, *e.g.*, *M.D.* v. *Perry*, No. C-11-84, 2011 WL 7047039, at *2 (S.D. Tex. July 21, 2011) (explaining "[t]he prospect of burdensome * * * discovery alone is not sufficient to demonstrate 'irreparable injury'").

C. The Legislators Do Not Meet Their Burden On The Final Two Stay Factors Because Delaying The Depositions Will Harm The Plaintiffs And The Public Interest

Because the Legislators cannot make a strong showing under the first two factors, the Court should deny the stay. *Nken*, 556 U.S. at 434. But if the Court considers the remaining factors, it will find that here, too, the Legislators fall short. This is especially so because here the United States is party to this litigation and opposes the stay; thus, the public interest merges with the interest of the *federal* government. See *id.*, 556 U.S. at 435. The federal government's interest lies in ensuring that the alleged discrimination in voting is eliminated as expeditiously as possible.

First, "it would be inherently unfair to require [the United States and the private plaintiffs] to continue to litigate this matter forward toward motion practice with an uncertainty surrounding whether [they] would ultimately have access to these records." *Tyree* v. *County of Summit*, No. 5:12cv2627, 2013 WL 1285887, at *2 (N.D. Ohio Mar. 26, 2013). Second, staying depositions would "substantially injure" plaintiffs because it would harm "the[ir] need for a timely resolution of

[their] claims." *New York* v. *U.S. Dep't of Commerce*, 339 F. Supp. 3d 144, 150 (S.D.N.Y. 2018). Any delay in these depositions threatens plaintiffs' ability to gather the information necessary to conduct other needed depositions and discovery, to complete discovery in accord with the cutoff less than 60 days from now (in mid-July), to meet motion practice deadlines, and to prepare their case presentation by the fast-approaching trial date. Therefore, the United States and private plaintiffs would be significantly harmed by a stay.

Moreover, the United States (and the private plaintiffs) seek to enforce the Voting Rights Act's prohibition on racial discrimination in elections, and the federal government's interests merge with those of the public. The Fourteenth and Fifteenth Amendments guarantee citizens the right to vote free of discrimination on the basis of race, a right "preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (citation omitted). Thus, "compliance with the Voting Rights Act so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy." *Rivera Madera* v. *Lee*, No. 1:18-cv-152, 2019 WL 2077037, at *2 (N.D. Fla. May 10, 2019) (citation omitted).

In their motion, the Legislators ignore the public interest in Voting Rights Act enforcement and again focus on the broad principles protected by the doctrine of legislative immunity, such as distraction from public duty and avoidance of the

burden of defending themselves. Mot. 17-18. Again, however, the Legislators are not being called to defend themselves in this action, and the Texas House will not be in session until 2023.

II

THE COURT SHOULD DENY THE LEGISLATORS' ALTERNATIVE REQUEST FOR A STAY PENDING THE SUPREME COURT'S DECISION IN *MERRILL*

Finally, there is no basis for a stay pending the Supreme Court's eventual decision in *Merrill* v. *Milligan*, probable jurisdiction noted, No. 21-1086 (U.S. Feb. 7, 2022). Such a stay would likely derail the trial in this case, preventing a ruling that could apply before the 2024 election. And it would do so in anticipation of a decision that likely will have no bearing on the Legislators' depositions.

The district court expedited discovery to allow for a September trial. This trial date would allow enough time for the court to reach a decision before the Texas State Legislature convenes for its 2023 Session in January 2023. See Tex. Gov. Code § 301.001. But the Supreme Court will not hear oral argument in *Merrill* until at least October 2022, after trial is scheduled to take place in this case. As with many prominent election-law cases, the Court likely will not issue a final decision in *Merrill* until late in the October 2022 Term, in all probability after the

2023 Texas legislative session has already ended.[5] See Legislative Reference Library of Texas, *Texas Legislative Sessions and Years* (last visited May 20, 2022), https://lrl.texas.gov/sessions/sessionyears.cfm (noting session ends May 29, 2023). Depositions then would still have to take place, followed by possible supplemental expert reports and proposed findings of fact and conclusions of law incorporating any information from those depositions.

In short, a stay of depositions pending *Merrill* would likely push back a trial in these cases by up to a year. And if plaintiffs prevail at trial, the Legislature presumably will have the option to convene in a Called Session to draw a new congressional map before the court imposes one. See *Lawyer* v. *Department of Just.*, 521 U.S. 567, 576 (1997); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.). Given that the candidate qualifying deadline for Texas's 2024 primaries is December 11, 2023, with primary voting beginning two months later,[6] a stay may well make it impossible to issue a ruling that could be implemented in time for the 2024 elections. See *Merrill* v. *Milligan*, 142 S. Ct.

[5] See, *e.g.*, *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (decided July 1); *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019) (decided June 27); *Gill* v. *Whitford*, 138 S. Ct. 1916 (2018) (decided June 18); *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017) (decided May 22).

[6] Texas Sec'y of State, *Important 2024 Election Dates* (last visited May 20, 2022), https://www.sos.state.tx.us/elections/voter/important-election-dates.shtml#2024.

879, 879-880 (2022) (Kavanaugh, J., concurring) (stay justified under *Purcell* principle where "primary elections begin (via absentee voting) just seven weeks from now," and "[f]iling deadlines need to be met, but candidates cannot be sure what district they need to file for"). Voters currently living in districts that dilute their voting power based on race would have to suffer through two full election cycles before seeing any hope of relief.

A stay, meanwhile, would provide no benefit beyond that of delay. Because cases raising constitutional challenges to statewide district maps can be appealed directly to the Supreme Court, see 28 U.S.C. 1253, 2284(a), and because the Court has pendent jurisdiction to hear direct appeals from three-judge courts even when the district court rules on statutory grounds, see *Alexander* v. *Fioto*, 430 U.S. 634, 636 (1977), the Supreme Court frequently hears statewide Voting Rights Act challenges. The mere existence of a pending redistricting case in the Supreme Court cannot create grounds to pause all vote dilution litigation in the lower courts. Whatever uncertainties may persist in the doctrine's application, lower courts have applied the well-established *Gingles* test for over three decades, and have done so even as the Court has refined that test over time.

In any event, a decision in *Merrill* will not likely affect the matters about which the United States intends to depose the Legislators. Indeed, the *Merrill* appellants' opening brief argues that Section 2 still requires plaintiffs to prove

intent even under the results test, albeit with a lower evidentiary threshold. See Appellants' Br. at 5-6, 33-34, *Merrill* v. *Milligan*, No. 21-1086 (Apr. 25, 2022). If anything, then, a ruling adopting the appellants' view in *Merrill* would make the challenged depositions more important, not less, and would correspondingly weaken rather than strengthen the Legislators' privilege claim.

Nor will the decision in *Merrill* affect the relevance of the topics on which the United States seeks to depose the Legislators, all of which relate to Section 2's textually-mandated totality-of-circumstances standard. To the contrary, the appellants' opening brief in *Merrill* concerns itself principally with the rules that *plaintiffs' experts* must follow to show that their demonstrative maps meet the "reasonable compactness" element of the first *Gingles* precondition, as well as whether plaintiffs must simulate "race-neutral" maps to show that the enacted map violates Section 2. See Appellants' Br. at 42-50, 53-70, *supra* (No. 21-1086). Even the appellants' constitutional arguments turn on the question of how, if at all, plaintiffs' experts may use race in drawing their own demonstrative maps. See *id.* at 71-80. Only the appellants' argument that Section 2 simply does not apply to single-member redistricting, *id.* at 50-53, could have any effect on the challenged depositions—an extreme and unlikely outcome, to say the least.

CONCLUSION

For the foregoing reasons, this Court should deny the Legislators' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 20, 2022, I electronically filed the foregoing APPELLEE UNITED STATES' OPPOSITION TO OPPOSED MOTION FOR A STAY PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Katherine E. Lamm
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CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLEE UNITED STATES' OPPOSITION TO OPPOSED MOTION FOR A STAY PENDING APPEAL (1) does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5194 words; and (2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

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Date: May 20, 2022