No. _____

In the Supreme Court of the United States

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

Third-Party Applicants,

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,

Respondents.

EMERGENCY APPLICATION FOR STAY PENDING APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OR, IN THE ALTERNATIVE, PENDING DISPOSITION OF PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Representatives Ryan Guillen, Brooks Landgraf, and John Lujan, who are members of the Texas House of Representatives. They were involuntarily subpoenaed as third parties in the consolidated district court actions. They are Appellants in the Fifth Circuit.

Respondents include the following Plaintiffs in the consolidated district court actions and Appellees in the Fifth Circuit: the United States of America, through the United States Department of Justice, League of United Latin American Citizens (LULAC), Southwest Voter Registration Education Project, Mi Familia Vota, American GI Forum of Texas, La Union Del Pueblo Entero, Mexican American Bar Association of Texas, Texas Hispanics Organized for Political Education, William C. Velasquez Institute, Fiel Houston, Inc., Texas Association of Latino Administrators and Superintendents, Emelda Menendez, Gilberto Menendez, Jose Olivares, Florinda Chavez, Joey Cardenas, Proyecto Azteca, Reform Immigration for Texas Alliance, Workers Defense Project, Jose Olivares, Paulita Sanchez, Jo Ann Acevedo, David Lopez, Diana Martinez Alexander, Jeandra Ortiz, Roy Charles Brooks, Sandra Puente, Jose R. Reyes, Shirley Anna Fleming, Louie Minor, Jr., Norma Cavazos, Felipe Gutierrez, Eva Bonilla, Clara Faulkner, Deborah Spell, Beverly Powell, Phyllis Goines, Voto Latino, Akilah Bacy, Orlando Flores, Marilena Garza, Cecilia Gonzales, Agustin Loredo, Cinia Montoya, Ana Ramon, Jana Lynne Sanchez, Jerry Shafer, Debbie Lynn Solis, Angel Ulloa, Mary Uribe, Rosalinda Ramos Abuabara, Mexican American Legislative Caucus (MALC), Texas State Conference of the NAACP, Fair Maps Texas

Action Committee, OCA-Greater Houston, North Texas Chapter of the Asian Pacific Islander American Public Affairs Association, Emgage, Turner Khanay, Angela Rainey, Austin Ruiz, Aya Eneli, Sofia Sheikh, Jennifer Cazares, Niloufar Hafizi, Lakshmi Ramakrishnan, Amatulla Contractor, Deborah Chen, Arthur Resa, Sumita Ghosh, Anand Krishnaswamy, Trey Martinez Fischer, Veronica Escobar, Sheila Jackson Lee, Alexander Green, Jasmine Crockett, and Eddie Bernice Johnson.

Also in the consolidated district court proceedings below, Defendants include the State of Texas, Governor Greg Abbott, Lieutenant Governor Dan Patrick, Texas Secretary of State John Scott, and Deputy Secretary of State Jose A. Esparza.

The proceedings below are:

1. *League of United Latin American Citizens, et al. v. Abbott*, No. 3:21-cv-259-DCG-JES-JVB (W.D. Tex.).
2. *League of United Latin American Citizens, et al. v. Representative Ryan Guillen, et al.*, No. 22-50407 (5th Cir.).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

TO THE HONORABLE SAMUEL A. ALITO, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

The United States Department of Justice and various plaintiffs have brought ten lawsuits to enjoin redistricting legislation in Texas. This week, the three-judge district court presiding over those consolidated suits ordered legislators serving in the Texas House of Representatives to sit for depositions, over the legislators' invocation of legislative immunity and privilege. *See* App.1-6. That alone transgresses the centuries-old legislative immunity and privilege conferred upon state legislators—deemed "so essential for representatives of the people" that they were inscribed in nearly every State's constitution, the Articles of Confederation, and the federal Constitution. *Tenney v. Brandhove*, 341 U.S. 367, 372-77 (1951). But it gets worse. The legislators are now under court order to answer every question posed to them irrespective of legislative privilege objections—even those that would be off-limits in nearly every court across the country. The legislators' depositions will probe the very innerworkings of the legislative process, examining the legislators' thoughts, impressions, and motivations for their legislative acts. Counsel may raise objections, but to what end? Little. Counsel *cannot* instruct legislators not to answer. Rather, the legislator must "answer the question in full." App. 4. 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 legislators immediately sought the Fifth Circuit's review. But the first wave of legislators' depositions will occur before any appeal can be resolved. The first

depositions are days away—noticed for May 24, May 25, and for the week of May 30, 2022. Plaintiffs have refused to postpone the depositions pending further review. The district court has refused to postpone. App.7. And now, a Fifth Circuit motions panel has refused to postpone. App.13 (Higginson, J.). In Judge Higginson's words, the district court's course laid out for the depositions "has been admirably prudent, cautious, vigilant, and narrow." App.16.

A stay from this Court is undoubtedly warranted. Without a stay of the depositions, further appellate review is largely academic for those legislators who will have already been deposed. The harm is done. They will have been taken away from the duties of their office, saddled with the burden of defending themselves in litigation. They will have aired their privileged testimony to counsel for six dozen plaintiffs in these consolidated suits, the United States Department of Justice, and ultimately the district court (acting as both arbiter of the privilege and factfinder for plaintiffs' claims). Worst of all, that whole exercise defies this Court's precedents and now presents a circuit split that is of such significant national importance to our federal system that the Fifth Circuit's "anything goes" approach must be nipped in the bud.

To prevent the legislators' depositions from proceeding without further appellate review, the legislators respectfully request an emergency stay of the depositions **as soon as practicable and ideally before Tuesday, May 24, 2022, at 9:30 a.m. Eastern**, shortly before the first legislator's deposition is set to begin**.** If the Court is not able to provide relief by then, a stay pending appeal is still warranted for the legislators' depositions to follow on May 25 and the week of May 30, 2022. And those

are just the start. Plaintiffs have 75 depositions or up to 325 hours of permitted deposition time, and they intend to reserve "many of those depositions" for "Texas legislators."[1] Any such stay would terminate upon the disposition of the legislators' appeal and petition for writ for certiorari, if one is sought, or alternatively upon the disposition of a petition for writ of mandamus.

The legislators also request an administrative stay as soon as practicable while the Court considers this emergency stay application. An administrative stay would allow the Court more time to consider the legislators' alternative requests for relief—including staying all legislators' depositions until this Court decides *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1087. *Merrill* is poised to clarify the ground rules for redistricting claims, including those in the ten consolidated redistricting suits here.[2] That clarification of the legal standards for plaintiffs' claims will necessarily inform the scope of permissible discovery regarding such claims. And with discovery tactics as "extraordinary" as deposing state legislators and ordering

[1] Pls. Resp. to Legislator's Emergency Mot. for a Stay Pending Appeal 18, *LULAC v. Rep. Guillen*, No. 22-50407 (5th Cir. 2022) (filed May 20, 2022).

[2] *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of stay) (describing "the underlying question" in *Merrill* as "whether a second majority-minority congressional district … is required by the Voting Rights Act and not prohibited by the Equal Protection Clause" and observing that "the Court's case law in this area is notoriously unclear and confusing"); *id.* at 882-83 (Roberts, C.J., dissenting from grant of stay) (noting "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim" and that noting probable jurisdiction in *Merrill* was warranted "to resolve th[at] wide range of uncertainties").

answers over their privilege objections,[3] there is every reason to postpone until the Court clarifies what plaintiffs can prove (if anything) with such discovery.

It is simply "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney*, 341 U.S. at 377. But without a stay, that is precisely what will transpire here. A stay is undoubtedly warranted. 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). 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) ("we have likewise concluded that plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances'").

DECISIONS BELOW

The three-judge district court's order is reproduced at App.1-6 and is available at 2022 WL 1570858. The district court's order denying a stay pending appeal is reproduced at App.7. The Fifth Circuit's order denying a stay is reproduced at App.8-17.

JURISDICTION

This Court has jurisdiction over this application for a stay pending appeal. *See* 28 U.S.C. §§1254, 1651. Both the district court and Fifth Circuit have denied the

[3] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (noting that policymakers could be called to testify only in "extraordinary instances" and, *even then*, such testimony "frequently will be barred by privilege").

legislators' stay request; accordingly, the relief sought here is not available in any other court. Sup. Ct. R. 23(3).

Plaintiffs have argued a stay should not issue because the Fifth Circuit does not have jurisdiction to consider the legislators' pending appeal of the order compelling their depositions and privileged testimony. Similarly, Judge Willett concurred only in the judgment of the Fifth Circuit's motions panel "because he is unconvinced that [the court would have] jurisdiction," citing this Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 108 (2009). App.13 n.1.

There are no jurisdictional barriers that could possibly foreclose this Court from staying the legislators' depositions, nor are there any jurisdictional barriers foreclosing the legislators' pending appeal. A majority of the Fifth Circuit motions panel has already concluded it has jurisdiction over that appeal. App.13. And on that issue, the panel was correct. The legislators are third parties to the underlying litigation; they have been subpoenaed to testify involuntarily and over serious objections of legislative immunity and privilege. As the Fifth Circuit has ably explained in analogous circumstances, this Court's decision in *Mohawk* "does not speak to the predicament of third parties." *Whole Woman's Health v. Smith*, 896 F.3d 362, 367-68 (5th Cir. 2018) (staying and then vacating discovery order compelling a third party, the Texas Conference of Catholic Bishops, to turn over internal Church documents over First Amendment privilege objections). After all, *Mohawk* entailed an interlocutory appeal by the *defendant* to the underlying litigation, not a third-party legislator who has been involuntarily subpoenaed. 558 U.S. at 105. Unlike a defendant, "forced

discovery" over a third party's immunity or privilege objections is "effectively unreviewable on appeal from the final judgment." *Whole Woman's Health*, 896 F.3d at 367-68 (quoting *Mohawk*, 558 U.S. at 106). A later order excluding evidence or a new trial *for a party* does an involuntarily subpoenaed *third party* no good. *Id.*; *accord In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015) (third party legislators who "unsuccessfully assert[] a governmental privilege may immediately appeal a discovery order where he is not a party to the lawsuit"); *Whitford v. Vos*, 2019 WL 4571109, at *1 (7th Cir. July 11, 2019) (converting Wisconsin speaker's mandamus petition to quash order compelling deposition to interlocutory appeal).

Alternatively, there is undoubtedly mandamus jurisdiction. Even *Mohawk* confirms that door remains open to *parties* themselves; *a fortiori*, it remains open to involuntarily subpoenaed *third parties.* 558 U.S. at 111-12 (describing mandamus as an "established mechanism[]" for continued "appellate review"). It is a course repeatedly charted in analogous circumstances. *See In re Dep't of Commerce*, 139 S. Ct. 16 (2018) (staying deposition pending disposition of mandamus or certiorari petitions); *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 390-91 (2004) (vacating denial of mandamus relief related to discovery order); *In re Kellogg Brown & Root*, 756 F.3d at 756 (granting mandamus and vacating discovery order transgressing attorney-client privilege); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 80-81 (1st Cir. 2021) (granting advisory writ of mandamus to bar depositions of former governor, former speaker, and former legislator).

In short, there is jurisdiction over the legislators' appeal of the order compelling them to sit for depositions and give testimony over their own privilege objections. And there is necessarily jurisdiction to postpone the depositions in the meantime—in aid of this Court's jurisdiction over both the important questions about the privilege's scope now on appeal as well as the ultimate disposition of the underlying redistricting cases. *See* 28 U.S.C. §1253.

BACKGROUND AND PROCEDURAL HISTORY

1. In October 2021, Texas enacted legislation revising electoral districts for the State's congressional delegation, Senate, House, and Board of Education based on 2020 Census data.[4] Plaintiffs sued, alleging the legislation violated §2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. The United States Department of Justice then joined the litigation, challenging congressional and House districts as §2 violations.[5]

There are now ten consolidated complaints. The complaints uniformly allege that §2 of the VRA required Texas to create more majority-minority districts than those created by the 2021 redistricting legislation.[6] Complaints also allege that the number of majority-minority districts as a percentage of total districts is disproportionate to the number of minority voters in Texas.[7]

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

[5] *See* App.20-64 (reproducing U.S. Compl.).

[6] *See, e.g.*, App.54 (U.S. Compl. ¶127); *see generally* Legislators' Mot. to Quash Pls. Subpoenas 1-3, ECF No. 278. (detailing private plaintiffs' claims). Unless otherwise noted, all ECF numbers refer to the docket in *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex).

[7] Legislators' Mot. to Quash Pls. Subpoenas 2-3, ECF No. 278 (citing *MALC* plaintiffs' allegations that the number of majority-Latino congressional, house, and

Relevant here, the first two legislators whom the United States and plaintiffs will depose in days, absent a stay, represent two of the challenged House districts.[8] They are minorities themselves. With respect to Representative John Lujan—who will be deposed on May 25—the United States asserts that he, a "Latino Republican…, was not the candidate of choice" in his San Antonio-area district.[9] The allegations regarding Representative Ryan Guillen—who will be deposed on May 24—are all the more revealing: The United States concedes that Representative Guillen had long been Latino voters' "preferred candidate," but that was when he was representing his South Texas district in the legislature as a Democrat.[10] The United States complains that he has now "switched parties."[11] According to the United States, his district, with a Hispanic Citizen Voting Age Population (CVAP) of roughly 65%, is now a Voting Rights Act violation.[12] And those two representatives are just the beginning. Plaintiffs intend to use "many" of their 75 depositions (or up to 325 total hours of deposition time) for Texas's remaining legislators.[13]

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senate districts is disproportionate to the Latino citizen voting age population; quoting *Fair Maps* plaintiffs' allegations that "Black, Latino, and AAPI voters continue to be proportionality [sic] underrepresented in the Texas legislature and congressional delegation"; citing *NAACP* plaintiff's allegation that that various senate, house, and congressional districts with majority "POC CVAP" are disproportionate to the overall population).

[8] *See, e.g.*, App.47-55 (U.S. Compl. ¶¶104-30); *see also* Legislators' Mot. to Quash Pls. Subpoenas 1-2, ECF No. 278 (describing *LULAC* plaintiffs' claims regarding House Districts 31 and 118).

[9] App. 48-49 (U.S. Compl. ¶108).

[10] App.48 (U.S. Compl. ¶117).

[11] *Id.*

[12] App.53 (U.S. Compl. ¶123).

[13] Pls. Resp. to Legislator's Emergency Mot. for a Stay Pending Appeal 18, *supra.*

Defendants have moved to dismiss every complaint for failure to state a claim and/or lack of standing.[14] The legislators have argued depositions should be postponed until the motions to dismiss are resolved. The courts below have not acknowledged that argument in orders compelling the depositions and denying stays. So absent a stay, depositions will proceed before those motions are decided. All ten are still pending before the district court.[15]

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. (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 responses to document subpoenas.

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.[16] Private plaintiffs

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[14] Defs. Mots. to Dismiss, ECF Nos. 82, 111, 181, 225, 233, 286, 287, 288, 289, 290.

[15] In light of plaintiffs' redistricting claims, Defendants also moved to stay the litigation altogether pending this Court's decision in *Merrill*. The district court denied the stay motion without further briefing. Order Denying Mot. to Stay, ECF No. 246.

[16] Legislators' Mot. to Quash U.S. Subpoenas, ECF No. 259; U.S. Opp'n to Legislators' Mot. to Quash, ECF No. 271; Private Pls. Br. in Support of U.S. Opp'n, ECF No. 272; Reply in Support of Legislators' Mot. to Quash U.S. Subpoenas, ECF No. 277.

then issued their own set of subpoenas, and the legislators immediately moved to quash those too.[17]

The legislators' motions to quash invoked legislative immunity and privilege. *See Dombrowski*, 387 U.S. at 85 (legislators protected "not only from the consequences of litigation's results but also from the burden of defending themselves"); *Tenney*, 341 U.S. at 377 (it is "not consonant with our scheme of government for a court to inquire into the motives of legislators"). The legislators explained that legislative immunity and privilege foreclosed their depositions at this time in this case, just as other courts have concluded that legislators could not be deposed or otherwise become targets of third-party discovery in other lawsuits challenging legislation. *See, e.g.*, *Lee*, 908 F.3d at 1187-88 (affirming local legislators could not be deposed in constitutional challenge to redistricting); *Hubbard*, 803 F.3d at 1307-08, 1315 (quashing subpoenas for legislators' documents in First Amendment challenge); *Am. Trucking*, 14 F.4th at 88-90 (quashing subpoenas to depose state lawmakers in Dormant Commerce Clause challenge); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299 (D. Md. 1992) ("entirely barr[ing]" "any inquiry" in redistricting challenge).[18] The legislators' motions added that, at the very least, the legislators could not be the *very first* deponents, before plaintiffs pursued alternative means of discovery or exhausted the voluminous public record and while motions to dismiss were pending. *See e.g., In re Perry*, 60 S.W.3d at 861-62 ("all other available evidentiary sources

[17] Legislators' Mot. to Quash Pls. Subpoenas, ECF No. 278.

[18] *See* Legislators' Mot. to Quash U.S. Subpoenas 11-17, ECF No. 259; Mot.to Quash Pls. Subpoenas 5-10, ECF No. 278.

must first be exhausted before extraordinary circumstances will be considered").[19] The orders never acknowledged that argument.

3. The district court denied the legislators' request for an administrative stay and denied their motions to quash. *See* App.1-6. And while the order ended with the statement that "nothing in this Order should be construed as deciding any issue of state legislative privilege," App.5, that statement in no way reflects what came before. The order began by rejecting the legislators' arguments that legislative immunity and privilege should bar legislators' depositions entirely in this case at this time. App.2. 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 Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (*dicta*) (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

[19] While it is not incumbent on third parties to provide a plaintiff with more permissible discovery strategies, counsel for the legislators proposed various alternatives—be it discovery to authenticate the legislature's public record; expert discovery, which will inevitably be center-stage for *Gingles*; making use of volumes of publicly available information regarding the districts from the public record, publicly posted submissions by the public and by legislators, and the U.S. Census Bureau; deposing others living in the challenged districts or past candidates; and pursuing less intrusive discovery than depositions to seek purportedly non-privileged and relevant information from legislators themselves. *See* Reply 1-2 n.3, ECF No. 278.

be limited." *Id.* (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003)). And deposing legislators (before deposing 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 (emphasis added).

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." App.4. Counsel may object to a question as privileged. But the legislators "must then answer the question in full." *Id.* Meaning, counsel for the United States and all private plaintiffs may ask the legislators whatever they wish, and the legislators *must* answer over their own legislative privilege objections. Where privilege objections are made, these 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. *Id.* The court (also the factfinder) will then read the privileged testimony and then decide whether that testimony, already known to all counsel and to the court, should also be made part of the public record. *Id.*

That order issued on May 18, 2022. Within hours, the legislators moved to stay depositions in the district court pending appellate review and timely filed a notice of appeal.[20] The district court denied the stay motion. App.7.

[20] Mot. for Stay Pending Appeal, ECF No. 283; Notice of Appeal, ECF No. 284.

The next day, the legislators requested that the Fifth Circuit stay depositions pending appellate review. The motions panel denied the motion. App.17. In a brief opinion authored by Judge Higginson, the panel described the district court's "procedures" for the depositions as "intended to protect the legislative privilege" and "admirably deliberate and cautious." App.13, 15.[21] Citing this Court's decision in *Gillock*, involving a federal criminal prosecution of a state legislator, along with a Fifth Circuit decision involving local government officials, the panel explained that the privilege was, "at best," qualified. App.14 (citing *United States v. Gillock*, 445 U.S. 360 (1980); quoting *Jefferson*, 849 F.3d at 624). That reliance on *Gillock* as a basis for curtailing privilege in these civil cases does not pass minimal scrutiny. Citing a criminal case for this proposition is like saying the crime-fraud exception to attorney-client privilege makes that privilege "at best" qualified. Uncritically applying that logic, the Fifth Circuit panel said that legislators can be deposed because, among other reasons, "there are likely to be relevant areas of inquiry that fall outside of topics potentially covered by the privilege." *Id.* And with respect to the myriad *privileged* areas of inquiry that will dominate the depositions? The panel did not mince words: legislative privilege cannot "prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege." App.16.

[21] Judge Willett concurred only in the judgment denying the stay because he was "unconvinced" that there would be jurisdiction over the legislators' appeal of the order. App.13 n.1. Explained in the legislators' jurisdictional statement, *supra*, no jurisdictional issue stands in the way of the legislators' request for relief.

The panel added that the legislators would not suffer irreparable harm, App.15, without acknowledging the irreparable harm arguments made by the legislators. To the panel, it was enough that the district court's "procedures" were "carefully crafted" by initially designating any privileged testimony as confidential, noting that public disclosure of confidential portions of the transcript "may" result in sanctions, and requiring motions to "compel" the already-given testimony to be reviewed *in camera* by the district court. App.15-16. The panel did not acknowledge that those procedures no less require the legislators to give privileged testimony to counsel for six dozen plaintiffs, the Department of Justice, and eventually the district court. Nor did the panel grapple with the fact that "the intrusion of the deposition itself" is the harm, "not correctable on appeal, even if [their] testimony is excluded at trial." *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705 (9th Cir. 2022); *accord In re Kellogg Brown & Root*, 756 F.3d at 761 ("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 (third-party's appeal of "forced discovery … is 'effectively unreviewable' on appeal from the final judgment"). The panel offered no reasons why postponing depositions for expedited appellate review would harm plaintiffs. And as for whether the stay favored the public interest, the panel said only that the district court's approach was "admirably prudent, cautious, vigilant, and narrow." *Id.*

Without a stay, the first of the legislators' depositions will proceed on May 24, May 25, and the week of May 30, 2022. The discovery period does not end until July

15 or later by agreement of the parties.[22] The United States and private plaintiffs have refused to postpone. Plaintiffs have said that these depositions must proceed because there are so many more to come; they intend to use "many" of their allotted 75 depositions to depose Texas legislators.[23] Every one of those depositions will not only burden the legislators with defending themselves; they will demand the legislators to detail, under oath for up to seven hours, the innermost workings of the legislative process, irrespective of their privilege arguments. That privilege-defying procedure cannot continue to evade appellate review. Accordingly, the legislators now apply for an emergency stay in this Court that will postpone the depositions until there is further appellate review of the scope of the legislators' privilege, and the deepening circuit split regarding the same.

ARGUMENT

A stay pending appeal is appropriate when there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will vote to reverse the judgment below"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Likewise, a stay pending the disposition of a petition for a writ of mandamus is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus" and (2) "a likelihood that irreparable harm will result from the denial of a stay." *Id.*; *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (weighing whether "the stay applicant has

[22] Scheduling Orders, ECF Nos. 96, 109.

[23] Pls. Resp. to Legislator's Emergency Mot. for a Stay Pending Appeal 18, *supra.*

made a strong showing that he is likely to succeed on the merits" and the balance of the equities). Applied here, the legislators' privilege arguments are meritorious, consistent with this Court's precedent and the courts of appeals in analogous cases. The Fifth Circuit's stay denial rejecting those arguments cements a circuit split on the scope of legislative privilege—a split that has long evaded this Court's review. The legislators are likely to succeed on the merits of these serious legal questions, which urgently warrant this Court's review.

This case, moreover, features the exceptional circumstances making immediate relief pending further appellate review appropriate. Without a stay, the district court's denial of the legislators' invocation of immunity and privilege is effectively unreviewable. There is no way to un-ring the bell once they testify—having been taken away from their public duties to prepare for and sit through depositions and, worse, forced to answer whatever questions counsel for the United States and counsel for six dozen plaintiffs have. On the other side of the ledger, plaintiffs' only alleged harm is that they are short on time. But nearly two months remain for the parties to take discovery, or more by joint agreement. There is ample time for the legislators to seek further appellate review. Even if there weren't, the harm to legislators well outweighs any harm to plaintiffs. The legislators' testimony has limited probative value and ought not be imputed to the legislature as a whole, *infra* §III.B.2. And the supposed "non-privileged" topics that plaintiffs wish to discuss with the legislators—be it "political behavior, the history of discrimination, and socioeconomic disparities," App.4—is ordinarily the stuff of expert testimony, not legislators as fact witnesses.

Finally, the public interest warrants a stay. This Court recognized that more than seventy years ago: Legislative privilege is "indispensably necessary" for legislators to discharge their public duties "uninhibited," "not for their private indulgence but *for the public good*." *Tenney*, 341 U.S. at 373, 377 (emphasis added).

I. There Is a Reasonable Probability That This Court Would Grant Certiorari, and the Legislators Would Prevail on the Merits.

A. The legislators' immunity and privilege arguments are undoubtedly "sufficiently meritorious" to ultimately warrant this Court's review. *Hollingsworth*, 558 U.S. at 190.

1. The courts below have cemented 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 Circuits, those courts would have refused to order the legislators to sit for depositions, much less provide privileged answers. The First Circuit has quashed subpoenas to depose legislators, explaining that depositions would cross the bounds of legislative immunity and privilege. It also admonished 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*, 14 F.4th at 86-90.[24]

Likewise, the Ninth Circuit has refused to make legislators sit for depositions, following the rule that "plaintiffs are generally barred from deposing legislators, even

[24] Discussed *infra*, the Fifth Circuit panel did not reconcile *American Trucking* or the other circuit precedents with its approach.

in 'extraordinary circumstances.'" *Lee*, 908 F.3d at 1187-88. In what context? A redistricting case that, just like here, included claims of impermissible legislative purpose. *See id*. The Ninth Circuit refused to adopt the *Lee* plaintiffs' request for "a categorical exception" to legislative privilege "whenever a constitutional claim directly implicates the government's intent," because that "would render the privilege 'of little value.'" *Id.* at 1188 (quoting *Tenney*, 341 U.S. at 377); *accord Marylanders*, 144 F.R.D. at 299 (concluding legislative officials in redistricting dispute "deserve all of the protection the *Tenney* court extended to them" and "entirely barr[ing]" "*any* inquiry").

Similarly, the Eleventh Circuit has quashed subpoenas *duces tecum* in a First Amendment challenge to Alabama legislation. *See Hubbard*, 803 F.3d at 1315. 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." *Id.* at 1311.

Finally, consider what would have transpired had the Texas legislators' case instead been before the Texas Supreme Court. The attempts to depose the legislators would have been rejected. *See In re Perry*, 60 S.W.3d at 862 (concluding redistricting plaintiffs could not depose officials). That should have given the courts below some pause. But instead, they ordered discovery from Texas legislators as though federal redistricting cases are an exception to comity.

2. The Fifth Circuit's order is irreconcilable with the First, Ninth, and Eleventh Circuits' approaches to privilege, as well as the approach taken by the legislators'

own Texas Supreme Court. The panel declared the district court's order compelling legislators' depositions and privileged testimony—before any other depositions or before motions to dismiss are even resolved, *supra*—as consistent with "the law of this Circuit." App.15 n.2. To make that leap, the panel elevated earlier Fifth Circuit *dicta* as the law of the Circuit. That earlier decision, merely quoting a district court opinion, stated 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 the truth.'" *Jefferson*, 849 F.3d at 624 (emphasis added) (quoting *Perez*, 2014 WL 106927, at *1 (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003))).

Until yesterday, that idea was just *dicta* applied only to local officials. *See Jefferson*, 849 F.3d at 624 (ultimately assuming, without deciding, that privilege applied). The Fifth Circuit's stay denial changes that. The *dicta* has now been transformed to a rule, deployed to reject state legislators' arguments that legislative immunity and privilege bar their depositions in this case. App.14, 16.

The Fifth Circuit's ruling, strictly construing privilege, is inconsistent with this Court's seminal decision in *Tenney*, explaining that the privilege exists to further the "public good," not to frustrate it. *Tenney*, 341 U.S. at 377. It was inconsistent with this Court's unqualified assurance that legislators are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85 (quoting *Tenney*, 341 U.S. at 376). And it was

inconsistent with this Court's observation in *Arlington Heights*, involving local policymakers and discussing both executive and legislative privileges, that policymakers could not be called to testify except in "extraordinary instances" and still then testimony "frequently will be barred by privilege." 429 U.S. at 268. Indeed, the only time this Court has qualified state (and federal) legislators' privilege is in federal criminal prosecutions. *See Gillock*, 445 U.S. at 373-74 ("[I]n protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line at *civil actions*." (emphasis added)); *accord Gravel v. United States*, 408 U.S. 606, 627 (1972) (federal criminal violations); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (qualifying spousal privilege in federal criminal prosecution).

The Fifth Circuit's ruling, moreover, is inconsistent with the approaches taken by the First, Ninth, and Eleventh Circuits' decisions discussed above. To be sure, those courts acknowledge that the privilege must yield in certain circumstances, just as the legislators have. *See, e.g.*, *Gillock*, 445 U.S. at 373-74 (qualifying the privilege for federal criminal actions). But none of the First, Ninth, or Eleventh Circuits' decisions reduces the legislative privilege to something "strictly construed" and "accepted only to the very limited extent." *Compare Jefferson*, 849 F.3d at 624, *with Am. Trucking*, 14 F.4th at 88 ("We need not reject altogether the possibility that there *might be* a private civil case in which state legislative immunity must be set to one side because the case turns so heavily on subjective motive or purpose." (emphasis added)), *and Hubbard*, 803 F.3d at 1311 ("To be sure, a state lawmaker's legislative privilege must yield in *some* circumstances." (emphasis added)). The differences between the orders

below and the Ninth Circuit's decision in *Lee* bring that to life. The Fifth Circuit panel stated that the Ninth Circuit's approach in *Lee* was "[l]ike us." App.15 n.2. That cannot be. The Ninth Circuit followed the rule that legislators would not be deposed and rejected *plaintiffs'* request for an "exception" to that rule for their intent claims. *Lee*, 908 F.3d at 1187-88. By contrast, the Fifth Circuit panel has now ruled that legislators can seemingly always be deposed, lest privilege be a "cudgel" to "prevent the discovery of non-privileged information or to prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege." App.16.

The origins for that erroneous version of legislative privilege are various trial court decisions that have evaded appellate review. Those trial courts employ a multi-factor balancing test to pierce legislative privilege. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003) (first endorsing test for legislative privilege); App.2-3 (citing various examples of Texas trial courts relying on *Rodriguez*). 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 suggested that such a malleable, privilege-destroying test is the law. It has never qualified the privilege in that way.

B. In light of the foregoing, the legislators have established a "reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and "a significant possibility of reversal of the lower court's decision." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). The legislators' appeal pending in the Fifth Circuit raises substantial questions of federal-state relations of nationwide importance: When may trial courts in federal redistricting litigation ignore legislative privilege as it has been applied in other cases, require legislators to sit for depositions, and demand that they answer questions about the innerworkings of the legislative process, over their privilege objections? *Compare* App.16, *with 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). Whether redistricting or Texas legislators are exceptions to that historically rooted privilege are quintessential issues "sufficiently meritorious for the grant of certiorari," with "a significant possibility of reversal." *Estelle*, 463 U.S. at 895.

The legislators are substantially likely to prevail on the merits, for all of the reasons detailed above. This Court, other courts of appeals, and the Texas Supreme Court have it right; the courts below, following trial courts applying their bespoke test, have it wrong. Neither redistricting nor Texas legislators are excepted from the twin safeguards of legislative immunity and privilege. *See In re Perry*, 60 S.W.3d at

862 (discovery of Texas officials in redistricting dispute was impermissible); *Lee*, 908 F.3d at 1187-88 (depositions of local legislators in redistricting dispute was impermissible). Consistent with all this Court has said about legislative immunity and privilege, the Texas legislators may not be required to testify, absent some "extraordinary instance[]" not yet established here, *Arlington Heights*, 429 U.S. at 268, "whether or not legislators themselves have been sued," *Hubbard*, 803 F.3d at 1308.

II. Alternatively, There Is a Fair Prospect That the Court Would Grant Mandamus Relief.

Alternatively, if the Court were to conclude that the legislators' appeal is more properly a petition for writ of mandamus, a stay pending the disposition of a petition for a writ of mandamus is warranted too.[25] A court may issue a writ of mandamus when (1) the petitioner's "right to issuance of the writ is 'clear and indisputable'"; (2) "no other adequate means [exist] to attain the relief he desires"; and (3) "the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81. Each is met here. Indeed, because the Fifth Circuit motions panel seemingly already rejected the legislators' privilege claims on the merits—beyond denying the stay, a majority of the panel affirmed the depositions must proceed and then called the deposition procedures "admirably prudent," App.16—this Court could simply construe this application as a petition for writ of mandamus and order the subpoenas quashed now.

[25] As explained in the legislators' reply brief filed in support of their motion to stay in the Fifth Circuit, the legislators are seeking expedited review from the Fifth Circuit pursuant to §1291, as anticipated by Fifth Circuit precedent. *See Whole Woman's Health*, 896 F.3d 362, 367-68. But those forthcoming papers could also be construed as a petition for writ of mandamus in the alternative.

A. The legislators' right to mandamus relief is clear and indisputable. According to the Fifth Circuit panel, the legislators' depositions must proceed and they must give privileged testimony, over their legislative privilege objections. The legislators know of no other court of appeals, let alone this Court, that has curtailed a legislator's immunity and privilege in such a way.

This Court has qualified the privilege only in *Gillock*, a federal criminal prosecution, *supra*. But the Fifth Circuit panel appeared to be of the view that privilege is so qualified that legislators may always be deposed so as not "to prevent the discovery of non-privileged information" in depositions "or to prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege." App.16. The Fifth Circuit has transformed what was deemed "extraordinary" in *Arlington Heights* to the ordinary. For these reasons and those discussed above, §I.A-B, that treatment of privilege is clearly and indisputably at odds with this Court's precedents, and those of the other courts of appeals abiding by those precedents. Relief is clearly and indisputably warranted.

B. No other adequate means exist to attain relief. Absent an order staying the depositions now, the orders compelling the legislators' depositions will be effectively unreviewable on appeal from any final judgment. They have asked the district court to quash the depositions; the district court not only demurred, it also ordered the legislators to answer questions for which answers can ordinarily be refused on privilege grounds. App.4-5. Then the legislators asked the district court for a stay; the district court rejected that too. App.7. And when the legislators asked the Fifth

Circuit for a stay, the motions panel denied the requested relief and sided with the district court, affirming that the only path forward was for legislators to sit for depositions and give privileged testimony. App.16. Without a stay or an order quashing the subpoenas altogether, the depositions will proceed. And once the depositions occur, the harm is done. *Infra*, §III.A.

C. Mandamus would be appropriate under the circumstances. As this Court observed in *Cheney*, the "mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." 542 U.S. at 382. Here too, mandamus is necessary to prevent a lower court from interfering with Texas legislators' duties to discharge their own constitutional responsibilities. Texas legislators are no less entitled to protections "from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85; *see also Consumers Union*, 446 U.S. at 723-33 ("equat[ing]" protections for state and federal legislators). Respecting their invocation of privilege is no less necessary here to allow them "the breathing room necessary to make these choices in the public's interest," 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).

In sum, there is a fair prospect that the Court would grant mandamus relief or reverse the denial of the same. At the very least, a stay is warranted pending the

disposition of a mandamus petition. Or, in light of the Fifth Circuit panel's order, the Court could construe this application as a petition for writ of mandamus and quash the subpoenas.

III. The Balance of Harms and Public Interest Warrant a Stay.

Absent a stay, the legislators will suffer immediate and irreparable harm. *See Hollingsworth*, 558 U.S. at 190. In contrast, postponing or quashing depositions will cause little to no harm to plaintiffs who have ample discovery alternatives and a voluminous public record to explore before seeking discovery from legislators. There's also ample time for further appellate review before pressing ahead with the legislators' depositions. Discovery does not close until July 15, 2022, or later by agreement. Finally, legislative privilege is in service of "the public good," *Tenney*, 341 U.S. at 377, and the public interest will thus be harmed if the depositions proceed.

A. Legislators will be irreparably harmed if depositions are not stayed.

Once the depositions occur, the harm is done. Legislators are under a court order to give answers to every "question in full," App.4, even if questions elicit entirely privileged testimony. The legislators will do so before counsel for six dozen plaintiffs, and the testimony will then be reviewable *in camera* by the three-judge district court, empowered to decide if the already-given testimony becomes public.

1. There's nothing "prudent, cautious, vigilant, and narrow," App.16, about that compelled-disclosure order. It is especially worrisome here because there is every guarantee that, absent a stay, there will be potentially dozens of legislators deposed and forced to give privileged testimony. Days after the district court refused to quash

the deposition subpoenas, plaintiffs confirmed that they planned to use "many" of their 75 depositions for Texas legislators in the coming months.[26]

Meanwhile, there is no guarantee that, absent a stay, the district court will keep the privileged testimony out of the public record. The district court has injected doubt about whether legislative privilege will ultimately protect the legislators' testimony here. Even if that testimony would ordinarily be privileged, so goes the argument, plaintiffs' redistricting claims here might be more important than protecting the legislators' privilege. *See* App.3 (citing *Rodriguez* test for piercing privilege, observing that "state legislative privilege may be limited," and concluding that "[w]hether state legislative privilege applies will depend on a more detailed and nuanced facts"). Earlier in these proceedings, the same district court remarked that if legislators are right about the scope of the privilege, then "[s]tate legislative privilege in this context raises serious questions about whether this Court (or any court) could ever accurately and effectively determine intent."[27] And the district court has suggested that an adverse inference might be appropriate for legislators invoking privilege. The district court's preliminary injunction opinion discussed a state senator's invocation of privilege at the hearing; according to the court, her invocation of privilege "strengthen[ed] the inference that her previously stated reasons for redrawing [the senate district at issue] were, at best, highly incomplete and, at worst, disingenuous."[28] In short, plaintiffs are poised to depose "many" legislators, who will be

[26] Pls. Resp. to Legislator's Emergency Mot. for a Stay Pending Appeal 18, *supra.*
[27] Opinion Denying Preliminary Injunction 50 n.14, ECF No. 258.
[28] *Id.* at 50.

required to give privileged testimony in a district court that might then pierce the privilege altogether.

This Court has previously stayed similar orders requiring disclosure of privileged materials for *in camera* review. Take *In re United States*, 138 S. Ct. 371 (2017), where the district court ordered the government to produce materials protected by deliberative-process privilege and "lodge full copies of such materials" so that the court could "review and rule on each item," *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 2017 WL 4642324, at *8 (N.D. Cal. Oct. 17, 2017). Perhaps the court below would have thought that approach "admirably deliberate and cautious." App.15. But this Court did not. This Court stayed the disclosure order "pending disposition" of the government's mandamus and certiorari petitions, affording the government sufficient time to file both. *In re United States*, 138 S. Ct. at 371. Likewise, here, the district court's order compelling the legislators to air their privileged testimony for both counsel and the district court is improper, and assuring *in camera* review by the district court does not cure the error.

2. The Fifth Circuit's focus on the district court's "procedure" also ignores the very nub of the legislators' argument: Legislative immunity and privilege prevent the United States and private plaintiffs from calling the legislators to testify at this time. Why? Because subjecting the legislators to depositions—absent any effort to establish some extraordinary circumstance warranting that extraordinary discovery—subjects legislators to the burden of defending themselves in litigation over any legislation. That contravenes the very purpose of legislative immunity and privilege. *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"). The legislators cannot recover the time spent in depositions, nor can counsel or the court un-hear the privileged testimony given. Absent a stay, those harms caused by the district court's order will take full effect. Once a legislator's deposition proceeds, that legislator's arguments about his ability to be deposed are largely moot. That harm warrants a stay now. *Cf. John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers); *U.S. Servicemen's Fund v. Eastland*, 488 F.2d 1252, 1254 (D.C. Cir. 1973) ("decisive element" for stay was that "unless a stay is granted this case will be mooted"), *rev'd on other grounds sub nom. Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 (1975).

Once the deposition occurs, especially in light of the district court's novel procedure compelling privileged testimony, "the cat is out of the bag" as far as the legislator is concerned. *In re Kellogg Brown & Root*, 756 F.3d at 761 (Kavanaugh, J.). That "forced disclosure of privileged material" constitutes "irreparable harm." *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir. 1997); *see John Doe*, 488 U.S. at 1308 (Marshall, J., in chambers) (issuing a stay after recognizing harm caused by forced disclosure of FOIA-exempted, protected materials). The harm is "the intrusion of the deposition itself," and excluding a party from using that testimony after-the-fact does nothing to erase that harm already endured by the third-party legislators. *In re U.S. Dep't of Educ.*, 25 F.4th at 705; *see In re Kellogg Brown & Root,* 756 F.3d at 761 ("privileged materials will already have been released"); *see also Mohawk*, 558 U.S. at 110 (relief

warranted where "litigants [are] confronted with a particularly injurious or novel privilege ruling").

B. A stay of the depositions will not harm plaintiffs more than the absence of a stay will irreparably harm the legislators.

1. As an initial matter, there are no timing concerns that could foreclose a stay. There are nearly two months left in the discovery period, or more by agreement of the parties, *supra* n.22. And the parties' trial is more than four months away, *id.* Plaintiffs' "interest in receiving this information immediately," even if a "significant" interest, is not tantamount to "irreparable harm" if there are delays. *John Doe*, 488 U.S. at 1309 (Marshall, J., in chambers). And here, any temporary delays pale in comparison to the permanent harm to the legislators. Where "[r]efusing a stay" will lead to an "irreversible harm" to the legislators, but granting a stay will "do no permanent injury" to plaintiffs, a stay is warranted. *Philip Morris USA Inc v. Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in chambers).

2. Even if legislators' depositions were barred altogether, the harm to plaintiffs does not surpass the harm to legislators if the depositions proceed. Plaintiffs have access to alternative sources of discovery, a voluminous public record, and a forthcoming battle of expert witnesses—all of which is far more probative than any testimony that the legislators could provide. For example, the United States and plaintiffs intend to ask the legislators about, of all things, the *Gingles* standard, including their views on "political behavior, the history of discrimination, and socioeconomic disparities" in their districts. App.4. That is ordinarily the stuff of expert reports and expert depositions, not legislators as fact witnesses.

More fundamentally, this Court has repeatedly admonished that legislators cannot be subject to "the hazard of a judgment against them based upon … speculation as to motives," *Tenney*, 341 U.S. at 377, and that "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. There are good reasons for that—the probative value of any one legislator's motivations or impressions is weak at best, while the affront to federalism and comity is at its zenith. There are alternative means for probing legislative purpose, detailed by this Court in *Arlington Heights*, also involving allegations of invidious intent. *Id.* 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 that do not require legislators' depositions. *Id.* But when it comes to individual legislators, 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 this 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 revealed at a deposition, "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). For that reason, evidence of legislative purpose is ordinarily divined from the public record, *see Arlington Heights*, 429 U.S. at 267-68, alongside the healthy 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.

C. The public interest also calls for a stay.

Legislative privilege serves "the public good." *Tenney*, 341 U.S. at 377. It is necessary to safeguard legislative independence, *id.* at 372-77, to keep the legislators focused on the task of legislating, and to avoid the burdens of defending themselves in litigation, versus at the ballot box, *Dombrowski*, 387 U.S. at 85; *accord Cheney*, 542 U.S. at 382 (recognizing that the "public interest" in "protecting" government officials from litigation "that might distract [them] from the energetic performance of [their] constitutional duties" was strong enough to satisfy the demanding mandamus standard). These interests, undoubtedly present here, warrant a stay. Protecting the privilege protects our system of representative democracy and, in turn, protects the public good.

IV. Alternatively, the Court Could Stay the Legislators' Depositions Pending its Decision in *Merrill*.

Plaintiffs' claims in the underlying litigation—and consequently, the permissible scope of discovery—will necessarily be affected by this Court's resolution of the

pending §2 cases in *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1087. *Merrill* will require resolving the interrelated questions of what §2 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"). Members of the Court have acknowledged that clarification of the "notoriously unclear and confusing" §2 caselaw is much needed. *Id.* at 881; *see id.* at 882-83 (Roberts, C.J., dissenting from grant of stay) (noting "that *Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim").

If *Merrill* is to "resolve the wide range of uncertainties arising under *Gingles*" this coming Term, *id.* at 883 (Roberts, C.J., dissenting), and if the United States' and plaintiffs' §2 claims here present those same uncertainties, then that cautions against proceeding with the "extraordinary" litigation tactic of calling legislators to testify about the *Gingles* standard or redistricting more broadly. *Arlington Heights*, 429 U.S. at 268. It presents substantial risk that deposing legislators now could 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 this Court clarify §2 in such a way that parties demand to depose legislators yet again in light of *Merrill*. Just as this Court has stayed discovery pending its disposition of the

underlying merits of cases,[29] this Court could and should stay legislators' depositions here pending the forthcoming clarification of the metes and bounds of redistricting plaintiffs' §2 claims.

CONCLUSION

The legislators respectfully request that the Court grant their application for an emergency stay, postponing the legislators' depositions pending the disposition of the appeal in the Fifth Circuit and disposition of a petition for writ of certiorari, if such writ is sought, or alternatively pending the disposition of a petition for writ of mandamus. In the alternative, the Court can construe this stay application as a mandamus petition and order the deposition subpoenas quashed. Or in the alternative, the Court can stay legislators' depositions altogether pending its decision in *Merrill*.

[29] *See, e.g.*, *In re United States*, 138 S. Ct. at 371 (staying discovery orders pending petitions for writ of mandamus or in the alternative certiorari); *Trump v. Deutsche Bank AG*, 140 S. Ct. 660 (2019) (staying order requiring disclosure pending further order of the Court); *John Doe*, 488 U.S. at 1310 (Marshall, J., in chambers) (staying order requiring disclosure pending disposition of certiorari petition); *In re Dep't of Commerce*, 139 S. Ct. at 16-17 (staying Commerce Secretary's deposition until disposition of mandamus or certiorari petition).

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