IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMMON CAUSE FLORIDA, *et al*.,

Plaintiffs,

Case No. 4:22-cv-00109-AW-MAF

v.

CORD BYRD, in his official capacity as Florida Secretary of State, *et al*.,

Defendants.
_____/

SIX LEGISLATORS' MOTION TO QUASH DEPOSITION SUBPOENAS OR ALTERNATIVELY FOR PROTECTIVE ORDER

Plaintiffs have served document and deposition subpoenas on six current and former members of the Florida Legislature (the "Legislators").[1] The Legislators—all non-parties—respectfully move the Court to quash the deposition subpoenas on the basis of the legislative privilege and the apex doctrine.

[1] The six Legislators are Chris Sprowls and Wilton Simpson, who served as Speaker of the Florida House of Representatives and President of the Florida Senate during the recent redistricting, and State Representatives Thomas Leek, Tyler Sirois, Randy Fine, and Kaylee Tuck. Representatives Leek and Sirois served as the Chairs, and Representatives Fine and Tuck as the Vice Chairs, of the House Redistricting Committee and the House Congressional Redistricting Subcommittee, respectively.

INTRODUCTION

The Supreme Court, the Eleventh Circuit, and this Court have all identified the sources of evidence available to plaintiffs to prove intentional racial discrimination—and those sources do not include the compelled testimony of state legislators over their objection. Yet time and time again, despite the multiple avenues of objective evidence available to plaintiffs in equal-protection cases, those plaintiffs pursue depositions of state legislators instead—no matter how often courts reaffirm the legislative privilege, which fundamentally protects the integrity and independence of the legislative branch.

This Court should quash the deposition subpoenas. For more than five hundred years, legislative immunity and privilege have safeguarded the integrity and independence of the legislative process and assured that fear of personal repercussions does not sway the votes of lawmakers or chill the freedom of speech and action in legislative deliberations. "The legislative privilege is important," *In re Hubbard*, 803 F.3d 1298, 1307 (11th Cir. 2015), as it allows legislators to vote with fidelity to the ballot box and to their consciences, without fear of personal burdens, hardships, threats, or reprisals.

That is why federal courts have consistently prohibited compelled depositions of legislators in important constitutional cases—even in cases that challenge election laws, such as redistricting legislation, or that require evidence of legislative purpose. All of these cases are important, but when lawmakers are personally entangled in civil litigation because of their legislative speech and conduct, the legislative process itself

is harmed. Courts have accordingly required litigants to find their evidence elsewhere, without the compelled testimony of legislators or intrusions on the legislative branch.

The apex doctrine also bars the proposed depositions. The Legislators are high-ranking government officials, and Plaintiffs cannot show that the information sought from the Legislators is essential to their case and unavailable from alternative sources or by less burdensome means. Because ample avenues of more probative information are readily available to Plaintiffs, the apex doctrine prohibits the proposed depositions.

Finally, even if the Court permits the depositions (which it should not), it should prohibit Plaintiffs from video-recording the depositions. The potential for misuse of video recordings in the hands of political opponents is self-evident—and substantially outweighs any minor benefit of a video recording over a traditional, written transcript.

ARGUMENT

I. THE FEDERAL LEGISLATIVE PRIVILEGE PROTECTS THE LEGISLATORS FROM COMPELLED DEPOSITIONS.

The legislative privilege prohibits depositions of state legislators—such as the Legislators here—with respect to their legislative duties. The privilege applies even—or especially—in important cases, and where the motives of the legislative branch are relevant. Plaintiffs are not entitled to interrogate legislators regarding their role in the enactment of Florida's new congressional districts. The subpoenas should be quashed.

A. The Legislative Privilege Safeguards the Legislative Process.

For five centuries, the twin doctrines of legislative immunity and privilege have secured lawmakers from suffering personal hazard or hardship on account of their performance of their official duties, and have thus safeguarded the legislative process from improper interference and intimidation.[2] The privilege reflected Parliament's assertions of independence from the British Crown and secured a freedom of speech and action to colonial assemblies even in the throes of revolution. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). It was considered so essential to the success of representative government that it was codified in the English Bill of Rights of 1689 and, as to members of Congress, in the Constitution's Speech or Debate Clause. *Id*. at 372–73.

The legislative privilege promotes four important purposes. *First*, by securing lawmakers from personal entanglement in judicial proceedings, it removes personal considerations from the lawmaking calculus and promotes the "uninhibited discharge" of legislative duties. *Id*. at 377. "In order to enable and encourage a representative . . . to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from

[2] Legislative immunity shields legislators from civil or criminal liability, while the legislative privilege relieves them of the obligation to furnish evidence. *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). These doctrines are "corollar[ies]," *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018), or "parallel" concepts, *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011), and are generally construed in tandem, *see, e.g.*, *In re Hubbard*, 803 F.3d at 1307–08, 1310 (relying on legislative-immunity cases to define the privilege).

the resentment of every one . . . to whom the exercise of that liberty may occasion offense." *Id*. at 373 (quoting II WORKS OF JAMES WILSON 38 (James De Witt Andrews ed., 1896)); *accord United States v. Gillock*, 445 U.S. 360, 369 (1980) (noting that British monarchs used "judicial process" to exert pressure on members of Parliament and "make them more responsive to their wishes"); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1061 (11th Cir. 1992) ("For our founding fathers, then, the growth of democracy and the right of the nation's legislators to be free from civil suit went hand-in-hand."). In particular, the privilege protects legislators from "political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011); *accord Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) (explaining that the privilege enables legislators to "discharge their public duties without concern of adverse consequences outside the ballot box"). "Private civil actions also may be used to delay and disrupt the legislative function." *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 503 (1975). By guarding state legislators from threats or apprehension of their personal entanglement in judicial proceedings, the legislative privilege assures that such considerations neither coerce nor influence public policy.

Second, the privilege assures that the prospect of compelled testimony does not chill the freedom of speech and action in legislative deliberations. *Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012) (Hinkle, J.). "Freedom of speech

and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney*, 341 U.S. at 372; *accord* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 863 (1833) (explaining that the "freedom of speech and debate" is a "great and vital privilege," "without which all other privileges would be comparatively unimportant, or ineffectual"). To protect this freedom, the Speech or Debate Clause assures that members of Congress will not be made to answer in a judicial forum for their legislative conduct. *Gravel v. United States*, 408 U.S. 606, 616 (1972). And federal common law recognizes that state legislators enjoy a privilege "similar in origin and rationale" to that secured by the Speech or Debate Clause. *In re Hubbard*, 803 F.3d at 1310 n.11.[3]

Third, the legislative privilege protects lawmakers from the burdens that civil litigation imposes on their time, energy, and attention, and thus permits them to "focus on their public duties." *Id*. at 1310 (quoting *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181); *accord Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (explaining that legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves"); *In re Hubbard*, 803 F.3d at 1311

[3] With exceptions not applicable here, federal common law, as developed "in the light of reason and experience," governs assertions of privilege. Fed. R. Evid. 501; *see also In re Hubbard*, 803 F.3d at 1307 (recognizing the federal legislative privilege under Rule 501).

(explaining that a "primary purpose of the legislative privilege" is to "shield[] lawmakers from the distraction created by inquiries into the regular course of the legislative process"). The privilege thus extends to discovery requests—even when the lawmaker is not a party—because compliance with discovery requests "detracts from the performance of official duties." *In re Hubbard*, 803 F.3d at 1310. A litigant need not name legislators as parties to a suit to "distract them from their legislative work. Discovery procedures can prove just as intrusive." *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988), *quoted in In re Hubbard*, 803 F.3d at 1310.

Fourth, "and perhaps most importantly," the legislative privilege embodies "the respect due to a coordinate branch of government." *Florida*, 886 F. Supp. 2d at 1303; *see also Gillock*, 445 U.S. at 373 (discussing "principles of comity" in support of the legislative privilege). Quite simply, "the exercise of legislative discretion should not be inhibited by judicial interference." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *accord Eastland*, 421 U.S. at 503 (explaining that, in a civil action brought by private litigants, "judicial power is still brought to bear on Members of Congress and legislative independence is imperiled"). "Legislators ought not to call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not to compel unwilling legislators to testify about the reasons for specific legislative votes." *Florida*, 886 F. Supp. 2d at 1303; *accord In re Grand Jury*,

821 F.2d 946, 957 (3d Cir. 1987) (explaining that "the legislator's need for confidentiality is similar to the need for confidentiality in communications between judges"); *cf. Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 628 (1st Cir. 1995) (explaining that the associated doctrine of legislative immunity "touches upon policies as basic as federalism, comity, and respect for the independence of democratic institutions").

The "fundamental concern" of the privilege, therefore, is not the "maintenance of confidentiality," *Pulte Home Corp. v. Montgomery Cnty.*, No. 14-cv-03955, 2017 WL 2361167, at *8 (D. Md. May 31, 2017), but instead protection of the legislative process from the harms that result when unwelcome entanglement in civil litigation inhibits lawmakers in the discharge of legislative duties. Most courts have recognized the higher interests at stake and diligently protected the legislative process from those harms.

B. The Legislative Privilege Applies to Inquiries Into Legislative Motivations.

It is no surprise, then, that the Eleventh Circuit has recognized the importance of the legislative privilege and its "deep roots in federal common law." *In re Hubbard*, 803 F.3d at 1307.[4] The privilege "protects the legislative process itself" and applies to all actions taken "in the proposal, formulation, and passage of legislation." *Id*. at 1308.

[4] This Court has questioned whether Eleventh Circuit precedent binds a three-judge district court. ECF No. 115 at 7 n.2. No matter the answer, *In re Hubbard* is a significant and well-reasoned decision that courts across the country have cited with approval.

The privilege "applies with full force against requests for information about the motives for legislative votes and legislative enactments." *Id*. at 1310; *see also id*. ("The legislative privilege protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." (internal marks omitted)). The privilege "would be of little value" if a plaintiff's suspicions regarding the motives of legislators could overcome it. *Tenney*, 341 U.S. at 377. Thus, the "claim of an unworthy purpose does not destroy the privilege." *Id*. A federal judicial inquiry into the motives of state legislators is "not consonant with our scheme of government," *id*., and "strikes at the heart of the legislative privilege," *In re Hubbard*, 803 F.3d at 1310.

Thus, in *Florida*, the court recognized the privilege and refused to compel state legislators to sit for deposition in a challenge to state laws under section 5 of the Voting Rights Act. The respect due to a coordinate branch of government, the burden of compelled testimony on legislators, and the chilling effect of compelled testimony on the freedom of speech and communication in legislative deliberations all supported the privilege. 886 F. Supp. 2d at 1303. That "discriminatory purpose" was relevant was immaterial: "legislative purpose is an issue in many other cases." *Id*. And while claims under the Voting Rights Act "are important, . . . so are equal-protection challenges to many other state laws, and there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases." *Id*. at 1304. For these reasons, the court

concluded that "the legislators have a federal legislative privilege—at least qualified, if not absolute—not to testify in this civil case about the reasons for their votes." *Id*.

In *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018), the plaintiffs sought to depose three city-council members to support their allegation that race was the predominant motive in the design of three city-council districts. The court, however, affirmed the district court's issuance of a protective order. *Id*. at 1186–88. It explained that local officials, like state and federal lawmakers, must be permitted "to discharge their public duties without concern of adverse consequences outside the ballot box" and without the tax that litigation would impose on their time, energy, and attention. *Id*. at 1187. If the privilege were overcome "whenever a constitutional claim directly implicates the government's intent," then the privilege would have little value. *Id*. at 1188.

In *Martinez v. Bush*, No. 1:02-cv-20244-AJ (S.D. Fla. May 31, 2002) (Jordan, J.) (ECF No. 201), a three-judge district court refused to permit depositions of six state legislators in an equal-protection challenge to congressional districts, *see* Ex. A, even though the claims there (as here) required proof of racially discriminatory purpose, *see Martinez v. Bush*, 234 F. Supp. 2d 1275, 1280 (S.D. Fla. 2002). The court explained that "state legislators are entitled to absolute immunity for their legislative activities, and this immunity functions as a testimonial privilege concerning the motivations for engaging in such activities." Ex. A at 2. The court even barred the plaintiffs

from questioning a legislative staff member about the motivations of individual lawmakers, even though the staff member had served an expert report and thus subjected himself to deposition. *Id*.

It is well-established, therefore, that the privilege does not yield merely because the plaintiff must offer evidence of legislative purpose. On the contrary, inquiries into legislative motive or purpose are among the most sensitive and intrusive inquiries into the legislative process. The privilege provides broad protection against these inquiries.

C. The Legislative Privilege Prohibits the Proposed Depositions.

The legislative privilege protects the Legislators from the proposed depositions. To permit compelled interrogation into the Legislators' legislative activities—and the motives for those activities—would violate the privilege and frustrate "the republican values it promotes." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. And if Plaintiffs may depose the Legislators, then so may anyone else who files a similar pleading.

Courts have consistently rejected efforts to compel state legislators to testify in similar civil-rights cases. The privilege has insulated state legislators from compelled participation in redistricting cases that feature racial-gerrymandering claims, and thus turn on legislative motive, *Lee*, 908 F.3d 1175 (city-council districts); *Atkins v. Sarasota Cnty.*, No. 8:19-cv-03048 (M.D. Fla. Feb. 4, 2020) (ECF No. 17) (county-commission districts); *Martinez v. Bush*, No. 1:02-cv-20244-AJ (S.D. Fla. May 31, 2002) (ECF No. 201) (congressional districts), in a challenge to state election laws under the

Fourteenth and Fifteenth Amendments and section 2 of the Voting Rights Act, *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 453–58 (N.D. Fla. 2021) (Walker, J.), and in a preclearance action under section 5 of the Voting Rights Act, which turns on legislative purpose, *Florida*, 886 F. Supp. 2d 1301. Despite the importance of these cases and the centrality of legislative motive or purpose to their resolution, the courts turned away attempts to encroach on the legislative process and coerce legislator testimony.

Here, Plaintiffs intend to depose the Legislators regarding the redistricting process, how the process unfolded, the Legislators' role in enacting the challenged law, their role in supporting or opposing alternative proposals, and the extent to which race was a factor in the decision-making calculus—*i.e.*, legislative motive.[5] Each of these topics invades sensitive regions of the legislative process and actions taken in a legislative capacity. To the extent Plaintiffs seek information about the objective mechanics of the redistricting process, that information is already available to them in the ample public record.

Redistricting is important, but so too are many cases. And the importance of the case only enhances the importance of the legislative privilege. It is in momentous and contentious affairs—not in prosaic ones—that legislative independence, like judicial

[5] Plaintiffs' counsel provided this summary during the parties' conferral under Local Rule 7.1(B).

independence, is most essential to the faithful discharge of public duties. *See Tenney*, 341 U.S. at 377 ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."). The privilege assures that legislators remain accountable to *all* voters at the ballot box and do not bend to a fear of litigation. *See Yeldell*, 956 F.2d at 1061 ("[F]or a democratic government to function democratically, our elected officials, when acting in their legislative capacity, must answer only to their constituents and only on election day.").

The legislative privilege thus secures the Legislators from compelled testimony here, just as it protects legislators from deposition in constitutional challenges to state laws across the country. This Court should sustain the privilege and quash Plaintiffs' deposition subpoenas.

D. The Legislative Privilege Is Not Subject to an Amorphous "Balancing Test."

Plaintiffs are likely to argue that the legislative privilege is not absolute and that its application hinges on a case-by-case, five-factor "balancing test" applied by some district courts. But these factors—sometimes called the *Rodriguez* factors, *see Favors v. Cuomo*, 285 F.R.D. 187, 205 (E.D.N.Y. 2012)—are not an appropriate method to analyze the legislative privilege, and no federal appellate court has ever applied them.[6]

[6] The five factors are: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their

A case-by-case balancing test is an especially inapt and incongruous method of analyzing the legislative privilege. An important purpose of the privilege is to secure state legislators from "deterrents to the uninhibited discharge of their legislative duty," *Tenney*, 341 U.S. at 377—that is, to provide them with the *certainty* and *predictability* that are essential to the confident exercise of legislative duties. As long as a legislator's subjection to deposition hinges on a subjective, case-by-case balancing test, the ever-present threat of deposition will continue to shadow all aspects of a legislator's duties. Unable to predict how five factors might be balanced in litigation that has not been filed, legislators will be denied the security that the privilege was intended to afford, and the privilege will do little to protect the freedom of speech and action in legislative bodies.

No federal appellate court has applied or even mentioned the *Rodriguez* factors in any analysis of the privilege. Rather, federal appellate courts have recognized one clear and categorical carveout from the privilege: the enforcement of federal criminal statutes. This bright-line approach is more consonant with the purpose of the privilege: to protect legislators from the inhibiting effect of the threat of compelled depositions.

In *Gillock*, a state legislator was indicted on federal bribery charges. Asserting the privilege, the legislator sought to suppress all evidence of his legislative acts. 445

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secrets are violable." *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y. 2003) (quoting *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979)) (internal marks omitted).

U.S. at 362–63. The Court rejected this assertion of legislative privilege, explaining that a privilege so expansive would "impair the legitimate interest of the Federal Government in enforcing its criminal statutes." *Id*. at 373. Though *Tenney* had affirmed a state legislator's immunity from civil liability, the Court distinguished *Tenney* on the ground that, while federal criminal liability had always operated as a restraint on state officials, *Tenney* "was a civil action brought by a private plaintiff to vindicate private rights." *Id*. at 372. The Court explained that "*Tenney* and subsequent cases on official immunity have *drawn the line at civil actions*." *Id*. at 373 (emphasis added). The Court held that the legislative privilege yields "where important federal interests are at stake, as in the enforcement of federal criminal statutes." *Id*.; *see also United States v. Nixon*, 418 U.S. 683 (1974) (rejecting claims of executive privilege in criminal proceeding).

In *In re Hubbard*, the Eleventh Circuit expressly declined to decide whether the privilege could ever be overcome in a civil action, 803 F.3d at 1312 n.13, but it noted the "fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government," *id*. at 1311–12; *cf*. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 384 (2004) (explaining, in the context of the executive privilege, that the distinction between civil and criminal cases "is not just a matter of formalism" and that the "need for information for use in civil cases . . . does not share the urgency or significance of the criminal subpoena requests" in *Nixon*). In *Florida*, Judge Hinkle recognized the distinction between civil and criminal cases, explaining

that *Gillock* distinguished *Tenney* "on the ground that it was a civil case," but concluding that, "even if the state legislative privilege is qualified in civil as well as criminal cases, there is no reason not to recognize the privilege here." 886 F. Supp. 2d at 1304.

These principles prohibit the proposed depositions here. This is a civil case, not a criminal prosecution. The Legislators here are not parties to the case. The Legislators also do not assert the privilege (as in *Gillock*) to exclude evidence of their legislative acts. Instead, the Legislators assert the legislative privilege in a civil action brought by private parties who seek to hale them into court to furnish evidence of their conduct and motives in the enactment of legislation. No federal appellate court has ever identified any "important federal interests" that would remove equal-protection claims in redistricting cases (like federal criminal prosecutions) from the scope of the privilege. *Tenney*, 445 U.S. at 373. The legislative privilege applies here, just as it did in *Florida*.

The *Rodriguez* factors were not developed with the legislative privilege in mind and disserve the purposes of the legislative privilege. First formulated in *In re Franklin National Bank Securities Litigation*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), which concerned an assertion of the official-information privilege by an office of the United States Treasury Department, the *Rodriguez* factors have often been applied to evaluate assertions of the deliberative-process and law-enforcement privileges, which together comprise the official-information privilege, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 5:56 (4th ed. 2019), and the bank-examination

privilege, a "close cousin" of the official-information privilege, *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1423–24 (D.C. Cir. 1998).

It was not until 2003—480 years after Sir Thomas More asserted the legislative privilege, *Tenney*, 341 U.S. at 372—that the *Rodriguez* factors were transplanted from their proper terrain and applied to the legislative privilege. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y. 2003).[7] Since then, a handful of district courts have weighed the *Rodriguez* factors to determine the limits of the legislative privilege.

Courts created the *Rodriguez* factors to evaluate different privileges that serve different purposes. The deliberative-process privilege, for example, applies only to documents that were prepared to assist agency decision-makers and express opinions on legal or policy questions. *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1263 (11th Cir. 2008). It has no historical pedigree approaching that of the legislative privilege; the first case to use the term "deliberative-process privilege" was *Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242, 248 (D.C. Cir. 1977). The court that first articulated the *Rodriguez* factors described the official-

[7] April 18, 2023, will mark the 500th anniversary of Sir Thomas More's petition to Henry VIII to extend to each member of the House of Commons "your most gracious licence and pardon, freely without doubt of your dreadful displeasure, . . . to discharge his conscience, and boldly in everything incident among us, to declare his advice." WILLIAM ROPER, THE LIFE OF SIR THOMAS MORE 17 (S.W. Singer ed., 1822).

information privilege as a "discretionary" privilege "that depends on Ad hoc considerations," *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 582 (quoting *United States v. Article of Drug Consisting of 30 Individually Contained Jars More or Less*, 43 F.R.D. 181, 190 (D. Del. 1967))—a far cry from the legislative privilege. And the district courts that have applied the five *Rodriguez* factors to the legislative privilege have not convincingly explained why those factors, designed for a different purpose, should confine—and water down—a centuries-old privilege that has vitally protected the integrity of the representative branch of government since the reign of Henry VIII.

The legislative privilege is more analogous to the privilege that the Speech or Debate Clause affords members of Congress than to the official-information privilege. *See United States v. Johnson*, 383 U.S. 169, 180 (1966) (finding "parity" between the common-law legislative privilege and the privilege afforded by the Speech or Debate Clause); *In re Hubbard*, 803 F.3d at 1310 n.11 (explaining that "state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded to Congressmen under the Speech or Debate Clause" (internal marks omitted)); *Star Distribs., Ltd. v. Marino*, 613 F.2d 4, 8 (2d Cir. 1980) ("The shared origins and justifications of these two doctrines would render it inappropriate for us to differentiate the scope of the two without good reason."); *cf. Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009) (explaining that the immunity of state legislators and that provided to federal legislators under the Speech or Debate Clause are "essentially coterminous").

Tellingly, no court appears to have applied the five *Rodriguez* factors to the Speech or Debate Clause, which the Supreme Court has read "broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501.

E. If the Legislative Privilege Were Subject to a Balancing Test, Then It Would Still Prohibit the Depositions.

Even if the *Rodriguez* factors applied, they would not compel the depositions that Plaintiffs seek. Most fundamentally, the *Rodriguez* factors ask whether the need for the evidence—considering its relevance, the availability of other evidence, and the seriousness of the litigation—outweighs the purpose of the legislative privilege. Here, it does not.

1. *Relevance*. The testimony of a small number of legislators is only minimally relevant at best. As Judge Hinkle explained, such testimony "may be relevant" in the sense that it may "move the needle at least a little," *Florida*, 886 F. Supp. 2d at 1302—but not significantly. A single legislator's testimony as to his or her own motives "may not say much about the actual overall legislative purpose." *Id*. That is because, in any legislative assembly, there might be as many motives as members—and often more. *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("The number of possible motivations, to begin with, is not binary, or indeed even finite. . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist."). "What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co. v. State*

Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983); *accord United States v. O'Brien*, 391 U.S. 367, 383–84 (1968). Because courts "cannot lightly attribute to [a legislature] as a whole the impermissible motives of a few of its members," *Wiley v. Bowen*, 824 F.2d 1120, 1122 (D.C. Cir. 1984), the deposition testimony of individual lawmakers is "often less reliable and . . . less probative than other forms of evidence bearing on legislative purpose," *Am. Trucking Ass'ns, Inc.*, 14 F.4th 76, 90 (1st Cir. 2021); *accord Citizens for Const. Integrity v. United States*, --- F.4th ----, No. 21-1317, 2023 WL 142782, at *11 (10th Cir. Jan. 10, 2023) ("[T]he statements of a few legislators concerning their motives for voting for legislation is a reed too thin to support invalidation of a statute."). And in ascertaining the purpose of a legislature, "the stakes are sufficiently high . . . to eschew guesswork." *O'Brien*, 391 U.S. at 384.

For these reasons, the testimony of the six Legislators would have only minimal relevance. The challenged law passed with the support of 92 legislators—68 votes in the House and 24 in the Senate. Fla. H.R. Jour. 30 (Spec. Sess. C 2022); Fla. S. Jour. 10 (Spec. Sess. C 2022). The testimony of six legislators would present only a fraction of the complete picture, revealing nothing about the motives of 86 of 92 members who voted for the bill. And even the "vote of a sponsor is only one vote." *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021).

2. *The availability of other evidence*. When assessing legislative motive, courts place greater weight on objective evidence than on the statements of legislators. *Fleming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."). In *Arlington Heights*, the Court set forth an illustrative list of the alternative sources to which courts may turn when assessing whether a legislature was motivated by racially discriminatory intent: (1) the impact of the challenged law on members of different races; (2) the historical background of the challenged law; (3) the specific sequence of events that produced the challenged law; (4) any departures from the normal procedural sequence; (5) any departures from substantive criteria that usually guide decision-makers; and (6) the legislative history, including reports, meeting minutes, and contemporaneous statements. 429 U.S. at 266–68; ECF No. 115 at 10–11. The Eleventh Circuit has identified three additional evidentiary sources for courts to consider: (7) the foreseeability of the disparate impact; (8) knowledge of the disparate impact; and (9) the availability of less discriminatory alternatives. *Greater Birmingham Ministries*, 992 F.3d at 1322. In November, this Court recognized each of these evidentiary sources and evaluated the sufficiency of Plaintiffs' allegations in light of these sources. ECF No. 115 at 10–11.

On the other hand, *Arlington Heights* cautioned that the compelled testimony of legislative and executive branch decision-makers represents a "substantial intrusion

into the workings of other branches of government," 429 U.S. at 268 n.18, and that, while public officials "might" be called to testify in "some extraordinary cases," "even then such testimony will frequently be barred by privilege," *id*. at 268 (citing *Tenney*).

Courts have thus recognized ample alternative sources of evidence that do not require depositions of lawmakers. All of these sources are accessible here without doing violence to a privilege that "protects the legislative process itself." *In re Hubbard*, 803 F.3d at 1308.

In enacting the challenged districts, the Legislature compiled a large legislative record that is available to the public online: bills, bill histories and analyses, legislative journals, video recordings of all floor proceedings and all 22 meetings of the House's and Senate's redistricting committees and subcommittees both before and during two legislative sessions, memoranda and correspondence, committee publications such as meeting packets and presentations, 72 congressional redistricting maps prepared by members of the public, written public comments, and all redistricting data and the map-drawing application used by legislative staff to prepare redistricting maps. The Legislature even created a redistricting website (https://www.floridaredistricting.gov) to facilitate easy access to this large legislative record, which is far more robust than the legislative record which accompanies most legislation. To the extent other relevant records exist, Florida has a broad public-records law of which Plaintiffs have already availed themselves. Fla. Const. art. I, § 24; Fla. Stat. § 11.4031. Given these sources,

the testimony of six of 92 supporters of the challenged law is unlikely to be especially probative.

Plaintiffs are well aware of these alternative sources of proof. Common Cause recently submitted 31 extensive public-records requests to the House and Senate and their members and staff. *See* Ex. B. The requests expressly note Common Cause's participation as a plaintiff in this litigation. *Id*.

Plaintiffs have also served document subpoenas on the six Legislators, separate and apart from their deposition subpoenas. Absent applicable objections, such as those founded on the attorney-client privilege, the Legislators will produce any responsive documents.

3. *The seriousness of the litigation.* While a challenge to congressional districts is serious, the seriousness of this litigation should be measured against the interest that justified abrogation of the legislative privilege in *Gillock*—a federal criminal bribery prosecution—and against the interests that were insufficient to overcome the privilege in *Lee*, *Florida*, *League of Women Voters*, *Atkins*, and *Martinez*—all of which involved constitutional challenges to state or local election laws, and some of which presented equal-protection challenges to district lines. This litigation, though serious, is not more serious than the claims asserted in *Lee*, *Florida*, *League of Women Voters*, *Atkins*, and *Martinez*—and does not approach in seriousness the criminal prosecution in *Gillock*.

4. *The government's role in the litigation*. This factor is "inapt in the legislative privilege context." *League of Women Voters of Fla., Inc.*, 340 F.R.D. at 457. This is so because the legislative privilege will ordinarily arise only when a plaintiff challenges legislative action and inquires into legislative purpose. *Id*. The State's role, therefore, is not a consequential factor when a court evaluates assertions of legislative privilege.

5. *The purpose of the legislative privilege*. For the reasons detailed above, the last and the most important factor tips the scales decidedly against the proposed depositions. The specter of compelled testimony introduces into the lawmaking process a fear of personal involvement in litigation and thus distorts decision-making and chills legislative debate. It diverts the time and energy of lawmakers from official duties and erodes the comity that should characterize relations between branches of government.

These concerns are pronounced in Florida, where the Legislature convenes in regular session for only 60 days in each year, *see* Fla. Const. art. III, § 3, and state law provides only part-time compensation for legislative service. Interference around the short window in which legislative work must be completed is especially problematic. But even when members are not in Tallahassee to conduct official business, the work continues. Year round, legislators meet with constituents and engage with policy while also earning a living, fulfilling family responsibilities, and campaigning for reelection. The prospect of being forced to furnish evidence that litigants will use to impugn their motives is no trifling matter. As lawsuits alleging improper legislative motive become

more common, the prospect of compelled participation in litigation could easily affect how members engage with controversial legislation, if not discourage public service altogether. "One must not expect uncommon courage even in legislators." *Tenney*, 341 U.S. at 377.

The balancing test does not support the proposed extraordinary intrusion into the workings of the legislative branch. Under any analysis, the deposition subpoenas should be quashed.

II. THE APEX DOCTRINE PROHIBITS THE PROPOSED DEPOSITIONS.

The apex doctrine shields high-ranking government officials from the distraction of depositions related to their official duties and in doing so enables them to focus their time, energy, and attention on public business. Because the Legislators are high-ranking government officials, and because Plaintiffs cannot carry their heavy burden to justify depositions of the Legislators, the apex doctrine also prohibits the proposed depositions.

The Supreme Court has cautioned that "the practice of calling high officials as witnesses should be discouraged." *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993) (citing *United States v. Morgan*, 313 U.S. 409 (1941)). High-ranking government officials "have greater duties and time constraints than other witnesses." *Id*. If they were subject to deposition in every case touching their official duties, their "time would be monopolized" by demands for testimony, and "the constant distraction

of testifying in lawsuits" would divert them from the performance of public duties. *Id*. The compelled appearance of high-ranking government officials in judicial proceedings, moreover, "implicates the separation of powers." *In re United States (Jackson)*, 624 F.3d 1368, 1372 (11th Cir. 2010) (noting that a 30-minute telephonic deposition of the Commissioner of the Food and Drug Administration would have "disrespected the separation of powers" (citing *In re United States (Kessler)*, 985 F.2d at 512)).

Once the official asserting the apex doctrine establishes that he or she is a high-ranking government official, the burden shifts to the party seeking discovery to "show a special need or situation compelling such testimony." *In re United States (Kessler)*, 985 F.2d at 512–13; *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21-cv-00186, 2021 WL 4962109, at *1 (N.D. Fla. Oct. 19, 2021). The deposition will be disallowed absent "exigent" or "extraordinary" circumstances. *In re United States (Kessler)*, 985 F.2d at 512–13. In determining whether the circumstances are "extraordinary," courts consider (1) whether the public official has personal knowledge of the subject matter; (2) whether the information sought is not only "relevant," but also "essential" to the case; and (3) whether the information can be obtained from alternative sources or by less burdensome means. *In re Off. of Utah Att'y Gen.*, 56 F.4th 1254, 1264 (10th Cir. 2022); *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999); *Spadaro v. City of Miramar*, No. 11-61607-CIV, 2012 WL 3614202, at *2–3 (S.D. Fla. Aug. 21, 2012).

The six Legislators are unquestionably high-ranking government officials. The Florida Constitution establishes their offices, provides for their election, and reposes the "legislative power of the state" in the legislative bodies to which they were elected. Fla. Const. art. III, § 1. Each is therefore a constitutional officer elected by Florida voters to serve among 40 members of the Florida Senate or 120 members of the Florida House. The Legislators also hold (or held) leadership positions in the Legislature: a former Speaker of the Florida House of Representatives, a former President of the Florida Senate, and the Chairs and Vice Chairs of the House Redistricting Committee and House Congressional Redistricting Subcommittee.[8] The Speaker and President are the biennially elected "permanent presiding officer[s]" of their respective chambers. Fla. Const. art. III, § 2. The Rules of the Florida House (in particular, Rule 2) and the Florida Senate (in particular, Rules 1.2 through 1.7) detail the specific powers, duties, and rights of the Speaker and the President. As Chairs and Vice Chairs in the House, Representatives Leek, Sirois, Fine, and Tuck also exercise duties and powers under legislative rules. For example, House Rule 7.3 authorizes Chairs to preside over committee meetings, establish meeting agendas, determine the order in which matters are to be considered, decide questions of order, and otherwise ensure the committee's orderly operation.

[8] The apex doctrine protects former high-ranking government officials as well. *Thomas v. Cate*, 715 F. Supp. 1012, 1049 (E.D. Cal. 2010).

Courts have consistently recognized that elected members of legislative bodies are high-ranking government officials entitled to invoke the apex doctrine. *See Link v. Diaz*, No. 4:21-cv-00271-MW-MAF (N.D. Fla. Jan. 4, 2023) (ECF No. 229) (state legislator); *League of United Latin Am. Citizens v. Abbott*, No. 3:21-cv-00259, 2022 WL 2866673, at *2 (W.D. Tex. July 6, 2022) (Speaker of the Texas House of Representatives); *Blankenship v. Fox News Network, LLC*, No. 2:19-cv-00236, 2020 WL 7234270, at *1 (S.D. W. Va. Dec. 8, 2020) (U.S. Senators); *Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d 437, 440–41 (S.D.N.Y. 2014) (U.S. House Majority Leader); *McNamee v. Massachusetts*, No. 4:12-cv-40050, 2012 WL 1665873, at *1 (D. Mass. May 10, 2012) (congressman); *Feldman v. Bd. of Educ. Sch. Dist. #1*, No. 1:09-cv-01049, 2010 WL 383154, at *1 (D. Colo. Jan. 28, 2010) (U.S. Senator). Courts have even applied the apex doctrine's protections to county commissioners. *See Bituminous Materials, Inc. v. Rice Cnty.*, 126 F.3d 1068, 1071 n.2 (8th Cir. 1997); *Watts v. Parr*, No. 1:18-cv-00079, 2019 WL 13175550, at *3 (M.D. Ga. Oct. 24, 2019); *Harding v. Cnty. of Dallas*, No. 3:15-cv-00131, 2016 WL 7426127, at *8 (N.D. Tex. Dec. 23, 2016).

Plaintiffs cannot carry their heavy burden to justify the depositions. *First*, they cannot show that the information known to the Legislators is "essential" to their case. Only information that is "necessary," *In re Off. of Utah Att'y Gen.*, 56 F.4th at 1264, or "absolutely needed," *In re U.S. Dep't of Educ.*, 25 F.4th 692, 703 (9th Cir. 2022),

is "essential" to a party's case. Here, as explained above, the testimony of individual lawmakers regarding their motives has minimal relevance to the motive or purpose of a collective body—indeed, courts have cautioned against reliance on such evidence—and ample sources of evidence outlined in *Arlington Heights* and *Greater Birmingham Ministries* are available to Plaintiffs (for example, in the legislative record and through public-records requests). This case presents no "special *need* or situation *compelling* such testimony." *In re United States (Kessler)*, 985 F.2d at 512 (citing *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982)) (emphases added); *see also Sweeney*, 669 F.2d at 546 (affirming refusal to compel Governor's deposition; finding that plaintiffs failed to show that information known to the Governor was "essential" to their case).[9]

Second, Plaintiffs did not exhaust all other avenues of information, or seek the information by less burdensome means, before they served subpoenas for deposition on six high-ranking legislative officials. Plaintiffs cannot therefore establish that any information they seek is unavailable from other sources or by less burdensome means.

For example, Plaintiffs have not awaited productions of documents in response to their document subpoenas and public-records requests. Nor have Plaintiffs sought to depose legislative committee staff on whose assistance and active participation the

[9] *Sweeney* was later abrogated on other grounds. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996).

Legislators relied.[10] Because Plaintiffs cannot demonstrate a special need compelling the depositions, the apex doctrine prohibits the depositions, and the subpoenas should be quashed.

III. EVEN IF THE DEPOSITIONS WERE APPROPRIATE, THE LEGISLATORS SHOULD NOT BE SUBJECT TO VIDEO-RECORDED DEPOSITIONS.

The potential for misuse of a video-recorded deposition in this context is self-evident. Members of a representative branch of government rely heavily on favorable public opinion. Their elections and their effectiveness depend on public support. They are accountable to voters at the ballot box and seek to cultivate the public's goodwill. In this litigation, they are non-parties, present not by choice but rather by compulsion.

A video-recorded deposition in the hands of a political opponent can easily become a tool of political warfare. The video recording will depict the witnesses under oath, subject to hostile interrogation into their motives and conduct—which, without more, can create an illusion of guilt or wrongdoing where none exists. A political opponent may be tempted for political purposes to exploit the opportunity to question a legislator on camera under the coercive restraints of federal discovery rules. After the deposition, the recording will be liable to grave misuse, either *in terrorem* or through public dissemination, perhaps after it is "cut and spliced" to heighten the prejudice to

[10] To be clear, legislative staff are entitled to assert—and likely would assert—the legislative privilege, *N.C. State Conf. v. McCrory*, No. 1:13-cv-00658, 2015 WL 12683665, at *6 (M.D.N.C. Feb. 4, 2015)—even if not entitled to apex protections. This Court need not reach the apex doctrine unless it finds the privilege inapplicable.

the witness. *See Mendez v. City of Chicago*, No. 18-cv-05560, 2019 WL 6210949, at *2 (N.D. Ill. Nov. 21, 2019) (describing the potential for abuse of video depositions).

District courts enjoy broad discretion for good cause to protect non-parties from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). It need not await the misuse of a video-recorded deposition before it may protect witnesses from a misuse that, once done, cannot be undone. *Willis v. CLECO Corp.*, No. 09-cv-02103, 2011 WL 13253345, at *2 (W.D. La. Mar. 3, 2011) (prohibiting video depositions where the "potential for abuse" outweighed "any positive potential use of video depositions"). Given the peripheral relevance of the testimony that the Legislators might offer, the unique potential for misuse of video recordings in the political arena outweighs any marginal benefit of a video recording over a traditional, written transcript.[11]

CONCLUSION

This Court should quash Plaintiffs' subpoenas for the Legislators' depositions.

LOCAL RULES CERTIFICATIONS

Counsel for the movants conferred with all adverse parties and thus complied with the attorney-conference requirement of Local Rule 7.1(B). Plaintiffs oppose this motion.

[11] Plaintiffs have expressed their willingness to treat any video recordings of the depositions as "confidential and sealed, subject to further order of the court," but this offer, while appreciated, does not remove the concerns expressed in this motion.

This motion contains 7,626 words and therefore complies with the word-count requirement of Local Rule 7.1(F).

Respectfully submitted,

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