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

COMMON CAUSE FLORIDA, et al.,

Plaintiffs,

v. Case No. 4:22-cv-109-AW/MAF

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

Defendants.
_____/

OPPOSED MOTION TO QUASH DEPOSITION SUBPOENAS

Governor Ron DeSantis, Deputy Chief of Staff to the Governor J. Alex Kelly, and General Counsel to the Governor Ryan Newman file this motion to quash deposition subpoenas. They are third parties to this litigation, involuntarily subpoenaed for depositions. Attached is their memorandum of law.

Respectfully submitted,

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Dated: February 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2023, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
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MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO QUASH DEPOSITION SUBPOENAS

Plaintiffs have taken the extraordinary step of subpoenaing Governor Ron DeSantis, Deputy Chief of Staff to the Governor Alex Kelly, and General Counsel to the Governor Ryan Newman (collectively, "Subpoena Recipients") for depositions. Instead of looking first to other sources of evidence and witnesses, Plaintiffs want to start from the highest levels of the Florida government. Courts uniformly disfavor this kind of "begin at the top and work down" tactic. And courts similarly avoid inquiring into government officials' subjective motivations, including in redistricting cases.

Rule 45 requires the Court to quash these subpoenas. The apex doctrine bars the Governor's deposition. Because the Governor is the highest-ranking executive branch official in Florida, his time is extremely valuable and dedicated to faithfully executing the laws. Plaintiffs cannot make the strong showing necessary to depose the Governor. Plaintiffs cannot articulate what unique *and* essential information only he has. Plaintiffs have at their disposal other witnesses, including the ability to ask certain questions of Deputy Chief of Staff Kelly and other likely deponents, and other evidentiary sources. *See* **Ex. 1** (Governor's Dec. in State Case). The Governor's deposition is separately barred by legislative privilege under binding Eleventh Circuit precedent. *See In re Hubbard*, 803 F.3d 1298, 1301-02 (11th Cir. 2015). Governors' "actions in the proposal, formulation, and passage of legislation" are covered by legislative privilege. *Id.* at 1307-08. Plaintiffs cannot "probe [the Governor's] subjective motivations," which "strikes at

the heart of the legislative privilege." *Id.* at 1310; *see also In re Paxton*, 53 F.4th 303, 309-10 (5th Cir. 2022) (barring deposition of state attorney general regarding his "personal 'thoughts and statements'"); Order 6, *In re Murthy*, No. 22-30697 (5th Cir. Jan. 5, 2023) (staying deposition of the former White House Press Secretary regarding "the meaning behind [her] statement[s]").

With respect to Mr. Kelly, counsel has agreed to permit plaintiffs in the related state-court redistricting litigation to depose Mr. Kelly, within the parameters of the state court's order in that ongoing case respecting the applicable state privileges. *See* **Ex. 2**, Order 4, *Black Voters Matter Capacity Building Inst., Inc. v. Byrd*, No. 2022-CA-666 (Fla. 2d Cir. Ct. Oct. 27, 2022) (hereafter, "State Court Order"). But counsel cannot agree to permit Mr. Kelly's deposition two times over. To further judicial economy and avoid undue burden on Mr. Kelly, a non-party, the Court should require Mr. Kelly's deposition for the state and federal plaintiffs to proceed simultaneously under the parameters set by the state court—routine in such litigation to minimize the burdens on witnesses facing multiple depositions in state-court and federal-court actions.[1]

Mr. Newman's deposition subpoena should be quashed entirely. Mr. Newman's testimony would be predominantly privileged. Attorney depositions are highly disfavored. There is simply no benefit to deposing Mr. Newman, and it would be unduly

[1] In fact, counsel for Defendants has made this offer to Plaintiffs in this case. Counsel for Plaintiffs have rejected it.

burdensome for him to sit for an all-day deposition and differentiate between non-privileged and privileged information. The apex doctrine also bars his deposition because Plaintiffs cannot show that Mr. Newman possesses unique, relevant, and non-privileged information that they can't obtain elsewhere.

BACKGROUND

After Florida enacted its congressional redistricting plan, plaintiffs challenged it in both state and federal court. That state and federal actions are proceeding simultaneously. *See* Order 14-15, ECF 115 (denying motion to stay federal proceedings).

On January 19, 2023, Plaintiffs in these federal proceedings issued subpoenas to depose Governor Ron DeSantis, Deputy Chief of Staff J. Alex Kelly, and General Counsel Ryan Newman. *See* **Ex. 3** (Governor Subpoena); **Ex. 4** (Kelly Subpoena); **Ex. 5** (Newman Subpoena). The subpoenas state that they are required to appear for depositions on February 21, 2023, and February 22, 2023. *Id.* The Governor, Mr. Kelly, and Mr. Newman are not parties to this case.[2]

Overlapping discovery issues have arisen in the state proceedings. The parties in the state litigation have agreed that Mr. Kelly can be deposed, within the parameters the state court set out in its order covering legislative privilege issues under state law.[3] In

[2] The Court has dismissed Governor DeSantis as an improperly named defendant. Doc.115 at 16.

[3] Issues of legislative privilege in the state-court case are governed by Florida law. Issues of legislative privilege in this federal case are governed by federal law. *See* Fed. R.

exchange, the state plaintiffs are not seeking the depositions of either the Governor, the General Counsel, or anyone else from the Executive Office of the Governor. With respect to Mr. Kelly's deposition, the state court has already recognized Mr. Kelly's involvement in redistricting legislation "fall[s] under the scope of the legislative privilege" for purposes of state law. **Ex. 2**, State Court Order 4. Per the court's order, Mr. Kelly is therefore protected from "revealing his thoughts or impressions or the thoughts or impressions shared with the Governor by staff." *Id.* at 5. He "may be questioned regarding any matter already part of the public record and information received from anyone not part of the Governor's Office," but "may not be questioned as to information internal to the Governor's Office that is not already public record (e.g., the thoughts or opinions of staff or those of the Governor)." *Id.* at 8-9.

Plaintiffs in this case have not yet deposed Mr. Kelly, and for the reasons explained below, any such deposition should occur once for all parties—not twice. As this Court acknowledged during an earlier hearing, it is prudent for overlapping discovery to involve all parties in the state and federal proceedings, thereby avoiding the burden of duplicative discovery regarding the same events. **Ex. 6**, Apr. 4, 2022, Hearing Tr. 34:9-16; *see also id.* at 8:12-20.

Evid. 501. Here, the state court's privilege parameters rested in part on federal caselaw, persuasive authority to the state court and binding authority here. *See* pp. 17-22, *infra*. Plaintiffs in this case are aware of the proceedings in the state court case, and the state court orders with respect to discovery are a matter of public record.

ARGUMENT

Under Rule 45, the Court "must quash or modify" a subpoena that "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(d)(A)(iii)-(iv). Such subpoenas are also limited by Rule 26. *EDST, LLC v. iApartments, Inc.*, 2022 WL 14022414, at *2 (M.D. Fla. Oct. 24, 2022); *see* Fed. R. Civ. P. 26(b)(1) (discovery is limited to "nonprivileged matter that is relevant … and proportional to the needs of the case," balancing "the importance of issues at stake," "the parties' relative access to relevant information," "the importance of the discovery in resolving the issues," and "whether the burden … of the proposed discovery outweighs its likely benefit"). The Court "must limit" discovery that is "unreasonably cumulative," can be obtained "from some other source that is more convenient, less burdensome, or less expensive," and is "outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). Applying these basic principles, the subpoenas issued to Governor DeSantis, Mr. Kelly, and Mr. Newman must be quashed.

I. The Court Should Quash Plaintiffs' Subpoena to Depose Governor DeSantis.

A. The Apex Doctrine Precludes Governor DeSantis's Deposition.

It is well settled that, under the apex doctrine or "*Morgan*" doctrine, involuntary depositions of high-ranking government officials are presumptively barred absent "extraordinary circumstances or a 'special need' for compelling the appearance of a high-ranking officer in a judicial proceeding." *In re United States* ("*EPA Adm'r*"), 624

F.3d 1368, 1373 (11th Cir. 2010); *see also United States v. Morgan*, 313 U.S. 409, 422 (1941) (observing that the Secretary of Agriculture "should never have been subjected to [deposition]").

The reason for imposing a high bar to deposing high-ranking officials is "obvious." *In re United States* ("*FDA Comm'r*"), 985 F.2d 510, 512 (11th Cir. 1993).[4] "High ranking government officials have greater duties and time constraints than other witnesses." *Id.* If high-ranking officials must "testify in every case," then their "time would be monopolized by preparing and testifying in such cases." *Id.*; *see also, e.g.*, *In re U.S. Dep't of Educ.*, 25 F.4th 692, 706 (9th Cir. 2022) (barring deposition of the former Secretary of Education); *Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199,

[4] In the Court's order dismissing Governor DeSantis as a defendant, the Court raised but did not decide "whether Eleventh Circuit precedent binds" the "three-judge district court." Doc.115 at 7 n.2 (citing Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and Democracy*, 107 Geo. L. J. 413, 438-55 (2019)). While some have taken the view that a three-judge court might not always be bound by circuit precedent, that view depends on which appellate court will ultimately review the particular decision of three-judge court. *See* Douglas & Solimine, *supra*, 107 Geo. L. J. at 438-40 ("'If our decision is reviewable only by the Supreme Court, logic suggests that we are not bound by circuit authority.'" (quoting *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio 2003) (Gwin, J., concurring))). This discovery dispute is appealable first to Eleventh Circuit, not to the Supreme Court. *See* 28 U.S.C. §1253 (limiting direct appeal to Supreme Court to three-judge court orders "granting or denying … an interlocutory or permanent injunction"); *compare, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2319-21 (2018) (appeal of order with practical effect of enjoining redistricting plan), *with Watkins v. Fordice*, 7 F.3d 453, 455 & n.2 (5th Cir. 1993) (appeal of fee award); *League of Women Voters v. Johnson*, 902 F.3d 572, 576-77 (6th Cir. 2018) (appeal of denial of motion to intervene in redistricting case); *In re Vos*, 2019 WL 4571109, at *1 (7th Cir. July 11, 2019) (appeal of discovery order in redistricting case). Accordingly, applicable Eleventh Circuit precedent is binding.

203 (2d Cir. 2013) (affirming order barring deposition of the New York City Mayor and the former Deputy Mayor); *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008) (barring depositions of the Chief of Staff to the Vice President); *Bogan v. City of Boston*, 489 F.3d 417, 424 (1st Cir. 2007) (affirming order barring deposition of the Boston Mayor); *In re United States* ("*Att'y Gen.*"), 197 F.3d 310, 312-13 (8th Cir. 1999) (barring testimony of the Attorney General and the Deputy Attorney General); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (barring deposition of FDIC directors); *In re Paxton*, 53 F.4th at 309-10 (staying attorney general's deposition); Order 8, *In re Murthy*, No. 22-30697 (5th Cir. Jan. 5, 2023) (staying press secretary's deposition).

To overcome the apex doctrine's burden, Plaintiffs must make a strong showing of "extraordinary circumstances" and "special need" based on the "record" evidence. *EPA Adm'r*, 624 F.3d at 1372; *EEOC v. Exxon Corp.*, 1998 WL 50464, at *1 (N.D. Tex. Jan. 20, 1998) (requiring a "strong showing"). That requires two things: First, Plaintiffs must "identify with particularity the information they need[ ]." *Lederman*, 731 F.3d at 203. Such information cannot be merely relevant; it must be "essential to the claims alleged by plaintiffs" and "absolutely needed for [the] case." *In re U.S. Dep't of Educ.*, 25 F.4th at 703-04; *see also DOJ*, 197 F.3d at 312-13 (requiring the same showing). Second, Plaintiffs must also proffer evidence that the high-ranking official "ha[s] first-hand knowledge" of that essential information that "[can]not be obtained elsewhere." *Lederman*, 731 F.3d at 203. Under Eleventh Circuit caselaw, the availability of "'alternate

witnesses"' bars discovery of the high-ranking official. *EPA Adm'r*, 624 F.3d at 1373 (quoting *FDA Adm'r*, 985 F.2d at 512). Plaintiffs cannot meet that high bar here.

1. The deposition will impede Governor DeSantis's ability to discharge his official duties and take valuable time away from his obligations as the highest-ranking executive official in Florida. *See FDA Comm'r*, 985 F.2d at 512; Fla. Const. art. IV, §1(a). As head of the government, the Governor must "take care that the laws" are "faithfully executed" throughout the state, and the Florida Constitution places the "administration of each [state] department" under his "direct supervision." Fla. Const. Art. IV, §1(a), §6. His time is especially valuable right now, with the legislative session about to begin on March 7. Among other duties, he must approve or veto legislation, recommend measures to the Legislature, and give the State of the State Address. Fla. Const. art. IV, §1(e); Fla. Const. art. IV, §1(e); Fla. Const. art. III, §8(a). He is constitutionally responsible "for the planning and budgeting for the state." Fla. Const. art. IV, §1(a). He must provide the Legislature with his "recommended balanced budget for the state, based on the Governor's own conclusions and judgment." Fla. Stat. §216.162(1); *see also* §§216.163-216.168 (additional provisions regarding the Governor's recommended budget and recommended revenues). Consistent with those duties, Governor DeSantis and his staff just recently recommended a balanced budget that totaled over $110

billion.[5] The Governor's office will now be shepherding that proposal through the legislative process.

Unsurprisingly in light of their all-consuming obligations, state governors are routinely shielded from depositions. *See, e.g.*, *Little v. JB Pritzker for Governor*, 2020 WL 868528, at *2-3 (N.D. Ill. Feb. 21, 2020) (Illinois Governor); *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 698-99 (D.N.M. 2019) (New Mexico Governor); *EMW Women's Surgical Ctr., PSC v. Glisson*, 2017 WL 3749889, at *3 (W.D. Ky. Aug. 30, 2017) (Kentucky Governor); *Hernandez v. Tex. Dep't of Aging & Disability Servs.*, 2011 WL 6300852, at *4 (W.D. Tex. Dec. 16, 2011) (Texas Governor); *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1049 (E.D. Cal. 2010) (California Governor); *New York v. Oneida Indian Nation of N.Y.*, 2001 WL 1708804, at *3 (N.D.N.Y. Nov. 9, 2001) (New York Governor).

So too in Florida. Requiring Governor DeSantis to sit for a deposition would impede his ability to discharge his role as the State's chief executive. *See FDA Comm'r*, 985 F.2d at 512; Fla. Const. art. IV, § 1(a). Any such deposition would require Governor DeSantis "'to take valuable time away from" his daily duties and matters of statewide importance, and on the eve of the legislative session. *EPA Adm'r*, 624 F.3d at 1372. In light of these ongoing duties to the State, the Governor cannot be required to spend

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[5] *See* "Framework for Freedom Budget 2023-24," frameworkforfreedombudget.com/PDFLoader.htm?file=HomeFY24.pdf

days preparing for and then attending a deposition. *See FDA Comm'r*, 985 F.2d at 512-13 & n.2 (observing that even a 30-minute testimony by the FDA Commissioner would be too burdensome). That is especially true here, where the topics to be covered are subject to legislative privilege and are thus not even discoverable. *See* Fed. R. Civ. P. 26(b)(1); *In re Hubbard*, 803 F.3d at 1307-08. Indeed, plaintiffs in the related state court litigation have already conceded that the apex doctrine bars the Governor's deposition. **Ex. 2**, State Court Order 1 n.1.

2. Plaintiffs cannot establish "extraordinary circumstances or a 'special need' for compelling" Governor DeSantis's deposition, *EPA Adm'r*, 624 F.3d at 1373.

First, Plaintiffs cannot identify with particularity what discoverable information they need from Governor DeSantis. *See Lederman*, 731 F.3d at 203. The only information that Plaintiffs could seek from the governor is already publicly available. *Infra* p. 29. This is fatal for Plaintiffs. *See Lederman*, 731 F.3d at 203.

In particular, as reflected in their intent-based claims, Plaintiffs intend to probe Governor DeSantis's motives and purposes behind his involvement in the redistricting process. To the extent not already publicly available, legislative privilege bars discovery of such information. *See infra* pp. 17-22. Separate from the legislative privilege, such discovery "as to 'the reasons for taking official action' is precisely the type of testimony that high-ranking government officials are generally not required to provide." *Ctr. for Juv. Mgmt., Inc. v. Williams*, 2016 WL 8904968, at *5-6 (W.D. Tex. Sept. 22, 2016)

(quoting *FDIC*, 58 F.3d at 1060); *see, e.g.*, *In re Dep't of Com.*, 139 S.Ct. 16 (2018) (staying deposition of Commerce Secretary where plaintiffs sought to depose him regarding his intent behind reinstating the citizenship question in the Census); *Morgan*, 313 U.S. at 422 (observing that it is "'not the function of the court to probe the mental processes of the [government official]'").

Moreover, Plaintiffs do not—and cannot—articulate how non-privileged information they seek from Governor DeSantis is "essential" or "absolutely needed" for their case. *In re U.S. Dep't of Educ.*, 25 F.4th at 703; *see also Hankins v. City of Philadelphia*, 1996 WL 524334, at (E.D. Pa. Sep. 12, 1996) (denying the motion to compel the Philadelphia Mayor's deposition because "there [was] no showing that the Mayor's testimony is essential"); *McNamee v. Massachusetts*, 2012 WL 1665873, at *1 (D. Mass. May 10, 2012) (requiring a showing that "the information sought is essential (not merely relevant)"). "'Without establishing this foundation, exceptional circumstances cannot be shown'"; otherwise, courts would "risk distracting [high-ranking officials] from their essential duties with an inundation of compulsory, unnecessary depositions." *In re U.S. Dep't of Educ.*, 25 F.4th at 703 (cleaned up) (quoting *Att'y Gen.*, 197 F.3d at 312-13). It is not enough, for example, for Plaintiffs to assert that Governor DeSantis's motives are "merely relevant" to their claims. *McNamee*, 2012 WL 1665873, at *1. Plaintiffs' claims depend on the legislative record and circumstantial evidence. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977); (weighing (1) disproportionate impact, (2) historical background, (3) departures from usual procedure, (4) substantive

departures, and (5) legislative history); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into [legislative] motives or purposes are a hazardous matter" because "[w]hat motivates" one legislator "is not necessarily what motivates scores of others"). None of these factors requires deposing Governor DeSantis.

Furthermore, there is little probative value of discovery regarding Governor DeSantis's involvement in redistricting even if his intent is relevant. Plaintiffs allege that Governor DeSantis improperly influenced the Legislature to adopt a congressional map that allegedly discriminates against Plaintiffs. *See* Doc.97 at ¶1. But as Judge Winsor previously observed, it is "unremarkable" that Governor DeSantis, in discharging his constitutional duties, "vetoed proposed legislation" and "propose[d] a map," and such actions cannot give rise to an inference of discrimination. Doc.115 at 20 (Winsor, J., concurring in part & dissenting in part). In addition, the Supreme Court made it clear that "[t]he 'cat's paw' theory has no application to legislative bodies," because "legislators have a duty to exercise their judgment and to represent their constituents." *Brnovich v. DNC*, 141 S.Ct. 2321, 2350 (2021). "It is insulting to suggest" that legislators "were mere dupes or tools." *Id.* If the intent of a single legislator cannot be imputed to the legislature or the legislative process as a whole, *see id.* at 2336, 2350, then neither can the Governor's intent. *See also Greater Birmingham Ministries v. Sec'y of State for Ala.*, 992 F.3d 1299, 1324-25 (11th Cir. 2021) ("It is … questionable whether the [bill] sponsor speaks for all legislators").

Second, Plaintiffs cannot show that the information they seek from the Governor cannot be discovered through less burdensome means. Plaintiffs must do more than generally assert that they are "unable to obtain the information" through other means. *FDIC*, 58 F.3d at 1061. "Exhaustion of all reasonable alternative sources is required." *In re U.S. Dep't of Educ.*, 25 F.4th at 704. As the Eleventh Circuit has explained, the availability of "alternate witnesses" "weigh[s] against" compelling the high-ranking official's deposition. *FDA Comm'r*, 985 F.2d at 512; *see also EPA Adm'r*, 624 F.3d at 1373 (holding that the district court abused its discretion in ordering the EPA Administrator to appear at a hearing and then denying the request to allow a lower-ranking EPA official to appear as the Administrator's substitute). Simply put, "'if other persons can provide the information sought, discovery will not be permitted against [a high-ranking] official.'" *In re U.S. Dep't of Educ.*, 25 F.4th at 704 (quoting *Att'y Gen.*, 197 F.3d at 312-14).

Plaintiffs cannot show a compelling need to depose Governor DeSantis because they can obtain the same information they otherwise seek from Mr. Kelly, the Governor's Deputy Chief of Staff. In the ongoing state-court litigation—concerning the same congressional map and questions of intent—the state plaintiffs' concession that the Governor "properly raised the apex doctrine" was based in part on the obvious truth that "the information they s[ought] can be discovered through Mr. Kelly." **Ex. 2**, State Court Order 1 n.1. The same is true here. Whatever relevant and non-privileged

information that Plaintiffs would seek from Governor DeSantis in this case, they can seek from Mr. Kelly and other likely deponents. Therefore, Plaintiffs cannot show a special need justifying deposing Governor DeSantis in this case. *See, e.g.*, *FDA Comm'r*, 985 F.2d at 512; *EPA Adm'r*, 624 F.3d at 1373; *Thomas*, 715 F. Supp. 2d at 1049 (barring California Governor's deposition because "it [was] highly likely that any information the Governor can provide is also available from other sources").

Relatedly, Plaintiffs also cannot show that they have exhausted other sources of information to justify deposing the Governor until they depose Mr. Kelly and exhaust other discovery options. *See In re U.S. Dep't of Educ.*, 25 F.4th at 704 (requiring "'*literal* exhaustion of alternatives'" (emphasis added)). Furthermore, statements or actions taken by Governor DeSantis are publicly available. *See* Order 11-12, ECF 115; *see also* Order 22-23 (Winsor, J., concurring in part & dissenting in part) (discussing publicly available statements by Governor DeSantis). Plaintiffs may continue to use these publicly available sources to build their claims. *See, e.g.*, *In re McCarthy*, 636 F. App'x 142, 144 (4th Cir. 2015) (observing that plaintiffs failed to show "a need for [the Administrator's testimony beyond what is already in the public record"); *Arlington Heights*, 429 U.S. at 266-68 (discussing various relevant public sources). Without first exhausting these sources, and without explaining why these sources are insufficient,[6]

[6] And even then, the unique knowledge must be more than simply participating in the decision-making process and concern more than the official's own decision-making

Plaintiffs cannot simply "begin at the top and work down." *Hernandez*, 2011 WL 6300852, at *4 (cleaned up).

B. Binding Circuit Precedent on Legislative Privilege Precludes Governor DeSantis's Deposition.

1. Because Governor DeSantis's testimony would be almost entirely privileged, binding circuit precedent precludes the deposition. In *In re Hubbard*, the Eleventh Circuit quashed subpoenas seeking documents of the current and former Governors of Alabama, the Alabama Senate President Pro Tempore, and the Speaker of the Alabama House, whom the Court "collectively" referred to as "the four lawmakers." 803 F.3d at 1301-02.[7] The Court reasoned that legislative privilege, with "deep roots in federal common law," "protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation." *Id.* at 1307-08 (citing *Tenney v. Brandhove*, 341 U.S. 367, 372, 376 (1951), and other federal circuit cases). The Court further explained that the legislative privilege "applies with full force against requests for information about the motives for legislative

process. *See, e.g., In re FDIC*, 58 F.3d at 1061 (disallowing depositions, even though officials were "responsible for making the [challenged] decision")*; In re United States* ("*Fed Chairman*"), 542 F. App'x 944, 946 (Fed. Cir. 2013) (prohibiting deposition despite "personal involvement in the decision-making process" and even though the plaintiff sought to depose the Fed Chairman regarding his "mental state"); *see also In re Dep't of Com.*, 139 S.Ct. at 16.

[7] Noted above, the Eleventh Circuit's decision in *Hubbard* is binding because any appeal of these discovery issues would go to the Eleventh Circuit.

votes and legislative enactments." *Id.* at 1310. The "privilege extends to discovery requests, even when the lawmaker is not a named party in the suit," because "complying with such requests detracts from the performance of official duties." *Id.* at 1310.

Applied in *Hubbard*, the Court concluded that the document subpoenas "str[uck] at the heart of the legislative privilege." *Id.* Their only conceivable purpose was to probe the subpoena recipients' motivation in passing and signing the legislation challenged in that litigation. *Id.* The Court quashed the subpoenas, without requiring anything else from the current and former Governors. *Id.* at 1315; *see, e.g.*, *id.* at 1311 ("there was no need for the lawmakers to peruse the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied to those documents").

It necessarily follows from *Hubbard* that Plaintiffs cannot depose a sitting governor regarding his involvement and motivations in passing the challenged redistricting legislation. Plaintiffs' allegations regarding Governor DeSantis directly concern his "actions in the proposal, formulation, and passage of [the redistricting] legislation." *Id.* at 1307-08. Specifically, they involve: Governor DeSantis's veto of the initial redistricting legislation on March 29, 2022; his recommendation of proposed legislation; the Legislature's passage of that legislation on April 21, 2022; and the Governor's approval of the Legislature's enacted plan on April 22, 2022. *See* Doc.97 at ¶¶1, 67, 72. The executive approval and veto functions undeniably include legislative characteristics; so much so that they are found in Article III of the Florida Constitution,

which concerns the Legislature. *See* Fla. Const. art. III, §8. Critically, these functions fall squarely within the legislative process such that the legislative privilege applies to Governor DeSantis. *See Hubbard*, 803 F.3d at 1307-08; *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) (holding that "[u]nder the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law"); *cf. Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298-99 (D. Md. 1992) (holding that the "*function*" not the "title" determines whether an official is entitled to legislative immunity and privilege and that even "the judiciary can act in a legislative capacity").

Likewise, the legislative privilege covers the Governor's "formulation" and recommendation of a "propos[ed]" map. *Hubbard*, 803 F.3d at 1307-08; *see also* Fla. Const. art. III, §8(a); *Baraka v. McGreevey*, 481 F.3d 187, 196-97 (3d Cir. 2007) (holding that a governor acts within the sphere of legislative activity when "advocating and promoting legislation"); *cf. Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) ("Meeting with persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents—to discuss issues that bear on potential legislation" are "a routine and legitimate part of [the] modern-day legislative process.").

That Plaintiffs allege discriminatory intent does not alter the analysis. To the contrary, it is *precisely* the reason for applying the privilege. "To put it another way, the factual heart of [Plaintiffs'] claim and the scope of the legislative privilege [are] one and the same: the subjective motivations of those acting in a legislative capacity." *Hubbard*,

803 F.3d at 1311; *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 455 (N.D. Fla. 2021) (similar). Any information that "go[es] to legislative motive [is] covered by the legislative privilege." *Hubbard*, 803 F.3d at 1311. Creating a "categorical exception" to legislative privilege "whenever a constitutional claim directly implicates the government's intent" "would render the privilege 'of little value.'" *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186 (9th Cir. 2018) (quoting *Tenney*, 341 U.S. at 377). Indeed, the Supreme Court explained that only in "extraordinary instances" "might" those invoking the legislative privilege be required to "testify concerning the purpose of the official action" and that "even then such testimony frequently will be barred by privilege." *Arlington Heights*, 429 U.S. at 268.

Applying these principles, the Eleventh Circuit barred discovery into the legislators' subjective motivations in a retaliation case. *Hubbard*, 803 F.3d at 1313. The Ninth Circuit also barred depositions of various Los Angeles city officials "involved in the redistricting process" even though that case—like this case—"involved an equal protection claim alleging racial discrimination—putting the government's intent directly at issue." *Lee*, 908 F.3d at 1186. The First Circuit similarly directed a district court to quash a deposition subpoena based on legislative privilege even though "interrogating the State Officials [including the Rhode Island Governor] could shed light on … discriminatory purpose or effect" relevant to plaintiffs' dormant Commerce Clause claim. *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021); *see also Utah Republican Party v. Herbert*, 2015 WL 13036889, at *3 (D. Utah, June 10, 2015) (applying

legislative privilege to quash a subpoena issued to Utah Governor and not requiring him to "testify[] about the purpose of" the challenged law). Because Plaintiffs' "sole reason for [deposing Governor DeSantis] [is] to probe [his] subjective motivations," the subpoena "strikes at the heart of the legislative privilege," and *Hubbard* thus requires that the subpoena be quashed. *Hubbard*, 803 F3d at 1310.

2. *Hubbard* also precludes the application of a multi-factor balancing test that plaintiffs have advanced in district courts to seek legislatively privileged materials. *See, e.g.*, *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003); *League of Women Voters*, 340 F.R.D. at 456 (considering "(1) whether the evidence Plaintiffs seek is relevant, (2) whether other evidence is available, (3) whether the litigation is sufficiently 'serious,' (4) whether the government is involved in litigation, and (5) whether upholding the subpoena defeats the legislative privilege's purpose"). No Court of Appeals has endorsed a multi-factor balancing test to determine whether and when the legislative privilege can be pierced. Nor was it conceived as a test to permit depositions. *Rodriguez*, 280 F. Supp. 2d at 96. It is entirely at odds with *Hubbard* and similar decisions. *See, e.g.*, *Hubbard*, 803 F.3d at 1130 (barring discovery without balancing where the "factual heart" of the claim was "the subjective motivation" of the legislators); *Alvitti*, 14 F.4th at 88-89 ("proof of the subjective intent of state lawmakers is unlikely to be significant enough in this case to warrant setting aside the privilege"); *Lee*, 908 F.3d at 1188 ("a constitutional claim [that] directly implicates the government's intent" was insufficient to overcome privilege); *see also Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D.

Fla. 2012) (holding that the privilege does not yield in Voting Rights Act and equal-protection cases). And any such balancing contravenes what the Supreme Court has said about legislative privilege—that while it may yield in federal criminal prosecutions, it will ordinarily preclude probing the minds of legislative actors in civil cases. *See United States v. Gillock*, 445 U.S. 360, 373 (1980); *see also Arlington Heights*, 429 U.S. at 268 & n.18

Even if the Court were to apply that balancing test, despite its absence in circuit precedent, the privilege holds. Governor DeSantis's subjective motivation for proposing and then signing the enacted map has little relevance to the map's constitutionality. *Supra* p. 13; *Brnovich*, 141 S.Ct. at 2350; *Greater Birmingham Ministries*, 992 F.3d at 1324-25. Plaintiffs also have access to alternate witnesses and evidence, including legislative history and publicly available sources, and do not need to resort to deposing Governor DeSantis. *Supra* p. 16; *Arlington Heights*, 429 U.S. at 266-68. Although claims of racial discrimination are serious, the same could be said for the claims in the Ninth Circuit's decision in *Lee*, involving the same allegations and where the court still quashed the subpoenas. *Lee*, 908 F.3d at 1188; *see also Alvitti*, 14 F.4th at 88-90; *Florida*, 886 F. Supp. 2d at 1304. Moreover, Governor DeSantis's ability to propose legislation, support legislation, communicate with legislators and staff, and veto legislation would be hindered if he cannot reliably depend on the confidentiality of that legislative process. *See, e.g.*, *Tenney*, 341 U.S. at 377. Again, the inquiry into his motivations "strikes at the heart of the legislative privilege." *Hubbard*, 803 F3d at 1310.

For all these reasons, The Governor's deposition subpoena should be quashed even under the balancing test.

II. The Court Should Quash Plaintiffs' Subpoena to Depose Deputy Chief of Staff Kelly and Require that Any Deposition Proceed at the Same Time within the Same Parameters as his Deposition in the State Litigation.

Plaintiffs also seek Mr. Kelly's deposition on February 22, 2023. Mr. Kelly, as Deputy Chief of Staff to the Governor, participated in the legislative process that resulted in the challenged redistricting bill.

Counsel is willing to permit the Plaintiffs in this case to depose Mr. Kelly at the same time the state plaintiffs depose Mr. Kelly, and under the parameters set by the state court. *See* **Ex. 2**, State Court Order 8-9. Those parameters are consistent with, and required, by the Eleventh Circuit's decision in *Hubbard*. Mr. Kelly cannot be made to answer questions "revealing his thoughts or impressions or the thoughts or impressions shared with the Governor by staff." *Id.* at 5; *accord Hubbard*, 803 F.3d at 1307-08, 1310-11 ("any [information] that did go to legislative motive [is] covered by the legislative privilege" and the privilege "shields" attempts to "uncover evidence of [the legislators'] motivations"). He "may not be questioned as to information internal to the Governor's Office that is not already public record (e.g., the thoughts or opinions of staff or those of the Governor"). **Ex. 2**, State Court Order 8-9; *accord Hubbard*, 803 F.3d at 1307-08, 1310-11.

Under Rule 45(d)(1), Plaintiffs have the duty to "avoid imposing undue burden or expense" on Mr. Kelly. There is little question that being "deposed once for both actions" will minimize the burden on Mr. Kelly and "serve[ ] the purposes of judicial economy," especially given that his "testimony will presumably cover identical topics" relating to the passage of the congressional map. *Franco v. Ideal Mortg. Bankers, Ltd.*, 2009 WL 3150320, at *7 (E.D.N.Y. Sep. 28, 2009); *see also Ojo v. Brew Vino LLC*, 2022 WL 275512, at *2 (M.D. Pa. Jan. 28, 2022) (observing that judicial economy is furthered by having "identical witnesses listed in both actions[ ] … deposed only once" especially when "[b]oth actions concern … largely identical issues of fact and questions of law").

The rules of procedure expect federal courts "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. They may order parties in a federal action to avoid discovery that is "duplicative of discovery taken in the state court action" and direct "each witness … [to] be deposed once, not once for the state case and a second time for the federal case." *Hartford Cas. Ins. Co. v. Constr. Builders in Motion*, 2012 WL 645982, at *4 (N.D. Ill. Feb. 28, 2012); *see also Koch v. Pechota*, 2013 WL 5996061, at *2 (S.D.N.Y. Nov. 8, 2013) (quashing subpoenas for non-party witnesses who were previously deposed "in a separate … state … action").

To that end, this Court should require "Plaintiffs' counsel" to "use their best efforts to coordinate the scheduling of depositions with state court plaintiffs in order to minimize the number of times that a witness shall appear for a deposition." *In re Vioxx Prods. Liability Litig.*, 2005 WL 928538, at *2 (E.D. La. Apr. 15, 2005); *see also In*

re Columbia/HCA Healthcare Corp. Billing Practices Litig., 93 F. Supp. 2d 876, 877 (M.D. Tenn. 2000) (ordering the parties to "use reasonable efforts to coordinate discovery with related state court actions to prevent duplications and conflicts"); *In re WorldCom, Inc. Sec. Litig.*, 2004 WL 113482, at *2 (S.D.N.Y. Jan. 26, 2004) (requiring that "[e]very effort … be made to depose witnesses common to [the federal] Actions and State Court Actions only once"); N.D. Cal. Civil Local Rule 3-13(b)(3)(D) (allowing the court to consider "whether proceedings [before any state court] should be coordinated to avoid conflicts, conserve resources and promote an efficient determination of the action"); *cf. Rice v. Regions Bank*, 2010 WL 11614152, at * & n.6 (N.D. Ala. Mar. 8, 2010) (observing that the parties were "urge[d]" to "depose each witness only once"); *Beijing Tong Ren Tang (USA), Corp. v. TRT USA Corp.*, 2009 WL 5108578, at *3 (N.D. Cal. Dec. 18, 2009) ("suggest[ing] that the parties coordinate discovery in [the federal] action and the State Court Action" to "avoid[ ] duplicative discovery efforts").

Accordingly, this Court should quash the deposition subpoena for Mr. Kelly for February 22, 2023, and instruct Plaintiffs to coordinate with counsel for the state plaintiffs, counsel for defendants, and counsel for Mr. Kelly to find an agreeable date to depose Mr. Kelly once, within the parameters set by the state court's order.

III. The Court Should Quash Plaintiffs' Subpoena to Depose General Counsel Newman

Mr. Newman is the General Counsel to the Governor. Rule 45 precludes his deposition in two related ways: any such deposition would be unduly burdensome to

Mr. Newman because the information that he has is largely nondiscoverable, either because the information is legislatively privileged or is attorney-client privileged.

A. Legislative privilege "extends to staff member at least to the extent that the proposed testimony would intrude on the legislators' own deliberative process and their ability to communicate with staff members on the merits of proposed legislation." *Florida*, 886 F. Supp. 2d at 1304; *see also Gravel v. United States*, 408 U.S. 606, 618 (1972) (holding that the Speech or Debate Clause applies to the Senator's "aides insofar as the conduct of the latter would be a protective legislative act if performed by the Member himself"); *League of Women Voters*, 340 F.R.D. at 454-55 (applying the legislative privilege both to Governor DeSantis and to "the Governor's office"); *Marylanders for Fair Representation*, 144 F.R.D. at 301 (extending the "full" legislative privilege to the Maryland Governor's redistricting advisory committee members "as the Governor's 'alter egos'"); **Ex. 2**, State Court Order 4 (extending Governor DeSantis's legislative privilege to his Deputy Chief of Staff).

Applied here, Mr. Newman acted as Governor DeSantis's General Counsel during the redistricting process. **Ex. 7**, Newman Decl. ¶2. As General Counsel, Mr. Newman was responsible for providing legal advice to Governor DeSantis in connection with the redistricting bills. *Id.* ¶¶7-8. Mr. Newman's deposition would "intrude on" the Governor's own legislative deliberations and his "ability to communicate with staff members on the merits of proposed legislation." *Florida*, 886 F. Supp. 2d at 1304. Indeed, Plaintiffs presumably want to depose Mr. Newman to ask

him about "the Governor's position" and the reasons why the Governor vetoed the initial bill beyond what Governor DeSantis and Mr. Newman have said publicly. Doc.97 at ¶¶67-69. Such inquiries into "subjective motivations" "strike[ ] at the heart of the legislative privilege" and should be quashed. *Hubbard*, 803 F3d at 1310.

B. Mr. Newman's testimony is separately barred by the attorney-client privilege. Mr. Newman is an attorney and serves as the General Counsel to the Governor in a legal capacity. **Ex. 7**, Newman Decl. ¶¶4-5. As an attorney, his private communications with the Governor are protected by the attorney-client privilege.

Rule 26 limits the scope of discovery to "*nonprivileged* matter." Fed. R. Civ. P. 26(b)(1) (emphasis added). And Rule 45 prohibits subpoenas that target "privileged or other protected matter" or are otherwise unduly burdensome. Fed. R. Civ. P. 45(d)(3)(A)(iii)-(iv). A subpoena must be quashed where, as here, it would require disclosure of privileged matter, and would otherwise subject Mr. Newman "to undue burden" because any nonprivileged knowledge he has is cumulative of other discovery. Mr. Newman participated in the redistricting process only in his role as the Governor's General Counsel. **Ex. 7**, Newman Decl. ¶8. Whatever non-privileged information Mr. Newman has, Plaintiffs may obtain such information through other sources. That includes Mr. Kelly's deposition and other depositions of individuals involved. There is simply no additional benefit to deposing Mr. Newman, but the burden would be significant and undue to require him to "sit for an all-day deposition." *Nat'l W. Life Ins. V. W. Nat'l Life Ins.*, 2010 WL 5174366, at *4 (W.D. Tex. Dec. 13, 2010). This is

especially so given that "it would be extremely difficult" for Mr. Newman "to differentiate non-privileged matters from privileged matters in this case." *Id.*; *see also* **Ex. 7**, Newman Decl. ¶3.

Unsurprisingly, federal courts "'disfavor … depositions [of a party's] attorney.'" *Axiom Worldwide, Inc. v. HTRD Grp. Hong Kong Ltd.*, 2013 WL 230241, at *2 (M.D. Fla. Jan. 22, 2013); *Theroit v. Par. of Jefferson*, 185 F.3d 477, 491 (5th Cir. 1999) (observing the same and affirming decision to quash deposition subpoenas for attorneys for Jefferson Parish in redistricting case). When the federal discovery rules were adopted, "members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries." *Hickman v. Taylor*, 329 U.S. 495, 514 (1947). And "'depositions of attorneys …are an invitation to harass the attorney and the party, to cause delay, and to disrupt the case.'" *Axiom*, 2013 WL 230241, at *2. Thus, where information can be obtained elsewhere, courts have rejected litigants' attempts to depose their opponents' attorneys. *See, e.g.*, *Wilcox v. La Pensee Condo. Ass'n, Inc.*, 2022 WL 1564502, at *2 (M.D. Fla. May 18, 2022) (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1987)) (barring deposition of an in-house counsel); *Sun Cap. Partners, Inc. v. Twin City Fire Ins. Co.*, 310 F.R.D. 523, 528 (S.D. Fla. 2015) (barring deposition of general counsel).[8]

[8] Some of these courts applied the so-called *Shelton* factors in similar cases, considering (1) whether no other means exist to obtain the information than to depose

Plaintiffs cannot meet these requirements. Plaintiffs may obtain the same information through other means, namely by deposing Mr. Kelly subject to the state court's parameters. *See, e.g.*, *Gates v. Tex. Dep't of Fam. & Protective Servs.*, 2010 WL 11598033, at *2 (W.D. Tex. 2010) (barring attorney deposition when other witnesses were "equally able to describe what happened"); *Nat'l W. Life Ins. V. W. Nat'l Life Ins.*, 2010 WL 5174366, at *3 (W.D. Tex. Dec. 13, 2010) (similar); *Sun Cap. Partners*, 310 F.R.D. at 528 (barring attorney deposition when the defendant "offered multiple individuals for deposition").

Moreover, Mr. Newman's memorandum describing and defending the proposed congressional map is publicly available. *Hall v. Louisiana*, a redistricting case, is instructive. 2014 WL 1652791 (M.D. La. Apr. 2014). In that case, plaintiffs subpoenaed an attorney who had represented state judges during the redistricting process and who then went on to represent defendants in the litigation. *Id.* at *3-4. Plaintiffs intended to depose the attorney about her involvement in the redistricting process, including testimony she gave on behalf of the judges before the legislature. *Id.* The district court

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opposing counsel; (2) whether the information sought is relevant and nonprivileged; and (3) whether the information is crucial to the case. *See Shelton v. Amer. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). Other courts have endorsed a more flexible. *See In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 72 (2d Cir. 2003) (considering "the need to depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought and in relation to the pending litigation, the risk of encountering privilege and work-product issues, and the extent of discovery already conducted"). Under any articulation, deposing the Governor's general counsel is unduly burdensome here.

quashed the deposition subpoena, concluding that it was sufficient that "counsel had obtained a transcript of th[e] testimony" that the attorney had publicly given. *Id.* at *4. Here, as in *Hall*, "[t]here is no need to depose" Mr. Newman "about what was said when the [memorandum] itself is available." *Id.*; *see also Fletcher v. Great Am. Ins. Co.*, 2010 WL 11507643, at *3 (M.D. Fla. June 2010) (barring attorney deposition because "nonprivileged documents" were already available).

Nor can Plaintiffs show that the information they would seek from Mr. Newman is relevant and not privileged. Such information must not only be "'relevant'" but also "'outweigh the dangers of deposing a party's attorney.'" *LaJoie v. Pavcon, Inc.*, 1998 WL 526784, at *1 (M.D. Fla. June 24, 1998). Plaintiffs presumably would want to ask Mr. Newman about the circumstances surrounding Governor DeSantis's veto of an initial map, proposal of a different map, and approval of the final map. *Hall* is again instructive. There, the court explained that, to the extent plaintiffs wanted to question the attorney "regarding the circumstances surrounding that [public] testimony such as any communications she had with her clients in preparation for such appearance," that "would necessarily infringe upon confidential attorney-client communications." *Hall*, 2014 WL 1652791, at *4. Similarly, requiring Mr. Newman to testify about the circumstances surrounding Governor DeSantis's official actions, beyond the publicly available memorandum, would necessarily infringe upon attorney-client communications. *Id.*; *see also* **Ex. 7**, Newman Decl. ¶¶8-9.

Last, Plaintiffs cannot show that deposing Mr. Newman would not "entail an inappropriate burden and hardship." *Fletcher*, 2010 WL 11507643, at *3. There is simply no benefit to deposing Mr. Newman and requiring him to undertake the difficult task of untangling privileged and nonprivileged information in his head when Plaintiffs may already depose Mr. Kelly and others about the same matters (or seek public records and discovery of documents, which they have). For all these reasons, Plaintiffs cannot justify deposing Mr. Newman.

CONCLUSION

For the foregoing reasons, this Court should quash the deposition subpoenas directed at Governor DeSantis, Mr. Kelly, and Mr. Newman.

Respectfully submitted,

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Dated: February 2, 2023

LOCAL RULE 7.1(B) CERTIFICATION

The undersigned certifies that he attempted in good faith to resolve the issues raised in this motion through a meaningful conference with Plaintiffs' counsel. Plaintiffs oppose this motion but have agreed that no deposition will go forward until this Court resolves this motion.

LOCAL RULE 7.1(F) CERTIFICATION

The undersigned certifies that this memorandum contains 7,479 words, excluding the case style and certifications.

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2023, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Mohammad O. Jazil
Mohammad O. Jazil.