No. 19-1910

United States Court of Appeals for the Seventh Circuit

IN RE WISCONSIN STATE ASSEMBLY SPEAKER ROBIN J. VOS,

Petitioner.

From the United States District Court for the Western District of Wisconsin in Case No. 3:15-cv-00421-JDP

PLAINTIFFS-RESPONDENTS' RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS AND OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING DISPOSITION OF PETITION FOR MANDMAMUS

Douglas M. Poland
RATHJE WOODWARD LLC
10 E Doty St., Ste. 507
Madison, WI 53703
(608) 960-7430
dpoland@rathjewoodward.com

Ruth M. Greenwood
Annabelle E. Harless
CAMPAIGN LEGAL CENTER
73 W. Monroe St., Ste. 302
Chicago, IL 60603
(312) 561-5508
rgreenwood@campaignlegal.org
aharless@campaignlegal.org

Paul M. Smith
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

Counsel for Plaintiffs-Respondents

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JURISDICTIONAL STATEMENT

For the reasons stated in Section I of the Argument, *infra*, this Court lacks jurisdiction to issue a writ of mandamus to review the discovery order at issue. Such a writ may be issued only in aid of a court's appellate jurisdiction. 28 U.S.C. § 1651(a). But this Court lacks jurisdiction over an appeal from any merits decision the three-judge district court may issue. Only the Supreme Court has such appellate jurisdiction. It follows that this Court has no authority to issue a writ of mandamus in this matter. This Court likewise has no jurisdiction to consider Speaker Vos's motion for a stay.

ISSUES PRESENTED

1. Whether this Court lacks jurisdiction to decide Speaker Vos's petition for a writ of mandamus and motion for a stay because only the Supreme Court, and not this Court, has appellate jurisdiction that could be aided by a writ issued pursuant to the All Writs Act.

2. Whether a district court's order compelling discovery from a legislator with the most knowledge of any person regarding a challenged redistricting plan constitutes an "outlandish decision" that "usurps power" sufficient to warrant issuing a writ of mandamus.

3. Whether the district court clearly abused its discretion by ordering a legislator with more knowledge than any other person about a challenged redistricting plan to provide discovery.

4. Whether the Court lacks jurisdiction to issue a stay because the Court lacks appellate or mandamus jurisdiction, and whether a stay of the district court's discovery order is unwarranted.

STATEMENT OF THE CASE

The Plaintiffs in the instant case filed suit in 2015, alleging that the district map for the Wisconsin Assembly, enacted in 2011 as Act 43, is a partisan gerrymander so extreme that it

violates the rights of Wisconsin voters protected by the First and Fourteenth Amendments. In November 2016, after a four-day trial, the three-judge district court issued an opinion authored by Circuit Judge Ripple holding that Act 43 is unconstitutional because it intentionally and systematically suppresses the voting power of Democratic voters in a manner that guarantees Republican control of the Assembly in any foreseeable electoral environment. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

The State Defendants appealed, and in 2018, the Supreme Court vacated and remanded, holding that the Plaintiffs had not yet established standing to pursue their claims. The Court held that in partisan gerrymandering cases based on vote dilution it is necessary to prove the case district by district, showing where the map "packs" and "cracks" supporters of the disfavored party. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018). It further held that there must be plaintiffs who live in those particular locations who can claim personal harm from such packing and cracking. *Id*.

On remand, the Plaintiffs filed an amended complaint adding 28 plaintiffs and accompanying allegations of packing or cracking in each Plaintiff's district. The Wisconsin State Assembly ("Assembly") then moved to intervene as a Defendant. The Plaintiffs opposed that motion as unnecessary and likely to delay the case, but the motion was granted. ECF 209, 217, 223.[1]

In the course of preparing for a new trial set for July 2019, the Plaintiffs sought discovery from Assembly Speaker Robin Vos. They did so because he has unique knowledge crucial to Plaintiffs' effort to prove their case consistent with the district-by-district approach mandated by the Supreme Court. Vos was at the center of the effort in 2011 to develop Assembly districts that would guarantee the Republicans a super-majority of seats even if they received less than half of

[1] All cites to ECF in this brief refer to the docket of *Whitford v. Gill*, 3:15-cv-421 (W.D. Wis. 2016), unless otherwise noted.

the votes for the Assembly. He was not yet Speaker. But he was one of only two people present in confidential individual meetings held with each Republican member of the Assembly to discuss the proposed boundaries for that member's district and its expected partisan performance. ECF 109, at 125:1-126:10; ECF 110, at 264:9-265:5. Those discussions, as well as other meetings of legislative leaders at which Vos was present and decisions about district configurations were made, provide the best potential evidence supporting Plaintiffs' claim that the Assembly leadership and staff engaged in intentional packing and cracking of Democrats designed to make a large majority of districts safe Republican seats. Moreover, the only other participant in the meetings with individual legislators, a legislative aide named Adam Foltz, who also was present for the meetings with legislative leadership (including Vos) where districts were discussed and approved, has testified that he has little or no memory of the substance of many of those discussions. ECF 109, at 146:2-10, 153:1-8; ECF 110, at 284:3-285:16.

Speaker Vos objected, but in a decision by Circuit Judge Ripple and District Judge Peterson, the district court concluded that "[p]robably no one has a better understanding of the challenged [redistricting] plan than [Speaker Vos] does," and thus ordered him to produce a limited set of documents and to be deposed—consistent with case law across the country requiring legislative leaders to participate in discovery in redistricting cases. Opinion and Order, slip op. at 2, *Whitford v. Gill* (No. 15-cv-421-jdp) (W.D. Wis. May 3, 2019), ECF 275 (hereafter "May 3 Order"). In response, Speaker Vos asks this Court to grant an extraordinary petition for a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651, to overturn the district court's discovery order.

SUMMARY OF ARGUMENT

Under the All Writs Act, courts may only issue writs of mandamus "in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). The Act does not create jurisdiction. That means that an appellate court may only issue a writ of mandamus addressing a district court's interlocutory ruling in situations where it may ultimately have appellate jurisdiction of an appeal of the merits of the case. Because this case is before a three-judge district court, any merits appeal will go directly to the Supreme Court. It follows that this Court has no jurisdiction to "aid" and thus no power to issue a writ of mandamus in this matter.

Even if the Court had jurisdiction, there would be no basis for issuing a writ here. "The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes." *Lindner v. Union Pac. R.R. Co*., 762 F.3d 568, 572 (7th Cir. 2014) (internal quotation marks omitted) (quoting *Cheney v. U.S. Dist. Court,* 542 U.S. 367, 380 (2004); *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). However, a legislative leader being ordered to provide discovery in a redistricting case over claims of legislative privilege is far from an "extraordinary cause"; it is simply par for the course. *See* May 3 Order at 4 (citing multiple cases where "gerrymandering claims raise sufficiently important federal interests to overcome legislative privilege").

This Court has held that "an applicant for mandamus has an uphill fight," *In re Hudson*, 710 F. 3d 716, 718 (7th Cir. 2013), that "[o]nly an outlandish decision justifies reversing" a lower court's order by granting a mandamus petition, *Bennett v. Bayer Healthcare Pharm., Inc.*, 577 F. App'x 616, 617 (7th Cir. 2014), and that "the [lower court's] order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous." *United States v.*

Vinyard, 539 F.3d 589, 591 (7th Cir. 2008) (quoting *In re. Rhone-Poulenc Rorer, Inc*, 51 F.3d 1293, 1295 (7th Cir. 1995)).

The test applied in this Court to determine when the extreme conditions for the imposition of a writ of mandamus are met is threefold: "first, there must be no other adequate means to remedy the problem; second, the party's right to the writ must be clear and indisputable; and third, the court must be satisfied that granting the writ would be an appropriate exercise of its discretion." *Lindner*, 762 F.3d at 572; *see also Abelesz v. Erste Grp. Bank AG,* 695 F.3d 655, 662 (7th Cir. 2012) ("'[T]he petitioner must show *irreparable* harm (or, what amounts to the same thing, the lack of an adequate remedy by way of direct appeal or otherwise) . . . .'" (quoting *In re Sandhal*, 980 F.2d 1118, 1119 (7th Cir. 1992))). Speaker Vos's mandamus petition fails all three prongs of this test.

First, Speaker Vos claims that a grant of mandamus is the only adequate remedy available, because "no postjudgment appeal can remedy the time spent preparing for and participating in the deposition." Pet. for Writ of Mandamus ("Pet.") at 8. But many legislative leaders around the country have dedicated time to discovery in redistricting cases with no apparent harm. *See* Section II, *infra*. Further, Plaintiffs have rescheduled Speaker Vos's deposition for a date when the Assembly is not in session, thereby reducing any alleged disruption to his official duties. Order Denying Mot. for Stay at 2 (May 13, 2019), ECF 280 ("May 13 Order"). Speaker Vos also claims that "the inevitable consequence" of the district court's order will be to "chill[] legislative debate in Wisconsin and elsewhere." Pet. at 8, 9. Given that many other legislative leaders around the country have sat for depositions in redistricting cases, either the chilling effect has already occurred, or there is no chilling effect at all. However, even if chilled speech were the necessary result of ordering Speaker Vos to participate in discovery, it is not relevant to the mandamus

petition because he has another avenue of redress: he may ask the district court to find his testimony inadmissible or subject to a protective order at trial. *See* May 3 Order at 9.

Second, Speaker Vos's right to the writ of mandamus is far from clear and indisputable. In fact, the weight of authority demonstrates instead that this is a clear case where Speaker Vos *cannot* claim legislative privilege to avoid participating in discovery. As the district court noted, "many courts, including two in the Seventh Circuit, have concluded that gerrymandering claims raise sufficiently important federal interests to overcome legislative privilege, reasoning that such claims involve public rights and that the ballot box may not provide adequate protection of those rights." May 3 Order at 4.

Third, granting a writ of mandamus in this case would not be an appropriate exercise of this Court's discretion. The district court was well within its bounds of authority to order Speaker Vos to participate in discovery in this case. Further, if every disgruntled legislator who is ordered by a district court to offer discovery in a redistricting case may expect mandamus relief in a Court of Appeals, appellate courts risk becoming day-to-day supervisors of the discovery process in the hundreds of redistricting cases that are filed in federal courts each decennial cycle.[2]

The final section of the Argument explains why this Court should not grant Speaker Vos's emergency motion for a stay. This Court has no jurisdiction to order a stay because it has no appellate or mandamus jurisdiction over this case. Even if it did, a stay should not be granted because Speaker Vos has: (1) failed to make any showing that he is likely to succeed in his mandamus petition; (2) not demonstrated that he will suffer an irreparable injury absent a stay; (3)

[2] Two hundred and forty nine statewide redistricting cases were filed in state and federal courts following the 2010 Census. Justin Levitt, *All About Redistricting*, Loyola Law Sch., http://redistricting.lls.edu/cases.php (last visited May 16, 2019).

disregarded the substantial prejudice that Plaintiffs will face as a result of a stay; and (4) failed to explain how the public interest favors a stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

ARGUMENT

I. This Court Lacks Jurisdiction to Review This Discovery Order.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). The Supreme Court has explained that "the express terms of the Act confine the power [under the Act] to issuing process 'in aid of' [a court's] existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (quoting 28 U.S.C. § 1651(a)); *see also United States v. Denedo*, 556 U.S. 904, 914 (2009) ("The authority to issue a writ under the All Writs Act is not a font of jurisdiction."); *United States v. Alkaramla*, 872 F.3d 532, 534 (7th Cir. 2017) (noting that the All Writs Act "simply authorizes a federal court to issue writs in aid of jurisdiction it already has"). The All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966).

This Court has no jurisdiction over this case that could be "aid[ed]" by issuing a writ of mandamus. There is no "potential jurisdiction" in the Seventh Circuit for this case, and no appeal "may be later perfected" in this Court. *Id.* Only the Supreme Court has jurisdiction over an appeal in this case, because the complaint seeks injunctive relief in a case required to be heard by a three-judge district court. *See* 28 U.S.C. §§ 1253, 2284; *see also id.* § 1291 (divesting courts of appeals of jurisdiction "where a direct review may be had in the Supreme Court"). Only the Supreme Court can issue a writ of mandamus because the Supreme Court is the only court whose appellate

jurisdiction can be "aid[ed]" by such a writ. An appellate court that could never hear an appeal of a district court's final judgment has no jurisdiction to protect by issuing a writ of mandamus.

Speaker Vos contends that the Supreme Court's appellate jurisdiction is limited to orders granting or denying injunctions, or having the practical effect of doing so, Pet. at 1, and that this Court retains jurisdiction "to consider all other orders from a three-judge district court." *Id.* Because the district court's discovery order does not have the effect of an injunction, Speaker Vos reasons, this Court has jurisdiction to entertain his petition. *Id.* at 2. This misses the point. The question under the All Writs Act is not whether a particular court has appellate jurisdiction over the order being challenged—the All Writs Act only comes to bear when the challenged order is *not* immediately appealable by statute. Speaker Vos is not *appealing* the discovery order, and so whether the discovery order has the effect of an injunction under § 1253 is beside the point. Instead, Speaker Vos is seeking a writ of mandamus under the All Writs Act, and so the question is whether an "existing statutory jurisdiction," *Clinton*, 526 U.S. at 534-35, would grant this Court the *potential* to have appellate jurisdiction over a final judgment in the case, and whether that future jurisdiction would be aided by issuing a writ now to protect that future jurisdiction. The only "existing statutory jurisdiction" granting appellate jurisdiction in this case is 28 U.S.C. § 1253, which places exclusive appellate jurisdiction with the Supreme Court. Only that Court can issue a writ of mandamus to protect its eventual jurisdiction.

Speaker Vos correctly notes that this Court would have jurisdiction over an appeal of an attorneys' fees award or denial of intervention by three-judge courts. Pet. at 1. But that jurisdiction is pursuant to statute—both are treated as final orders over which this Court has jurisdiction under 28 U.S.C. § 1291. *See Shea v. Angulo*, 19 F.3d 343, 344-45 (7th Cir. 1994) (noting that denial of intervention is final appealable order under § 1291); *Hastert v. Ill. State Bd. of Election Comm'rs*,

28 F.3d 1430, 1436-37 (7th Cir. 1993) (noting that court of appeals has jurisdiction pursuant to § 1291 where only issue appealed from three-judge district court is attorneys' fees decision). If the district court had entered some order that jeopardized this Court's eventual appellate jurisdiction over *those* issues, then this Court could entertain such a petition for a writ of mandamus. But because there is no statute that gives this Court jurisdiction to entertain an appeal of a discovery order,[3] the only source of authority that can grant jurisdiction to exercise the powers afforded by the All Writs Act here is § 1253. Only the Supreme Court, and not this Court, has jurisdiction to decide Speaker Vos's petition for a writ of mandamus. The petition should be dismissed for lack of jurisdiction.

Speaker Vos also invites the Court to treat his petition as a notice of appeal should this Court conclude that it has appellate jurisdiction over the district court's discovery order under the collateral order doctrine. This Court has no such jurisdiction. In *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), the Supreme Court held that a party may not appeal a district court's discovery order—in that case rejecting a claim of attorney-client privilege—under the collateral order doctrine. In doing so, the Court noted that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Id.* at 113 (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006)). That is so, the Court reasoned, because Congress has enacted legislation "designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Id.*

[3] The district court likewise would not be authorized to certify an immediate appeal of its discovery order to this Court under 28 U.S.C. § 1292(b). Congress only extended the mechanism of certification to "[t]he Court of Appeals which would have jurisdiction of an appeal of such action." Congress specifically amended the statute to add that phrase. *See* Trademark Clarification Act of 1984, Pub. L. No. 98-620, 98 Stat. 3335. As Fifth Circuit Judge Jerry Smith ruled on behalf of the three-judge court in *Perez v. Perry*, this express limitation precludes certification pursuant to § 1292(b) in redistricting cases where the Supreme Court has direct review. *See Perez v. Perry*, No. 11-360 (W.D. Tex. 2017), ECF No. 1385 (denying motion for certification, ruling that "[n]o such court of appeals exists" to accept a certified appeal).

(quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995)). No such rulemaking authorizes Speaker Vos's attempted appeal.

Speaker Vos contends that *Mohawk* may not apply to discovery orders affecting *nonparties*, but as he acknowledges, this Court has already foreclosed that argument. In *Ott v. City of Milwaukee*, 682 F.3d 552 (7th Cir. 2012), this Court was faced with this question and held that it was "immaterial . . . that this case involves a discovery order directed at nonparties whereas *Mohawk Industries* involved parties to the case." *Id.* at 555. As the *Ott* court concluded, "[t]he Supreme Court's concern that piecemeal, prejudgment appeals . . . undermine[ ] efficient judicial administration and encroach [ ] upon the prerogatives of district court judges applies with equal force to the nonparties subject to the discovery orders in this case." *Id.* (internal quotation marks omitted) (quoting *Mohawk Industries*, 558 U.S. at 106). Speaker Vos notes that the *Ott* court also held in the alternative that it would reject the appealing nonparties' arguments on the merits, but that does not diminish the court's main holding: "[w]e conclude that we lack jurisdiction to rule on the state agencies' appeal." *Ott*, 682 F.3d at 558. Speaker Vos cites no reason this Court should overturn its decision in *Ott*. *See United States v. Reyes-Hernandez*, 624 F.3d 405, 412 (7th Cir. 2010) ("There is a long-standing principle that we may not overturn circuit precedent without compelling reasons."). The Court has no jurisdiction to hear Speaker Vos's attempted appeal under the collateral order doctrine.

II. Denying the Mandamus Petition Will Not Cause Speaker Vos to Suffer Irreparable Harm and He Has Other Adequate Means of Relief.

Speaker Vos claims that spending time participating in discovery "will distract [him] from his public duties." Pet. at 8. That claim is simply without merit. First, this is a case in which Speaker Vos is the leader of the legislative body—the Assembly—that chose to intervene in the case, and Speaker Vos himself has managed many aspects of the Assembly's work on the case: he signed

the retainer letter engaging Bartlit Beck as attorneys for the Assembly;[4] he reviews and approves the payment of invoices by Bartlit Beck and experts in the case; and he signed the retainer agreements with testifying experts for the Assembly.[5] *See* ECF 267 at 58:7-12.

Second, Speaker Vos offers no evidence to support his claim that he cannot find the time to prepare and sit for a deposition in this case. Instead he compares himself to the federal Commerce Secretary and the Vice President of the United States. Pet. at 10-11. The analogy is both factually and legally inapt. Speaker Vos is no different from Representative David Lewis and Senator Robert Rucho (of North Carolina), Senator C. Anthony Muse and Delegate Curt S. Anderson (of Maryland), and Speaker William J. Howell (of Virginia), all of whom have submitted to discovery in redistricting cases since 2010. *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 601 (M.D.N.C.), *vacated and remanded,* 138 S. Ct. 2679 (2018) (relying on deposition testimony from Senator Rucho and Representative Lewis); *Benisek v. Lamone*, 241 F. Supp. 3d 566, 572, 577 (D. Md. 2017) (discussing Senator Muse and Delegate Anderson's motions to quash, and affirming Judge Bredar's order that they submit to discovery); *Lee v. Va. State Bd. Of Elections*, No. 15-cv-357, 2015 WL 9461505, at *1, *7 (E.D. Va. Dec. 23, 2015) (identifying Speaker Howell as a recipient of a subpoena, and order granting in part, and denying in part, motion to quash). Even Governor Martin O'Malley (of Maryland) sat for a deposition in a post-2010 redistricting case. *Benisek v. Lamone,* 266 F. Supp. 3d 799, 809 (D. Md. 2017), *aff'd,* 138 S. Ct. 1942 (2018) (relying

[4] *See* Patrick Marley, *Redistricting Legal Fight on Track to Cost Wisconsin Taxpayers $3.5 Million*, Milwaukee J. Sentinel (Jan. 22, 2019), https://www.jsonline.com/story/news/politics/2019/01/22/wisconsin-gerrymandering-legal-fight-track-cost-3-5-million/2645940002/. The article provides a link to the retention letter, available at https://assets.documentcloud.org/documents/5696077/Bartlitt-Beck-Contract.pdf.

[5] Speaker Vos apparently also finds time in his schedule to discuss this case with the media. *See* Patrick Marley (@PatrickDMarley), Twitter (Feb. 21, 2019, 10:45 AM), https://twitter.com/patrickdmarley/status/1098654911817043975?s=21; Jonathan Chait, *The More Republicans Lose, the Harder They Work to Rig the Game*, N.Y. Mag. (Dec. 9, 2018), http://nymag.com/intelligencer/2018/12/when-republicans-lose-they-work-harder-to-rig-the-game.html.

on testimony from Governor O'Malley). Courts thus regularly find that provision of discovery in redistricting cases is not inconsistent with the role of a state legislative leader.

Third, any burden on Speaker Vos's time is adequately mitigated by Plaintiffs setting a rescheduled deposition for May 29, 2019, with documents due to be produced by May 22, 2019. Subpoena to Testify at a Deposition in a Civil Action, *Whitford v. Gill* (No. 15-cv-421-jdp) (W.D. Wis. May 10, 2019), ECF 278-2. The Assembly's current "Floorperiod" ends on May 16, and restarts on June 4, giving Speaker Vos time to comply with the subpoena and document production request between sessions.[6] *See* May 13 Order at 2.

Fourth, Speaker Vos claims that "the 'post-release review of a ruling that documents' and testimony 'are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents' and testimony." Pet. at 10 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014). Yet the district court specifically explained that it will entertain motions as to the admissibility or application of a protective order with respect to Speaker Vos's testimony. May 3 Order at 9. Thus, Speaker Vos's documents and testimony can first be released to the attorneys in the case, allowing Speaker Vos a chance to argue before the district court that specific materials must be protected from public release. *Id.*

Fifth, there is no basis to Speaker Vos's assertion that "the inevitable consequence" of the district court's order will be to "chill[] legislative debate in Wisconsin and elsewhere." Pet. at 8, 9. If that were the case, such chilling would have already occurred given that legislative leaders in many states have provided discovery in redistricting cases. Further, Speaker Vos has remedies that can minimize any intrusion: he may seek to exclude his testimony as inadmissible at trial, or

[6] *See* Wis. State Legislature, *2019-2020 Session Schedule at a Glance*, https://docs.legis.wisconsin.gov/2019/related/session_calendar/calendar (last visited on May 16, 2019).

request that it be covered by a protective order. Thus, the order compelling Speaker Vos to provide discovery in itself will not affect future chilling of speech either way.

Finally, Speaker Vos claims that he cannot seek review of the discovery order in the normal way (defying the order and being found in contempt) because it implicates "unique federalism concerns absent in cases involving corporations." Pet. at 12. However, Speaker Vos does not explain what those concerns are because he cannot. If there were "federalism concerns," then they would have applied to the many other legislators ordered to produce discovery in redistricting cases. Yet, Speaker Vos cannot cite a single case that explains this apparent concern. In fact, the very case that Speaker Vos cites as the reason why this Court has jurisdiction to entertain a mandamus petition over a discovery order in a redistricting case, Pet. at 1, finds that "a 'long-recognized option' for nonparties aggrieved by discovery orders is to defy the disclosure orders and incur appealable contempt citations." *Ohio A. Philip Randolph Inst. v. Larose*, No. 18-4258, 2019 WL 259431, at *4 (6th Cir. Jan. 18, 2019) (quoting *Mohawk Industries*, 558 U.S. at 111). Notably, that case also involves a court of appeal denying a mandamus petition for review of a discovery order of a three-judge district court panel in a redistricting case. *Id.* at *1.

III. Mandamus Relief Is Far From Clearly or Indisputably Warranted.

The May 3 Order carefully examines each of the arguments raised by Speaker Vos in his briefing before the district court as to his claim of legislative immunity or privilege (including the argument that extraordinary circumstances are required to justify deposing a high ranking official) and finds each argument lacking. May 3 Order at 2-9. The task for this Court is not to review those decisions *de novo*, but to decide whether the district court was "outlandish" in its reasoning, *Bennett*, 577 F. App'x at 617, or whether it "so far exceed[ed] the proper bounds of judicial discretion as to be legitimately considered usurpative in character," *Vinyard*, 539 F. 3d at 591, or whether it made a ruling that is "so patently unsound as to exceed the legitimate bounds of judicial

power." *In re U.S.,* 614 F.3d 661, 663 (7th Cir. 2010). The district court was clearly within the bounds of its authority in ordering Speaker Vos to participate in discovery.

A. The District Court Correctly Applied *Tenney*.

Speaker Vos's argument that the district court's opinion is clearly wrong relies on two misunderstandings. First, Speaker Vos claims that "there is no redistricting exception to" *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court's decision addressing legislative privilege. Pet. at 13. But the Supreme Court noted that "where important federal interests are at stake . . . comity yields." *United States v. Gillock*, 445 U.S. 360, 373 (1980). In contrast to the private right asserted in *Tenney*,[7] federal courts have long recognized the right to vote as an important public right. *See United States v. Carolene Prods. Co*., 304 U.S. 144, 152 n.4 (1938); *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1554 (11th Cir. 1984) ("There is no question that this case is a public matter, concerning the most fundamental of public rights, the right to participate in the political process.").

Second, Speaker Vos also suggests that all cases involving § 1983 and First or Fourteenth Amendment claims must be considered as a monolith. Pet. at 13. However, such cases are not all the same. Particularly in redistricting cases, courts have found that while "witnesses can, in theory, benefit from the federal common law doctrine of legislative privilege, that privilege is *qualified*, not absolute." *Benisek*, 241 F. Supp. 3d at 572; *see also Baldus v. Brennan*, Nos. 11- 562, 11-1101, 2011 WL 6122542, at *3 (E.D. Wis. Dec. 8, 2011), *order clarified*, Nos. 11-562, 11 -1011, 2011 WL 6385645 (E.D. Wis. Dec. 20, 2011); *Comm. for a Fair & Balanced Map*, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011); *Rodriguez v. Pataki*, 280 F. Supp.2d 89, 101

[7] The plaintiff in *Tenney* claimed that the California legislature's "un-American activities" panel had violated his First Amendment right to free speech, which the Court later deemed a private right in *Gillock*, 445 U.S. at 369.

(S.D.N.Y. 2003). The district court was "persuaded by the reasoning of the many courts concluding that there is a qualified rather than absolute legislative privilege from complying with discovery requests in the context of a claim regarding unconstitutional gerrymandering." May 3 Order at 5. The sheer volume of other court opinions supporting the district court's decision, along with the court's thoughtful analysis of those cases, demonstrates that the district court's decision was thoroughly researched and precedent-backed, rather than an "outlandish" or "patently unsound" piece of judicial reasoning.

The only case that Speaker Vos cites in support of his view that even in redistricting cases legislative privilege cannot be broken is *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018). But as the district court noted, "the court in *Lee* did not hold that a gerrymandering claim can never overcome legislative privilege, only that 'the factual record in [that] case [fell] short of justifying the substantial intrusion into the legislative process.'" May 3 Order at 5 (quoting *Lee*, 908 F.3d at 1188). Here, unlike in *Lee*, the facts clearly justify overcoming Speaker Vos's qualified legislative privilege.

B. The District Court Correctly and Carefully Applied the Five-Factor Test for Qualified Legislative Privilege in Redistricting Cases.

Speaker Vos also errs in his attacks on the district court's application of a five-factor test for the application of qualified legislative privilege. That test was identified by the district court as "(1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the seriousness of the litigation; (4) the role of the State, as opposed to individual legislators, in the litigation; and (5) the extent to which the discovery would impede legislative action. *E.g.*, *Benisek*, 241 F. Supp. 3d at 575." May 3 Order at 6. The court found that it had already addressed the final three factors in its earlier discussion of "the seriousness of the litigation," concluding that "plaintiffs' claim implicates an important federal interest." *Id*. Therefore, the district court limited its discussion to

the importance of the requested discovery and the availability of alternative means to obtain the information.

As to the first question, the district court relied on multiple partisan gerrymandering cases in concluding that discriminatory intent will be a crucial element for Plaintiffs to prove at trial with respect to each challenged district. *Id.* This follows directly from the Supreme Court's decision remanding the case for further consideration, and was agreed upon by the Plaintiffs and the Wisconsin Elections Commission Defendants in the Parties' Joint Rule 26(f) Report After Remand from the Supreme Court, dated October 5, 2018. *Whitford v. Gill*, 15-cv-421-jdp, ECF 213, at 2 ("With respect to the first issue, the only points that remain unresolved in the wake of the Supreme Court's remand are in which districts plaintiffs have standing and whether defendants intentionally cracked or packed these districts.").

As to the second question, the district court explained that neither "the availability of other documents [n]or Foltz's testimony renders Vos's testimony unnecessary." May 3 Order at 8. With respect to Mr. Foltz, the district court noted that it did "not believe that [Foltz's testimony] is properly viewed as an adequate substitute for testimony from Vos" because "some of his testimony was 'unworthy of credence'" and "even assuming that everything Foltz said was true, the perspective of a legislative aide cannot be compared to that of one of the primary architects of the redistricting plan." *Id.* at 8, 9. With respect to "other documents," the district court found that "it is undisputed that there are significant gaps in the records because much electronic discovery was lost as the result of damage to one hard drive that contained information related to the redistricting process and the destruction of others." *Id.* at 8.

Speaker Vos's only argument as to how this aspect of the district court's decision could be clearly wrong is that he "absolutely disputes that 'there are significant gaps in the records' or that

'much electronic discovery was lost.'" Pet. at 20. This would be a more convincing argument if he did not go on to misrepresent the reason why discovery from one computer hard drive was unavailable. He suggests this was simply a failure by Plaintiffs' expert. But that expert found that the hard drive in question

> bore marks, including scratches and denting of the external metal housing and a stripped screw, indicating that the housing previously had been removed from the drive in a manner that damaged the outer housing. Moreover, this external hard drive could not be read. Although the disk will spin when the drive is powered up, it is unable to be read, indicative of damage, physical or otherwise.

Decl. of Mark Lanterman, *Baldus v. Brennan,* No. 2:11-cv-00562-JPS-DPW-RMD (E.D. Wis. Mar. 11, 2013), *Baldus* ECF 297, ¶ 3. Moreover, the expert found that with respect to some of the other hard drives, "software designed to 'wipe' data – that is, to permanently destroy data on a hard drive, overwrite free space, or permanently delete files so that they can no longer be recovered – was downloaded . . . within the last year." *Id.* ¶ 5. Given these facts, it was perfectly reasonable for the district court to find that the testimony sought from Speaker Vos was not only relevant to Plaintiffs' claims, but necessary to the case because it cannot otherwise be provided.

C. The District Court Found There Were Exceptional Circumstances to Justify Deposing a High-Ranking Public Official.

Speaker Vos claims that the district court did not address whether exceptional circumstances justified deposing a high-ranking public official. Pet. at 18-22. However, the district court clearly explained that

> this is an exceptional case that raises important federal questions about the constitutionality of Wisconsin's plan for electing members of the Assembly. Vos was a key figure in enacting that plan and he was involved at nearly every stage of the process. Probably no one has a better understanding of the challenged plan than he does. Under these circumstances, the qualified legislative privilege to which Vos is entitled must yield to the important federal interests implicated by plaintiffs' claims.

May 3 Order at 2. The reasons the district court lists to support this finding are discussed in detail above in Sections III.A and III.B.

IV. A Writ of Mandamus Is Inappropriate in the Context of a Routine Discovery Order in a Redistricting Case.

This Court will issue a writ of mandamus "only when the applicant has an indubitable right to that prerogative writ or there is no other way to correct a manifest injustice." *Fowler v. Butts*, 829 F. 3d 788, 793 (7th Cir. 2016). Three examples of the extreme circumstances that have led this Court to grant a writ of mandamus are instructive.

In one case, a district court judge had explained in open court that "if he granted a mistrial it would have double-jeopardy effect on the entire case," he proceeded to "invite[] the jurors to provoke a mistrial," he "accused the government of lying and other misconduct," and his remarks "concerning the evidentiary issue reveal[ed] a degree of anger and hostility toward the government that [wa]s in excess of any provocation . . . in the record." *In re U.S.*, 614 F.3d at 662, 663, 665.

In a second case, a district judge took the unusual step of calling an "off-the-record meeting with the United States Attorney and the Federal Defender" that was found to be "clearly violative of the specific prohibition in the Federal Rules of Criminal Procedure that forbids the court from becoming involved in plea negotiations." *In re U.S.*, 572 F.3d 301, 310 (7th Cir. 2009). This Court issued a writ of mandamus because "a reasonable, well-informed observer well may have concluded that the Judge was no longer acting as a neutral arbiter, but was advocating for his desired result" and had "misapprehended the limits of his authority" *Id.* at 311, 312.

In a third case, Holocaust victims and their relatives brought an action against a Hungarian bank. *Abelesz v. OTP Bank*, 692 F.3d 638 (7th Cir. 2012). The district court judge denied the bank's motion to dismiss and the bank sought a writ of mandamus because this Court otherwise did not have pendent appellate jurisdiction. This Court granted the writ of mandamus because if the district court's reasoning was left to stand, "virtually any large bank located anywhere in the world could be sued in any U.S. court on any claim arising anywhere in the world. That would be

an extraordinary and unwarranted expansion of the U.S. courts' general jurisdiction that would raise serious international law questions about the reach of U.S. law." *Id.* at 653.

This case bears no resemblance to any of these cases. The Court should not conclude otherwise.

Speaker Vos concludes his section on whether a writ of mandamus is appropriate under the circumstances by lamenting that "the district court's order comes on the eve of the Supreme Court's decisions in related partisan gerrymandering cases, *Rucho* and *Lamone*." Pet. at 24. This echoes an earlier comment by Speaker Vos that "[a]t the very least, the district court should have waited for the Supreme Court to decide *Rucho* and *Lamone* before concluding that Plaintiffs' partisan gerrymandering claims require the Speaker of the Wisconsin State Assembly to sit for a deposition and turn over documents." *Id.* at 18. At its heart, Speaker Vos's petition for a writ of mandamus is, at least partially, a cry of frustration that partisan gerrymandering claims are still justiciable. The Assembly has already tried to stay this case once, and, having been rejected—but failing to seek review of that order—is now seeking another bite at the apple. That is not a basis to grant relief now.

V. Plaintiffs Oppose Speaker Vos's Emergency Motion for Stay.

The Court should deny Speaker Vos's Emergency Motion for a Stay ("Stay Motion"). To begin, this Court lacks jurisdiction to issue a stay because, as explained above, the Court does not have appellate jurisdiction over the district court's discovery order; only the Supreme Court can entertain a motion for a stay. On the merits, Speaker Vos's motion should be rejected because he has: (1) failed to make any showing that he is likely to succeed in his mandamus petition; (2) not demonstrated that he will suffer an irreparable injury absent a stay; (3) disregarded the substantial prejudice that Plaintiffs will face as a result of a stay; and (4) failed to explain how the public

interest favors a stay. *See Hilton*, 481 U.S. at 776. The district court, familiar with the case and the Speaker's repeated attempts to stall this litigation, denied the Speaker's emergency request for a stay below. This Court should follow suit.

First, the Speaker's stay request makes no showing that he is likely to succeed on his mandamus petition. Like the petition itself, the request for a stay lacks even a scintilla of evidence to demonstrate that the district court's ruling constituted "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion [that] will justify the invocation of this extraordinary remedy." *Larose*, 2019 WL 259431, at *4; *see also Cheney*, 542 U.S. at 380 (describing a writ of mandamus as a "drastic and extraordinary remedy reserved for really extraordinary causes" (internal quotation marks omitted)).

Second, the Speaker suggests that he will suffer a slew of irreparable injuries absent a stay. But he provides no evidence for this claim. He simply asserts that he will have to "divert his time and attention away from the Wisconsin Legislature" without describing what kind of work he will be "distracted" from and what the relative burden on his time and resources will be. Stay Motion at 7, 10. Every government official who participates in litigation inevitably diverts time and attention away from their public duties. This does not immunize them from discovery or the obligations attendant to litigation. Moreover, the Speaker fails to offer any proof for the specious claim that the district court's order will have a "chilling effect" on legislative debate in Wisconsin and elsewhere—an effect so grave that it merits an immediate stay. It bears repeating: depositions of state government officials are part and parcel of redistricting disputes. And the Speaker's repeated reference to the Supreme Court reveals that, regardless of when this Court rules on the mandamus petition, the Speaker will seek to delay the deposition into late summer, at which point it will become difficult, if not impossible, to conduct the deposition in time for trial.

The district court quickly rejected the Speaker's arguments when denying a stay below. As the court explained, Speaker Vos "provides nothing specific about his duties or how the ordered discovery would interfere with them. We count on plaintiffs to show due respect to Vos's legislative duties. Plaintiffs have, apparently, shown that respect by scheduling the deposition for May 29, when the legislature is not in session." May 13 Order at 2. Speaker Vos contends that the district court got it wrong here, too, since the legislature is in session for the entire two-year period between January 2019 and January 2021. But no court has ever held that a state legislative leader can single-handedly stonewall discovery simply by relying on the fact that the legislature is in session for a two-year period. To the contrary, courts have regularly permitted the discovery and depositions of state legislative leaders in redistricting cases, recognizing the importance of this discovery to resolving these disputes. As the district court emphasized, "Vos has not suggested when he would be able to sit for a deposition if [the court] granted the stay and [the court's] order is affirmed, and the legislature will be back in session for most of June." *Id.* This remains true on appeal. Speaker Vos's assertion does little more than suggest that he would delay discovery well into the next redistricting cycle, if permitted to do so.

Fourth, the public interest firmly does *not* support a stay. A deposition would not meaningfully "distract[]" the Speaker from his "duties to the people of Wisconsin." Stay Motion at 10. Quite the contrary: it would go to the question of whether the Speaker is in fact complying with his constitutional duties to the people of Wisconsin. If anything, the public interest weighs in favor of denying the stay and permitting the case to proceed so that the people of Wisconsin and Plaintiffs can have this case resolved on the merits before the next redistricting cycle.

Thus, this Court should decline the request for a stay.

CONCLUSION

Plaintiffs respectfully request that the Court deny Speaker Vos's petition for writ of mandamus and his emergency motion for a stay.

Respectfully submitted,

/s/ Ruth M. Greenwood

Ruth M. Greenwood
Annabelle E. Harless
CAMPAIGN LEGAL CENTER
73 W. Monroe St., Ste. 302
Chicago, IL 60603
(312) 561-5508
rgreenwood@campaignlegal.org
aharless@campaignlegal.org

Douglas M. Poland
RATHJE WOODWARD LLC
10 E Doty St., Ste. 507
Madison, WI 53703
(608) 960-7430
dpoland@rathjewoodward.com

Paul M. Smith
CAMPAIGN LEGAL CENTER
1101 14th Street NW, Ste. 400
Washington, DC 20005
(202) 736-2200
psmith@campaignlegal.org

Counsel for Plaintiffs-Respondents

MAY 16, 2019

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 21(d) & 32

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because, according to the word count function of Microsoft Word for Mac, version 16.24, the Brief contains 7,263 words excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac, version 16.24, in 12-point Times New Roman font for the main text and 11-point Times New Roman font for footnotes.

/s/ Ruth M. Greenwood
Ruth M. Greenwood

Counsel for Plaintiffs-Respondents

May 16, 2019

PROOF OF SERVICE

I hereby certify that on May 16, 2019, the foregoing Response in Opposition to Petition for a Writ of Mandamus and Opposition to Emergency Motion for Stay Pending Disposition of Petition for Mandamus was submitted to the Clerk of the U.S. Court of Appeals for the Seventh Circuit by using the CM/ECF. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that the foregoing document was served by electronic mail to the following non-CM/ECF participants:

J. Gerald Hebert
Danielle Marie Lang
Mark P. Gaber
1101 14th St, Suite 400
Washington, DC 20005
ghebert@campaignlegalcenter.org
dlang@campaignlegalcenter.org
mgaber@campaignlegal.org

Nicholas Odysseas Stephanopoulos
University of Chicago Law School
1111 E 60th St
Chicago, IL 60637
nsteph@uchicago.edu

Peter Guyon Earle
Law Office of Peter Earle, LLC
839 North Jefferson St., Suite 300
Milwaukee, WI 53202
peter@earle-law.com

Michele Louise Odorizzi
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
modorizzi@mayerbrown.com

Clayton P. Kawski
Karla Z. Keckhaver
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707
keenanbp@doj.state.wi.us
kawskicp@doj.state.wi.us
keckhaverkz@doj.state.wi.us

/s/ Ruth M. Greenwood
Ruth M. Greenwood

Counsel for Plaintiffs-Respondents

May 16, 2019