No. 19-1910

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: SPEAKER ROBIN J. VOS,	)	Petition for Writ of Mandamus
	)	from the United States District Court
Petitioner.	)	for the Western District of Wisconsin
	)	in Case No. 3:15-cv-00421-JDP

WISCONSIN STATE ASSEMBLY SPEAKER ROBIN J. VOS'S REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING DISPOSITION OF PETITION FOR WRIT OF MANDAMUS

Plaintiffs' response to the Wisconsin State Assembly Speaker's mandamus petition and accompanying stay motion relies on the same flawed premise that the district court endorsed: partisan gerrymandering cases are a special exception to the rule that legislators are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). There is no bespoke test for legislative privilege in redistricting cases. For this reason, the reasons below, and those stated in Speaker Vos's mandamus petition and motion for stay, this Court has jurisdiction to issue a writ of mandamus to dissolve or delay the district court's order compelling Speaker Vos to participate in discovery. A stay is warranted to enable this Court to consider the important issues raised in that mandamus petition. With trial two months away, there is no reason to forge ahead with a deposition of the Wisconsin State Assembly Speaker when the Supreme Court will soon decide whether partisan gerrymandering claims are even justiciable.

ARGUMENT

I. This Court has jurisdiction.

Plaintiffs contend that this Court has no jurisdiction to grant Speaker Vos's stay motion or issue a writ of mandamus because the writ would not be "in aid of" this Court's appellate jurisdiction. Resp. Br. 1, 7-8; *see* 28 U.S.C. § 1651(a). Plaintiffs state categorically that

"[t]here is no 'potential jurisdiction' in the Seventh Circuit for this case, and no appeal 'may be later perfected' in this Court." Resp. Br. 7 (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966)). Plaintiffs are wrong.

Nearly a century of precedent confirms that the Supreme Court's section 1253 jurisdiction is to be "narrowly construed." *Gunn v. Univ. Comm. to End War in Vietnam*, 399 U.S. 383, 386-88 (1970) (quotation marks omitted); *see Goldstein v. Cox*, 396 U.S. 471, 478 (1970). Section 1253 is not a non-stop ticket to the Supreme Court for parties in redistricting cases. It confers jurisdiction only over orders "granting or denying, after notice and hearing, an interlocutory or permanent injunction," or those with the "practical effect" of granting or denying an injunction. 28 U.S.C. § 1253; *Abbott v. Perez*, 138 S. Ct. 2305, 2318-21 (2018) (exercising jurisdiction over orders requiring parties to proceed with hearings on remedial redistricting plans, the "practical effect" of which was granting an injunction). And while Plaintiffs are correct that it would *also* be appropriate for the Supreme Court to issue a writ of mandamus "in aid of" its jurisdiction over any later-issued injunction in this case, Plaintiffs are incorrect to suggest that the Supreme Court is the *only* Court that may do so. The Supreme Court's appellate jurisdiction in redistricting cases is not mutually exclusive of this Court's.

This Court retains jurisdiction over any and all orders that do not grant or deny an injunction. For example, as Plaintiffs acknowledge, this Court retains jurisdiction over awards of fees and costs. Resp. Br. 8. If, hypothetically, Plaintiffs were to prevail on their motion to depose Speaker Vos or if Plaintiffs were to prevail in this litigation, Plaintiffs might claim they are entitled to fees and costs for Speaker Vos's deposition. *See*, *e.g.*, FED. R. CIV. P. 37(a)(5); 42 U.S.C. § 1988. Ordinarily only this Court would have appellate jurisdiction to resolve the dispute over Plaintiffs' entitlement to those fees or costs. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 737 n.16 (1980); *see*, *e.g.*, *King v. Ill. State Bd. of Elections*, 410

F.3d 404, 407 (7th Cir. 2005). Or consider another example: if Speaker Vos is compelled to testify and produce documents, this Court retains jurisdiction over future disputes involving any protective order covering his testimony or documents. *See*, *e.g.*, *U.S. Dep't of Educ. v. Nat'l Collegiate Athletic Ass'n*, 481 F.3d 936, 938 (7th Cir. 2007).

Speaker Vos's mandamus petition is no less "in aid of" this Court's appellate jurisdiction over fees or other orders than it is "in aid of" the Supreme Court's appellate jurisdiction over a later-issued injunction. Both this Court and the Supreme Court have the authority to issue a writ of mandamus to dissolve or delay the district court's order compelling discovery of the Wisconsin Speaker.

Finally, as stated in Speaker Vos's mandamus petition, this Court could also construe Speaker Vos's petition as a notice of appeal if this Court determines that *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997), is still a basis for nonparties to immediately appeal discovery orders. *See* Pet. 2-3; *see also In re Hubbard*, 803 F.3d 1298, 1306-08 (11th Cir. 2015) (permitting Alabama elected officials to immediately appeal discovery order).

Plaintiffs' jurisdictional arguments are no reason to deny the Speaker's motion for a stay pending this Court's disposition of the Speaker's mandamus petition.

II. There is no redistricting exception to legislative privilege and immunity.

Nor do any of Plaintiffs' remaining arguments defeat Speaker Vos's request for a stay pending the disposition of Speaker Vos's mandamus petition. Again in this Court, Plaintiffs ignore binding precedent that legislative privilege and immunity protects legislators from discovery, whatever their motives for enacting legislation. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997) ("An inquiry into a legislator's motives for his actions, regardless of whether those reasons are proper or improper, is not an appropriate consideration for the court."); *United States v. O'Brien*, 391 U.S.

367, 383-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."); *see also* Pet. 12-18.

Plaintiffs' disregard for state elected officials is not reflected in the United States Constitution or Code. *See*, *e.g.*, Resp. Br. 11 (describing Speaker Vos's reliance on cases involving the U.S. Commerce Secretary and Vice President as "factually and legally inapt"). Speaker Vos is entitled to the same protections as any other legislator. *See* Pet. 13-17 (discussing *Tenney*, 341 U.S. at 376, *Biblia Abierta*, 129 F.3d at 905-06, *Bagley v. Blagojevich*, 646 F.3d 378, 396-97 (7th Cir. 2011), *Hubbard*, 803 F.3d at 1310, and others).[1] Further, Plaintiffs' casual demeaning of the Speaker's duties highlights the delicate comity concerns raised by the district court's order.

Plaintiffs' only contrary authorities are redistricting cases, every one of which begins with the flawed premise that "redistricting is different." It is not. *See* Pet. 14-16. Indeed, the justiciability of all partisan gerrymandering claims, including Plaintiffs' particular claims, is still "unresolved." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Such dubiously justiciable claims ought not mark the first and only time that either this Court or the Supreme Court departs from the rule in *Tenney* and progeny. *See Dombrowski*, 387 U.S. at 85; *compare also Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015) (raising concerns that it would be "nearly impossible for a legislature to function" without robust protections for legislators), *with* Resp. Br. 6 n.2 (noting 249 redistricting cases were filed since the 2010 census).

[1] One wonders whether Plaintiffs' counsel even asked anyone in Wisconsin (like, possibly, their own clients) who has more of an impact on their daily lives, the Secretary of Commerce or the Speaker of the Wisconsin Assembly? The question answers itself, and Plaintiffs' argument that somehow Secretary Ross is more important than Speaker Vos could only have come from within the Beltway.

Compelling discovery from the Speaker of the Wisconsin State Assembly raises the same federalism concerns as those underpinning the legislative immunity cases cited throughout Speaker Vos's brief. *See*, *e.g.*, *Reeder*, 780 F.3d at 804; *Hubbard*, 803 F.3d at 1305; *see also Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 381 (2004) (stating mandamus is appropriate when a lower court's "actions would…result in the intrusion by the federal judiciary on a delicate area of federal-state relations" (quotation marks omitted)). The very purpose of *Tenney* was to confirm that state legislators are entitled the same legislative freedoms as those in Congress. 341 U.S. at 377-78. Rejecting that argument, Plaintiffs rely on an unpublished Sixth Circuit decision involving a discovery order implicating none of the same federalism concerns as those here. *See* Resp. Br. 13 (citing *Ohio A. Philip Randolph Inst. v. Larose,* 761 F. App'x 506 (6th Cir. 2019)). The subpoenaed third parties in *Larose* were the Republican National Committee, the National Republican Congressional Committee, and a National Republican Congressional Committee redistricting coordinator, not legislators; their arguments were predicated on First Amendment privilege, not legislative privilege or immunity; and they produced the privileged documents, rather than seek a stay pending appeal. *See Ohio A. Philip Randolph Inst.*, 761 F. App'x at 508-10.

The string of redistricting decisions cited in Plaintiffs' brief cannot overwrite the decisions of the Supreme Court or this Court. *See Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019). That is especially so here, where the Supreme Court is considering the merits of two of the redistricting cases Plaintiffs rely on. *See* Resp. Br. 11 (relying on discovery in *Rucho* and *Lamone*); *see also* Pet. 5-6, 24.[2] Speaker Vos's petition for writ of mandamus is no

[2] At least *Rucho* is also inapposite because there legislators chose to waive legislative privilege—a fact Plaintiffs refuse to acknowledge, despite Speaker Vos's having raised it in the district court. *See* Speaker Vos Opp'n at 24, ECF 265.

"cry of frustration that partisan gerrymandering claims are still justiciable." Resp. Br. 19. It is a request that this Court stop the Speaker of the Wisconsin State Assembly's deposition, at the very least until the Supreme Court decides whether partisan gerrymandering suits belong in the federal courts.

III. Plaintiffs' arguments about the importance of immediately deposing the Speaker cannot be reconciled with Plaintiffs' delay.

Plaintiffs make the same error as the district court, concluding that exceptional circumstances justify deposing a high-ranking public official without explaining what unique evidence Speaker Vos has, how such evidence is essential to Plaintiffs' case, and why such evidence cannot be obtained in ways less burdensome than requiring Speaker Vos to prepare for and attend a deposition less than two weeks from now. *See* Resp. Br. 17; *see also* Pet. 18-22. Plaintiffs' repeated refrain that they must hear from Speaker Vos cannot be reconciled with the fact that they waited more than three and one-half years to compel discovery from Speaker Vos in this case (not to mention the nearly eight years that have passed since Act 43 was enacted). Nor can it be reconciled with the fact that they have demanded (and the State Assembly has now acceded) to depose legislative aides Adam Foltz and Tad Ottman for a fifth time.

Finally, Plaintiffs surmise that "any burden on Speaker Vos's time is adequately mitigated" by Plaintiffs' scheduling his deposition for May 29, 2019, and requiring documents by May 22. Resp. Br. 12. Plaintiffs never once asked Speaker Vos about his availability for a deposition before subpoenaing him; they unilaterally decided—based on a publicly available schedule of the Assembly's scheduled floor periods—that the Speaker of the State Assembly is available for a day-long deposition with little more than two weeks' notice. As the Speaker has stated, the Legislature is in session and is in the midst of one of its busiest seasons as it works to formulate Wisconsin's biennial budget. *See* Pet. 11; Mot. for Stay 1, 8.

For these and other reasons in Speaker Vos's mandamus petition and stay motion, Plaintiffs' various arguments about why a stay is unwarranted fall flat. It was Plaintiffs who waited years to subpoena the Speaker of the Wisconsin State Assembly. And Plaintiffs' assertion that Speaker Vos will not be harmed by preparing for and attending a last-minute deposition because government officials "who participat[e] in litigation inevitably diver[t] time and attention away from their public duties," Resp. Br. 20, ignores that Speaker's Vos's "participation" is as a subpoenaed non-party. It also assumes the answer to the question pending before this Court: must Speaker Vos be compelled to participate in discovery in this partisan gerrymandering case? A stay is warranted so that Plaintiffs' insistence that Speaker Vos be deposed now does not moot the Court's consideration of that important question.

CONCLUSION

For the foregoing reasons and those stated in the mandamus petition and emergency stay motion, Speaker Vos respectfully requests that this Court stay the district court's order pending its disposition of Speaker Vos's petition for writ of mandamus.

Respectfully submitted,

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MAY 17, 2019

CERTIFICATE OF COMPLIANCE

1. This reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 2,091 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) and Circuit Rule 32(b). This brief has been prepared using Microsoft Word version 2016 using a 12-point, proportionally spaced font (Garamond).

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PROOF OF SERVICE

I hereby certify that on May 17, 2019, the foregoing Reply in Support of Wisconsin Assembly Speaker Robin Vos's Emergency Motion for Stay was submitted to the Clerk of the U.S. Court of Appeals for the Seventh Circuit by using the CM/ECF system. 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:

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