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IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., *et al.*,

Plaintiffs,

Case No. 2022-CA-000666

v.

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

Defendants.
_____/

REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER PREVENTING DEPOSITIONS OF INDIVIDUAL LEGISLATORS AND STAFF

The Individual Legislators and Staff respectfully reply to Plaintiffs' "Opposition to Motion to Quash Depositions of Legislators and Staff," dated October 17, 2022.

INTRODUCTION

In *Apportionment IV*, the Florida Supreme Court recognized a case-sensitive balancing approach to the legislative privilege. It noted multiple times the stage of that litigation and the incriminating evidence proffered by the plaintiffs, and determined that the plaintiffs' interest in further factual development warranted a limited qualification of a constitutional privilege.

Plaintiffs here have sought no third-party discovery and offer no factual corroboration for their bare allegation that legislators and legislative staff acted with improper intent. Rather, Plaintiffs ask this Court to discard *Apportionment IV*'s balancing approach and to recognize a categorical redistricting exception to the legislative privilege, relieving them—and anyone else who files a similar complaint—of any obligation to marshal some evidentiary support for their

bare allegations before legislators and legislative staff are compelled to submit to interrogation in a civil case concerning their legislative activities.

Finally, Plaintiffs mischaracterize the apex doctrine. Nothing in the plain language of Rule 1.280(h) limits the apex doctrine to executive officers, and courts have routinely applied the doctrine to the legislative branch. The declarations of the Individual Legislators and Staff, moreover, sufficiently explain their roles in the redistricting process and the active assistance and participation of committee staff who possess the same knowledge. This evidence is more than enough to enable the Court to evaluate the facial plausibility of the nonparties' disavowal of unique knowledge, and to shift to Plaintiffs a burden that Plaintiffs do not attempt to carry.

The Court should accordingly grant the motion.

ARGUMENT

I. THE LEGISLATIVE PRIVILEGE PROHIBITS THE PROPOSED DEPOSITIONS.

Plaintiffs make no factual showing that *any* member of the Florida Legislature, or any legislative staff, acted with improper intent. They do not even try. Rather, Plaintiffs argue that the mere filing of a complaint alleging wrongdoing in redistricting—without more—entitles the litigant to interrogate legislators and legislative staff under oath, beginning with the House Speaker and committee chairs.

Plaintiffs reach this conclusion only by erasing *Apportionment IV*'s case-by-case, stage-by-stage balancing test and replacing it with a blanket redistricting exception to the legislative privilege. But *Apportionment IV* did not emphasize the stage of the litigation and the plaintiffs' evidence of wrongdoing for nothing. As explained in the nonparties' motion, *see* Mot. at 5–7, those circumstances were not mere surplusage in the Court's opinion, but key considerations

in the Court's endorsement of the trial court's limited qualification of the legislative privilege.[1]

This Court should accordingly reject Plaintiffs' invitation to convert *Apportionment IV*'s facts-and-circumstances approach into a categorical exception to the legislative privilege in all redistricting litigation—no matter the facts and circumstances. Grounded in Florida's strong Separation of Powers Clause, *see* art. II, § 3, Fla. Const., the legislative privilege does not yield at the mere filing of a lawsuit. Rather, its preservation is of the utmost importance, protecting the uninhibited discharge of legislative duties. *See Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (characterizing the separation of powers as the "cornerstone of American democracy").

Contrary to Plaintiffs' assertions, this case is far from "identical" or "strikingly similar" to *Apportionment IV*. Resp. at 8, 10. In *Apportionment IV*, the plaintiffs presented factual support for their allegations. In their briefing, the plaintiffs represented that "third-party discovery has revealed that Florida legislators and staff communicated secretly and extensively with partisan organizations and consultants while formulating [the redistricting plan]," and referenced "filings in the trial court" to support that representation. Pets.' Reply Br. at 12 (Aug. 12, 2013) (No. SC13-949), *available at* 2013 WL 9792111. The Florida Supreme Court made multiple references to that evidence in concluding that the plaintiffs' compelling, competing interest in discovery outweighed the legislative privilege. Here, Plaintiffs offer no evidence whatsoever.

Plaintiffs claim that *Apportionment IV* does not require them to show communications with political operatives and that impermissible intent may be established in "myriad" ways. Resp. at 13. But that only exacerbates Plaintiffs' failure to make *any* factual showing. Despite the purportedly "myriad" ways to prove intent, Plaintiffs fail to present a single iota of factual

[1] As explained in their motion, the Individual Legislators and Staff preserve for appeal their contentions that *Apportionment IV* was wrongly decided, and that the legislative privilege is absolute in civil cases.

support for their allegation that legislators and legislative staff acted with impermissible intent.

Conceding the complete absence of any facts to support their allegations of improper intent against legislators and legislative staff, Plaintiffs all too predictably blame their failure on Defendants' well-founded discovery objections. Resp. at 5–7. Plaintiffs' recourse against discovery objections to which they take exception is not, however, to discard a constitutional privilege, but rather to move to compel. Nothing in *Apportionment IV* suggests that a plaintiff that takes exception to a defendant's objections to written discovery may forego the ordinary methods of resolving discovery disputes and depose nonparty legislators and legislative staff.[2]

Finally, Plaintiffs insist they "cannot afford to wait" and that expert disclosures must be made in three months. Resp. at 1. But that problem is solely of Plaintiffs' own making, and affords no sound reason to trample on a centuries-old constitutional privilege. Plaintiffs filed this case on April 22, 2022, and have taken no third-party discovery to attempt to establish a basis for depositions of legislators and legislative staff. Nor did Plaintiffs serve the deposition notices at issue here until October 3—well over five months after the case was filed, and seven weeks after the Secretary's counsel *invited* Plaintiffs to notice these depositions so this Court would be able to address the anticipated privilege objections by nonparty officials in the executive and legislative branches at the same time. Plaintiffs' belated realization that six months have passed does not warrant the breach in separation-of-powers principles that *Apportionment IV* condoned only in the most exceptional cases. To rule otherwise would grant plaintiffs in every redistricting case a perverse incentive and reward delays in pursuing discovery. Absent

[2] Plaintiffs also mischaracterize the progress of discovery. The House and Senate have produced more than 50,000 pages of documents collected from their members and staff, while withholding as privileged only traditionally protected communications with attorneys and non-testifying experts, as well as draft district maps that were not considered in any legislative proceeding.

evidence that legislators or legislative staff acted with impermissible intent, this Court should exercise the broad discretion that *Apportionment IV* conferred and protect the nonparties from deposition.

II THE APEX DOCTRINE PROHIBITS THE PROPOSED DEPOSITIONS.

As to the apex doctrine, Plaintiffs badly misread the law. Plaintiffs argue that the apex doctrine protects only executive-branch officials and never applies to legislators, but nothing in the plain language of Rule 1.280(h) imposes that limitation, and no precedent supports it.

Rule 1.280(h)'s plain language protects any "high-level government . . . officer"—not merely high-level executive officers. As the Florida Supreme Court explained, an "officer" is anyone "who holds an office of authority or trust in an organization, such as a corporation or government." *In re Amend. to Fla. Rule of Civ. P. 1.280*, 324 So. 3d 459, 462 (Fla. 2021) (quoting AMERICAN HERITAGE DICTIONARY 1223 (5th ed. 2011). The adjective "high-level" means "being of high importance or rank" or "occurring, done, or placed at a high level." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/high-level. There is no question that elected legislators as well as the chief of staff hold offices of authority or trust in government, and that their offices are of high importance or rank and placed at a high level.

Courts have consistently found that legislators are entitled to invoke the apex doctrine. Only three months ago, in a redistricting case in Texas, the Department of Justice advanced the same argument that Plaintiffs now refurbish here: that the apex doctrine does not protect the legislative branch. The court flatly rejected that argument and concluded that the Speaker of the Texas House of Representatives is a high-level government officer entitled to claim the apex doctrine's protections. *League of United Latin Am. Citizens v. Abbott*, No. 3:21-cv-00259, 2022 WL 2866673, at *2 (W.D. Tex. July 6, 2022); *see also id.* at *1 n.1 (explaining that the

federal doctrine is also called the "apex doctrine"). The court noted that the apex doctrine's rationale—to protect the time of government officials whose official acts might otherwise involve them in frequent litigation—applied no less to legislative than executive-branch officers. The court found no precedent to support an executive-branch limitation on the apex doctrine.

Plaintiffs claim to have found no case that applies the apex doctrine to state legislators, Resp. at 17, but their counsel are counsel of record in *Abbott*, and should have been well aware that the court applied the apex doctrine to the Speaker of the Texas House of Representatives three months ago. Nor does *Abbott* stand alone. While the legislative privilege often defeats attempts to depose legislators without recourse to the apex doctrine, courts have not hesitated to apply the apex doctrine to legislators as well. *See Blankenship v. Fox News Network, LLC*, No. 2:19-cv-00236, 2020 WL 7234270, at *1 (S.D. W. Va. Dec. 8, 2020) (U.S. Senators); *McNamee v. Massachusetts*, No. 4:12-cv-40050, 2012 WL 1665873, at *1 (D. Mass. May 10, 2012) (congressman); *Feldman v. Bd. of Educ. Sch. Dist. #1*, No. 1:09-cv-01049, 2010 WL 383154, at *1 (D. Colo. Jan. 28, 2010) (U.S. Senator); *Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d 437, 440–41 (S.D.N.Y. 2014) (U.S. House Majority Leader). Courts have even applied the doctrine to county commissioners. *Bituminous Materials, Inc. v. Rice Cnty.*, 126 F.3d 1068, 1071 n.2 (8th Cir. 1997); *Watts v. Parr*, No. 1:18-cv-00079, 2019 WL 13175550, at *3 (M.D. Ga. Oct. 24, 2019); *Harding v. Cnty. of Dallas*, No. 3:15-cv-00131, 2016 WL 7426127, at *8 (N.D. Tex. Dec. 23, 2016). These cases refute any contention that the apex doctrine applies to the executive branch only.

Plaintiffs next contend that, even if the Speaker is entitled to apex protection, the other nonparties are not, since they are not at the "highest or uppermost point" of the Legislature. Resp. at 18. But Plaintiffs again overlook the plain language of Rule 1.280(h), which expressly

protects "high-level" government officers—not only the "highest-level" government officers. Tellingly, none of the legislators to whom the apex doctrine applied in *Blankenship*, *McNamee*, *Feldman*, and *Moriah* occupied the "highest or uppermost point" in the legislative branch, but they were still high-level government officers, and were therefore entitled to apex protection.

Plaintiffs incorrectly argue that nobody with personal knowledge may invoke the apex doctrine. Resp. at 9. If it protected only officers lacking personal knowledge, then the apex doctrine would be altogether unnecessary. Instead, the explicit text of the apex doctrine, as codified in the Florida Rules of Civil Procedure, recognizes that high-level government officers participate in and have knowledge of many officials acts, but should not be deposed unless their knowledge is "unique"—*i.e.*, nobody else knows what they know. *See* Fla. R. Civ. P. 1.280(h) (requiring the party seeking a deposition to demonstrate that the officer has "unique, personal knowledge"). If the same information can be obtained from someone not entitled to assert apex protections, then the high-level government officer cannot be compelled to testify.

The declarations submitted by the nonparties are sufficient to carry their burden under Rule 1.280(h). The declarations describe each nonparty's role in the redistricting process and explain that the nonparties acted with the assistance and participation of committee staff and that their knowledge is therefore not unique, but rather shared. "The point" of the declaration requirement in Rule 1.280(h) "is for the court—and the other side—to be able to evaluate the facial plausibility of the officer's claimed lack of unique, personal knowledge." *In re Amend. to Fla. Rule of Civ. P. 1.280*, 324 So. 3d at 463. The declarations here do just that. Their description of a legislative process in which legislators worked closely with committee staff who therefore share the same knowledge—a common working relationship in any legislative body—establishes the "facial plausibility of the officer's claimed lack of unique, personal knowledge." *Id.*

Finally, Plaintiffs argue that committee staff cannot possibly know the "intent" of the Individual Legislators and Staff, who therefore have unique knowledge of "the intent underlying the Enacted Plan." Resp. at 20–21. Critically, however, as Plaintiffs readily concede, the primary action the legislators took with respect to the Enacted Plan was not to *draw* it, but to *vote* for it. *Id.* at 19–20. To the extent Plaintiffs seek to depose the legislators to determine *why* they voted for the Enacted Plan, they cannot.[3] In *Apportionment IV*, even while permitting depositions of legislators and legislative staff, the Court barred any inquiry into the witness's subjective thoughts and impressions—as distinguished from objective facts. *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 141, 154 (Fla. 2013). Under any scenario, Plaintiffs would therefore be barred from inquiring into the one and only subject of which they claim the nonparties have "unique, personal knowledge." Fla. R. Civ. P. 1.280(h).

Plaintiffs have not demonstrated that they have "exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information." *Id.* Because Plaintiffs have not satisfied their burden, the apex doctrine applies.

CONCLUSION

For these reasons, the Court should enter a protective order prohibiting the depositions of the Individual Legislators and Staff.

[3] If the legislative privilege protects anything at all, it protects legislative officials from such inquiries into their motivations. *See Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 524 (Fla. 1st DCA 2012) ("The power vested in the legislature under the Florida Constitution would be severely compromised if legislators were required to appear in court to explain why they voted a particular way or to describe their process of gathering information on a bill.").

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CERTIFICATE OF SERVICE

I certify that, on October 19, 2022, the foregoing document was furnished by email to all individuals identified on the Service List that follows.

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