1D22-3834; L.T. 2022-CA-666

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

SENATOR RAY RODRIGUES, ET AL.,

Non-Parties-Appellants,

v.

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., ET AL.,

Plaintiffs-Appellees.

APPENDIX TO APPELLANTS' RESPONSE TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

ANDY BARDOS (FBN 822671)
GRAYROBINSON, P.A.
301 South Bronough Street
Suite 600
Tallahassee, Florida 32301

Counsel for Speaker Chris Sprowls, Representative Thomas Leek, Representative Tyler Sirois, Mat Bahl, Leda Kelly, and Jason Poreda

DANIEL E. NORDBY (FBN 14588)
GEORGE N. MEROS, JR. (FBN 263321)
TARA R. PRICE (FBN 98073)
SHUTTS & BOWEN LLP
215 South Monroe Street
Suite 804
Tallahassee, Florida 32301

CARLOS REY (FBN 11648)
FLORIDA SENATE
404 South Monroe Street
Tallahassee, Florida 32399

Counsel for Senator Ray Rodrigues, Senator Aaron Bean, Senator Jennifer Bradley, Jay Ferrin, and Thomas Justin Eichermuller

INDEX TO APPENDIX

Respectfully submitted this thirteenth day of January 2023.

/s/ Andy Bardos
ANDY BARDOS (FBN 822671)
GRAYROBINSON, P.A.
301 South Bronough Street,
Suite 600
Tallahassee, Florida 32301
(850) 577-9090
andy.bardos@gray-robinson.com
vanessa.reichel@gray-robinson.com

Counsel for Speaker Chris Sprowls, Representative Thomas Leek, Representative Tyler Sirois, Mat Bahl, Leda Kelly, and Jason Poreda

/s/ Daniel E. Nordby
DANIEL E. NORDBY (FBN 14588)
GEORGE N. MEROS, JR. (FBN 263321)
TARA R. PRICE (FBN 98073)
SHUTTS & BOWEN LLP
215 South Monroe Street,
Suite 804
Tallahassee, Florida 32301
(850) 241-1717
DNordby@shutts.com
GMeros@shutts.com
TPrice@shutts.com
MMontanaro@shutts.com
CHill@shutts.com

CARLOS REY (FBN 11648)
FLORIDA SENATE
404 South Monroe Street
Tallahassee, Florida 32399
(850) 487-5855
Rey.Carlos@flsenate.gov

Counsel for Senator Ray Rodrigues, Senator Aaron Bean, Senator Jennifer Bradley, Jay Ferrin, and Thomas Justin Eichermuller

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2023, a copy of the foregoing was filed via electronic means through the Florida Courts E-Filing portal and was served via electronic mail on all counsel identified on the Service List that follows.

/s/ Andy Bardos
Andy Bardos (FBN 822671)

SERVICE LIST

Frederick S. Wermuth
Thomas A. Zehnder
King, Blackwell, Zehnder & Wermuth, P.A.
P.O. Box 1631
Orlando, Florida 32802
fwermuth@kbzwlaw.com
tzehnder@kbzwlaw.com

Attorneys for Plaintiffs-Appellees

Abha Khanna
Jonathan P. Hawley
Elias Law Group LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
akhanna@elias.law
jhawley@elias.law

Attorneys for Plaintiffs-Appellees

Christina A. Ford
Joseph N. Posimato
Graham W. White
Harleen K. Gambhir
Elias Law Group LLP
10 G Street N.E., Suite 600
Washington, D.C. 20002
cford@elias.law
jposimato@elias.law
gwhite@elias.law
hgambhir@elias.law

Attorneys for Plaintiffs-Appellees

Bradley R. McVay
Ashley Davis
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399
brad.mcvay@dos.myflorida.com
ashley.davis@dos.myflorida.com
stephanie.buse@dos.myflorida.com

Attorneys for Defendant, Secretary of State

Mohammad O. Jazil
Gary V. Perko
Michael Beato
Holtzman Vogel Baran Torchinsky & Josefiak LLC
119 South Monroe Street, Suite 500
Tallahassee, Florida 32301
mjazil@holtzmanvogel.com
gperko@holtzmanvogel.com
mbeato@holtzmanvogel.com
zbennington@holtzmanvogel.com

Attorneys for Defendant, Secretary of State

Tab A

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

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

Plaintiffs,

v.

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

Defendants.

Case No. 2022-ca-000666

PLAINTIFFS' OPPOSITION TO MOTION TO QUASH DEPOSITIONS OF LEGISLATORS AND STAFF

TABLE OF CONTENTS

INTRODUCTION

The Court should reject Movants' attempt to obstruct Plaintiffs' ability to obtain highly relevant and critical discovery in this case by moving to quash depositions of a specific subset of legislators and staff who were central to the redistricting process.[1] The trial court and the Florida Supreme Court required similarly-situated individuals to provide such testimony in the last redistricting cycle, and this Court should do the same. In arguing to the contrary, Movants warp binding precedent, rewrite the Fair Districts Amendments standards, and stretch the apex doctrine beyond recognition.

Plaintiffs cannot afford to wait to obtain depositions from witnesses who were central to the redistricting process, including the Movants here. Plaintiffs' expert reports are due in three months. The discovery window will close shortly thereafter. These deadlines are not arbitrary: They were selected to ensure that Plaintiffs would have the opportunity to prove their claims in advance of the 2024 election cycle—something that this Court has already recognized the importance of.

Movants' resistance should be recognized for what it is: an effort to run out the clock, or at least delay Plaintiffs' access to discovery long enough to preclude relief in time for the next election cycle. Neither law nor equity supports their aim. As the Florida Supreme Court explained in allowing discovery to proceed against legislators in the last redistricting cycle, "the failure to permit factual inquiry and the development of a factual record in circuit court proceedings would allow the Legislature to circumvent the constitutional standards." *League of Women Voters of Fla.*

[1] Movants are six legislators (Speaker Chris Sprowls, Representatives Thomas Leek and Tyler Sirois, and Senators Ray Rodrigues, Aaron Bean, and Jennifer Bradley, collectively "the Individual Legislators") and five current and former legislative staff members of the House and Senate redistricting committees (Mathew Bahl, Jason Poreda, Leda Kelly, Jay Ferrin, and Thomas Eichermuller). Plaintiffs seek to depose these witnesses specifically about their personal knowledge and involvement in the redistricting process this cycle.

v. Fla. House of Representatives, 132 So. 3d 135, 149 (Fla. 2013) ("*Apportionment IV*") (quotation omitted). The Court should deny the motion and allow Plaintiffs a fair opportunity to prove their claims.

BACKGROUND

I. The Individual Legislators noticed for depositions personally oversaw the development of Florida's congressional plan.

In the fall of 2021, Representatives Thomas Leek and Tyler Sirois and Senators Ray Rodrigues and Jennifer Bradley were named Chairs of the House and Senate redistricting committees, respectively. *See* Exs. 1-2. Speaker Sprowls oversaw the House's reapportionment work. *See* Exs. 3, 7, 8. Senator Aaron Bean, as President Pro Tempore of the Senate, served as a member of the Senate's redistricting committee. *See* Ex 2.[2]

These members controlled the Legislature's map drawing process following the 2020 Census. When the Legislature began work on reapportionment, Speaker Sprowls circulated a memo outlining his guidance and expectations for members and staff for the redistricting cycle. *See* Ex. 3. The redistricting committee chairs then held a series of meetings to set expectations for the committees' and staffs' work on reapportionment. These meetings often featured detailed presentations describing the Chairs' understanding of redistricting requirements. They also involved the presentation of draft reapportionment plans, which legislative staff created pursuant to the Chairs' guidance and instructions. *See, e.g.*, Ex. 4 (Chair Rodrigues setting out map-drawing expectations for legislative staff).

[2] In this section, Plaintiffs focus on the Individual Legislators' role in the congressional redistricting process, rather than the staff's role, given Movants' invocation of the apex doctrine for the Individual Legislators (and Mr. Bahl, Speaker Sprowls' Chief of Staff). Plaintiffs have otherwise noticed for deposition two staff members of the House Redistricting Committee (Leda Kelly and Jason Poreda) and two staff members of the Senate Redistricting Committee (Jay Ferrin and Thomas Eichermuller).

These members tightly controlled the introduction of, process for, and approval of draft plans. For example, at the very first meeting of the House Redistricting Committee, Chair Leek announced a policy that anyone who submitted a map must be prepared to disclose the persons or entities with whom they collaborated.[3] At the same meeting, Chair Leek declined to answer whether maps submitted by the public would actually be considered by committee staff.[4]

Committee meetings and memos demonstrate that the Chairs were personally involved in overseeing the map drawing process. *See, e.g.*, Ex. 5 (explaining that Chair Rodrigues was working with committee staff and counsel on new map proposals and selecting amendments to propose). But the public meeting packets and public meeting statements alone provide little to no explanation of why certain map drawing decisions were made. For example, when Chair Sirois was asked why a certain draft plan jumped across Tampa Bay given that the Florida Supreme Court ruled that such a maneuver constituted an unconstitutional partisan gerrymander in 2015, he refused to answer, stating only: "I am very much focused on the here and now. . . . I'm not focused on the past."[5]

Records of the committee meetings make clear that the chairs and members were well aware of the legal requirements for redistricting as they were developing draft plans. At one meeting, for example, Chair Leek explained in reference to CD-5 that he believed "[y]ou could have a district that is not majority minority and still would be performing" and protected under the Tier I standards.[6] Later, when Governor DeSantis sent an ambassador, Robert Popper, to argue

[3] *See* September 22, 2021 House Redistricting Committee Hearing. A video of the hearing is available at: https://www.myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?CommitteeId=3107.
[4] *See id.*
[5] See December 2, 2021 House Congressional Redistricting Committee Hearing. A video of the hearing is available at: https://www.myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?CommitteeId=3110.
[6] See January 13, 2022 House Redistricting Committee Hearing. A video of the hearing is available at: https://www.myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?CommitteeId=3107.

against retaining the longstanding configuration of CD-5, Chair Sirois personally pushed back against Mr. Popper's articulation of the legal requirements for redistricting. *See* Ex. 6.

Just three days later, however, legislative leaders began to cave to Governor DeSantis' demand that CD-5 be eliminated, despite the legislative staff's recommendation that CD-5 be retained in its existing form. *See, e.g.,* Ex. 7 (Speaker Sprowls releasing House Amendment that eliminated Benchmark CD-5 in favor of a Duval-only district, calling it "a singular exception to the diminishment standard"). Knowing the map was on shaky legal ground, however, the members also put forward a secondary map, which retained the Benchmark CD-5 and would take effect "should the courts find the primary map's North Florida configuration illegal." *Id.* As Speaker Sprowls explained, the secondary map which retained the Benchmark CD-5 "is one the Legislature knows is legally compliant under current law." *Id.*

After the Governor vetoed both plans, House and Senate leadership suddenly made the decision to eliminate a district they had previously insisted was protected under the Fair Districts Amendments. As Speaker Sprowls and President Simpson explained, "At this time, Legislative reapportionment staff is not drafting or producing a map for introduction during the special session. We are awaiting a communication from the Governor's Office with a map that he will support." Ex. 8. Chair Rodrigues later confirmed that he was briefed by the Governor's office on the Enacted Plan before the special session. *See* Ex. 9.

As J. Alex Kelly, Deputy Chief of Staff to Governor DeSantis, explained in an address before the Legislature, the plan that was ultimately enacted was the product of "consultation and collaboration between [the Governor's office] and leadership in the House and Senate." Ex. 10 at 5. The Enacted Plan does reflect contributions from the Legislature: Ten of the districts in the final

plan originated from the House and Senate. *See id.* As Mr. Kelly explained, the Enacted Plan "aligns in several . . . ways . . . with the House and Senate's map drawing." *Id.*

II. Plaintiffs sought discovery from the Florida House and Senate before seeking depositions of individual legislators and staff.

On July 20, Plaintiffs served interrogatories and document requests on the House and Senate seeking information and materials related to the congressional redistricting process, including information specifically related to draft reapportionment plans, functional analyses performed on redistricting plans, partisan analyses performed on redistricting plans, and communications with the Governor's office, third parties, or Republican consultants about congressional redistricting. *See* Exs. 11-12. Plaintiffs' requests were precisely the kinds of documents and communications that the Florida Supreme Court held were discoverable in the last redistricting cycle.

The House and Senate responded by invoking blanket privilege objections to many of Plaintiffs' requests while obscuring on whose behalf the House and Senate were answering. For example, while Plaintiffs had defined "House" and "Senate" to include the body's members, *see* Ex. 11 at 4, both the House and Senate refused to collect information or documents from members and staff beyond a small "subset" of individuals they personally chose but declined to specifically identify.[7] These omissions were meaningful. For example, the House and Senate both responded that they have "no knowledge" of communications with Republican consultants and that they did not test the political performance of the redistricting plans. But Plaintiffs do not know which members (if any) were consulted in formulating those answers.

[7] *See* Ex. 13 at 2 (House responding to interrogatories on behalf of unidentified subset of members and staff) Ex. 14 at 2 (Senate responding to interrogatories based on information collected from only a "subset of employees"); Ex. 15 (House refusing to collect documents from all House members and staff); Ex. 16 (Senate refusing to collect all documents from all Senate members and staff).

Shortly thereafter, Plaintiffs contacted the House and Senate's counsel via email to clarify whether they represented individual House and Senate members in this case and whether their objection to responding on behalf of third parties included objecting on behalf of members. *See* Ex. 17. The House and Senate's counsel declined to answer, instead suggesting that Plaintiffs follow up with "specific questions about specific objections or limitations." *Id.* Plaintiffs did just that by sending a follow-up letter to the House and Senate's counsel, asking that they clarify which individuals (and specifically, which members) were consulted in responding to Plaintiffs' discovery requests. The House and Senate's counsel did not respond to Plaintiffs' letter for four weeks. And when they did, they continued to obscure who was consulted in responding to Plaintiffs' discovery requests. The House's response suggested that only a handful of members were consulted in responding to Plaintiffs' discovery requests. The Senate's response appeared to suggest that counsel may not have consulted with any members at all.

Plaintiffs provide this background, not because they wish to litigate the House and Senate's responses to Plaintiffs' written discovery requests at this time,[8] but to demonstrate why they need to seek the individual depositions of members and staff who were involved in redistricting *now*. In light of the difficulty that Plaintiffs have encountered in obtaining even straightforward answers about who House and Senate counsel purport to represent and who was consulted in responding to Plaintiffs' written discovery requests, they have little confidence that they will receive a timely or full accounting of the redistricting process or decisions that were made without speaking directly to the members and staff who were involved. Accordingly, Plaintiffs issued notices of these depositions on October 3, after agreeing to a briefing schedule with Movants' counsel (who, it

[8] Indeed, Plaintiffs have attempted to resolve these issues without judicial involvement and, even now, are continuing to engage in discussions with House and Senate counsel regarding Plaintiffs' discovery requests.

turns out, are the House and Senate's counsel), and agreeing to postpone the depositions until Movants' privilege objections could be heard.

Plaintiffs' deposition list is narrow and targeted. In addition to the public record, which made clear that each of the noticed deponents had a substantial role in the redistricting process, each of the 11 individuals noticed for a deposition was specifically identified by the House or Senate in their interrogatory responses as a person who possessed responsibility for or advised the chambers on the redistricting process. *See* Ex. 13 at 4-6; Ex. 14 at 9-10.

In fact, Plaintiffs noticed these depositions at the invitation of Defendants' counsel. After Plaintiffs issued a deposition subpoena to the Governor and Mr. Kelly, counsel for the Governor and Secretary *suggested* to Plaintiffs that they notice legislator depositions at this time so that any objections could be heard at the same time as the Governor's motion was considered. *See* Ex. 18 (Defendants' counsel asking, "If you are planning to depose legislators and legislative staff, in addition to the Governor, could you serve the relevant subpoenas so the trial court can hear the parties' arguments for and against the depositions all at the same time? That will ensure an efficient hearing and appellate process on arguments that overlap, like the legislative privilege.") Defendants' counsel have also made clear to Plaintiffs that they will seek interlocutory appeals of any order requiring legislators or staff to appear for depositions, as they seek to overturn *Apportionment IV*. As a result, waiting to notice these depositions until later in the discovery process is unlikely to leave sufficient time for this Court and any appellate court that might be asked to consider any ruling to properly consider the matter. It could also result in inefficient and duplicative proceedings.

This matter is currently ripe and properly before the Court. For the reasons that follow, the Court should deny the motion to quash.

LEGAL STANDARD

"[T]he party asserting privilege has the burden to prove such a privilege should apply." *Avatar Prop. & Cas. Ins. Co. v. Simmons*, 298 So. 3d 1252, 1254 (Fla. 5th DCA 2020); *see also Apportionment IV*, 132 So. 3d at 150-54 (considering and rejecting Legislature's arguments as to why legislative privilege should apply). Under the apex doctrine, "the person or party resisting a deposition has two burdens: a burden to persuade the court that the would-be deponent meets the high-level officer requirement, and a burden to produce an affidavit or declaration explaining the official's lack of unique, personal knowledge of the issues being litigated." *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d 459, 463 (Fla. 2021).

ARGUMENT

Movants seek to preclude depositions on the grounds of legislative privilege and the apex doctrine. But neither bars the depositions at issue here. In *Apportionment IV*, which is binding on this Court, the Florida Supreme Court already decided that the compelling interest in vindicating the Fair Districts Amendments outweighs the purposes of the qualified legislative privilege that might otherwise shield legislators from the discovery process in a normal civil case. While Movants attempt to distinguish *Apportionment IV* from this case to evade its holding and argue that Plaintiffs' requested depositions are premature, this case is on a nearly identical track to *Apportionment IV*, in which challengers noticed depositions of legislators a few months after the case was filed and received their first order authorizing those depositions in October 2012.

Contrary to Movants' assertions, Plaintiffs do not need to discover evidence of wrongdoing from third parties to proceed with their depositions of legislators and staff. In so arguing, Movants warp the governing standard to show a violation of the Fair Districts Amendments. The amendments do not prohibit working with third parties in the redistricting process—they prohibit

partisan intent and discriminatory racial intent in the redistricting process, however that intent takes hold. To be sure, one *can* prove a violation of the Fair Districts Amendments by discovering a secretive, collusive process with Republican consultants, as the challengers did last time. But that is not the standard—neither to prove a violation of the Amendments, nor for discovery against the Legislature to proceed in a case alleging such a violation. It is the intent of the *officials who drew and enacted the plan* that matters. And the individuals who have been noticed for a deposition clearly have knowledge relevant to that question.

The legislators' invocation of the apex doctrine to preclude their depositions is also inconsistent with that doctrine. The purpose of the apex doctrine is to prevent harassment and unduly burdensome discovery against high-ranking officials *who lack personal knowledge* of the issue at hand. Here, Plaintiffs seek the depositions of those individuals who directly oversaw and personally participated in the congressional redistricting process. Indeed, every legislator and staff member who was noticed for a deposition was individually identified by the House and Senate in their interrogatory responses as a key player in the congressional redistricting process. The apex doctrine accordingly does not apply, and the depositions should proceed.

I. Under binding precedent, the legislative privilege must yield when plaintiffs seek discovery from individuals directly involved in the redistricting process in a case seeking to vindicate the Fair Districts Amendments.

As Plaintiffs explained in detail in response to the Governor's Motion for Protective Order, the Florida Supreme Court has held that the testimonial legislative privilege "is not absolute" and must yield where "the purposes underlying the privilege are outweighed by the compelling, competing interest of effectuating the *explicit* constitutional mandate that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting." *Apportionment IV*, 132 So. 3d at 138. In the last redistricting cycle, the Court found that—in exactly these

circumstances, when plaintiffs sought discovery from legislators directly involved in redistricting in a case brought under the Fair Districts Amendments—the privilege must yield.

The circumstances were strikingly similar. That case was filed immediately after redistricting plans were passed in the spring of 2012, and by the summer, the challengers had begun noticing legislator depositions. In July 2012, members of the Legislature filed a motion for a protective order to prevent the discovery of "legislative draft maps and supporting documents," as well as the depositions of legislators and legislative staff about the redistricting process. *Id.* at 141. In early October 2012, the trial court largely rejected the motion and ordered the Legislature and its members to respond to plaintiffs' discovery requests and sit for depositions. *See* Ex. 19. This decision came early in the discovery process. Indeed, at that time, *no* substantial discovery had taken place.

After the Legislature sought an interlocutory appeal, the issue progressed to the Florida Supreme Court. The Court agreed with the trial court and found that, while a legislative privilege does exist in Florida, it is not absolute. *Apportionment IV*, 132 So. 3d at 146. And it expressly held that ensuring compliance with the Fair Districts Amendments was a compelling, competing interest that outweighed legislators' desire to be shielded from discovery in such a case. *Id.* at 148-49; *see also id.* at 138 (holding that "the purposes underlying the privilege are outweighed by the compelling, competing interest of effectuating the *explicit* constitutional mandate that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting"). As the Court explained, "in order to fully effectuate the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering, it is essential for the challengers to be given the opportunity to discover information that may prove any potentially unconstitutional intent." *Id.* at 148. To that end, the Supreme Court permitted all of the plaintiffs'

discovery against the Legislature to proceed except for discovery into the subjective "thoughts or impressions of individual legislators or legislative staff." *Id.* at 151; *see also id.* at 154 (holding "legislators and legislative staff members may assert a claim of legislative privilege . . . only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process").

As a result of *Apportionment IV*, the plaintiffs in the 2012 Fair Districts litigation were permitted to and did obtain extensive discovery from the Legislature, including depositions of legislative leaders, individual legislators, redistricting chairs, and their staff about the redistricting process. They ultimately deposed all of following individuals from the House and Senate:

- Dean Cannon, Speaker of the House
- Don Gaetz, President of the Senate
- Christopher Clark, Chief of Staff to the Senate President
- Steve Precourt, Former Vice-Chair of the House Redistricting Committee
- Will Weatherford, Chairman of the House Redistricting Committee
- Jack Latvala, Senator involved in the redistricting process
- John Legg, Senator involved in the redistricting process
- Doug Holder, Representative involved in the redistricting process
- George Levesque, Corporate Representative of the Senate
- Daniel Nordby, Corporate Representative of the House
- John Guthrie, Staff Director for the Florida Senate Redistricting Committee
- J. Alex Kelly, Staff Director for the Florida House

- Kirk Pepper, Staff Director of the Florida House
- Jason Poreda, Legislative Analyst
- Jay Ferrin, Staff Director of the Senate Committee on Reapportionment

The information discovered from the Legislature as a result of document discovery and these depositions was key to the Florida Supreme Court's eventual finding that the Legislature violated the Fair Districts Amendments in the last redistricting cycle. *See generally League of Women Voters of Fla. v. Detzner,* 172 So. 3d 363 (Fla. 2015) ("*Apportionment VII"*).

The reasoning of *Apportionment IV* applies equally to the depositions that Plaintiffs have noticed here of crucial legislators and staff who were key to this redistricting cycle. Any other holding would deny Plaintiffs the right to develop "a factual record" and "would allow the Legislature to circumvent the constitutional standards" of the Fair Districts Amendments. *Apportionment IV*, 132 So. 3d at 149 (quotation omitted).

II. Plaintiffs do not need to show evidence of communications with political operatives to proceed with legislator or staff depositions.

Apportionment IV announced a two-step test in which "courts must engage" "when the legislative privilege is asserted." *Id.* at 147. First, the Court must ask "whether the information sought falls within the scope of the privilege," and, second, whether "the purposes underlying the privilege . . . are outweighed by a compelling, competing interest." *Id.* Neither question is dependent upon the moving party first obtaining third-party communications suggesting wrongdoing before they may attempt to take depositions of legislators and staff. While it is true that plaintiffs in the last redistricting cycle ultimately uncovered such communications in the course of the litigation, *Apportionment IV's* holding is not at all dependent that fact. Moreover, imposing such a requirement would improperly "allow the Legislature to circumvent the constitutional standards" of the Fair Districts Amendments, in direct contravention of the Court's

holding, *id.* at 149, which repeatedly emphasized the importance of the ability of plaintiffs to vindicate the rights protected by those Amendments. *See, e.g., id.*

Further evidencing the absurdity of Movants' position is the fact that the Fair Districts Amendments do not prohibit *third-party communications about redistricting*, but partisan intent in redistricting, period. *See* Fla. Const. art. III, § 20. Under the Amendments, *any* partisan intent in the map drawing process is unlawful; "there is no acceptable level of improper intent" when it comes to redistricting. *In re S. J. Res. of Legis. Apportionment 1176*, 83 So. 3d 597, 617 (Fla. 2012) ("*Apportionment I*"). Legislative communications with partisan organizations *may* provide evidence of improper partisan intent—and, indeed, last redistricting cycle those communications *did*, in glaring, undeniable terms. But partisan intent may also be shown in any myriad of other ways.

The Florida Supreme Court found as much, holding that "[i]n the redistricting context," "unlawful intent" can be discerned from, among other sources, "the actions and statements of [those] involved in the map drawing process," the "specific sequence of events" surrounding passage of the plan, and the role of "alternative plans." *Apportionment VII*, 172 So. 3d at 388-89. In 2012, "those involved in the map drawing process" included not just legislators and their staff, but outside political operatives. But nothing in the Supreme Court's decision required that there first be a showing of mal-intent before discovery can proceed, much less one that is shown specifically by the discovery of communications with partisan third parties. Indeed, one would not expect that the Legislature—having been taken to task last cycle for violating the Fair Districts Amendments—would operate in exactly the same way this cycle.[9]

[9] Notably, in their discovery responses, the House and Senate stated that, to their "knowledge," they had no communications with outside partisan organizations. *See* Ex. 13 at 12; Ex. 14 at 19. Assuming that the House and Senate conducted a proper inquiry, and that is in fact true, Movants' new rule would effectively

Even if there was a requirement that plaintiffs could not seek discovery of the Legislature until there was evidence that indicated partisan intent improperly influenced the redistricting process (and for the reasons discussed, there is not), it would be met here. As discussed in prior filings with the Court, there *is* already public evidence that political operatives were involved again in creating the Enacted Plan this cycle, as seen by Mr. Kelly's admissions in the special session, *see* Resp. to Governor's Mot. for Protective Order at 6-7, as well as recent reporting finding that the Governor and Secretary hired the general counsel of the National Republican Redistricting Trust to assist in redistricting, along with other Republican consultants. *See* Ex. 20. Thus, there is no reasonable basis—even under Movants' own newly-created test—to deny Plaintiffs the opportunity to conduct the noticed depositions to determine the extent to which partisan actors or partisan intent actually influenced the process, as well as any role they played in the preparation or enactment of the Enacted Map.

Movants also ignore that Plaintiffs' case this cycle concerns not only partisan intent, but also racial intent. *See* Compl. Count II (alleging intent to abridge and diminish minority voting strength). Legislators are regularly subject to discovery in redistricting cases alleging improper racial intent. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 336 (E.D. Va. 2015) (listing cases); *Favors v. Cuomo*, 285 F.R.D. 187, 221 (E.D.N.Y. 2012); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *11 (N.D. Ill. Oct. 12, 2011); *see also LULAC v. Abbott*, EP-21-CV-00259-DCG-JES-JVB, 2022 WL 1570858, at *1-3 (W.D. Tex. May 18, 2022) (permitting depositions of state legislators to proceed

insulate them from inquiry about the Enacted Map, even if that map were in fact drawn with discriminatory partisan (or, as discussed further *infra*, racial) intent, as evidenced in other ways. For the reasons explained, this would be an absurd result, wholly inconsistent with the Fair Districts Amendments and binding Florida Supreme Court precedent.

in case alleging voting-related bill was passed with discriminatory racial intent). Here, in passing the Governor's plan, the legislators agreed to eviscerate CD-5, a district they acknowledged was a Black-performing district that they believed merited protection under the Fair Districts Amendments. The process by which CD-5 was eliminated, and the reasons for doing so, are plainly at issue in this case. There is no reason why Plaintiffs would need to put forward communications with third parties discussing the elimination of CD-5 to prove their racial intent claims or seek discovery on them.

Finally, Movants' assertion that Plaintiffs' noticing of depositions of legislators and staff is premature compared to last redistricting cycle is not only beside the point, but also inaccurate. In the last cycle, the trial court ordered the depositions of legislators and staff on October 3, 2012—just a few months into the discovery process and almost exactly where the parties find themselves today. *See* Ex. 19 The plaintiffs had *not* taken extensive discovery of third parties before noticing those legislative depositions. In fact, at the time the challengers were opposing the legislators' motion for a protective order, the defendants had "refused to even identify outside consultants who were involved in the redistricting process" and claimed their identities were privileged. Ex. 21 at 7 n.7.

III. This Court has no authority to overturn the Florida Supreme Court's decision in *Apportionment IV*.

Movants argue that *Apportionment IV* should be "overruled," relying extensively on *Apportionment IV*'s dissent. Mot. at 7. But this Court has no power to overrule decisions of the Florida Supreme Court. *See State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) ("Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling."); *State v. Lott*, 286 So. 2d 565, 566 (Fla. 1973) (holding "[t]he trial court is bound by the decisions of [the Florida Supreme] Court just as the District Courts of Appeal follow controlling

precedents set by the Florida Supreme Court"). *Apportionment IV* remains not just good law but binding precedent, in this circuit and in every circuit in Florida. *See, e.g.*, *City of Weston*, 2021 WL 1326331 (1st DCA Apr. 9, 2021) (relying on *Apportionment IV* for the proposition that "state legislators' testimonial privilege in their exercise of official functions is limited. The privilege must yield where improper intent is a proper legal inquiry."). There is no basis for the Court to entertain Movants' invitation to ignore it.

IV. The apex doctrine does not apply.

Movants claim that the apex doctrine precludes the depositions of each of the Individual Legislators and House Chief of Staff Mathew Bahl. But the doctrine does not protect the Movants against the depositions sought here. To properly invoke the apex doctrine, a person seeking to prevent a deposition must (1) persuade the court that they are a "current or former high-level government or corporate officer," and (2) "produce an affidavit or declaration explaining the official's *lack* of unique, personal knowledge of the issues being litigated." *In re Amend. to Fla. Rule of Civ. Proc. 1.280*, 324 So. 3d at 462-63 (emphasis added) (*In re Amend. Rule 1.280*); *see also* Fla. R. Civ. P. 1280(h). "If the resisting person or party satisfies those burdens, and the deposition-seeker still wants to depose the high-level officer," the burden shifts to the person seeking the deposition "to persuade the court that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information." *In re Amend. Rule 1.280*, 324 So. 3d at 463.[10]

Here, Movants fail to satisfy their initial burden to establish that the relevant individuals

[10] While the Florida Supreme Court amended the Rules of Civil Procedure to include the apex doctrine in 2021, *see In re Amend. Rule 1.280*, 324 So. 3d at 462-63, the First District Court of Appeal has recognized the doctrine in some form since 2005. *See Horne v. Sch. Bd. of Miami-Dade Cnty.*, 901 So. 2d 238 (Fla. 1st DCA 2005). The apex doctrine was thus recognized in Florida at the time the challengers took depositions of legislators in the last redistricting cycle.

are "high-level" officials deserving of apex protection and to adequately explain those individuals' lack of unique, personal knowledge of the issues in this case. The individuals whom Plaintiffs seek to depose personally oversaw the progression of Florida's redistricting plan; they are not bystanders to this process. The Court should decline to apply the apex doctrine.

A. The Individual Legislators and Mr. Bahl are not "high-level" officials for purposes of the apex doctrine.

Movants first fail to meet their burden of demonstrating that the individual legislators and Mr. Bahl are "high-level" government officials under Rule 1.280(h). *Id.* at 462. The Florida Supreme Court has declined to codify a definition of "high-level government or corporate officer." *Id.* Rather, it points litigants toward the "rich body of case law applying the term," explaining that "a proper interpretation of the term will necessarily consider how courts have traditionally used the term, together with the well-established purposes of the apex doctrine." *Id.* However, the Court has emphasized that "'high-level officer status' depends on the organization and the would-be deponent's role in it, not on whether the person is an 'officer' in a legal sense." *Id.*

Movants fail to cite a single case from the "rich body of case law applying" the apex doctrine in which any court has held that state legislators or their staff are high-level officials for purposes of the apex doctrine.[11] Plaintiffs themselves searched for such a case and have yet to find a single one.

The fact that legislators (or their staff) have not been the subject of apex doctrine cases is not surprising, given the purpose of the doctrine. It is specifically intended to "prevent[] the high level official deposition that is sought *simply because [s]he is the . . . top official*, *not because of*

[11] Movants cite one case in which a court assumed that a U.S. Congressman was a high-ranking official, but the party seeking depositions in that case did not contest the point. The court later held that the Congressman's chief of staff was high-ranking on the basis of his association. *See McNamee v. Massachusetts*, No. 12-cv-40050, 2012 WL 1665873, at *2 (D. Mass. May 10, 2012).

any special knowledge of, or involvement in, the matter in dispute." *Gen. Motors, LLC v. Buchanan*, 874 S.E.2d 52, 61 (Ga. 2022) (emphasis added). Insofar as the apex doctrine has been applied to political actors, they have generally been *executive*-type officials, such as governors, mayors, or executive agency heads. *See, e.g.*, *Sec. & Exch. Comm'n v. Comm. on Ways & Means of the U.S. H.R.*, 161 F. Supp. 3d 199, 250 (S.D.N.Y. 2015) (summarizing cases). According apex protection to such individuals, who sit atop a unitary structure, accords with the doctrine's purpose. In contrast, according apex protection to all 160 Florida state legislators (not to mention any number of individuals among their staff) would make little sense. The doctrine contemplates a "single-hierarchy corporate structure" and so is "ill-suited" where an organization can identify multiple "high-level" officials in order to "evad[e] otherwise relevant and permissible discovery." *Apple Inc. v. Samsung Elecs. Co., Ltd*, 282 F.R.D. 259, 263 (N.D. Cal. 2012). In other words, the fact that all the legislator Movants invoke it is itself reason to find that it does not apply.

In the absence of any case law supporting their suggestion that every state legislator and (at least some number of legislative staffers) qualify as "high-level" officials under the meaning of Rule 1.280(h), Movants point to the fact that all Florida state legislators are "constitutional officer[s]," the Senate President Pro Tempore is a "Senate Officer," and the House Speaker is a "permanent presiding officer," Mot. at 12-13. But, as noted, the Supreme Court has been clear that high-level status does not depend "on whether the person is an 'officer' in a legal sense"; instead, it depends on "the organization and the would-be deponent's role in it." *In re Amend. Rule 1.280*, 324 So. 3d at 462. Moreover, even if this Court were to hold that Speaker Sprowls merits apex protection because of his specific role as Speaker of the House, there is no argument that the other individual legislators or Mr. Bahl are at the "highest or uppermost point" of the Legislature. *See Florida v. United States*, No. 3:21CV1066, 2022 WL 4021934, at *3–4 (N.D. Fla. Sept. 2, 2022)

(quoting Webster's Third New International Dictionary 99 (2002)) (rejecting argument that Immigration and Customs Enforcement official was high-level, even though he had "an important job with significant responsibility," and citing risk that "what was intended as a limited exception to the general rule that all persons are subject to deposition would be expanded exponentially"). That risk is exceptional here, if all 160 Florida legislators—and some of their staff, to boot—may simply claim they are high-ranking officials for the purpose of the apex doctrine.

B. The Individual Legislators' and Mr. Bahl's assertions that they lack unique, personal knowledge of the issues in this case are insufficient as a matter of fact and law.

Perhaps more importantly, as reflected by the Defendants' own discovery responses in this case, each of the Movants—including those who seek to invoke the apex doctrine to avoid a deposition—are individuals who have unique, personal knowledge of issues central to this case. The affidavits that Movants submit to attempt to establish otherwise are based on an unsustainably narrow view of the issues in this case and further fail to comply with the Rule, which the Supreme Court has emphasized requires "that the officer '*explain*,'" underscoring that "[b]ald assertions of ignorance will not do." *In re Amend. Rule 1.280*, 324 So. 3d at 463 (emphasis added). Notably, "[a] sufficient explanation will show the relationship between the officer's position and the facts at issue in the litigation" so that "the court—and the other side—[can] evaluate the facial plausibility of the officer's claimed lack of unique, personal knowledge." *Id.*

The affidavits submitted by the individual legislators and Mr. Bahl do not merit apex protection under Rule 1.280(h). The relevant portion of each affidavit is nearly identical: each claims they lack unique knowledge of matters relevant to the case because (1) they did not "personally draw" a map or "generate redistricting work product" and (2) they "acted with the assistance and active participation of legislative staff." *See, e.g.*, Mot. Exs. 1, 2, 5. The first assertion is beside the point—any number of individuals who did not "personally draw" a map or

"generate redistricting work product" could have unique, personal knowledge relevant to the issues in this case. And the second assertion is actually a concession that the affiant was in fact personally involved with redistricting—the fact that they worked "with assistance and active participation" of others does not preclude unique and personal knowledge about the facts of these case. Moreover, the assertion itself is so generic and conclusory that it fails to meet the standard required by the Rule and Supreme Court precedent: i.e., it does not "expl[ain] the relationship between the litigation and the officer's apex position" in a manner that allows "the court to sufficiently evaluate the applicability of the officer's personal knowledge." *Karisma Hotels & Resorts Corp. Ltd. v. Hoffmann*, No. 4D22-729, 2022 WL 2232540, at *1 (Fla. 1st DCA, June 22, 2022) (finding affidavit insufficient under Rule 1.280(h) where it stated only that the movant lacked unique or personal knowledge apart from information provided in others' depositions).

Here, moreover, the public record alone demonstrates that each of the individuals that Plaintiffs have noticed for depositions were *deeply* involved in the redistricting process—including crucial involvement that did not involve staff decision making. *See supra* at 2-4. It was the *Members*—not the staff—who gave instructions as to how to draw redistricting plans and what criteria to follow. *Id.* It was the *Members*—not the staff—who decided to abandon Benchmark CD-5 after they had publicly acknowledged it merited protection under the Fair District Amendments. *Id.* And it was the *Members*—not the staff—who ultimately voted for the Enacted Plan, a plan that was openly known to be a partisan gerrymander and which crucially rearranged parts of the state compared to maps that legislative staff had drawn for this cycle. *Id.*

Moreover, the fact that Defendants themselves identified each of these individuals as persons who had "responsibility" in the redistricting process is further reason to reject invocation of the apex doctrine here. *See* Ex. 13 at 12; Ex. 14 at 19. *Compare with DecisionHR USA, Inc. v.*

Mills, 341 So. 3d 448, 455 (Fla. 2d DCA 2022) (applying apex protection where proposed deponent was "ostensibly unaware of the complained-of" activities and was not mentioned in the complaint). It is facially implausible that the Individual Legislators and Mr. Bahl would lack unique, personal knowledge regarding the claims in this case. This is particularly true given that the Fair Districts Amendments look to the "intent" underlying a redistricting plan. *See* Fla. Const. art. III, § 20(a); *see also Apportionment I*, 83 So. 3d at 617 (explaining that "there is no acceptable level of improper intent" when it comes to redistricting). To the extent the Individual Legislators and Mr. Bahl participated in the redistricting process, they have unique and personal knowledge of the intent underlying the Enacted Plan.

In sum, Movants have failed to meet their burden under Rule 1.280(h) to demonstrate that the Individual Legislators and Mr. Bahl merit apex protection. The Court should reject their argument and permit the depositions to proceed.[12]

CONCLUSION

Accordingly, the Court should deny the motion for a protective order and allow Plaintiffs to depose Movants.

[12] If the Court finds otherwise and issues an order preventing the depositions of the Individual Legislators and/or Mr. Bahl, Plaintiffs reserve the right under Rule 1.280(h) to move the court to "vacate or modify the order if, after additional discovery," they can demonstrate that they have "exhausted other discovery, that such discovery is inadequate, and that the officer[s] ha[ve] unique, personal knowledge of discoverable information." Fla. R. Civ. P. 1.280(h).

Dated: October 17, 2022

Respectfully submitted,

/s/ Christina A. Ford

Frederick S. Wermuth
Florida Bar No. 0184111
Thomas A. Zehnder
Florida Bar No. 0063274
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, Florida 32802
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
fwermuth@kbzwlaw.com
tzehnder@kbzwlaw.com

John M. Devaney*
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
jdevaney@perkinscoie.com

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Telephone: (206) 656-0177
Facsimile: (206) 656-0180
akhanna@elias.law

Christina A. Ford
Florida Bar No. 1011634
Joseph N. Posimato*
Graham W. White*
Harleen K. Gambhir*
Julie Zuckerbrod**
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
cford@elias.law
jposimato@elias.law
gwhite@elias.law
hgambhir@elias.law
jzuckerbrod@elias.law

Counsel for Plaintiffs

**Admitted pro hac vice*
***Motion for admission pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 17, 2022 I electronically filed the foregoing using the State of Florida ePortal Filing System, which will serve an electronic copy to counsel in the Service List below.

/s/ Frederick S. Wermuth
Frederick S. Wermuth
Florida Bar No. 0184111

Counsel for Plaintiffs

SERVICE LIST

Bradley R. McVay
Ashley Davis
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399
brad.mcvay@dos.myflorida.com
ashley.davis@dos.myflorida.com

Counsel for Florida Secretary of State

Mohammed O. Jazil
Michael Beato
Holtzman Vogel Baran Torchinsky
& Josefiak, PLLC
119 S. Monroe Street, Suite 500
Tallahassee, FL 32301
mjazil@holtzmanvogel.com
mbeato@holtzmanvogel.com

Counsel for Florida Secretary of State

Daniel E. Nordby
Shutts & Bowen LLP
215 S. Monroe Street
Suite 804
Tallahassee, FL 32301
ndordby@shutts.com

Counsel for Florida Senate

Andy Bardos, Esq.
GrayRobinson, P.A.
301 S. Bronough Street
Suite 600
Tallahassee, FL 32302
andy.bardos@gray-robinson.com

Counsel for the Florida House of Representatives

Tab B

IN THE CIRCUIT COURT OF 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.
_____/

ORDER ON MOTION FOR PROTECTIVE ORDER PREVENTING DEPOSITIONS OF INDIVIDUAL LEGISLATORS AND STAFF

This case came on for hearing on October 20, 2022, on a motion for protective order filed on behalf of six legislators[1] and five current and former legislative staff members[2] (the "Individual Legislators and Staff"), all non-parties who have been noticed by Plaintiffs for videotaped depositions. Upon consideration of the Motion, responses, replies, and the presentations by counsel, the Court hereby finds as follows:

In this case, Plaintiffs bring constitutional challenges to the congressional district map passed by the Legislature as Senate Bill 2-C on April 21, 2022, and signed by the Governor on April 22, 2022. Ch. 2022-265, Laws of Fla. As part of their discovery, Plaintiffs are seeking to depose the Individual Legislators and Staff to gain insight into the drawing of the

[1] Speaker Chris Sprowls; Representatives Thomas Leek and Tyler Sirois; and Senators Ray Rodrigues, Aaron Bean, and Jennifer Bradley

[2] Mathew Bahl (Chief of Staff to Speaker Sprowls), Leda Kelly (former Staff Director, House Redistricting Committee), Jason Poreda (Chief Map Drawer, House Redistricting Committee), Jay Ferrin (Staff Director, Senate Committee on Reapportionment), and Thomas Justin Eichermuller (Legislative Analyst, Senate Committee on Reapportionment)

congressional district map. The Individual Legislators and Staff seek a protective order preventing their deposition in this case under the legislative privilege[3] and the apex doctrine (Fla. R. Civ. P. 1.280(h)).

Legislative Privilege

In *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013) (*"Apportionment IV"*), the Florida Supreme Court "decide[d] for the first time that Florida should recognize a legislative privilege founded on the constitutional principle of separation of powers" in a case arising from last decade's redistricting. The Court found the privilege exists but is "not absolute and may yield to a compelling, competing interest." *Id.* at 143. The Court also found that the "compelling interest in [that] case [was] ensuring compliance with article III, section 20(a), which specifically outlaws improper legislative 'intent' in the congressional reapportionment process." *Id.* at 147. It also held that the case presented "a compelling competing interest against application of an absolute legislative privilege." *Id.* at 150. Finally, the trial court's balancing approach that the "legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions... revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to

[3] *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 138 (Fla. 2013) ("*Apportionment IV*"). The parties agreed at the hearing that this Court is bound by the majority ruling in *Apportionment IV* (to the extent that it may apply in this case), and that the language used in the Individual Legislators and Staff's motion and argument regarding any alleged errors in that opinion are solely to preserve the issue for appeal.

testify…concerning any other information or communications pertaining to the…reapportionment process" was adopted by the Court. *Id.* at 154.

In this case, Plaintiffs have alleged that the Governor (through his staff) drew the congressional district map that was ultimately enacted into law. *Compl. at ¶ 74-76. See also,* Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 6. They have alleged that the map violates the Fair Districts Amendment. *See,* Fla. Const. art III sect. 20. Accordingly, they seek to depose the Individual Legislators and Staff about the reapportionment map-drawing process as was done under *Apportionment IV*. The Individual Legislators and Staff argue that this case differs from the trial posture seen in *Apportionment IV* in that Plaintiffs have conducted no 3rd party discovery to date.[4] This Court will note the only real difference between this case and the trial posture addressed in *Apportionment IV* is that the Office of the Governor is now alleged to be the conduit through which the alleged partisan political organizations and political consultants are reaching the legislators. *See, e.g.* Pl.'s Notice of Supplemental Ex. 9., Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 6., and Compl. at ¶ 77. Any directed sequence of discovery appears to give this Court unfettered discretion in controlling the application of the privilege. While this Court has great concerns about allowing Plaintiffs to intrude into the internal processes of a separate co-equal branch of government, the binding precedent of *Apportionment IV* provides little relief to the Individual Legislators and Staff other than

[4] Plaintiffs are seeking to depose a member of the Governor's staff which is subject to a separate motion in this case. *See*, Governor and J. Alex Kelly's Mot. to Quash & for Protection from Subpoena Duces Tecum for Dep.

protection from revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators.[5]

Apex Doctrine

Several of the Individual Legislators and Staff have also asserted that the apex doctrine shields them from deposition. *See,* Fla. R. Civ. P. 1.280(h). These individuals include Speaker of the House Chris Sprowls, President Pro Tempore of the Florida Senate Aaron Bean, Chair of the Select Committee on Congressional Reapportionment Senator Jennifer Bradley, Chair of the House Congressional Redistricting Subcommittee Tyler Sirois, Chair of the House Redistricting Committee Thomas J. Leek, Chair of the Committee on Reapportionment Senator Ray Rodrigues, and Chief of Staff to the Speaker of the House Mathew Bahl. Each of them has submitted an affidavit attesting to the fact that each lack unique, personal knowledge of the issues being litigated. Each generally reiterate that they hold leadership positions within the Legislature and fulfill leadership duties, relying on the expertise of legislative staff and, as it relates to the drawing of the map at issue in this case, the expertise of members of the Governor's staff. During the hearing on this matter, the Court took judicial notice of the fact that Senator Rodrigues actually sponsored Senate Bill 2-C that created the congressional districts in this case. *See also*, Pl.'s Opp'n to Third-Parties' Mot. for Protective Order Ex. 6.

[5] The Court notes that *Apportionment IV* allows legislators to be questioned regarding the reapportionment process despite recognition of a legislative privilege. This Court, in fashioning relief in this case, attempts to set "objective rules that can be applied without the suggestion that the coordinate branch's privilege is subject to diminishment or abrogation through the unfettered discretion of judges." *Apportionment IV*, 132 So. 3d at 160 (Canady, J., dissenting).

Apportionment IV does not address the apex doctrine as applied under the common law. The apex doctrine has since been codified as part of Fla Rule of Civ. Pro. 1.280(h). *In re Amend. to Fla. Rule of Civ. Pro. 1.280*, 324 So. 3d 459, 461 (Fla. 2021). In this case, each of the individuals asserting the apex doctrine, save one, have shown the doctrine applies as to the internal process by which the legislation moved from introduction to enrollment. Senator Rodrigues, by contrast, has shown the apex doctrine only applies as to his function as chair of the Committee on Reapportionment. However, the Court cannot find the apex doctrine to shield him from questioning regarding the introduction of the bill. Nor can this Court, in light of the holding of *Apportionment IV*, find that the apex doctrine shields any individual legislator as to information he or she received prior to voting. Whereas this Court respects the role of each constitutionally elected legislator, it cannot find all 160 legislators to be an apex officer not subject to deposition as to legislation they introduce or vote on. That notion is not supported by the text of the Constitution itself which says that "Each house...shall biennially choose its officers." Fla. Const. art. III sect. 2. The Constitution also specifies that "On the fourteenth day following each general election the legislature shall convene for the exclusive purpose of organization and selection of officers." Fla. Const. art. III sect. 3. There is no requirement that a legislator be an officer to introduce legislation, nor to vote.

The affidavits of each legislator asserting the apex doctrine show a reliance on information provided by staff members and the Governor's Office as to the map drawing. Because this Court is constrained by the holding in *Apportionment IV* as to legislators being deposed regarding map-making, this Court finds that the apex doctrine shields Chief of Staff Bahl and each legislator from questions regarding the process by which the bill moved through each respective chamber. The apex doctrine does not protect any individual legislator or Chief of Staff Bahl from information he or she received related to the drafting of the bill or drawing of the map.

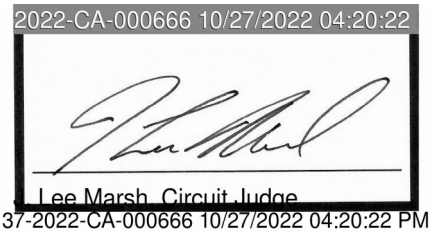
Relief

This Court finds the balancing test applied in *Apportionment IV* not to be directly applicable in this case. In *Apportionment IV,* "the challengers uncovered communications between the Legislature and partisan political organizations and political consultants" and the use of that information in map-drawing. 132 So. 3d at 141. In this case, based on the affidavits already submitted, the information regarding redistricting and map-drawing came from the Governor's office. Therefore, drawing the line between "thoughts or impressions of legislators" and "`objective' information and communications" within the respective chamber is unnecessary and does not strike the proper balance between the privilege and the compelling competing interest. The appropriate line in this case is where the doors to the House and Senate meet the outside world. Accordingly, each legislator and legislative staff member may be questioned regarding any matter

already part of the public record and information received from anyone not elected to the Legislature, their direct staff members, or the staff of the legislative bodies themselves. They may not be questioned as to information internal to each Legislative Body that is not already public record (e.g., their thoughts or opinions or those of other legislators).

For the foregoing reasons, the Motion for Protective Order Preventing Depositions of Individual Legislators and Staff is **GRANTED in part and DENIED in part.** The motion for protective order as to all Individual Legislators and Staff is granted to the extent that they may not be questioned as to information internal to each Legislative Body that is not already public record (e.g., their thoughts or opinions or those of other legislators). The motion is denied in that they may be questioned only as to any matter already part of the public record and information received from anyone not elected to the Legislature, their direct staff members, or the staff of the legislative bodies themselves. This includes the identity of or sources of information outside of the groups identified in this paragraph.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this Thursday, October 27, 2022.



J. LEE MARSH
CIRCUIT JUDGE

Copies furnished to:

All Counsel of Record

Tab C

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

Common Cause Florida, FairDistricts Now, Florida State Conference of the National Association for the Advancement of Colored People Branches, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan, *Plaintiffs,* v. Cord Byrd, in his official capacity as Florida Secretary of State, *Defendant*.	Case No.: 4:22-cv-109-AW-MAF

NOTICE OF SERVICE OF SUBPOENAS FOR THE PRODUCTION OF DOCUMENTS AND INFORMATION

PLEASE TAKE NOTICE that, pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs Common Cause Florida, FairDistricts Now, Florida State Conference of the National Association for the Advancement of Colored People Branches, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan, by and through their attorneys Patterson Belknap Webb & Tyler LLP, are serving Subpoenas to Produce Documents, Information, or Objects in a Civil Action on the non-parties listed below.

Gov. Ron DeSantis Executive Office of the Governor c/o Ashley Moody, Attorney General 400 S. Monroe Street Tallahassee, FL 32399	Robert Popper 9221 Adelaide Dr. Bethesda, MD 20817
Rep. Randy Fine Florida House of Representatives 402 House Office Building 402 S. Monroe Street Tallahassee, FL 32399	Ray W. Rodrigues, Chancellor State University System of Florida 200 West College Avenue, Suite 210 Tallahassee, FL 32301
Adam Foltz 1219 S. Lamar Blvd. Apt. 804 Austin TX 78704	Commissioner Wilton Simpson Florida Department of Agriculture and Consumer Services Plaza Level 10, The Capitol 400 S. Monroe St. Tallahassee, Florida 32399
J. Alex Kelly Executive Office of the Governor 400 S. Monroe Street, Suite 209 Tallahassee, FL 32399	Rep. Tyler Sirois Florida House of Representatives 402 House Office Building 402 S. Monroe Street Tallahassee, FL 32399
Rep. Tom Leek Florida House of Representatives 402 House Office Building 402 S. Monroe Street Tallahassee, FL 32399	Chris Sprowls Buchanan Ingersoll & Rooney PC 401 E. Jackson Street, Suite 2400 Tampa, FL 33602-5236
Ryan Newman Executive Office of the Governor 400 S. Monroe Street, Suite 209 Tallahassee, FL 32399	Rep. Kaylee Tuck Florida House of Representatives 402 House Office Building 402 S. Monroe Street Tallahassee, FL 32399

A true and correct copy of each Subpoena is attached hereto.

[Signature page follows]

Dated: January 9, 2023

By: /s/ *Catherine J. Djang*

Catherine J. Djang (*pro hac vice*)
cdjang@pbwt.com
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
Telephone: (212) 336-2000

Attorneys for Plaintiffs Common Cause Florida, FairDistricts Now, Florida State Conference of the National Association for the Advancement of Colored People Branches, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan