IN THE DISTRICT COURT OF APPEAL
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.

Case No.: 1D22-3834
L.T. No.: 2022-ca-000666

APPENDIX OF APPELLEES TO MOTION FOR LEAVE TO FILE REPLY

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I HEREBY CERTIFY that on February 2, 2023 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.

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

COMMON CAUSE FLORIDA, *et al*.,

Plaintiffs,

Case No. 4:22-cv-00109-AW-MAF

v.

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

Defendants.
_____/

SIX LEGISLATORS' MOTION TO QUASH DEPOSITION SUBPOENAS OR ALTERNATIVELY FOR PROTECTIVE ORDER

Plaintiffs have served document and deposition subpoenas on six current and former members of the Florida Legislature (the "Legislators").[1] The Legislators—all non-parties—respectfully move the Court to quash the deposition subpoenas on the basis of the legislative privilege and the apex doctrine.

[1] The six Legislators are Chris Sprowls and Wilton Simpson, who served as Speaker of the Florida House of Representatives and President of the Florida Senate during the recent redistricting, and State Representatives Thomas Leek, Tyler Sirois, Randy Fine, and Kaylee Tuck. Representatives Leek and Sirois served as the Chairs, and Representatives Fine and Tuck as the Vice Chairs, of the House Redistricting Committee and the House Congressional Redistricting Subcommittee, respectively.

INTRODUCTION

The Supreme Court, the Eleventh Circuit, and this Court have all identified the sources of evidence available to plaintiffs to prove intentional racial discrimination—and those sources do not include the compelled testimony of state legislators over their objection. Yet time and time again, despite the multiple avenues of objective evidence available to plaintiffs in equal-protection cases, those plaintiffs pursue depositions of state legislators instead—no matter how often courts reaffirm the legislative privilege, which fundamentally protects the integrity and independence of the legislative branch.

This Court should quash the deposition subpoenas. For more than five hundred years, legislative immunity and privilege have safeguarded the integrity and independence of the legislative process and assured that fear of personal repercussions does not sway the votes of lawmakers or chill the freedom of speech and action in legislative deliberations. "The legislative privilege is important," *In re Hubbard*, 803 F.3d 1298, 1307 (11th Cir. 2015), as it allows legislators to vote with fidelity to the ballot box and to their consciences, without fear of personal burdens, hardships, threats, or reprisals.

That is why federal courts have consistently prohibited compelled depositions of legislators in important constitutional cases—even in cases that challenge election laws, such as redistricting legislation, or that require evidence of legislative purpose. All of these cases are important, but when lawmakers are personally entangled in civil litigation because of their legislative speech and conduct, the legislative process itself

is harmed. Courts have accordingly required litigants to find their evidence elsewhere, without the compelled testimony of legislators or intrusions on the legislative branch.

The apex doctrine also bars the proposed depositions. The Legislators are high-ranking government officials, and Plaintiffs cannot show that the information sought from the Legislators is essential to their case and unavailable from alternative sources or by less burdensome means. Because ample avenues of more probative information are readily available to Plaintiffs, the apex doctrine prohibits the proposed depositions.

Finally, even if the Court permits the depositions (which it should not), it should prohibit Plaintiffs from video-recording the depositions. The potential for misuse of video recordings in the hands of political opponents is self-evident—and substantially outweighs any minor benefit of a video recording over a traditional, written transcript.

ARGUMENT

I. THE FEDERAL LEGISLATIVE PRIVILEGE PROTECTS THE LEGISLATORS FROM COMPELLED DEPOSITIONS.

The legislative privilege prohibits depositions of state legislators—such as the Legislators here—with respect to their legislative duties. The privilege applies even—or especially—in important cases, and where the motives of the legislative branch are relevant. Plaintiffs are not entitled to interrogate legislators regarding their role in the enactment of Florida's new congressional districts. The subpoenas should be quashed.

A. The Legislative Privilege Safeguards the Legislative Process.

For five centuries, the twin doctrines of legislative immunity and privilege have secured lawmakers from suffering personal hazard or hardship on account of their performance of their official duties, and have thus safeguarded the legislative process from improper interference and intimidation.[2] The privilege reflected Parliament's assertions of independence from the British Crown and secured a freedom of speech and action to colonial assemblies even in the throes of revolution. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). It was considered so essential to the success of representative government that it was codified in the English Bill of Rights of 1689 and, as to members of Congress, in the Constitution's Speech or Debate Clause. *Id*. at 372–73.

The legislative privilege promotes four important purposes. *First*, by securing lawmakers from personal entanglement in judicial proceedings, it removes personal considerations from the lawmaking calculus and promotes the "uninhibited discharge" of legislative duties. *Id*. at 377. "In order to enable and encourage a representative . . . to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from

[2] Legislative immunity shields legislators from civil or criminal liability, while the legislative privilege relieves them of the obligation to furnish evidence. *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). These doctrines are "corollar[ies]," *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018), or "parallel" concepts, *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011), and are generally construed in tandem, *see, e.g.*, *In re Hubbard*, 803 F.3d at 1307–08, 1310 (relying on legislative-immunity cases to define the privilege).

the resentment of every one . . . to whom the exercise of that liberty may occasion offense." *Id*. at 373 (quoting II WORKS OF JAMES WILSON 38 (James De Witt Andrews ed., 1896)); *accord United States v. Gillock*, 445 U.S. 360, 369 (1980) (noting that British monarchs used "judicial process" to exert pressure on members of Parliament and "make them more responsive to their wishes"); *Yeldell v. Cooper Green Hosp., Inc.*, 956 F.2d 1056, 1061 (11th Cir. 1992) ("For our founding fathers, then, the growth of democracy and the right of the nation's legislators to be free from civil suit went hand-in-hand."). In particular, the privilege protects legislators from "political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011); *accord Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) (explaining that the privilege enables legislators to "discharge their public duties without concern of adverse consequences outside the ballot box"). "Private civil actions also may be used to delay and disrupt the legislative function." *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 503 (1975). By guarding state legislators from threats or apprehension of their personal entanglement in judicial proceedings, the legislative privilege assures that such considerations neither coerce nor influence public policy.

Second, the privilege assures that the prospect of compelled testimony does not chill the freedom of speech and action in legislative deliberations. *Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012) (Hinkle, J.). "Freedom of speech

and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney*, 341 U.S. at 372; *accord* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 863 (1833) (explaining that the "freedom of speech and debate" is a "great and vital privilege," "without which all other privileges would be comparatively unimportant, or ineffectual"). To protect this freedom, the Speech or Debate Clause assures that members of Congress will not be made to answer in a judicial forum for their legislative conduct. *Gravel v. United States*, 408 U.S. 606, 616 (1972). And federal common law recognizes that state legislators enjoy a privilege "similar in origin and rationale" to that secured by the Speech or Debate Clause. *In re Hubbard*, 803 F.3d at 1310 n.11.[3]

Third, the legislative privilege protects lawmakers from the burdens that civil litigation imposes on their time, energy, and attention, and thus permits them to "focus on their public duties." *Id*. at 1310 (quoting *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181); *accord Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (explaining that legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves"); *In re Hubbard*, 803 F.3d at 1311

[3] With exceptions not applicable here, federal common law, as developed "in the light of reason and experience," governs assertions of privilege. Fed. R. Evid. 501; *see also In re Hubbard*, 803 F.3d at 1307 (recognizing the federal legislative privilege under Rule 501).

(explaining that a "primary purpose of the legislative privilege" is to "shield[] lawmakers from the distraction created by inquiries into the regular course of the legislative process"). The privilege thus extends to discovery requests—even when the lawmaker is not a party—because compliance with discovery requests "detracts from the performance of official duties." *In re Hubbard*, 803 F.3d at 1310. A litigant need not name legislators as parties to a suit to "distract them from their legislative work. Discovery procedures can prove just as intrusive." *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988), *quoted in In re Hubbard*, 803 F.3d at 1310.

Fourth, "and perhaps most importantly," the legislative privilege embodies "the respect due to a coordinate branch of government." *Florida*, 886 F. Supp. 2d at 1303; *see also Gillock*, 445 U.S. at 373 (discussing "principles of comity" in support of the legislative privilege). Quite simply, "the exercise of legislative discretion should not be inhibited by judicial interference." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *accord Eastland*, 421 U.S. at 503 (explaining that, in a civil action brought by private litigants, "judicial power is still brought to bear on Members of Congress and legislative independence is imperiled"). "Legislators ought not to call unwilling judges to testify at legislative hearings about the reasons for specific judicial decisions, and courts ought not to compel unwilling legislators to testify about the reasons for specific legislative votes." *Florida*, 886 F. Supp. 2d at 1303; *accord In re Grand Jury*,

821 F.2d 946, 957 (3d Cir. 1987) (explaining that "the legislator's need for confidentiality is similar to the need for confidentiality in communications between judges"); *cf. Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 628 (1st Cir. 1995) (explaining that the associated doctrine of legislative immunity "touches upon policies as basic as federalism, comity, and respect for the independence of democratic institutions").

The "fundamental concern" of the privilege, therefore, is not the "maintenance of confidentiality," *Pulte Home Corp. v. Montgomery Cnty.*, No. 14-cv-03955, 2017 WL 2361167, at *8 (D. Md. May 31, 2017), but instead protection of the legislative process from the harms that result when unwelcome entanglement in civil litigation inhibits lawmakers in the discharge of legislative duties. Most courts have recognized the higher interests at stake and diligently protected the legislative process from those harms.

B. The Legislative Privilege Applies to Inquiries Into Legislative Motivations.

It is no surprise, then, that the Eleventh Circuit has recognized the importance of the legislative privilege and its "deep roots in federal common law." *In re Hubbard*, 803 F.3d at 1307.[4] The privilege "protects the legislative process itself" and applies to all actions taken "in the proposal, formulation, and passage of legislation." *Id*. at 1308.

[4] This Court has questioned whether Eleventh Circuit precedent binds a three-judge district court. ECF No. 115 at 7 n.2. No matter the answer, *In re Hubbard* is a significant and well-reasoned decision that courts across the country have cited with approval.

The privilege "applies with full force against requests for information about the motives for legislative votes and legislative enactments." *Id*. at 1310; *see also id*. ("The legislative privilege protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." (internal marks omitted)). The privilege "would be of little value" if a plaintiff's suspicions regarding the motives of legislators could overcome it. *Tenney*, 341 U.S. at 377. Thus, the "claim of an unworthy purpose does not destroy the privilege." *Id*. A federal judicial inquiry into the motives of state legislators is "not consonant with our scheme of government," *id*., and "strikes at the heart of the legislative privilege," *In re Hubbard*, 803 F.3d at 1310.

Thus, in *Florida*, the court recognized the privilege and refused to compel state legislators to sit for deposition in a challenge to state laws under section 5 of the Voting Rights Act. The respect due to a coordinate branch of government, the burden of compelled testimony on legislators, and the chilling effect of compelled testimony on the freedom of speech and communication in legislative deliberations all supported the privilege. 886 F. Supp. 2d at 1303. That "discriminatory purpose" was relevant was immaterial: "legislative purpose is an issue in many other cases." *Id*. And while claims under the Voting Rights Act "are important, . . . so are equal-protection challenges to many other state laws, and there is nothing unique about the issues of legislative purpose and privilege in Voting Rights Act cases." *Id*. at 1304. For these reasons, the court

concluded that "the legislators have a federal legislative privilege—at least qualified, if not absolute—not to testify in this civil case about the reasons for their votes." *Id*.

In *Lee v. City of Los Angeles*, 908 F.3d 1175 (9th Cir. 2018), the plaintiffs sought to depose three city-council members to support their allegation that race was the predominant motive in the design of three city-council districts. The court, however, affirmed the district court's issuance of a protective order. *Id*. at 1186–88. It explained that local officials, like state and federal lawmakers, must be permitted "to discharge their public duties without concern of adverse consequences outside the ballot box" and without the tax that litigation would impose on their time, energy, and attention. *Id*. at 1187. If the privilege were overcome "whenever a constitutional claim directly implicates the government's intent," then the privilege would have little value. *Id*. at 1188.

In *Martinez v. Bush*, No. 1:02-cv-20244-AJ (S.D. Fla. May 31, 2002) (Jordan, J.) (ECF No. 201), a three-judge district court refused to permit depositions of six state legislators in an equal-protection challenge to congressional districts, *see* Ex. A, even though the claims there (as here) required proof of racially discriminatory purpose, *see Martinez v. Bush*, 234 F. Supp. 2d 1275, 1280 (S.D. Fla. 2002). The court explained that "state legislators are entitled to absolute immunity for their legislative activities, and this immunity functions as a testimonial privilege concerning the motivations for engaging in such activities." Ex. A at 2. The court even barred the plaintiffs

from questioning a legislative staff member about the motivations of individual lawmakers, even though the staff member had served an expert report and thus subjected himself to deposition. *Id*.

It is well-established, therefore, that the privilege does not yield merely because the plaintiff must offer evidence of legislative purpose. On the contrary, inquiries into legislative motive or purpose are among the most sensitive and intrusive inquiries into the legislative process. The privilege provides broad protection against these inquiries.

C. The Legislative Privilege Prohibits the Proposed Depositions.

The legislative privilege protects the Legislators from the proposed depositions. To permit compelled interrogation into the Legislators' legislative activities—and the motives for those activities—would violate the privilege and frustrate "the republican values it promotes." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. And if Plaintiffs may depose the Legislators, then so may anyone else who files a similar pleading.

Courts have consistently rejected efforts to compel state legislators to testify in similar civil-rights cases. The privilege has insulated state legislators from compelled participation in redistricting cases that feature racial-gerrymandering claims, and thus turn on legislative motive, *Lee*, 908 F.3d 1175 (city-council districts); *Atkins v. Sarasota Cnty.*, No. 8:19-cv-03048 (M.D. Fla. Feb. 4, 2020) (ECF No. 17) (county-commission districts); *Martinez v. Bush*, No. 1:02-cv-20244-AJ (S.D. Fla. May 31, 2002) (ECF No. 201) (congressional districts), in a challenge to state election laws under the

Fourteenth and Fifteenth Amendments and section 2 of the Voting Rights Act, *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 453–58 (N.D. Fla. 2021) (Walker, J.), and in a preclearance action under section 5 of the Voting Rights Act, which turns on legislative purpose, *Florida*, 886 F. Supp. 2d 1301. Despite the importance of these cases and the centrality of legislative motive or purpose to their resolution, the courts turned away attempts to encroach on the legislative process and coerce legislator testimony.

Here, Plaintiffs intend to depose the Legislators regarding the redistricting process, how the process unfolded, the Legislators' role in enacting the challenged law, their role in supporting or opposing alternative proposals, and the extent to which race was a factor in the decision-making calculus—*i.e.*, legislative motive.[5] Each of these topics invades sensitive regions of the legislative process and actions taken in a legislative capacity. To the extent Plaintiffs seek information about the objective mechanics of the redistricting process, that information is already available to them in the ample public record.

Redistricting is important, but so too are many cases. And the importance of the case only enhances the importance of the legislative privilege. It is in momentous and contentious affairs—not in prosaic ones—that legislative independence, like judicial

[5] Plaintiffs' counsel provided this summary during the parties' conferral under Local Rule 7.1(B).

independence, is most essential to the faithful discharge of public duties. *See Tenney*, 341 U.S. at 377 ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."). The privilege assures that legislators remain accountable to *all* voters at the ballot box and do not bend to a fear of litigation. *See Yeldell*, 956 F.2d at 1061 ("[F]or a democratic government to function democratically, our elected officials, when acting in their legislative capacity, must answer only to their constituents and only on election day.").

The legislative privilege thus secures the Legislators from compelled testimony here, just as it protects legislators from deposition in constitutional challenges to state laws across the country. This Court should sustain the privilege and quash Plaintiffs' deposition subpoenas.

D. The Legislative Privilege Is Not Subject to an Amorphous "Balancing Test."

Plaintiffs are likely to argue that the legislative privilege is not absolute and that its application hinges on a case-by-case, five-factor "balancing test" applied by some district courts. But these factors—sometimes called the *Rodriguez* factors, *see Favors v. Cuomo*, 285 F.R.D. 187, 205 (E.D.N.Y. 2012)—are not an appropriate method to analyze the legislative privilege, and no federal appellate court has ever applied them.[6]

[6] The five factors are: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their

A case-by-case balancing test is an especially inapt and incongruous method of analyzing the legislative privilege. An important purpose of the privilege is to secure state legislators from "deterrents to the uninhibited discharge of their legislative duty," *Tenney*, 341 U.S. at 377—that is, to provide them with the *certainty* and *predictability* that are essential to the confident exercise of legislative duties. As long as a legislator's subjection to deposition hinges on a subjective, case-by-case balancing test, the ever-present threat of deposition will continue to shadow all aspects of a legislator's duties. Unable to predict how five factors might be balanced in litigation that has not been filed, legislators will be denied the security that the privilege was intended to afford, and the privilege will do little to protect the freedom of speech and action in legislative bodies.

No federal appellate court has applied or even mentioned the *Rodriguez* factors in any analysis of the privilege. Rather, federal appellate courts have recognized one clear and categorical carveout from the privilege: the enforcement of federal criminal statutes. This bright-line approach is more consonant with the purpose of the privilege: to protect legislators from the inhibiting effect of the threat of compelled depositions.

In *Gillock*, a state legislator was indicted on federal bribery charges. Asserting the privilege, the legislator sought to suppress all evidence of his legislative acts. 445

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secrets are violable." *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y. 2003) (quoting *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979)) (internal marks omitted).

U.S. at 362–63. The Court rejected this assertion of legislative privilege, explaining that a privilege so expansive would "impair the legitimate interest of the Federal Government in enforcing its criminal statutes." *Id*. at 373. Though *Tenney* had affirmed a state legislator's immunity from civil liability, the Court distinguished *Tenney* on the ground that, while federal criminal liability had always operated as a restraint on state officials, *Tenney* "was a civil action brought by a private plaintiff to vindicate private rights." *Id*. at 372. The Court explained that "*Tenney* and subsequent cases on official immunity have *drawn the line at civil actions*." *Id*. at 373 (emphasis added). The Court held that the legislative privilege yields "where important federal interests are at stake, as in the enforcement of federal criminal statutes." *Id*.; *see also United States v. Nixon*, 418 U.S. 683 (1974) (rejecting claims of executive privilege in criminal proceeding).

In *In re Hubbard*, the Eleventh Circuit expressly declined to decide whether the privilege could ever be overcome in a civil action, 803 F.3d at 1312 n.13, but it noted the "fundamental difference between civil actions by private plaintiffs and criminal prosecutions by the federal government," *id*. at 1311–12; *cf*. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 384 (2004) (explaining, in the context of the executive privilege, that the distinction between civil and criminal cases "is not just a matter of formalism" and that the "need for information for use in civil cases . . . does not share the urgency or significance of the criminal subpoena requests" in *Nixon*). In *Florida*, Judge Hinkle recognized the distinction between civil and criminal cases, explaining

that *Gillock* distinguished *Tenney* "on the ground that it was a civil case," but concluding that, "even if the state legislative privilege is qualified in civil as well as criminal cases, there is no reason not to recognize the privilege here." 886 F. Supp. 2d at 1304.

These principles prohibit the proposed depositions here. This is a civil case, not a criminal prosecution. The Legislators here are not parties to the case. The Legislators also do not assert the privilege (as in *Gillock*) to exclude evidence of their legislative acts. Instead, the Legislators assert the legislative privilege in a civil action brought by private parties who seek to hale them into court to furnish evidence of their conduct and motives in the enactment of legislation. No federal appellate court has ever identified any "important federal interests" that would remove equal-protection claims in redistricting cases (like federal criminal prosecutions) from the scope of the privilege. *Tenney*, 445 U.S. at 373. The legislative privilege applies here, just as it did in *Florida*.

The *Rodriguez* factors were not developed with the legislative privilege in mind and disserve the purposes of the legislative privilege. First formulated in *In re Franklin National Bank Securities Litigation*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), which concerned an assertion of the official-information privilege by an office of the United States Treasury Department, the *Rodriguez* factors have often been applied to evaluate assertions of the deliberative-process and law-enforcement privileges, which together comprise the official-information privilege, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 5:56 (4th ed. 2019), and the bank-examination

privilege, a "close cousin" of the official-information privilege, *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1423–24 (D.C. Cir. 1998).

It was not until 2003—480 years after Sir Thomas More asserted the legislative privilege, *Tenney*, 341 U.S. at 372—that the *Rodriguez* factors were transplanted from their proper terrain and applied to the legislative privilege. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y. 2003).[7] Since then, a handful of district courts have weighed the *Rodriguez* factors to determine the limits of the legislative privilege.

Courts created the *Rodriguez* factors to evaluate different privileges that serve different purposes. The deliberative-process privilege, for example, applies only to documents that were prepared to assist agency decision-makers and express opinions on legal or policy questions. *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1263 (11th Cir. 2008). It has no historical pedigree approaching that of the legislative privilege; the first case to use the term "deliberative-process privilege" was *Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242, 248 (D.C. Cir. 1977). The court that first articulated the *Rodriguez* factors described the official-

[7] April 18, 2023, will mark the 500th anniversary of Sir Thomas More's petition to Henry VIII to extend to each member of the House of Commons "your most gracious licence and pardon, freely without doubt of your dreadful displeasure, . . . to discharge his conscience, and boldly in everything incident among us, to declare his advice." WILLIAM ROPER, THE LIFE OF SIR THOMAS MORE 17 (S.W. Singer ed., 1822).

information privilege as a "discretionary" privilege "that depends on Ad hoc considerations," *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 582 (quoting *United States v. Article of Drug Consisting of 30 Individually Contained Jars More or Less*, 43 F.R.D. 181, 190 (D. Del. 1967))—a far cry from the legislative privilege. And the district courts that have applied the five *Rodriguez* factors to the legislative privilege have not convincingly explained why those factors, designed for a different purpose, should confine—and water down—a centuries-old privilege that has vitally protected the integrity of the representative branch of government since the reign of Henry VIII.

The legislative privilege is more analogous to the privilege that the Speech or Debate Clause affords members of Congress than to the official-information privilege. *See United States v. Johnson*, 383 U.S. 169, 180 (1966) (finding "parity" between the common-law legislative privilege and the privilege afforded by the Speech or Debate Clause); *In re Hubbard*, 803 F.3d at 1310 n.11 (explaining that "state lawmakers possess a legislative privilege that is similar in origin and rationale to that accorded to Congressmen under the Speech or Debate Clause" (internal marks omitted)); *Star Distribs., Ltd. v. Marino*, 613 F.2d 4, 8 (2d Cir. 1980) ("The shared origins and justifications of these two doctrines would render it inappropriate for us to differentiate the scope of the two without good reason."); *cf. Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009) (explaining that the immunity of state legislators and that provided to federal legislators under the Speech or Debate Clause are "essentially coterminous").

Tellingly, no court appears to have applied the five *Rodriguez* factors to the Speech or Debate Clause, which the Supreme Court has read "broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501.

E. If the Legislative Privilege Were Subject to a Balancing Test, Then It Would Still Prohibit the Depositions.

Even if the *Rodriguez* factors applied, they would not compel the depositions that Plaintiffs seek. Most fundamentally, the *Rodriguez* factors ask whether the need for the evidence—considering its relevance, the availability of other evidence, and the seriousness of the litigation—outweighs the purpose of the legislative privilege. Here, it does not.

1. *Relevance*. The testimony of a small number of legislators is only minimally relevant at best. As Judge Hinkle explained, such testimony "may be relevant" in the sense that it may "move the needle at least a little," *Florida*, 886 F. Supp. 2d at 1302—but not significantly. A single legislator's testimony as to his or her own motives "may not say much about the actual overall legislative purpose." *Id*. That is because, in any legislative assembly, there might be as many motives as members—and often more. *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("The number of possible motivations, to begin with, is not binary, or indeed even finite. . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist."). "What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co. v. State*

Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983); *accord United States v. O'Brien*, 391 U.S. 367, 383–84 (1968). Because courts "cannot lightly attribute to [a legislature] as a whole the impermissible motives of a few of its members," *Wiley v. Bowen*, 824 F.2d 1120, 1122 (D.C. Cir. 1984), the deposition testimony of individual lawmakers is "often less reliable and . . . less probative than other forms of evidence bearing on legislative purpose," *Am. Trucking Ass'ns, Inc.*, 14 F.4th 76, 90 (1st Cir. 2021); *accord Citizens for Const. Integrity v. United States*, --- F.4th ----, No. 21-1317, 2023 WL 142782, at *11 (10th Cir. Jan. 10, 2023) ("[T]he statements of a few legislators concerning their motives for voting for legislation is a reed too thin to support invalidation of a statute."). And in ascertaining the purpose of a legislature, "the stakes are sufficiently high . . . to eschew guesswork." *O'Brien*, 391 U.S. at 384.

For these reasons, the testimony of the six Legislators would have only minimal relevance. The challenged law passed with the support of 92 legislators—68 votes in the House and 24 in the Senate. Fla. H.R. Jour. 30 (Spec. Sess. C 2022); Fla. S. Jour. 10 (Spec. Sess. C 2022). The testimony of six legislators would present only a fraction of the complete picture, revealing nothing about the motives of 86 of 92 members who voted for the bill. And even the "vote of a sponsor is only one vote." *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1324 (11th Cir. 2021).

2. *The availability of other evidence*. When assessing legislative motive, courts place greater weight on objective evidence than on the statements of legislators. *Fleming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."). In *Arlington Heights*, the Court set forth an illustrative list of the alternative sources to which courts may turn when assessing whether a legislature was motivated by racially discriminatory intent: (1) the impact of the challenged law on members of different races; (2) the historical background of the challenged law; (3) the specific sequence of events that produced the challenged law; (4) any departures from the normal procedural sequence; (5) any departures from substantive criteria that usually guide decision-makers; and (6) the legislative history, including reports, meeting minutes, and contemporaneous statements. 429 U.S. at 266–68; ECF No. 115 at 10–11. The Eleventh Circuit has identified three additional evidentiary sources for courts to consider: (7) the foreseeability of the disparate impact; (8) knowledge of the disparate impact; and (9) the availability of less discriminatory alternatives. *Greater Birmingham Ministries*, 992 F.3d at 1322. In November, this Court recognized each of these evidentiary sources and evaluated the sufficiency of Plaintiffs' allegations in light of these sources. ECF No. 115 at 10–11.

On the other hand, *Arlington Heights* cautioned that the compelled testimony of legislative and executive branch decision-makers represents a "substantial intrusion

into the workings of other branches of government," 429 U.S. at 268 n.18, and that, while public officials "might" be called to testify in "some extraordinary cases," "even then such testimony will frequently be barred by privilege," *id*. at 268 (citing *Tenney*).

Courts have thus recognized ample alternative sources of evidence that do not require depositions of lawmakers. All of these sources are accessible here without doing violence to a privilege that "protects the legislative process itself." *In re Hubbard*, 803 F.3d at 1308.

In enacting the challenged districts, the Legislature compiled a large legislative record that is available to the public online: bills, bill histories and analyses, legislative journals, video recordings of all floor proceedings and all 22 meetings of the House's and Senate's redistricting committees and subcommittees both before and during two legislative sessions, memoranda and correspondence, committee publications such as meeting packets and presentations, 72 congressional redistricting maps prepared by members of the public, written public comments, and all redistricting data and the map-drawing application used by legislative staff to prepare redistricting maps. The Legislature even created a redistricting website (https://www.floridaredistricting.gov) to facilitate easy access to this large legislative record, which is far more robust than the legislative record which accompanies most legislation. To the extent other relevant records exist, Florida has a broad public-records law of which Plaintiffs have already availed themselves. Fla. Const. art. I, § 24; Fla. Stat. § 11.4031. Given these sources,

the testimony of six of 92 supporters of the challenged law is unlikely to be especially probative.

Plaintiffs are well aware of these alternative sources of proof. Common Cause recently submitted 31 extensive public-records requests to the House and Senate and their members and staff. *See* Ex. B. The requests expressly note Common Cause's participation as a plaintiff in this litigation. *Id*.

Plaintiffs have also served document subpoenas on the six Legislators, separate and apart from their deposition subpoenas. Absent applicable objections, such as those founded on the attorney-client privilege, the Legislators will produce any responsive documents.

3. *The seriousness of the litigation*. While a challenge to congressional districts is serious, the seriousness of this litigation should be measured against the interest that justified abrogation of the legislative privilege in *Gillock*—a federal criminal bribery prosecution—and against the interests that were insufficient to overcome the privilege in *Lee*, *Florida*, *League of Women Voters*, *Atkins*, and *Martinez*—all of which involved constitutional challenges to state or local election laws, and some of which presented equal-protection challenges to district lines. This litigation, though serious, is not more serious than the claims asserted in *Lee*, *Florida*, *League of Women Voters*, *Atkins*, and *Martinez*—and does not approach in seriousness the criminal prosecution in *Gillock*.

4. *The government's role in the litigation*. This factor is "inapt in the legislative privilege context." *League of Women Voters of Fla., Inc.*, 340 F.R.D. at 457. This is so because the legislative privilege will ordinarily arise only when a plaintiff challenges legislative action and inquires into legislative purpose. *Id*. The State's role, therefore, is not a consequential factor when a court evaluates assertions of legislative privilege.

5. *The purpose of the legislative privilege*. For the reasons detailed above, the last and the most important factor tips the scales decidedly against the proposed depositions. The specter of compelled testimony introduces into the lawmaking process a fear of personal involvement in litigation and thus distorts decision-making and chills legislative debate. It diverts the time and energy of lawmakers from official duties and erodes the comity that should characterize relations between branches of government.

These concerns are pronounced in Florida, where the Legislature convenes in regular session for only 60 days in each year, *see* Fla. Const. art. III, § 3, and state law provides only part-time compensation for legislative service. Interference around the short window in which legislative work must be completed is especially problematic. But even when members are not in Tallahassee to conduct official business, the work continues. Year round, legislators meet with constituents and engage with policy while also earning a living, fulfilling family responsibilities, and campaigning for reelection. The prospect of being forced to furnish evidence that litigants will use to impugn their motives is no trifling matter. As lawsuits alleging improper legislative motive become

more common, the prospect of compelled participation in litigation could easily affect how members engage with controversial legislation, if not discourage public service altogether. "One must not expect uncommon courage even in legislators." *Tenney*, 341 U.S. at 377.

The balancing test does not support the proposed extraordinary intrusion into the workings of the legislative branch. Under any analysis, the deposition subpoenas should be quashed.

II. THE APEX DOCTRINE PROHIBITS THE PROPOSED DEPOSITIONS.

The apex doctrine shields high-ranking government officials from the distraction of depositions related to their official duties and in doing so enables them to focus their time, energy, and attention on public business. Because the Legislators are high-ranking government officials, and because Plaintiffs cannot carry their heavy burden to justify depositions of the Legislators, the apex doctrine also prohibits the proposed depositions.

The Supreme Court has cautioned that "the practice of calling high officials as witnesses should be discouraged." *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993) (citing *United States v. Morgan*, 313 U.S. 409 (1941)). High-ranking government officials "have greater duties and time constraints than other witnesses." *Id*. If they were subject to deposition in every case touching their official duties, their "time would be monopolized" by demands for testimony, and "the constant distraction

of testifying in lawsuits" would divert them from the performance of public duties. *Id*. The compelled appearance of high-ranking government officials in judicial proceedings, moreover, "implicates the separation of powers." *In re United States (Jackson)*, 624 F.3d 1368, 1372 (11th Cir. 2010) (noting that a 30-minute telephonic deposition of the Commissioner of the Food and Drug Administration would have "disrespected the separation of powers" (citing *In re United States (Kessler)*, 985 F.2d at 512)).

Once the official asserting the apex doctrine establishes that he or she is a high-ranking government official, the burden shifts to the party seeking discovery to "show a special need or situation compelling such testimony." *In re United States (Kessler)*, 985 F.2d at 512–13; *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21-cv-00186, 2021 WL 4962109, at *1 (N.D. Fla. Oct. 19, 2021). The deposition will be disallowed absent "exigent" or "extraordinary" circumstances. *In re United States (Kessler)*, 985 F.2d at 512–13. In determining whether the circumstances are "extraordinary," courts consider (1) whether the public official has personal knowledge of the subject matter; (2) whether the information sought is not only "relevant," but also "essential" to the case; and (3) whether the information can be obtained from alternative sources or by less burdensome means. *In re Off. of Utah Att'y Gen.*, 56 F.4th 1254, 1264 (10th Cir. 2022); *In re United States (Holder)*, 197 F.3d 310, 314 (8th Cir. 1999); *Spadaro v. City of Miramar*, No. 11-61607-CIV, 2012 WL 3614202, at *2–3 (S.D. Fla. Aug. 21, 2012).

The six Legislators are unquestionably high-ranking government officials. The Florida Constitution establishes their offices, provides for their election, and reposes the "legislative power of the state" in the legislative bodies to which they were elected. Fla. Const. art. III, § 1. Each is therefore a constitutional officer elected by Florida voters to serve among 40 members of the Florida Senate or 120 members of the Florida House. The Legislators also hold (or held) leadership positions in the Legislature: a former Speaker of the Florida House of Representatives, a former President of the Florida Senate, and the Chairs and Vice Chairs of the House Redistricting Committee and House Congressional Redistricting Subcommittee.[8] The Speaker and President are the biennially elected "permanent presiding officer[s]" of their respective chambers. Fla. Const. art. III, § 2. The Rules of the Florida House (in particular, Rule 2) and the Florida Senate (in particular, Rules 1.2 through 1.7) detail the specific powers, duties, and rights of the Speaker and the President. As Chairs and Vice Chairs in the House, Representatives Leek, Sirois, Fine, and Tuck also exercise duties and powers under legislative rules. For example, House Rule 7.3 authorizes Chairs to preside over committee meetings, establish meeting agendas, determine the order in which matters are to be considered, decide questions of order, and otherwise ensure the committee's orderly operation.

[8] The apex doctrine protects former high-ranking government officials as well. *Thomas v. Cate*, 715 F. Supp. 1012, 1049 (E.D. Cal. 2010).

Courts have consistently recognized that elected members of legislative bodies are high-ranking government officials entitled to invoke the apex doctrine. *See Link v. Diaz*, No. 4:21-cv-00271-MW-MAF (N.D. Fla. Jan. 4, 2023) (ECF No. 229) (state legislator); *League of United Latin Am. Citizens v. Abbott*, No. 3:21-cv-00259, 2022 WL 2866673, at *2 (W.D. Tex. July 6, 2022) (Speaker of the Texas House of Representatives); *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); *Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d 437, 440–41 (S.D.N.Y. 2014) (U.S. House Majority Leader); *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). Courts have even applied the apex doctrine's protections to county commissioners. *See 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).

Plaintiffs cannot carry their heavy burden to justify the depositions. *First*, they cannot show that the information known to the Legislators is "essential" to their case. Only information that is "necessary," *In re Off. of Utah Att'y Gen.*, 56 F.4th at 1264, or "absolutely needed," *In re U.S. Dep't of Educ.*, 25 F.4th 692, 703 (9th Cir. 2022),

is "essential" to a party's case. Here, as explained above, the testimony of individual lawmakers regarding their motives has minimal relevance to the motive or purpose of a collective body—indeed, courts have cautioned against reliance on such evidence—and ample sources of evidence outlined in *Arlington Heights* and *Greater Birmingham Ministries* are available to Plaintiffs (for example, in the legislative record and through public-records requests). This case presents no "special *need* or situation *compelling* such testimony." *In re United States (Kessler)*, 985 F.2d at 512 (citing *Sweeney v. Bond*, 669 F.2d 542, 546 (8th Cir. 1982)) (emphases added); *see also Sweeney*, 669 F.2d at 546 (affirming refusal to compel Governor's deposition; finding that plaintiffs failed to show that information known to the Governor was "essential" to their case).[9]

Second, Plaintiffs did not exhaust all other avenues of information, or seek the information by less burdensome means, before they served subpoenas for deposition on six high-ranking legislative officials. Plaintiffs cannot therefore establish that any information they seek is unavailable from other sources or by less burdensome means.

For example, Plaintiffs have not awaited productions of documents in response to their document subpoenas and public-records requests. Nor have Plaintiffs sought to depose legislative committee staff on whose assistance and active participation the

[9] *Sweeney* was later abrogated on other grounds. *See O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 716 (1996).

Legislators relied.[10] Because Plaintiffs cannot demonstrate a special need compelling the depositions, the apex doctrine prohibits the depositions, and the subpoenas should be quashed.

III. EVEN IF THE DEPOSITIONS WERE APPROPRIATE, THE LEGISLATORS SHOULD NOT BE SUBJECT TO VIDEO-RECORDED DEPOSITIONS.

The potential for misuse of a video-recorded deposition in this context is self-evident. Members of a representative branch of government rely heavily on favorable public opinion. Their elections and their effectiveness depend on public support. They are accountable to voters at the ballot box and seek to cultivate the public's goodwill. In this litigation, they are non-parties, present not by choice but rather by compulsion.

A video-recorded deposition in the hands of a political opponent can easily become a tool of political warfare. The video recording will depict the witnesses under oath, subject to hostile interrogation into their motives and conduct—which, without more, can create an illusion of guilt or wrongdoing where none exists. A political opponent may be tempted for political purposes to exploit the opportunity to question a legislator on camera under the coercive restraints of federal discovery rules. After the deposition, the recording will be liable to grave misuse, either *in terrorem* or through public dissemination, perhaps after it is "cut and spliced" to heighten the prejudice to

[10] To be clear, legislative staff are entitled to assert—and likely would assert—the legislative privilege, *N.C. State Conf. v. McCrory*, No. 1:13-cv-00658, 2015 WL 12683665, at *6 (M.D.N.C. Feb. 4, 2015)—even if not entitled to apex protections. This Court need not reach the apex doctrine unless it finds the privilege inapplicable.

the witness. *See Mendez v. City of Chicago*, No. 18-cv-05560, 2019 WL 6210949, at *2 (N.D. Ill. Nov. 21, 2019) (describing the potential for abuse of video depositions).

District courts enjoy broad discretion for good cause to protect non-parties from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). It need not await the misuse of a video-recorded deposition before it may protect witnesses from a misuse that, once done, cannot be undone. *Willis v. CLECO Corp.*, No. 09-cv-02103, 2011 WL 13253345, at *2 (W.D. La. Mar. 3, 2011) (prohibiting video depositions where the "potential for abuse" outweighed "any positive potential use of video depositions"). Given the peripheral relevance of the testimony that the Legislators might offer, the unique potential for misuse of video recordings in the political arena outweighs any marginal benefit of a video recording over a traditional, written transcript.[11]

CONCLUSION

This Court should quash Plaintiffs' subpoenas for the Legislators' depositions.

LOCAL RULES CERTIFICATIONS

Counsel for the movants conferred with all adverse parties and thus complied with the attorney-conference requirement of Local Rule 7.1(B). Plaintiffs oppose this motion.

[11] Plaintiffs have expressed their willingness to treat any video recordings of the depositions as "confidential and sealed, subject to further order of the court," but this offer, while appreciated, does not remove the concerns expressed in this motion.

This motion contains 7,626 words and therefore complies with the word-count requirement of Local Rule 7.1(F).

Respectfully submitted,

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

COMMON CAUSE FLORIDA, et al.,

Plaintiffs,

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

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

Defendants.
_____/

OPPOSED MOTION TO QUASH DEPOSITION SUBPOENAS

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

Respectfully submitted,

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Counsel for Governor DeSantis, Mr. Newman, and Mr. Kelly

Dated: February 2, 2023

CERTIFICATE OF SERVICE

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

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

MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO QUASH DEPOSITION SUBPOENAS

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

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

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

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

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

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

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

BACKGROUND

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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Dated: February 2, 2023

LOCAL RULE 7.1(B) CERTIFICATION

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

LOCAL RULE 7.1(F) CERTIFICATION

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

/s/ Mohammad O. Jazil
Mohammad O. Jazil

CERTIFICATE OF SERVICE

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

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