IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TENNESSEE STATE CONFERENCE OF THE NAACP et al.,	)	
Plaintiffs,	)	No. 3:23-cv-00832
v.	)	JUDGE ELI RICHARDSON JUDGE ERIC E. MURPHY
WILLIAM B. LEE et al.,	)	JUDGE BENITA Y. PEARSON
Defendants.	)	MAGISTRATE JUDGE ALISTAIR E. NEWBERN

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL AND PLAINTIFFS' OPPOSITION TO NON-PARTY LEGISLATORS' MOTION TO QUASH AND FOR A PROTECTIVE ORDER

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INTRODUCTION

The Legislators' Motion to Quash seeks to shroud the information most relevant to this litigation—including communications with third parties and documents in the possession of the Legislators' staffs—in a veil of absolute secrecy. But that is not the law in this court, nor should it be. Here, Plaintiffs have advanced colorable, credible allegations that the Tennessee legislature allowed impermissible racial motivations to drive their recent redistricting; Defendants' main substantive defense (which is currently unsupported by any evidence) is that the legislature was in fact acting with partisan—not racial—motivation in drawing the maps as it did. *See* Dkt. 43 at 18 ("The explanation for the challenged districts is partisanship, not racial animus").

In taking this position, Defendants have placed the motives of the legislature—and individual Legislators—squarely at issue. Yet in their responses to Plaintiffs' discovery requests, Defendants have claimed that they played no role in the decision-making process and thus have no knowledge or information regarding those motivations. Accordingly, Plaintiffs turned to the *only* possible source of that discovery—the Legislators themselves (who, not coincidentally, are represented by the exact same counsel as Defendants).[1] Like Defendants, the Legislators deny that race played any role in their redistricting decisions, asserting that they acted out of purely partisan motives. *See* Dkt. 62 at 1, 16–17. But rather than produce discovery to support that assertion, the Legislators simply refuse to provide any documents at all going to that issue (or any other), claiming that they are shielded by a "complete barrier" to any discovery in all civil cases. The barrier the Legislators seek to erect is indeed complete and categorical and provides Plaintiffs

[1] This point as critical as counsel appears to be asserting privilege here as both a sword and a shield. The Sixth Circuit "recognizes the doctrine of 'sword and shield' waiver . . . litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case. [T]he attorney-client privilege cannot at once be used as a shield and a sword." *First Horizon Nat'l Corp. v. Certain Underwriters at Lloyd's*, No. 211CV02608SHMDKV, 2013 WL 11934936, at *5–6 (W.D. Tenn. Oct. 17, 2013).

no way to directly test Defendants' affirmative assertions of partisan motivation: the Legislators are refusing to produce any documents, (*id.* at 10–19), any deposition testimony (*id.* at 24–28), or even a privilege log, (*id*. at 13–14).

This position creates a Catch-22. On the one hand, Plaintiffs are entitled to discovery regarding their claims that the Legislature was motivated by racial considerations. On the other hand, the Legislators refuse to meaningfully engage with any of Plaintiffs' discovery requests about intent outside the public record (which contains no evidence of partisan intent), while Defendants disclaim any relevant knowledge. *Id*. at 9, 15. The end result is that Plaintiffs lack basic factual information pertaining to this redistricting cycle, such as who drew the congressional and state senate maps and which specific criteria were used to draw them, leaving Plaintiffs in the dark regarding Defendants' and the Legislators' own assertion that the impacted districts were drawn for wholly partisan reasons. This "heads I win, tails you lose" approach to discovery is inappropriate. [2]

Leaving aside this fundamental fairness issue, the Legislators' specific arguments with respect to why they should be shielded from discovery lack any merit. First, the Legislators conflate legislative immunity and legislative privilege: while legislative immunity has been construed as essentially absolute, legislative privilege is qualified. Second, because the legislative privilege is qualified, this Court should apply the balancing test that other courts in this Circuit have applied in determining whether to pierce the legislative privilege, and that balancing test

[2] Further highlighting this one-way-street discovery are Defendants' recently issued interrogatories, which seek this very information from Plaintiffs. Specifically, Defendants ask Plaintiffs to produce any proposed redistricting maps in their possession, the creators of those maps, the criteria used to draw them, the dates on which they were drawn, and—most tellingly of all—their communications on the subject with legislative committees (which are of course swept up within the Legislators' definition of privilege). *See* Ex. 10, Defendants' May 10, 2024 Interrogatories.

weighs in favor of disclosure. Third, not all the discovery served on the Legislators even implicates the legislative privilege. Many of the requests call for basic factual information and communications with third parties (which are firmly outside the privilege's scope) and there is no reasonable justification for the Legislators' failure to produce a privilege log. Fourth, the *Morgan* doctrine does not bar depositions of the Legislators because its application is narrow and none of the Legislators is a high-ranking official. Fifth, none of the other privileges cited half-heartedly by the Legislators, such as the attorney-client privilege or work-product protection (which is itself subject to a showing of need), provide any basis for altogether barring document discovery.

The Court should grant Plaintiffs' motion to compel and deny the Legislators' motion to quash Plaintiffs' subpoenas and for a protective order.

I. THE LEGISLATIVE PRIVILEGE IS NOT ABSOLUTE AND THIS COURT SHOULD APPLY THE BALANCING TEST USED BY COURTS IN THIS CIRCUIT.

The legislative privilege is qualified not absolute. Accordingly, courts in this Circuit favor a flexible approach to legislative discovery that balances the need for the information sought while protecting legislative sovereignty and minimizing any direct intrusion into the legislative process. Furthermore, the Legislators' concerns—that permitting legislative discovery would chill their internal legislative deliberation, result in separation of powers issues, and frustrate principles of comity—are not a basis for barring discovery in this case.

A. The Legislators Wrongly Conflate Legislative Privilege and Legislative Immunity.

As the Legislators themselves concede, the Speech or Debate Clause of the United States Constitution does not apply here.[3] Dkt. 62 at 8. Indeed, nearly all of the cases the Legislators cite

[3] The Speech or Debate Clause states that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place," U.S. Const. art. I, § 6, cl. 1, and

as support for their view that the *state* legislative privilege is absolute—cases about federal legislative immunity, which is a different doctrine than the state legislative privilege—were decided in an entirely different context and involved (1) criminal prosecutions or civil litigation against Members of Congress for their speech before Congress[4] or (2) criminal prosecutions or civil litigation against Members of Congress based on their past legislative actions related to their duties in Congress.[5] All of these cases are inapposite. None of the Legislators subpoenaed here are being sued—let alone criminally prosecuted—for the passage of the redistricting plans. Moreover, the Legislators' motives, and as a result, their past legislative acts, are squarely at issue in this case because the central question is whether racial considerations either predominated over traditional districting principles or were a motivating factor in the decision to draw the challenged districts. Accordingly, this case presents a very different set of facts for which the policy rationales underlying the doctrine of absolute immunity—(1) "ensur[ing] the independence of the

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immunizes Members of Congress from "civil and criminal actions" concerning conduct that is "within the legitimate legislative sphere," *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–03 (1975). The Clause originates from "England's experience with monarchs exerting pressure on members of Parliament by using judicial process to make them more responsive to their wishes," *United States v. Gillock*, 445 U.S. 360, 368–69 (1980). In fact, the English Bill of Rights of 1689, declared in unequivocal language, "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 Wm. & Mary, Sess. 2, c. II. *See Stockdale v. Hansard*, 9 Ad. & El. 1, 113–114 (1839). As such, the inclusion of this language into the English Bill of Rights followed on the heels of "a long and bitter struggle" in 1668 between Parliament and Charles I, "who had prosecuted Sir John Elliot and others for 'seditious' speeches in Parliament." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). Recognizing the importance of the freedom of speech and debate, the Founders of our Nation imported this language from the English Bill of Rights into the "Articles of Confederation and later into the Constitution as the Speech or Debate Clause." *Id.*

[4] *United States v. Johnson*, 383 U.S. 169, 178–180 (1966) (criminal prosecution for speech before Congress).

[5] *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (criminal prosecution); *Gravel v. United States*, 408 U.S. 606, 625 (1972) (federal grand jury investigation); *Doe v. McMillan*, 412 U.S. 306, 315 (1973) (civil suit for damages); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–03 (1975) (civil suit); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (civil suit).

legislature" and (2) "reinforc[ing] the separation of powers so deliberately established by the Founders,"—are far less salient. *U.S. v. Johnson*, 383 U.S. 169, 178–180 (1966).

The Legislators next cite *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), relying heavily on that case's holding as support for their position that the state legislative privilege is absolute. But the Legislators' position involves a category error, as *Tenney* has nothing at all to do with state legislative *privilege*. Rather, *Tenney* involved a question of state legislative *immunity* rooted in federal common law, not the Speech or Debate Clause. *Gillock*, 445 U.S. at 372, n.10 (citing *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 404 (1979)). Specifically, the Supreme Court simply held that state officials are absolutely immune from federal suit for personal damages when undertaking actions within the sphere of legitimate legislative activities. 341 U.S. at 377. That is not the situation presented by this case. Moreover, in reaching that conclusion, the Court noted that "the privilege in a case in which the defendants are members of a legislature . . . deserves greater respect than . . . when the legislature seeks the affirmative aid of the courts to assert a privilege." *Id*. In other words, even in the context of state legislative immunity, the Court recognized that a legislator might not enjoy the same protections where they have "affirmatively…assert[ed]" a claim of privilege (as opposed to having it thrust upon them by a civil or criminal suit). If anything, then, *Tenney* supports Plaintiffs' position that the Legislators do not enjoy some categorical exemption from their discovery obligations.

The Supreme Court's holding in *U.S. v. Gillock* is squarely on point here. That is because *Gillock*, unlike *Tenney*, actually involved the application of the state legislative *privilege*. There, the Supreme Court expressly declined to recognize an absolute testimonial or evidentiary privilege for state legislators. 445 U.S. at 360. The Court, considering whether a state legislator could invoke the evidentiary legislative privilege to support his position that his prior legislative acts

were absolutely privileged and hence inadmissible in his federal criminal prosecution, *id.* at 366 – 67, rejected the legislator's efforts to base the legislative privilege on the absolute immunity recognized in *Tenney*, *id.* at 372–73. The historical and policy considerations that had prompted the Court's earlier reading of the Speech or Debate Clause, 445 U.S. at 368-374, did not animate its decision vis-à-vis the state legislative privilege. Thus, the Court noted that unlike legislative immunity, the state legislative privilege does not guard against "intrusion by the Executive or Judiciary into the affairs of a coequal branch," a concern that is grounded "solely on the separation of powers doctrine." *Id.* at 369–70. The Court reasoned further that "principles of comity" do not "require the extension of a speech or debate type privilege to state legislators," *id.* at 370, because "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." *Id.* at 373. Applying that reasoning, the Court in *Gillock* concluded that the privilege yields "when important federal interests are at stake." *Id.* at 373. So too here. This case—like *Gillock*—is highly dependent on an assessment of intent. And, even more critically, this case involves the right to vote, which the Supreme Court has held is a "fundamental" right "preservative of all other rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As in *Gillock*, the legislative privilege should yield given the paramount federal interest involved.

Since *Gillock*, numerous federal courts have rejected that the view that the state legislative privilege is absolute, in particular, that the "common law immunity of state legislators gives rise to a general evidentiary privilege" that is absolute and can never be pierced. *See Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997); *Fla. Ass'n of Rehab. Fac., Inc, v. Fla. Dept. Health and Rehab. Servs.*, 164 F.R.D. 257, 267 (N.D. Fla. 1995); *Cano v. Davis*, 193 F. Supp. 2d 1177, 1180 (C.D. Cal. 2002); *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir.1987); *Comm. for a Fair and*

Balanced Map v. Ill. State Bd. of Elections, 2011 WL 4837508, *5–7 (N.D. Ill. Oct. 12, 2011); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95–96 (S.D.N.Y. 2003); *Mi Familia Vota v. Hobbs*, 682 F. Supp. 3d 769 (D. Ariz. 2023); *cf. Pernell v. Fla. Bd. of Governors of the State Univ.*, 2023 WL 7125049, at *4 (11th Cir. Oct. 30, 2023); *In re N.D. Legis. Assembly*, 70 F.4th 460, 465 (8th Cir. 2023); *La Union Del Pueblo Entero ("LUPE") v. Abbott*, 68 F.4th 228, 239–40 (5th Cir. 2023) *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 88–89 (1st Cir. 2021) (same though preserving possibility that "there might be a private civil case in which state legislative immunity must be set to one side because the case turns so heavily on subjective motive or purpose").

Importantly, courts in this Circuit have interpreted the privilege as qualified. *See Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015); *League of Women Voters of Michigan v. Johnson*, 2018 WL 2335805, at *3 (E.D. Mich. May 23, 2018); *Glowgower v. Bybee-Fields*, 2022 WL 4042412, at *8–9 (E.D. Ky. Sept. 2, 2022). There is no reason for this Court to adopt the Legislators' sweeping view of the state legislative privilege, in light of the different origins—and the interests implicated—by the separate doctrines of immunity and state legislative privilege.

B. Applying a Balancing Test Is Appropriate Here.

Recognizing that the legislative privilege is not absolute, courts in this Circuit have applied a five-factor balancing test that traces its roots to *Rodriguez v. Pataki*, 280 F. Supp. 2d at 101, to determine whether the legislative privilege should be pierced. That balancing test weighs: (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 government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Nashville Student Org. Comm.*, 123 F. Supp. 3d at 969; *League of*

Women Voters of Mich., 2018 WL 2335805, at *2–4; *Mich. State A. Philip Randolph Inst. v. Johnson*, 2018 WL 1465767, at *5–6 (E.D. Mich. Jan. 4, 2018).

The United States Supreme Court long ago explained in *Arlington Heights* that where discriminatory intent is an element of a constitutional claim, legislative privilege is not absolute. To the contrary, the Court concluded that, "[i]n some extraordinary instances," legislators "might be called to the stand at trial to testify concerning the purpose of the official action," even though such testimony could frequently "be barred by privilege." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 268 & n.18 (1977). The *Arlington Heights* factors themselves require proof that race was a motivating factor, outlining three categories of direct and circumstantial evidence courts should consider in determining whether discriminatory intent existed in cases involving the Equal Protection Clause of the Fourteenth Amendment: (1) the impact of the challenged action; (2) the historical background or sequence of events leading up to the action; and (3) the legislative history of the action. *Id.* at 264–68. Indeed, the Court considered in that case whether trial testimony by a legislator established evidence of discriminatory intent—showing that such evidence is admissible and not absolutely privileged. *Id.* at 270. And the Court also assumed it could have been proper to question Board members "about their motivation at the time they cast their votes," and "about materials and information available to them at the time of decision." *Id.* at 270, n.20.

The Legislators raise a series of objections. They complain that permitting *any* discovery in this case would result in a "chilling effect" on "internal deliberations." Dkt. 62 at 9. But the balancing test accounts for that because it requires the Court to weigh any potential chilling effect on legislative deliberations (Factor 5) against Plaintiffs' need for disclosure and the seriousness of

the claims (Factors 1–4). The Legislators' argument that all discovery should be barred because of potential impairment of the legislative function therefore falls short. *See* Dkt. 59.

As for the Legislators' separation of powers concern, Dkt. 62 at 10, the Court in *Gillock* expressly rejected that rationale as supporting a grant of absolute state legislative privilege on the grounds that "where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." 445 U.S. at 365. That is particularly true in this case, since at stake is the enforcement of the Fourteenth and Fifteenth Amendments of the United State Constitution vis-à-vis the state's redistricting plans. Furthermore, as with all evidentiary privileges, the role of the federal courts is to determine whether the privilege exists and the extent to which it may be asserted. *See* Fed. R. Evid. 501 ("The common law—as interpreted by United States courts in the light of reason and experience— governs a claim of privilege."). Since the Supreme Court's decision in *Gillock*, lower courts have exercised their discretion and developed the rules around state legislative privilege on a case-by-case basis. And for decades courts in this Circuit, as well as in others, saw fit to apply a balancing test. *League of Women Voters of Mich*., 2018 WL 2335805 at *4–6; *Bybee-Fields*, 2022 WL 4042412 at *9.

Finally, the Legislators contend that apart from the separation of powers doctrine, principles of comity bar any legislative discovery in this case. Dkt. 62 at 10. Comity refers to the principle that the same protections granted to Members of Congress through the Speech or Debate Clause should extend to state legislators. As above, the Court has recognized that state legislators enjoy the same *immunity* protections from suit as do Members of Congress. *Tenney*, 341 U.S. at 373. But the Court has explicitly rejected the idea that comity "requires the extension of a speech or debate type *privilege*" to state legislators. *Gillock*, 445 U.S. at 370 (emphasis added).

This Court should apply the balancing test to determine whether the privilege applies here.

II. THE *RODRIGUEZ* BALANCING TEST WEIGHS IN PLAINTIFFS' FAVOR AND THE LEGISLATIVE PRIVILEGE SHOULD YIELD.

As explained above, this Court should apply the *Rodriguez* balancing test to communications protected by the legislative privilege. *See supra,* Section I.; *see also* Dkt. 59 at 11–18. Contrary to the Legislators' arguments, that five-factor balancing test weighs in Plaintiffs' favor here, and the legislative privilege should yield.

A. Relevance

Plaintiffs seek discovery from the Legislators related to basic facts that underpin their racial gerrymandering and intentional discrimination claims:

- The identities of key mapdrawers. *See* Dkt. 51-1 at Request Nos. 1(a), 1(d), 1(e), 6, 8.
- The mapping software and underlying demographic data the General Assembly used to draw maps. *See id.* at Request Nos. 1(c), 1(i), 1(j), 2(l), 2(m), 7, 9.
- Draft senate and congressional maps. *See id.* at Request Nos. 1(a), 1(c), 1(d), 1(f).
- The General Assembly's motivations for adopting the maps, including communications with third parties. *See id.* at Request Nos. 1(b), 2, 5, 8
- The General Assembly's consideration of traditional redistricting principles in the drafting of the plans. *See id*. at Request Nos. 1(b), 1(c), 1(g), 1(i), 1(j), 2(m), 7.
- The General Assembly's consideration of race in the drafting of the plans. *See id.* at Request Nos. 1(b), 1(c), 1(i), 2(l), 2(m), 2(o), 3, 7.
- The General Assembly's consideration, if any, of partisanship in the drafting of the plans. *See id.* at Request Nos. 1(b), 1(c), 1(j).

- The General Assembly's motivations for adopting the legislative procedures used to enact new maps, including the ability of legislators of color, and voters of color, to participate in the process. *See id.* at Request Nos. 2(f), 2(g), 2(h), 2(i), 2(k).

Plaintiffs also seek to depose certain Legislators on limited topics:

- Public statements the Legislators made about the challenged redistricting plans and the factual support for those statements. Dkt. 59-5 at 7 (topics 1 and 2).
- The Legislators' communications with third parties about the challenged redistricting plans. *See id.* (topics 4 and 5).
- The Legislators' understanding of public comments and the consideration by the legislature of the same. *See id.* (topic 3).
- The Legislators' understanding of the extent to which the challenged maps adhere to traditional redistricting principles, such as population equality, compactness, and respect for political boundaries. *See id.* at 8 (topic 7).
- The Legislators' understanding of communities of interest in the challenged districts. *See id.* (topic 8).

As Plaintiffs explained in their Motion to Compel, this type of information goes directly to the heart of Plaintiffs' claims that the maps were drawn with discriminatory intent and is exactly the type of information that courts consider when adjudicating constitutional challenges to redistricting maps. *See* Dkt. 59 at 12-15.

The Legislators' primary argument as to why the relevance factor does not weigh in Plaintiffs' favor is that no discovery request about the intent of any individual legislators could *ever* be relevant, because "proof of [a legislator's] individual intent says nothing about the General Assembly's intent as a whole," and one cannot attribute "the intent of one legislator to the entire

legislative body." Dkt. 62 at 21, 24 ("Legislative privilege blocks the deposition subpoenas for the same reasons that it blocks the document subpoenas."). But, of course, the General Assembly is made up of individual legislators, which is why courts weigh evidence about the motivation of key legislators and mapdrawers—among other evidence—when examining the full tapestry of discriminatory intent evidence. Indeed, the Supreme Court itself has relied on documents produced in discovery and deposition testimony of key legislators and their staff to discern whether racial considerations predominated over traditional redistricting principles. In *Miller v. Johnson*, the Court relied on the statements of a legislative staffer who operated the redistricting software as well as on the admissions of various state officials. 515 U.S. 900, 919–20 (1995). In *Cooper v. Harris*, the Court similarly relied on the testimony at deposition and trial of the state's mapmakers and senators. 581 U.S. 285, 299 (2017). In *Alabama Legislative Black Caucus v. Alabama*, the Court referred to the "extensive record testimony" of multiple state legislators reflecting the motivations behind moving additional black voters into underpopulated districts. 575 U.S. 254, 273 (2015). In *Bethune-Hill v. Virginia State Board of Elections*, the Court relied on evidence of the "discussions among certain members of the House Black Caucus and the leader of the redistricting effort in the House, Delegate Chris Jones" to determine the development of a racial target. 580 U.S. 178, 184–85 (2017). In *Alexander v. S.C. State Conf. of NAACP*, No. 22-807 (U.S. argued Oct. 11, 2023), the Court questioned both sides about the testimony provided by the cartographer and his staff that politics and traditional redistricting principles, not race drove his decision making. Transcript of Oral Argument at 8:18–25, 9:1–13: 67:2–10.[6] And taken to its

[6] Even in other contexts, such as reviewing an agency's decision making under the Administrative Procedure Act, the Court has relied on testimony from non-party decision makers to determine whether an agency action was arbitrary or capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (relying on documents from then attorney general regarding addition of the citizenship

logical conclusion, this argument would bar inquiry into the motivations of any individual who participates within a larger group simply because it can be said that one individual does not necessarily speak for the whole. That is plainly not how the discovery process works.

The cases cited by the Legislators in support of their extreme position, *Isle Royale Boaters Ass'n v. Norton*, 330 F.3d 777, 784–85 (6th Cir. 2003) (statutory interpretation case), *U.S. v. O'Brien*, 391 U.S. 367, 367 (1968) (legislators' intentions in passing statute criminalizing draft-card burning do not bear on statute's constitutionality), and *In re N.D. Legis. Assembly*, 70 F.4th at 465 (addressing a claim under Section 2 of the Voting Rights Act, which "does not depend on" proof of legislative intent), are inapposite, because in none of those cases do Plaintiffs allege discriminatory intent.

The Legislators' remaining arguments about relevancy are quibbles about a small handful of individual requests. *First*, the Legislators object that document subpoenas were served on Chairman Rose, Sen. White, and Doug Himes. With regards to Chairman Rose and Sen. White, the Legislators note that "it is unclear what relevant information about motivation Plaintiffs think they would possess." Dkt. 62 at 21. The answer is simple: Chairman Rose and Sen. White were vice chairs of the Senate Judiciary Committee.[7] That committee discussed and approved both the state senate and congressional map.[8] As for the congressional map, the committee discussed the split of Davidson County into three congressional and whether that split would dilute the Black

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question to the Census to evaluate whether decision making of the Secretary of Commerce was arbitrary and capricious).

[7] Tenn. General Assembly, *Senate Standing Committee: Judiciary*, (Feb. 28, 2022), https://web.archive.org/web/20220228122540/https:/www.capitol.tn.gov/Senate/committees/judiciary.html.

[8] Tenn. General Assembly, *Senate Judiciary Committee Meeting*, (Jan. 18, 2022), https://tnga.granicus.com/player/clip/25709?view_id=610&meta_id=630374&redirect=true.

vote.[9] Documents and communications from the Senate Judiciary Committee are thus highly relevant to Plaintiffs' claims. And to the extent that neither Chairman Rose nor Sen. White have relevant documents, they should say so.

As for Doug Himes, the Legislators suggest that Plaintiffs' sole basis for seeking documents from him is his role in drawing the Tennessee State House map. Dkt. 62 at 21. Not so. The public record indicates that Mr. Himes had a larger role in the redistricting process. For example, Mr. Himes gave a presentation on the census and the redistricting process at the House Select Committee on Redistricting's September 8, 2021 meeting, and he listed himself as a point of contact.[10] Discovery from Defendants also shows that he was involved in answering questions about redistricting, including the congressional map. *See, e.g.*, Ex. 11 (DEFS_HARGETT-GOINS-0000026); Ex. 12, (DEFS_HARGETT-GOINS-0000094); Ex. 13 (DEFS_HARGETT-GOINS-0000456). And, just as with Chairman Rose and Sen. White, if Mr. Himes does not possess any relevant documents about the congressional and senate maps, he is free to say so.

The Legislators also take issue with Plaintiffs' request that the Legislators produce all rules, procedural memos, and guidelines for the House Public Service Subcommittee, House State Government Committee, and Senate Judiciary Committee, because those committees have "duties that go far beyond redistricting." Dkt. 62 at 21. Plaintiffs are willing to limit these requests to rules, guidelines, and procedural memos related to redistricting—but to date, the Legislators have refused to engage in any negotiation about the scope of Plaintiffs' requests. Regardless, such documents are relevant to the *Arlington Heights* inquiry, which states that "[d]epartures from the

[9] *Id*. at 1:28:30–1:38:30.
[10] Tenn. General Assembly, *House Select Committee on Redistricting Meeting*, (Sept. 8, 2021), https://tnga.granicus.com/player/clip/25419?view_id=688&redirect=true.

normal procedural sequence also might afford evidence that improper purposes are playing a role. *Arlington Heights*, 429 U.S. at 267.

Finally, the Legislators object to the Plaintiffs' request for all documents produced in other litigation challenging the Redistricting plans, asserting that "[d]ocuments about other lawsuits having nothing to do with racial bias, particularly lawsuits involving completely different redistricting cycles, are obviously irrelevant." Dkt. 62 at 21–22. Plaintiffs are also willing to limit this request to litigation during this redistricting cycle, and to documents or communications that are relevant to the General Assembly's motivations for adopting the challenged plans or the General Assembly's motivations for adopting the legislative procedures used to enact the challenged plans, but again that would require the Legislators to engage in considering these requests—rather than blanketly asserting privilege.

B. Availability of Other Evidence

The Legislators vaguely contend that "Plaintiffs want documents that are available from other sources," although they neglect to specify what specific requests could be satisfied via public or other sources. Dkt. 62 at 22. As explained in the Motion to Compel, the discovery Plaintiffs seek from the Legislators about the identity of key legislative decisionmakers, the motivations of those decisionmakers, the processes those decisionmakers adopted for redistricting, and their communications with third parties is likely to be the only way to obtain direct evidence of discriminatory intent. *See* Dkt. 59 at 15–16. This makes sense, because "seldom, if ever, [do public officials] announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority . . . It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this." *Smith v. Town of Clarkton, N. C.*, 682 F.2d 1055, 1064 (4th Cir. 1982). *See also*

Nashville Student Org. Comm., 123 F. Supp. 3d at 971 (acknowledging the need for testimony of lawmakers with a role in the redistricting process "given the dearth of available documentary evidence outside of the legislative history" and given that "additional relevant information may come from the legislators themselves.").

To be clear, the Legislators' assertion that Plaintiffs' current lack of access to this direct evidence means that Plaintiffs have "the sparsest support for discriminatory-intent claims," Dkt. 62 at 22, misconstrues the roles of direct and circumstantial evidence in redistricting cases. The Supreme Court has held that Plaintiffs may rely partially or entirely on circumstantial evidence both for discriminatory intent and racial gerrymandering claims. *See, e.g.*, *Arlington Heights*, 429 U.S. at 266–68; *Cooper*, 581 U.S. at 291. Indeed, Plaintiffs make considerable use of such circumstantial evidence in their Complaint in setting forth the factual basis for their claims. *See, e.g.*, Compl. at ¶¶ 61–62; ¶¶ 67–71; ¶¶ 78–81; ¶¶ 101–108; *see also* Dkt. 46 at 15–18, 21–23 (Plaintiffs' Opp. to Mot. to Dismiss). But the documents and testimony sought from the Legislators here could assist the Court's task in assessing Plaintiffs' discriminatory intent and racial gerrymandering claims. *Benisek v. Lamone*, 241 F. Supp. 3d 566, 576 (D. Md. 2017) (ruling that public legislative records and circumstantial evidence are "not a substitute for the ability to depose a witness and obtain *direct* evidence of motive and intent"); *see also Covington v. North Carolina*, 316 F.R.D. 117, 154 (M.D.N.C. 2016) ("[E]ven if the circumstantial evidence were less clear, the direct evidence of legislative intent removes any doubt."), *summarily aff'd*, 581 U.S. 1015 (2017).

C. Seriousness

The Legislators assert that this litigation is not "so extraordinary that the legislative privilege must yield," and that "Plaintiffs allege no federal interests beyond mere constitutionality." Dkt. 62 at 22. But the Legislators ignore that "[c]ourts have readily recognized the 'seriousness of the litigation' in racial gerrymandering cases" when weighing the *Rodriguez*

factors. *Bethune-Hill v. Va. State Bd. of Elections.*, 114 F. Supp. 3d 323, 341 (E.D. Va. 2015). Moreover, the unique nature of legislative redistricting, where legislators are presented with a classic conflict of interests between their re-election and Constitutional compliance, raises the stakes of the instant action and justifies for more probing discovery. *See Favors v. Cuomo*, 285 F.R.D. 187, 219 (E.D.N.Y. 2012) ("[I]t is indisputable that racial and malapportionment claims in redistricting cases 'raise serious charges about the fairness and impartiality of some of the central institutions of our state government,' and thus counsel in favor of allowing discovery."); *Nashville Student Org. Comm.*, 123 F. Supp. 3d at 971 (holding the seriousness factor weighed in Plaintiffs favor because "this litigation involves a serious constitutional issue: whether Tennessee passed a law intended to suppress the voting rights of Tennessee college students."); *Marylanders for Fair Rep., Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (concurring opinion) (recognizing that because redistricting "is not a routine exercise of [legislative] power" as "it directly involves the self-interest of the legislators themselves" "[w]e should not simply rely upon bright line tests which have been developed in other contexts to bar virtually all discovery of relevant facts"). *See also* Dkt. 59 at 16–17.

D. Role of Government

As for the role of the government, the Legislators misunderstand what this factor seeks to evaluate. The inquiry here is not whether Plaintiffs are seeking discovery from particular legislators (*see* Dkt. 62 at 23), but instead whether individual legislators are the targets of the litigation such that Plaintiffs are truly trying to end-run legislative immunity as opposed to legislative privilege. *See S.C. State Conf. of NAACP v. McMaster*, 584 F. Supp. 3d 152, 165 (D.S.C. 2022) ("This is not a case where individual legislators are targeted by a private plaintiff *seeking damages*. Plaintiffs' stated purpose is to overturn legislative action on constitutional grounds.") (emphasis added); *Benisek*, 241 F. Supp. 3d at 576 ("When individual legislators are

the targets of litigation, the possibility of their suffering individualized consequences can significantly increase the need for legislative privilege."); *see also Tenney*, 341 U.S. at 378 ("legislative privilege in a [a case where defendants are legislators] deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege."); Dkt. 59 at 17. The Defendants in this case are not the Legislators but instead "the State's agents who are, in their official capacity, responsible for" enforcing the redistricting plans. *Benisek*, 241 F. Supp. 3d at 576. Thus, the Legislators "have no personal stake in the litigation and face no direct adverse consequences if the plaintiffs prevail," which weighs in favor of Plaintiffs being able to overcome the legislative privilege here. *Id.*

E. Potential Chilling Effect

As argued in the Motion to Compel and above, any potential chilling effect on the Legislators by disclosure here is outweighed by the other four *Rodriguez* factors. Dkt. 59 at 17–18. Indeed, the requested discovery about legislator motivations and communications here "relate to moments when unconstitutional intent may have infected the legislative process," and "[b]ecause of the importance of the federal interests at stake and because the evidence of these conversations may be crucial to their vindication," the privilege should yield. *Benisek*, 241 F. Supp. 3d at 576. Further, as the Supreme Court has explained, the chilling effect "is significantly reduced, if not eliminated" when, as here, "the threat of personal liability is removed." *Owen v. City of Independence, Missouri*, 445 U.S. 622, 656 (1980).

III. THERE IS NO BLANKET PRIVILEGE FOR THIRD-PARTY COMMUNICATIONS, FACTUAL INFORMATION, A PRIVILEGE LOG, AND DEPOSITIONS.

Communications between the Legislators and third parties and communications occurring after the passage of the challenged redistricting legislation are discoverable and not privileged. Moreover, there is no justification for an exception to the basic rule that the party asserting

privilege must provide a privilege log setting forth sufficient information for this Court to determine the extent to which any privilege applies to withheld information. Lastly, several grounds exist which warrant the deposition of the Legislators and Mr. Himes.

A. Third-Party, Purely Factual, and Post-Enactment Communications Are Not Privileged.

The Legislators contend that the privilege covers third-party communications because such meetings and communications with third parties are part of the internal legislative process and thus not discoverable. Dkt. 62 at 11–12.[11] But courts in this Circuit have found that communications between legislators or their staff and third parties are not privileged. In *League of Women Voters of Michigan*, the district court ordered the production of "any . . . documents or communications pertaining to the 2012 Michigan Redistricting process shared with, or received from, any individual or organization outside the employ of the individual legislators or standing committees of the Michigan Legislature[,]" recognizing these documents were not covered by the privilege. 2018 WL 2335805, at *7; *see also*, *Mich. State A. Philip Randolph Inst.*, 2018 WL 1465767, at *7 ("[C]ommunications between legislators or their staff and any third party are not protected by the legislative privilege."); *Plain Local Sch. Dist. Bd. of Educ. v. DeWine*, 464 F. Supp. 3d 915, 921 (S.D. Ohio 2020) ("[N]ot every action or communication by a legislator is covered by the legislative privilege, and courts have declined to apply the privilege to communications between legislators and third parties, such as lobbyists or constituents."). This makes sense: once

[11] Notably, in reaching this conclusion, the Fifth Circuit relied on a case dealing with the scope of legislative immunity from suit rather than legislative privilege. *See Hughes*, 68 F.4th at 236 n.46 (citing *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)). The same is true of the Eight Circuit. *See In re N.D. Legis. Assembly*, 70 F.4th at 464 (citing *Riddle*, 631 F.2d at 280 and *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007)). Furthermore, in concluding that "the legislators did not send privileged documents to third parties *outside* the legislative process; instead they brought third parties *into* the process," the Fifth Circuit relied on a privilege log, *Hughes*, 68 F.4th at 237, something the Legislators here have refused to produce. *See* Dkt. 59 at 19.

communications have been shared with third parties, the privilege is waived because those parties could share those communications with others by publishing in the news or online, sharing with litigants, or even bringing them directly to the legislator's opposition.[12] *See, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 343 ("[T]he House must produce any documents or communications shared with, or received from, any individual or organization outside the employ of the legislature."); *Lee v. Va. State Bd. of Elecs.*, 2015 WL 9461505, at *4–5 (E.D. Va. Dec. 23, 2015) ("[A]ny communications the Nonparty Legislators or the Legislative Employees made with Third Parties—such as state agencies, constituents, lobbyists, and other third parties—are not protected by legislative privilege . . . . because the involvement of third parties inherently destroyed any privilege that may or may not have existed."). This is especially true of communications with journalists, and some Legislators no doubt have engaged with journalists. *See* Dkt. 59 at 5–6.

The legislative privilege does not protect purely factual information either. *League of Women Voters Mich.*, 2018 WL 2335805, at *6 ("Fact-based documents and communications are not protected by legislative privilege.") (citing *Bethune-Hill*, 114 F. Supp. 3d at 343); *Hopkins v. U.S. Dep't of Hous. & Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991) ("The [deliberative process] privilege does not, as a general matter, extend to purely factual material.") (internal citation omitted); *Brandt v. Rutledge*, 2022 WL 3108795, at *2 (E.D. Ark. Aug. 4, 2022) (ordering legislators to produce documents that were purely factual and/or dated after the passage of the legislation at issue); *Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710, at *16 (C.D. Cal.

[12] So obvious and uncontroversial is this point that even the Legislators admit it was their "understanding of the privilege's scope" reflected in the "caselaw" until very recently. Dkt. 62 at 18 n.7 (acknowledging voluntary disclosure of third-party communications during a 2022 state-court case).

Oct. 10, 2003) ("Where deliberative matters are intermingled with purely factual matters, the latter must be disclosed if they are severable.").

Nor does the legislative privilege cover documents and communications that post-date enactment of the legislation at issue because these by definition cannot constitute integral steps in the pre-enactment deliberative process. *League of Women Voters Mich.*, 2018 WL 2335805, at *6 ("Documents and communications created after the date of enactment are outside the scope of legislative privilege.") (citation omitted); *Brandt*, 2022 WL 3108795, at *2 (ordering legislators to produce documents that were purely factual and/or dated after the passage of the legislation at issue); *Bethune-Hill*, 114 F. Supp. 3d at 343 ("The House must produce any documents or communications created after the redistricting legislation's date of enactment because the privilege protects 'integral steps' in the legislative process and does not extend to commentary or analysis following the legislation's enactment").

Third-party communications, purely factual information, and post-enactment documents are not protected by the legislative privilege and the Legislators should be required to produce those documents here.

B. The Legislators Must Produce a Privilege Log.

Remarkably, the Legislators and Mr. Himes seek to avoid the bare minimum task required of parties asserting *any* privilege—producing a privilege log. But Courts in this Circuit have routinely ordered nonparty legislative bodies to produce a privilege log that complies with Federal Rule of Civil Procedure 26(b)(5). *See, e.g.*, *Bybee-Fields*, 2022 WL 4042412, at *8 ("assertions of [legislative] privilege" are made "with a sufficiently detailed privilege log"); *League of Women Voters Mich.*, 2018 WL 2335805, at *7 (ordering the creation of a privilege log for information withheld under the legislative privilege"). Courts in other Circuits have similarly required non-party legislators to produce a privilege log not only reflecting claims of legislative privilege but

also the attorney-client privilege or work-product doctrine. *See Bethune-Hill*, 114 F. Supp. 3d at 345 (finding privilege log asserting legislative privilege inadequate and ordering legislators to produce modified log for *in camera* review).

The Legislators counter that they need not produce a privilege log because all the information Plaintiffs seek is privileged anyway. Dkt. 62 at 13–14. The Legislators further complain that the log's itemized list would show the documents retained by individual legislators and staff and thus somehow reveal the substance of the Legislators' deliberations. *Id.* But apart from being wholly circular, the Legislators' position would completely defeat the purpose of requiring a party withholding relevant documents to produce a privilege log—which is to allow the requesting party and the court to assess and test those claims of privilege. The Legislators may not simply assert a blanket legislative privilege without any further explanation.

Fed. R. Civ. P. 26 also counsels against the Legislators' view. The long-held understanding is that a party raising a privilege holds the burden of establishing its existence. *In re Grand Jury Investigation*, 723 F.2d 447, 450 (6th Cir. 1983) ("The burden of establishing the existence of the privilege rests with the person asserting it."). Accordingly, Rule 26 dictates that when a party withholds otherwise discoverable materials, the party must expressly make the privilege claim and describe the nature of the documents, communications, or tangible things. Fed. R. Civ. P. 26(b)(5). Generally, when a privilege is asserted, "counsel is obligated to create and produce a privilege log laying out the information required under Rule 26" so that the court "can assess the claim of privilege and determine if it is a legitimate one." *Bybee-Fields*, 2022 WL 4042412, at *8. Indeed, "failure to produce a privilege log is fatal to the assertion of privilege." *Id.*

The Legislators further contend that producing a privilege log would be too burdensome because the Legislators would have to collect and review documents. Dkt. 62 at 13–14. But that

is not a good reason for altogether exempting the Legislators from producing a privilege log. To date, Plaintiffs have been reasonable in working with Defendants to narrow the scope of their discovery requests to focus on the most relevant documents and would do so here as well to alleviate any burden on the Legislators.

The Court should order the Legislators to produce a privilege log of relevant and responsive documents. Excusing the Legislators from having to produce a log would impede Plaintiffs' and the Court's ability to conduct accurate evaluations of the Legislators' privilege assertion. Furthermore, such an approach would permit legislators to conceal everything, even responsive and not privileged facts, behind an impenetrable wall of secrecy.

C. The Privilege Does Not Shield Legislators from Sitting for Depositions.

The Legislators contend that the legislative privilege also provides absolute immunity from having to sit for a deposition. Dkt. 62 at 24–25. Not so. As an initial matter, the same substantive considerations relevant to the production of documents and communications in a case (like this one) which centers on intent apply with equal force to deposition testimony. Furthermore, for the same reasons that third party communications and factual information are not covered by the privilege, *see* Part II.A, the deposition topics concerning the Legislators' communications with third parties, public statements, and factual support for those statements are also not privileged, and hence Plaintiffs are entitled to depose the Legislators as to these topics.

The Legislators assert that it would be difficult to constrain the scope of questioning during a deposition so that it only covered those topics deemed appropriate by this Court. But other courts have found any number of ways to deal with that purported concern. For instance, one court in this Circuit permitted plaintiffs to proceed with depositions at which the legislators must answer questions posed, subject to any privilege objection, with the transcripts of such depositions remaining sealed unless specifically ordered to be made public by the court. *Nashville Student*

Org. Comm., 123 F. Supp. 3d at 971; *see also Perez v. Perry*, 2014 WL 106927, at *2–3 (W.D. Tex. Jan. 8, 2014) (allowing the depositions of legislators, legislative aides, and legislative staff to proceed under seal, with portions of the transcripts submitted for in camera review). Other courts have authorized the depositions of legislators in similar cases as well. *S.C. State Conf. of NAACP*, 584 F. Supp. 3d 152, 157, 166 (at minimum, the plaintiffs were entitled to "[d]epositions of all legislators, staff (including Map Room staff) and consultants involved in the development, design and/or revisions of H. 4493").

The Legislators next contend that sitting for depositions would be too burdensome because they would be subject to endless hours of questioning. Dkt. 62 at 7. But this is an overstatement, to say the least. Under Rule 30(d)(1), contrary to the Legislators' suggestion, the Legislators at most can be questioned for "1 day of 7 hours," absent leave from the court permitting a deposition of greater length, and—given the limited scope of the subject matter here—Plaintiffs would be willing to negotiate shorter deposition times in at least some cases. The Legislators also assert that they would be burdened because six of the noticed deponents are "actively campaigning for re-election." Dkt. 62 at 24, n.9. But the primary is not until August 1, 2024, and Plaintiffs would schedule depositions on a date and time convenient to the Legislators. Moreover, this logic does not apply House Majority Leader Lamberth, who does not face an opponent in the primary election, and Chairman Hicks, Chairman Marsh, Chairman Rose, and Chairman Vaughan, who do not face any opposition in the primary *or* the general elections. *See* https://perma.cc/3Q5S-7TXB. Plaintiffs are willing to mitigate the burdens by conducting local in-person depositions or in the alternative, remote depositions should the Legislators prefer that option.

Finally, the Legislators fall back on the so-called *Morgan* doctrine, which they assert precludes Plaintiffs from deposing them because they are all "high-ranking" officials. Dkt. 62 at

25–27. By invoking the *Morgan* doctrine and its progeny, the Legislators seek to require Plaintiffs to show "extraordinary circumstances" justifying those depositions. *Id*. Though the Sixth Circuit recognized the doctrine over fifty years ago in *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968), it did not elaborate on its application of the doctrine, nor has it addressed the issue since. *See Mitchell v. Arnold*, 2023 WL 7711478, at *2 n.3 (W.D. Ky. Nov. 15, 2023) (noting that, in *Warren Bank*, the Sixth Circuit "did not elaborate on the [*Morgan* doctrine's] protection" and "ha[s] not addressed the issue since"). Courts outside this Circuit—which have more recently addressed the doctrine—generally apply the protection only to "high-ranking" government officials, a designation granted on a "case-by-case" basis. *See e.g.*, *U.S. v. Sensient Colors, Inc.*, 649 F.Supp.2d 309, 317–18 (D.N.J. 2009) ("[T]here is no hard and fast rule when it comes to applying *Morgan* to a particular government official.").

Here, Legislators fail to show that Plaintiffs should be precluded from deposing the subpoena recipients on *Morgan* grounds. None of the Legislators—besides Deputy Speaker Johnson—qualify as "high ranking" government officials. The Legislators' assertion that the subpoena recipients are all statutorily defined as members of the legislative branch and thus qualify as "high ranking" proves too much; after all, if that were enough, no legislator could *ever* be deposed simply because each of them is part of the legislative body. Moreover, the Tennessee Constitution explicitly states that each part of the legislative body (the House and Senate), is represented by its respective speaker, thus imposing a hierarchical distinction within those bodies. *See* Tenn. Const. Art. II § 11.

The cases the Legislators cite on this point are inapposite. In *McNamee v. Massachusetts*, a Massachusetts federal court rejected a request to depose a congressman and his staffer because "Rep. McGovern ha[d] no basis of personal knowledge of facts relating to the circumstances of

plaintiff's employment during the period relevant to his workers' compensation claim, except that his office appears to have communicated with plaintiff's supervisor on several isolated occasions." 2012 WL 1665873, at *2 (D. Mass. May 10, 2012). Here, by contrast, every legislator that Plaintiffs seek to depose played a direct role in the passage of the challenged districts. In *LULAC v. Abbott I*, the court did not permit a deposition of the Texas Speaker of the House on the grounds that the plaintiffs desired additional documents beyond those the plaintiffs had already obtained. 2022 WL 2866673, at *2 (W.D. Tex. July 6, 2022). But here Plaintiffs have no documents or testimony from the Legislators (or any other sources, for that matter) enabling them to prosecute their claims of unconstitutional redistricting or address the affirmative assertions of partisan motivation advanced by Defendants and the Legislators.

This point—that the testimony in question goes to the heart of the claims and defenses in this case—ultimately carries the day. Indeed, even if the Court were to find that all nine Legislators here are "high-ranking" officials under the *Morgan* doctrine, it should nevertheless find the existence of "extraordinary circumstances" warranting their depositions because each of them possesses personal knowledge "essential to the case," which "Plaintiffs cannot obtain . . . through other means." *Mitchell,* 2023 WL 7711478, at *3; *see also In re Gold King Mine Release in San Juan Cty, Co. on Aug. 5, 2015*, 2021 WL 3207351, at *4 (D.N.M. Mar. 20, 2021) (denying motion to quash deposition of a high-ranking official who had "personal knowledge of material facts that are essential to the [parties' claims] that cannot be obtained elsewhere"); *Burgess v. U.S.*, 2022 WL 17725712, at *6 (E.D. Mich. Dec. 15, 2022) (accepting that the deposition of a high-ranking official with personal knowledge is appropriate where the information is essential to the case and other avenues of discovery are exhausted); *U.S. v. Sensient Colors, Inc.*, 649 F.Supp.2d 309, 317–

18 (D.N.J. 2009) (acknowledging that the "personal involvement or knowledge of the deponent" is a factor that courts deem "critical" in applicability of *Morgan*).

The Legislators' involvement in the formation and the implementation of the redistricting maps is directly related to the facts of this case. As stated above, Supreme Court jurisprudence has made the intent of the Legislators the centerpiece of litigations involving the allegations at issue here. *See Arlington Heights*, 429 U.S. at 266–68 (outlining the direct and circumstantial evidence courts should consider in determining whether *discriminatory intent* existed in cases involving the Equal Protection Clause of the Fourteenth Amendment). The Legislators are not remote from the facts here—their "subjective beliefs . . . are relevant to the broader inquiry into legislative intent and the possibility of racially motivated decisions that were not adequately tailored to a compelling government interest." *S.C. State Conf. of NAACP*, 584 F. Supp. 3d at 163 (internal citation omitted). The "unique first-hand knowledge" of the Legislators and Mr. Himes justify permitting their depositions where (i) the drawing of the maps was under their control, (ii) neither the public nor other legislators were included in the implementation of the maps (*see e.g.*, Compl. at ¶¶ 67–84), and (iii) Defendants have not offered alternative sources of the sought-after information. *See SEC v. Comm. on Ways & Means*, 161 F. Supp. 3d 199, 249 (S.D.N.Y. 2015).

In addition, Defendants' contention that Plaintiffs have conceded that alternative sources for the information exist is wrong. Indeed, Plaintiffs specifically subpoenaed the Legislators and Mr. Himes ***because*** they were unable to obtain this information through the normal avenues. Unlike in *Burgess*, 2022 WL 17725712, at *6, Plaintiffs sent discovery requests to Defendants—who have been slow to supplement their limited document productions—and have not yet taken any depositions due to the lack of documents received thus far. Here, where Plaintiffs have sufficiently shown that the information they seek is uniquely held by Defendants, and irretrievable

from less burdensome sources, the Court should compel the Legislators and Mr. Himes to produce relevant documents and sit for deposition.

Moreover, cases following *Morgan* have also permitted taking depositions where there are allegations of improper motive—which is another central element of Plaintiffs' claims here. *See e.g., Coleman v. Schwarzenegger*, 2008 WL 4300437, at *3 (E.D. Cal. Sept. 15, 2008) (collecting cases). Plaintiffs have alleged that Defendants "acted outside of the scope of their official duties" by using racial considerations to draw the 2022 maps, and with the "improper motive" to disenfranchise voters of color. *Coleman*, 2008 WL 4300437, at *3; *see* Compl. at ¶¶ 156–183.

Because the Legislators' testimony will provide unique and personal information which goes directly to the heart of Plaintiffs' claims of the legislature's discriminatory purpose, Plaintiffs are entitled to depose the Legislators.

IV. NONE OF THE OTHER PRIVILEGES CATEGORICALLY BAR THE LEGISLATORS FROM PRODUCING DOCUMENTS, A PRIVILEGE LOG, OR SITTING FOR DEPOSITIONS.

Should the Legislators and Mr. Himes choose to assert privilege protections—other than the legislative privilege—over their documents or depositions, they must demonstrate application of the privilege and protection beyond simply noting the presence of counsel. Dkt. 62 at 27; *see Mark A. G'Francisco v. GoFit, LLC*, 2015 WL 247873 at *3 (M.D. Tenn. Jan. 20, 2015) (compelling defendants to produce a privilege log describing responsive information and documents withheld upon claims of privilege). Contrary to the Legislators' contention, correspondence with attorneys regarding the 2021–22 redistricting does not automatically entitle the entire chain of discussion to the attorney-client privilege or work product protection. *Ohio A. Philip Randolph Inst. v. Smith,* 2018 WL 6591622, at *3 (S.D. Ohio Dec. 15, 2018) (holding that "facts, data, and maps" or documents containing "strictly factual information" "cannot be immunized from discovery simply by incorporating [them] into a document which is entitled to

work-product protection" or the attorney-client protection) (internal citation and quotation marks omitted).

Likewise, the work product protection does not apply where lawyers involved in the redistricting would not have taken certain steps or sent or received documents "if litigation over the Map was not likely"—the Legislators and Mr. Himes will have to demonstrate that any withheld documents "would have been prepared differently but for the anticipated litigation." *Id.* at *5. The proper procedure here would be to require the Legislators to produce a privilege log invoking the privileges for any relevant documents withheld and providing the basis of invoking the privilege.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny the Legislators Motion to Quash and compel the Legislators to produce the relevant documents in response to Plaintiffs' requests and privilege log and to provide deposition testimony.

Dated: May 16, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2024, the undersigned filed the foregoing document via this Court's electronic filing system, which sent notice of such filing to the following counsel of record:

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