No. 21A756

IN THE SUPREME COURT OF THE UNITED STATES

REPRESENTATIVE RYAN GUILLEN, ET AL., APPLICANTS

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR A STAY PENDING APPEAL OR, IN THE ALTERANTIVE, PENDING DISPOSITION OF A PETITION FOR A WRIT OF MANDAMUS

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The Solicitor General, on behalf of the United States of America, respectfully submits this response in opposition to the application for a stay pending appeal or, in the alternative, pending disposition of a petition for a writ of mandamus.

This case involves an action brought by the United States alleging that Texas's 2021 Congressional and State House redistricting plans violate Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301. As is routine in redistricting cases, the United States sought testimony from state legislators who represent some of the challenged districts -- specifically, the three applicants here. Courts, including this Court, often rely on such testimony both in assessing the motive and justification for districting choices and in considering the "totality of circumstances" relevant to minority voters' electoral opportunities, as the VRA di-

rects. 52 U.S.C. 10301(b); see, e.g., Abbott v. Perez, 138 S. Ct. 2305, 2329 (2018); Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 265-266, 273-274 (2015); LULAC v. Perry, 548 U.S. 399, 434 (2006). Here, however, applicants moved to quash the subpoenas based on the state legislative privilege, a qualified federal common-law privilege that in some circumstances prevents inquiries into the motive for legislative acts. Appl. App. 2.

The three-judge district court unanimously denied the motion. The court acknowledged that applicants may have valid claims of privilege against some potential questions. Appl. App. 2-5. But the court determined that applicants' categorical privilege claim was "not yet ripe for decision" because "no questions have been asked, and no answers given." Id. at 1-2. And the court declined to bar the depositions altogether because "there are likely to be relevant areas of inquiry that fall outside of topics potentially covered by state legislative privilege." Id. at 4. The court thus allowed the depositions to proceed subject to the same protective procedures "used by the last three-judge court to hear Texas redistricting cases." Ibid. Specifically, applicants are free to assert the state legislative privilege in response to particular questions. Ibid. Any answers given subject to an assertion of privilege are sealed and no party may use them unless and until the court grants a motion to compel. Id. at 5. The court emphasized that "nothing" in its order "should be construed

as deciding any issue of state legislative privilege," and admonished that the parties may face sanctions for any disclosure of potentially privileged material. Ibid.

The court of appeals denied a stay pending appeal, finding that applicants had shown neither a likelihood of success nor irreparable harm. Appl. App. 8-17. The court emphasized that "[t]he district court is ready and willing to protect the state legislative privilege if and when the issue arises." Id. at 16. And the court of appeals praised the district court's "prudent, cautious, vigilant, and narrow" approach to resolving any questions of privilege. Ibid. Judge Willett concurred in the judgment, finding that applicants had not established jurisdiction under the collateral-order doctrine. Id. at 13 n.1.

Applicants now seek an emergency stay from this Court. But as six federal judges have already concluded, applicants' effort to block their one-day depositions does not come close to satisfying the standard for that extraordinary remedy. Applicants do not challenge the lower courts' conclusion that they have nonprivileged information relevant to this case. They could scarcely do so: One of the applicants, Representative John Lujan, does not have even an arguable claim of legislative privilege with respect to the challenged districting plans because he was not in the legislature when the plans were passed -- a critical fact that applicants do not mention. And applicants have not cited any

decision, from any court, granting their requested relief: a categorical prohibition on legislative depositions seeking concededly nonprivileged information.

Applicants instead rely on decisions holding that, in particular circumstances, private parties seeking information that was indisputably subject to the state legislative privilege had not made the showing necessary to overcome it. But as the court of appeals explained in distinguishing the cases on which applicants rely, that question is not presented here because the lower courts have not yet decided whether the privilege applies to any of the questions that might be asked -- let alone whether it can be overcome. Appl. App. 15 & n.2.

Finally, as the court of appeals emphasized, the other cases on which applicants rely did not involve "the kind of extensive procedural safeguards designed to protect the privilege" that the district court adopted here. Appl. App. 15 n.2. Those safeguards serve to preserve the confidentiality of any assertedly privileged information, which means that applicants do not face any harm at all -- let alone irreparable injury -- from the denial of a stay. The application should be denied.

STATEMENT

1. In October 2021, the Texas Legislature passed, and the Governor signed into law, statewide redistricting plans based on the 2020 Census. Appl. App. 28, 47. Shortly thereafter, the

United States filed this suit alleging that the State's Congressional and State House redistricting plans violate Section 2 of the VRA, 52 U.S.C. 10301. Appl. App. 20-64.

Section 2 of the VRA prohibits States from adopting a voting rule, including a districting plan, that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a); see, e.g., Wisconsin Legislature v. Wisconsin Elections Comm'n, 142 S. Ct. 1245, 1248 (2022) (per curiam). Such a denial or abridgement may occur as a result of intentional discrimination by the state actors who adopted the plan. Chisom v. Roemer, 501 U.S. 380, 394 n.21 (1991). Alternatively, a violation of Section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State" are "not equally open to participation by members of a [minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

This Court has "construed § 2 to prohibit the distribution of minority voters into districts in a way that dilutes their voting power." Wisconsin Legislature, 142 S. Ct. at 1248. In Thornburg v. Gingles, 478 U.S. 30 (1986), the Court "provided a framework for demonstrating a violation of that sort." Wisconsin Legislature, 142 S. Ct. at 1248. "First, three 'preconditions' must be

shown: (1) The minority group must be sufficiently large and compact to constitute a majority in a reasonably configured district, (2) the minority group must be politically cohesive, and (3) a majority group must vote sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate." Ibid. (quoting Gingles, 478 U.S. at 50–51). "If the preconditions are established, a court considers the totality of circumstances to determine 'whether the political process is equally open to minority voters.'" Ibid. (quoting Gingles, 478 U.S. at 79); see Gingles, 478 U.S. at 36-37 (listing relevant factors).

Here, the United States' complaint alleges that Texas's 2021 Congressional redistricting plan violates Section 2 by intentionally discriminating against minority voters in West Texas and the Dallas-Fort Worth area, and by producing discriminatory results in West Texas and the Harris County (Houston) area. Appl. App. 28-45. With respect to the State House, the complaint alleges that the redistricting plan produces discriminatory results in District 118 in Bexar County; District 31 in South Texas; and districts in West Texas, including District 81. Id. at 46-59.

The United States' action was consolidated with several similar cases brought by private plaintiffs that are being heard by a three-judge court consisting of Circuit Judge Jerry Smith and District Judges David Guaderrama and Jeffrey Brown. D. Ct. Doc.

83 (Dec. 10, 2021).[1] The court adopted an expedited schedule that will allow a decision and appellate review well in advance of preparations for the 2024 elections. Discovery closes on July 15, 2022, and a trial is set for September 28, 2022. D. Ct. Docs. 96 and 109 (Dec. 17 and 27, 2021).

On April 20 and May 3, 2022, the United States served subpoenas for applicants' deposition testimony. See D. Ct. Docs. 259-2, 259-3, 259-4 (May 4, 2022). Applicants are the state legislators representing three of the Texas House districts challenged in the United States' complaint: Districts 31, 81, and 118. The first deposition is scheduled to occur on May 24. Appl. App. 1. Each deposition is scheduled for a single day, and the United States offered to conduct them at any location convenient for applicants. D. Ct. Doc. 271, at 3 n.2 (May 12, 2022). Private plaintiffs later served subpoenas seeking to depose applicants at the same time. Appl. App. 1.

In negotiating over the subpoenas, counsel for the United States explained that "Section 2 requires the Court to assess the totality of circumstances in the districts [applicants] represent, including population patterns, political behavior, the history of discrimination, socioeconomic disparities, campaign tactics, and other matters." D. Ct. Doc. 259-1, at 1 (May 4, 2022) (citing

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[1] References to the district court docket refer to the consolidated case, No. 3:21-cv-259 (W.D. Tex.).

Gingles, supra). Counsel added that, "as both elected officials and candidates, [applicants] likely have highly probative information regarding the United States' claims." Id. at 1-2.

3. After failed negotiations, applicants moved to quash the subpoenas, or alternatively, for a protective order limiting their testimony to matters in the "public record." D. Ct. Doc. 259, at 5, 17 (May 4, 2022). The district court unanimously denied the motion, finding that "issues of state legislative privilege are not yet ripe for decision." Appl. App. 1; see id. at 1-6. The court also unanimously denied a stay pending appeal. Id. at 7.

The district court acknowledged that state legislators "enjoy broad immunity from suit for actions they take during the course of their legislative duties." Appl. App. 2 (citing Tenney v. Brandhove, 341 U.S. 367, 377-378 (1951)). But the court emphasized that this case involves only "state legislative privilege, not immunity." Ibid. State legislative privilege "is a federal common law privilege, 'applied through Rule 501 of the Federal Rules of Evidence.'" Ibid. (citation omitted). It "is not coextensive with state legislative immunity" and confers only a "'qualified'" privilege that "may be limited" depending on the context and the need for the evidence. Id. at 2-3 (citation omitted).

The district court concluded that it was "not positioned" at present "to rule on what information may or may not be the subject of the state legislative privilege," because the privilege's ap-

plication is "fact- and context-specific" and "'depends on the question being posed.'" Appl. App. 2 (quoting Perez v. Perry, No. 11-cv-360, Doc. No. 102, at 5 (W.D. Tex. Aug. 1, 2011) (Perez I)). Instead, the court held only that "the privilege is not so broad as to compel the [c]ourt to quash the deposition subpoenas" altogether or to limit questioning to matters "strictly within the public record." Id. at 2-3 (citing cases).

The court acknowledged applicants' argument that evidence related to the motive or intent behind the 2021 redistricting plans may be protected by the legislative privilege. Appl. App. 3. But the court concluded that questions about whether the privilege applies to such evidence, and whether it could be overcome, "are not yet directly raised" and would "depend on more detailed and nuanced facts than those currently before the court." Ibid.

"In any event," the district court concluded that "there are other purposes for deposing [applicants]" that have nothing to do with their motives as legislators or other potentially privileged matters. Appl. App. 4. The court explained that applicants may have relevant, non-privileged information about topics including "political behavior, the history of discrimination, and socioeconomic disparities," as well as "firsthand knowledge" of issues such as "discrimination within their home districts," "legislator responsiveness to communities of color," and "alternative maps considered during the redistricting process." Ibid. (citations

omitted). The court thus concluded that "there are likely to be relevant areas of inquiry that fall outside of topics covered by state legislative privilege." Ibid.

Accordingly, the district court allowed the depositions to proceed, following the procedure "originally used by the last three-judge court to hear Texas redistricting cases." Appl. App. 4 (citing Perez I, Doc. No. 102, at 5-6). Applicants must appear and answer questions, but their answers "will be subject to the [state legislative] privilege" if invoked. Ibid. The relevant portions of the deposition transcripts must be kept confidential unless and until the court grants a motion to compel specific testimony. Id. at 5. The court warned that "any public disclosure of information to which a privilege has been asserted may result in sanctions, including the striking of pleadings." Ibid. (emphasis omitted).

4. The court of appeals unanimously denied a stay pending appeal. Appl. App. 8-17. The court first concluded that it had jurisdiction. Id. at 13 n.1. But the court noted that Judge Willett "concur[red] in the judgment because he is unconvinced that we have jurisdiction under the collateral order doctrine." Ibid.

On the merits, the court of appeals concluded that applicants had "not shown that they are likely to succeed." Appl. App. 14. The court explained that both the Fifth Circuit and this Court

"have confirmed that the state legislative privilege is not absolute." Ibid. (citing United States v. Gillock, 445 U.S. 360, 361 (1980)). The court emphasized that the district court "did not deny that state legislative privilege might apply to this case," but instead merely concluded that disputes about the privilege are "'not yet ripe for decision.'" Id. at 14-15. And the court of appeals concluded that the district court was "taking an admirably deliberate and cautious approach to the legislative privilege issue." Id. at 15.

The court of appeals added that applicants' motion had "mischaracterize[d]" both the district court's order and the "law of other circuits." Appl. App. 15 n.2. The court explained that, contrary to applicants' description, "the First, Ninth, and Eleventh Circuits all recognize that the state legislative privilege is qualified." Ibid. And the court added that "none of the[] cases" on which applicants relied "involved the kind of extensive procedural safeguards" that "the district court implemented in this case." Ibid.

The court of appeals also held that applicants had "not shown that they will be irreparably injured absent a stay." Appl. App. 15. The court emphasized that the district court's "vigilant and narrow order goes to great lengths to protect [applicants]." Ibid. And it concluded that those procedures show that "the district

court is ready and willing to protect the state legislative privilege if and when the issue arises." Id. at 16.

Finally, the court of appeals held that "the district court's approach to the case thus far accords with the public interest." Appl. App. 16. The court explained that "[t]he state legislative privilege must be protected when it arises," but "must not be used as a cudgel to prevent the discovery of non-privileged information or to prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege." Ibid. And the court reiterated that the district court's approach to balancing those competing interests had been "admirably prudent, cautious, vigilant, and narrow." Ibid.

ARGUMENT

An applicant asking this Court for a stay or injunction in a matter "pending before [a federal] Court of Appeals," in which "the Court of Appeals [has] denied [a] motion for a stay," faces "an especially heavy burden." Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). To obtain such extraordinary relief, the "applicant must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed." Id. at 1319; cf., e.g.,

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (describing the standard for a stay pending disposition of a petition for a writ of certiorari).

Applicants cannot meet any element of that heavy burden. The district court issued a narrow decision that rejected only applicants' sweeping claim that they need not sit for depositions at all. The court made clear that it will review any relevant assertion of privilege and ensured that applicants' assertedly privileged answers will remain strictly confidential until then. There is no plausible prospect that this Court would grant review of -- or ultimately reverse -- a Fifth Circuit decision affirming that limited ruling. Nor is there any conflict among the courts of appeals that would warrant this Court's review. And there are significant questions about whether the court of appeals even has jurisdiction to decide applicants' pending appeal. All of those considerations weigh against granting applicants' request for emergency relief pending appeal.

For similar reasons, there is no merit to applicants' alternative argument that the Court should grant a stay pending the court of appeals' resolution of a petition for a writ of mandamus or that this Court should grant mandamus in the first instance. And the Court should likewise reject applicants' unprecedented request for a stay pending this Court's decision in Merrill v. Milligan, No. 21-1086 (probable jurisdiction noted Feb. 7, 2022).

This Court does not grant emergency stays to superintend lower courts' management of their dockets.

I. THIS COURT IS NOT LIKELY TO REVIEW OR REVERSE A FIFTH CIRCUIT JUDGMENT AFFIRMING THE DISTRICT COURT'S DECISION

To obtain the extraordinary relief they request here, applicants must show that this Court would likely grant review of -- and then reverse -- a Fifth Circuit judgment affirming the district court's decision. See Packwood, 510 U.S. at 1319 (Rehnquist, C.J., in chambers). Applicants cannot make that demanding showing for multiple reasons. The district court's decision is correct. And in any event, this Court's review would not be warranted, both because no conflict among the circuits exists and because there are serious questions about whether the court of appeals has jurisdiction over applicants' pending appeal.

A. The District Court's Decision Is Correct

Applicants contend that the district court's decision "transgresses [a] centuries-old legislative immunity and privilege conferred upon state legislators." Appl. 1; see Appl. 17-23. That mischaracterizes both the protection applicants seek and the scope of the district court's decision. As the Fifth Circuit recognized in denying applicants' request for emergency relief, the district court resolved only a narrow threshold question, and the court resolved that threshold issue correctly.

1. Applicants repeatedly invoke (Appl. 1, 5, 10, 16-17, 19) state legislators' "immunity and privilege," which they trace to

"this Court's seminal decision in" Tenney v. Brandhove, 341 U.S. 367 (1951). Tenney is a seminal decision, but its holding is not directed at the issue that applicants raise here. The Court held that state legislators are not subject to "civil liability for acts done within the sphere of legislative activity." Id. at 376 (emphasis added). Thus, state legislators may not be subjected to "the burden of defending themselves" in a civil suit. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967) (per curiam); see Rehberg v. Paulk, 566 U.S. 356, 361 (2012) ("[I]n Tenney * * * , the Court held that [42 U.S.C.] 1983 did not abrogate the long-established absolute immunity enjoyed by legislators for actions taken within the legitimate sphere of legislative authority."); Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998) ("[S]tate and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities.").

This case does not implicate that principle. The suits filed by the United States and private respondents do not seek to impose "civil liability" on applicants. Tenney, 341 U.S. at 376. Applicants are not defendants and cannot be found "legally responsible" for any violation. Id. at 379 (citation omitted). Applicants likewise do not face the "burden of defending themselves" against liability, Dombrowski, 387 U.S. at 85, and their "absolute immunity" from such liability is not in dispute, Rehberg, 566 U.S. at 361. Indeed, the district court expressly recognized that there

is "[n]o doubt [that] state legislators enjoy broad immunity from suit for actions they take during the course of their legislative duties." Appl. App. 2.

2. The dispute in this case instead involves "questions * * * of state legislative privilege, not immunity." Appl. App. 2 (emphases added); accord Jefferson Cmty. Health Care Ctrs. v. Jefferson Parish Gov't, 849 F.3d 615, 624 (5th Cir. 2017). As recognized by decisions on which applicants themselves rely (Appl. 17-18, 20-21), "[a]ssertions of legislative immunity and privilege * * * rely on different footing." American Trucking Ass'n v. Alviti, 14 F.4th 76, 87 (1st Cir. 2021); see Lee v. City of Los Angeles, 908 F.3d 1175, 1187 (9th Cir. 2018), cert. denied, 139 S. Ct. 2669 (2019). Like other testimonial privileges, the state legislative privilege is governed by Federal Rule of Evidence 501, which permits "a claim of privilege" under the "common law -- as interpreted by United States courts in the light of reason and experience," so long as no provision of federal law provides to the contrary. See United States v. Gillock, 445 U.S. 360, 366-373 (1980); see also, e.g., Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Appl. App. 2-3 (citing additional cases).

The crux of applicants' position (Appl. 1) is that the privilege bars state legislators' testimony on matters that "probe the very innerworkings of the legislative process, examining the legislators' thoughts, impressions, and motivations for their legis-

lative acts." Critically, the district court did not reject that contention; it "did not deny that state legislative privilege might apply to this case," and "it emphatically stated that 'nothing in [its] Order should be construed as deciding any issue of state legislative privilege.'" Appl. App. 14; see id. at 5. The court instead issued a "narrow" ruling that allowed the depositions to proceed, explaining that the depositions seek "non-privileged information" and that applicants could object to any questions implicating the asserted privilege, with the court resolving those objections after reviewing a transcript that would be kept "confidential" in the interim. Id. at 4-5, 15; see id. at 15 (noting that the district court's "vigilant" approach "goes to great lengths to protect" applicants).

Applicants do not -- and, by definition, cannot -- claim that any privilege bars testimony on "relevant areas of inquiry that fall outside of topics potentially covered by state legislative privilege," such as "'political behavior, the history of discrimination, and socioeconomic disparities.'" Appl. App. 4 (citation omitted). Such topics are undisputedly relevant to a Section 2 claim, see, e.g., Thornburg v. Gingles, 478 U.S. 30, 64 (1986) (listing relevant considerations in the totality-of-circumstances analysis), and unrelated to any aspect of the legislative process that might be protected by any applicable privilege, cf. United States v. Helstoski, 442 U.S. 477, 489 (1979) (explaining that the

protection provided for federal legislators by the Speech or Debate Clause, U.S. Const. Art. I, § 6, protects only "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts") (citation omitted). Notably, one applicant in this case -- Representative John Lujan -- was not even in the legislature when the relevant redistricting occurred and therefore cannot plausibly invoke legislative privilege on that basis. Gov't C.A. Stay Opp. 12 n.4.

Applicants instead make the sweeping claim (Appl. 1, 16, 21) that the state legislative privilege prevents them from having to sit for the depositions at all. But that claim has no foundation in this Court's precedent. To the contrary, the Court specifically declined to recognize an absolute testimonial privilege for state legislators in Gillock, instead reasoning that any such privilege must yield "where important federal interests are at stake." 445 U.S. at 373. Accordingly, all of the circuit court cases on which applicants rely recognize that the state legislative privilege is not absolute and can be overcome. See, e.g., American Trucking, 14 F.4th at 88; Lee, 908 F.3d at 1187.

Applicants rely heavily on the Court's earlier decision in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). But Arlington Heights addressed only circumstances where legislators are called to testify "concerning the purpose of [an] official action"; it did not impose any limit

on legislator testimony about nonprivileged matters. Id. at 268. Even then, the Court expressly contemplated that there will be some cases where legislators may be called to testify about purpose, notwithstanding that aspects of such testimony may "be barred by privilege." Ibid. That recognition is unsurprising given that a discriminatory legislative purpose can be the basis for a violation of Section 2 or the Constitution. See Mobile v. Bolden, 446 U.S. 55, 66-67 (1980) (plurality opinion) (citing Arlington Heights, supra); see also, e.g., Chisom v. Roemer, 501 U.S. 380, 394 n.21 (1991).

In keeping with those principles, district courts have routinely denied legislators' requests for blanket protective orders barring depositions in voting-rights actions raising statutory or constitutional claims. See, e.g., South Carolina State Conf. of NAACP v. McMaster, No. 21-cv-3302, 2022 WL 425011, at *8 (D.S.C. Feb. 10, 2022); Benisek v. Lamone, 241 F. Supp. 3d 566, 576-577 (D. Md. 2017); Nashville Student Organizing Comm. v. Hargett, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015); Veasey v. Perry, No. 13-cv-193, Doc. No. 341 (S.D. Tex. June 18, 2014); Texas v. Holder, No. 12-cv-128, Doc. No. 84 (D.D.C. Apr. 20, 2012); Baldus v. Brennan, No. 11-cv-562, Doc. No. 74 (E.D. Wis. Dec. 8, 2011); Perez v. Perry, No. 11-cv-360, Doc. No. 102 (W.D. Tex. Aug. 1, 2011); United States v. County of Los Angeles, 127 F.R.D. 169, 173-174 (C.D. Cal. 1989).

This Court, moreover, has frequently relied on testimony from legislators in addressing redistricting claims under the Constitution and the VRA. See, e.g., Abbott v. Perez, 138 S. Ct. 2305, 2329 (2018); Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788, 801 (2017); Cooper v. Harris, 137 S. Ct. 1455, 1468-1469 (2017); Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 265-266, 273-274 (2015); LULAC v. Perry, 548 U.S. 399, 434 (2006); Bush v. Vera, 517 U.S. 952, 961 (1996) (plurality opinion).

Legislator testimony has already been a feature of this case as well. Texas presented such testimony at a preliminary injunction hearing. D. Ct. Doc. 258, at 15 (May 4, 2022). And in identifying its own potential witnesses, the State's initial disclosures under Federal Rule of Civil Procedure 26(a)(1)(A) listed the chairs and members of the legislative committees that adopted the challenged plans. D. Ct. Doc. 271-6, at 4-6 (May 12, 2022); see Fed. R. Civ. P. 26(a)(1)(A)(i) (requiring disclosure regarding individuals "likely to have discoverable information * * * that the disclosing party may use to support its claims or defenses") (emphasis added).

Applicants' position that state legislators can invoke an absolute privilege entitling them to avoid even sitting for a deposition would thus require a sharp departure from settled litigation practices in voting-rights cases. As the Fifth Circuit's

denial of their stay motion demonstrates, that broad position is unlikely to prevail.

B. The Decisions Below Do Not Implicate Any Conflict Warranting This Court's Review

Applicants scarcely acknowledge the established practice of legislator depositions in redistricting cases. Instead, they contend (Appl. 17-21) that this Court would likely grant certiorari if the court of appeals affirmed the district court's order because they assert that order is inconsistent with decisions of the First, Ninth, and Eleventh Circuits, as well as a decision of the Texas Supreme Court. Those contentions lack merit. And this Court recently denied a petition for a writ of certiorari relying on the same decisions and asserting a similar conflict, further underscoring that review is unlikely. See Lee v. Los Angeles, 139 S. Ct. 2669 (2019) (No. 18-1257).

1. As the court of appeals explained, applicants "mischaracterize the law of other circuits." Appl. App. 15 n.2. The First, Ninth, and Eleventh Circuit decisions on which they rely held that, in circumstances where the legislative privilege indisputably applied, private parties had not made the showing required to overcome it. Here, in contrast, the courts below specifically declined to decide whether the privilege applies to any as-yet-unasked questions or whether it could be overcome because those questions are "not yet ripe for decision." Id. at 1; see id. at 14-15. And the courts below did so in the context of an

enforcement action by the United States, not a suit by private parties alone.

In American Trucking, Rhode Island state officials sought to quash subpoenas for documents in a Dormant Commerce Clause challenge to a state law establishing bridge tolls. 14 F.4th at 81. The First Circuit noted that "no party dispute[d]" that the subpoenas "sought evidence" of "legislative acts and underlying motives" or that "if the legislative privilege applies, the discovery requested by those subpoenas falls within its scope." Id. at 87. Thus, the court concluded that "the only question" was whether the private plaintiffs had shown that their "interest in obtaining evidence of the State Officials' subjective motives outweighed" the privilege. Id. at 88.

In concluding that the plaintiffs had not made that showing, the First Circuit emphasized that "no representative of the federal government asserts any interest" in the relevant evidence. American Trucking, 14 F.4th at 88. The court stated that the privilege might be overcome even in "a private civil case," but it concluded that American Trucking "was not such a case" because the plaintiffs' Dormant Commerce Clause challenge would turn primarily on the challenged law's effects rather than the legislature's intent. Id. at 88-89; see id. at 90 ("[T]he need for the discovery requested here is simply too little.").

Similarly, in In re Hubbard, 803 F.3d 1298 (2015), the Eleventh Circuit found that the subpoenas' "sole reason for existing was to probe the subjective motivations of the legislators who supported" the challenged law -- "an inquiry that strikes at the heart of the legislative privilege." Id. at 1310. The court specifically distinguished a case like this one, where "[s]ome of the relevant information" sought by a subpoena "could have been outside of any asserted privilege." Id. at 1311.

In holding that the plaintiffs had not overcome the privilege, moreover, the Eleventh Circuit emphasized that the subpoenas "d[id] not serve an important federal interest" because the case involved a "civil action[] by private plaintiffs" and because the plaintiffs' First Amendment retaliation claim was not cognizable in any event. Hubbard, 803 F.3d at 1312. The court thus emphasized the limits of its holding, explaining that it "should not be read as deciding whether, and to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim," id. at 1312 n.13 -- let alone in a suit by the United States.

Finally, in Lee, the district court entered a protective order that precluded private plaintiffs who were challenging the redistricting of the Los Angeles City Council from questioning certain city officials "regarding any legislative acts, motivations, or deliberations," and prohibited the plaintiffs from deposing other

officials altogether. 908 F.3d at 1181. As in American Trucking and Hubbard, the plaintiffs did not dispute that the evidence they sought was subject to the privilege; instead, they argued only that the privilege "should be overcome in this case." Id. at 1187.[2]

In rejecting that argument, the Ninth Circuit declined to adopt the plaintiffs' broad argument for a "categorical exception" to state legislative privilege "whenever a constitutional claim directly implicates the government's intent" -- an argument the United States and private plaintiffs do not make here. Lee, 908 F.3d at 1188. The court acknowledged that there are some cases in which the privilege may be overcome, but it held that the "factual record in [Lee] [fell] short of justifying" an "exception to the privilege" because the plaintiffs had failed to make a sufficient showing of impermissible racial motivation. Ibid.

The plaintiffs in Lee sought certiorari, urging this Court to clarify the scope of the state legislative privilege and specifically asserting that the Ninth Circuit's decision conflicted with the Fifth Circuit decision on which the decisions below relied and with the approach reflected in "redistricting cases" more generally. Pet. at 18, 20, Lee, supra (No. 18-1257) (citing Jefferson

[2] The plaintiffs separately argued that the legislative privilege does not apply to state and local officials at all, a claim that the court rejected. Lee, 908 F.3d at 1186-1187.

Cmty. Health Care, supra). But this Court denied review, and it would likely do the same here. Indeed, this case would be a far worse vehicle for addressing those issues because the district court has not yet decided whether the privilege applies or whether the United States' interests in the evidence are sufficient to overcome it.

2. Applicants also briefly discuss (Appl. 18) the Texas Supreme Court's decision in In re Perry, 60 S.W.3d 857 (2001). But applicants do not and could not assert that Perry reflects any division of authority warranting this Court's review. There, the Texas Supreme Court applied the legislative privilege reflected in state law and looked to federal law only by analogy. Id. at 859. Here, in contrast, the relevant privilege is "a federal common law privilege." Appl. App. 2; see Fed. R. Evid. 501; Gillock, 445 U.S. at 367-368, 374. And in any event, Perry is distinguishable on the same grounds as American Trucking, Hubbard, and Lee: It involved subpoenas that sought only evidence concededly covered by the legislative privilege, and it arose in a private suit, not an enforcement action by the United States. 60 S.W.3d at 858-859.

C. This Court Would Be Unlikely To Grant Review Because There Are Serious Doubts About The Court Of Appeals' Jurisdiction

This Court would be unlikely to grant certiorari for an additional reason: As Judge Willett observed, there are serious doubts about the court of appeals' jurisdiction over applicants'

appeal. Appl. App. 13 n.1. The jurisdictional question appears to arise infrequently, and applicants do not suggest that it independently warrants this Court's review. But the Court would have to confront that thorny threshold question if it were to grant certiorari. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998).

Courts of appeals have jurisdiction to review "final decisions of the district courts." 28 U.S.C. 1291. Pursuant to the collateral-order doctrine, this Court has construed that language to allow review of a "small category" of orders "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995).

In Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100 (2009), this Court held that "disclosure orders adverse to the attorney-client privilege" are not immediately appealable pursuant to the collateral-order doctrine because such orders are not effectively unreviewable on appeal from a final judgment. Id. at 103. The Court explained that it "ha[s] generally denied review of pretrial discovery orders." Id. at 108 (citation omitted). And it found that the relevant interests are adequately protected by alternative mechanisms for review, which may include an appeal from a final judgment, a certified appeal under 28 U.S.C. 1292(b), peti-

tioning for mandamus, or refusing compliance and appealing the resulting contempt citation. Mohawk, 558 U.S. at 109-112.

Applicants assert (Appl. 5-6) that Mohawk is distinguishable because they are "third parties to the underlying litigation" and thus could not appeal from a final judgment. But the other avenues for review identified in Mohawk remain available to applicants. For that reason, this Court has not recognized the third-party exception applicants invoke. To the contrary, the Court has held that the possibility of review following a contempt citation is by itself sufficient to justify denying an immediate appeal. See United States v. Ryan, 402 U.S. 530, 532-534 (1971).[3]

In any event, even if applicants' third-party distinction had merit in other circumstances, it would not apply here. Applicants are hardly strangers to this litigation. They are officers of the State of Texas, and they are represented by the Texas Attorney General, who also represents the State and the state officials who are named defendants -- and who will presumably continue to represent applicants' interests in any post-judgment appeal.

Those jurisdictional questions provide still further reason why this Court would be unlikely to grant certiorari in this case.

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[3] The Court has made an exception to that principle only when a party to the litigation seeks to appeal a discovery order directed to a "disinterested" custodian, because such a custodian "presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." Church of Scientology of California v. United States, 506 U.S. 9, 18 n.11 (1992).

Even if the scope of the state legislative privilege otherwise warranted this Court's consideration, applicants have identified no reason why the Court would not await a case arising in a posture that was free of such threshold obstacles -- especially because such a case would also present the privilege question in the concrete form that is lacking here. Cf. American Trucking, 14 F.4th at 84-85 (mandamus); Lee, 908 F.3d at 1181-1182 (final judgment).

II. APPLICANTS DO NOT FACE IRREPARABLE HARM AND THE BALANCE OF THE EQUITIES WEIGHS AGAINST RELIEF

Even if applicants were able to show that this Court would be likely to ultimately grant review and reverse a Fifth Circuit decision affirming the district court, they have not established that the applicable equitable factors warrant a grant of emergency relief. See, e.g., Nken v. Holder, 556 U.S. 418, 425-426 (2009).

A. Applicants have not shown that they face irreparable harm from the denial of a stay. The district court's order simply requires them to appear for one-day depositions and "goes to great lengths" to protect the confidentiality of any assertedly privileged material. Appl. App. 15. Neither of applicants' arguments establishes any cognizable injury -- much less irreparable harm -- from that "prudent, cautious, vigilant, and narrow" approach. Id. at 16.

First, applicants assert that "[o]nce the deposition occurs," the "cat is out of the bag" on any assertedly privileged testimony. Appl. 29 (quoting In re Kellogg Brown & Root, Inc., 756 F.3d 754,

761 (D.C. Cir. 2014) (Kavanaugh, J.)); see Appl. 26-28. That is not accurate. In fact, the district court employed procedures from past redistricting cases to ensure that the bag remains tightly cinched. Applicants are free to assert privilege, and the portions of the deposition transcripts containing assertedly privileged material are "deemed to contain confidential information" and thus subject to the operative confidentiality and protective order in this case. Appl. App. 4-5 (citation omitted). Before using any part of the deposition testimony that may be subject to legislative privilege, a party "must seal those portions and submit them to the [c]ourt for in camera review, along with a motion to compel." Id. at 6. The court also admonished counsel that they face sanctions for any unapproved disclosures. Ibid.

Applicants cite no decision finding irreparable harm in the presence of such safeguards. This case is nothing like Kellogg Brown & Root, where the district court had already concluded that the privilege did not apply and ordered the relevant documents disclosed. 756 F.3d at 756. And applicants only underscore the lack of support for their position in asserting (Appl. 28) that this case is "similar" to In re United States, 138 S. Ct. 371 (2017). The orders at issue there would have compelled the United States to "publicly file" privileged documents. Stay Appl. at 27, In re United States, supra (No. 17A570). And although the orders allowed the United States to lodge other privileged documents for

in camera review, the government faced irreparable harm because it would have been forced to divert resources from "essential programmatic functions" to review more than 21,000 "internal [Executive Branch] documents" on an extraordinarily compressed timeframe. Id. at 26-27. Applicants face no such burden here.

Applicants protest (Appl. 27) that "there is no guarantee" that the district court "will keep the privileged testimony out of the public record" because the court may disagree with applicants' future assertions of privilege. But that only confirms that applicants do not presently face any irreparable harm. If applicants assert privilege over particular information, and if the district court concludes that the information is not privileged or that the privilege has been overcome, applicants can seek review at that point, and the privilege issue will then be presented in concrete form. But the possibility that applicants might disagree with the court's future rulings does not establish irreparable harm now.

Second, applicants assert (Appl. 28-29) that merely being required to participate in a deposition is itself irreparable harm. But they err in repeatedly invoking "the burden of defending themselves." Appl. 4 (quoting Dombrowski, 387 U.S. at 95); see Appl. 2, 10, 15, 19, 25, 28-29. As noted above, Dombrowski concerned legislative immunity from suit, but applicants have not been sued and have no need to "defend" themselves. Nor do they face "the hazard of a judgment against them." Appl. 31 (quoting Tenney, 341

U.S. at 377). Instead, they need only appear for single-day depositions held at a location of their choosing.

Applicants protest (Appl. 2) that even those brief depositions will take them "away from the duties of their office." But applicants are not Cabinet Secretaries or close presidential advisors; this is not a case where a discovery request "interfere[s] with a coequal branch's ability to discharge its constitutional responsibilities." Cheney v. United States Dist. Court, 542 U.S. 367, 382 (2004); see In re Dep't of Commerce, 139 S. Ct. 16 (2018). Nor are they heads of state agencies with ongoing day-to-day responsibilities. Instead, applicants are three of Texas's 181 part-time state legislators. The State Legislature is not in session, and its next regular session will not begin until January 2023. See Tex. Gov't Code § 301.001. There is thus no reason to think that the depositions will detract from applicants' duties at all -- much less to a degree that might constitute irreparable harm.

B. Even if applicants could establish some form of irreparable harm, the balance of the equities and the public interest would weigh against a stay. Where, as here, the United States is a party, "[t]hese factors merge." Nken, 556 U.S. at 435. And the United States and the public have a strong interest in ensuring that these serious challenges to the legality of Texas's statewide redistricting plans are adjudicated promptly and with the benefit of all relevant and admissible evidence.

Granting a stay pending appeal would compromise that interest. Discovery closes on July 15, 2022, less than eight weeks from now. D. Ct. Doc. 96 (Dec. 17, 2021). Even with extraordinarily expedited proceedings in the Fifth Circuit, it is unlikely that the court would resolve the appeal in time for depositions to be taken by that deadline.

Delaying the current schedule would also compromise the public interest. Since this Court's decision in Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam), the Court "has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election," including the process leading up to the primaries. Merrill v. Milligan, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of stays) (collecting cases). In part because of that principle, the 2022 elections will occur under Texas's current plans before the legality of those plans can be adjudicated. Cf. D. Ct. Doc. 258, at 56-58 (May 4, 2022) (denying private plaintiffs' motion for a preliminary injunction on some of their claims).

That makes it all the more important that this case be resolved before the run-up to the 2024 election, which begins with candidate-qualifying deadlines in late 2023. Recognizing that concern, the district court established an expedited schedule with trial set to begin on September 28, 2022. D. Ct. Doc. 109 (Dec. 27, 2021). Delaying that trial -- and the subsequent appellate

proceedings -- would increase the risk that this case is not resolved before the Purcell principle comes into play for a second election cycle.

Applicants wave away those concerns, asserting (Appl. 30) that even if the practical effect of a stay would be to "bar[] altogether" any legislators' depositions, their testimony is not important. But decades of redistricting experience show otherwise. As described above, testimony from legislators has been a frequent -- even ubiquitous -- feature of redistricting litigation for decades, and this Court and lower courts have repeatedly relied on such testimony in considering the "totality of circumstances" relevant to minority voters' electoral opportunities, as the VRA directs, 52 U.S.C. 10301(b). See p. 20, supra. Applicants' unprecedented effort to exclude that traditional form of evidence entirely would seriously undermine the public interest.

III. MANDAMUS RELIEF IS UNWARRANTED

As an alternative to their principal request for relief, applicants briefly contend (Appl. 23-26) that this Court should either grant a stay pending the court of appeals' resolution of a petition for a writ of mandamus or grant a writ of mandamus in the first instance. Those requests are unavailing because applicants cannot support the "drastic and extraordinary" remedy of a writ of mandamus. Cheney, 542 U.S. at 380 (citation omitted).

To support issuance of a writ of mandamus, "three conditions must be satisfied." Cheney, 542 U.S. at 380. First, the petitioner's "right to issuance of the writ" must be "'clear and indisputable.'" Id. at 381 (citation omitted). Second, the petitioner must "have no other adequate means to attain the relief he desires." Ibid. "Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." Ibid.

Applicants fall far short of meeting those demanding conditions. First, as explained above (see pp. 14-21, supra), applicants' entitlement to relief is hardly "clear and indisputable." Cheney, 542 U.S. at 381 (citation omitted). To the contrary, this Court has rejected suggestions of an absolute privilege of the kind applicants assert, see Gillock, 445 U.S. at 366-373; Arlington Heights, 429 U.S. at 268, and lower courts have routinely declined to enter blanket protection orders of the kind applicants request, see p. 19, supra.

Second, applicants have "other adequate means to attain the relief" they seek. Cheney, 542 U.S. at 381. As explained above, the district court's careful procedures ensure that the court will rule on all of their assertions of legislative privilege and that their assertedly privileged answers will remain confidential in

the meantime. See p. 29, supra. The same "vigilant" approach has been used in past redistricting litigation. Appl. App. 8.

Finally, granting mandamus would not be "appropriate under the circumstances." Cheney, 542 U.S. at 381. As explained above, any conceivable harm to applicants from sitting for one day of depositions (after which their assertedly privileged answers will be kept confidential) is negligible. By contrast, the harm to the United States, the private respondents, and the public would be significant, because pausing this litigation over Texas's redistricting plan would make it more difficult to resolve the claims before the 2024 elections. See pp. 32-33, supra.

IV. THERE IS NO BASIS FOR A STAY PENDING THIS COURT'S DECISION IN MERRILL

Finally, there is no basis for applicants' brief alternative request (Appl. 32-34) for a stay pending this Court's decision in Merrill v. Milligan, No. 21-1086. A stay is an extraordinary remedy intended to preserve this Court's jurisdiction and prevent irreparable harm; it is not a device for superintending lower courts' routine docket-management choices.

Applicants assert (Appl. 33-34 & n.29) that this Court has previously "stayed discovery pending its disposition of the underlying merits of cases." But in each of the examples applicants cite, the Court was reviewing the same case in which it granted a stay, and the Court's review bore directly on the propriety of the stayed discovery. This case is entirely different: Applicants

seek a stay simply because they believe (Appl. 32-33) that "[p]laintiffs' claims in the underlying litigation" will "be affected by" the Court's interpretation of Section 2 in Merrill.

Applicants do not identify any prior instance in which this Court has stayed discovery simply because it was considering related substantive issues in a different case. Nor do they attempt to reconcile their request with this Court's stay standard, which demands a showing of a likelihood of success on the merits and irreparable harm -- not merely the possibility of relevant legal developments. See Hollingsworth, 558 U.S. at 190.

In any event, the Court's decision in Merrill will not likely affect the matters about which the United States intends to depose applicants. All of those matters concern Section 2's textually mandated "totality of circumstances" standard, 52 U.S.C. 10301(b). See p. 17, supra. The appellants' brief in Merrill, in contrast, focuses on the rules that plaintiffs' experts must follow to show that their demonstrative maps meet the "reasonable compactness" element of the first Gingles precondition, as well as whether plaintiffs must simulate "race-neutral" maps to show that the enacted map violates Section 2. Appellants' Br. at 42-50, 53-80, Merrill, supra (No. 21-1086). The Merrill appellants do not question the relevance of legislative testimony like that sought here; to the contrary, they have affirmatively relied on it. See, e.g., id. at 21 (citing testimony from "Former District 1 Congressman

Bradley Byrne" about the "communities of interest" and other political dynamics in the districts at issue); Singleton v. Merrill, No. 21-cv-1291, 2022 WL 265001, at *41, 43-44 (N.D. Ala. Jan. 24, 2022). To the extent Merrill is relevant at all, therefore, it only further confirms that applicants' unprecedented request to categorically bar such testimony should be rejected.

CONCLUSION

The application should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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