No. 21A756

IN THE SUPREME COURT OF THE UNITED STATES

REPRESENTATIVE RYAN GUILLEN TEXAS HOUSE MEMBER, REPRESENTATIVE BROOKS LANDGRAF, TEXAS HOUSE MEMBER, & REPRESENTATIVE JOHN LUJAN, TEXAS HOUSE MEMBER,

Third-Party Applicants,

v.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Respondents.

PRIVATE RESPONDENTS' JOINT OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OR, IN THE ALTERNATIVE, PENDING DISPOSITION OF PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Representatives Ryan Guillen, Brooks Landgraf, and John Lujan, who are members of the Texas House of Representatives. They were served with third party deposition subpoenas in consolidated actions in the United States District Court for the Western District of Texas. They are Appellants in the United States Court of Appeals for the Fifth Circuit.

Respondents are the following plaintiffs in the consolidated district court actions: Voto Latino, Akilah Bacy, Orlando Flores, Marilena Garza, Cecilia Gonzales, Agustin Loredo, Cinia Montoya, Ana Ramon, Jana Lynne Sanchez, Jerry Shafer, Debbie Lynn Solis, Angel Ulloa, Mary Uribe, Rosalinda Ramos Abuabara, League of United Latin American Citizens (LULAC), Southwest Voter Registration Education Project, Mi Familia Vota, American GI Forum of Texas, La Union Del Pueblo Entero, Mexican American Bar Association of Texas, Texas Hispanics Organized for Political Education, William C. Velasquez Institute, FIEL Houston, Inc., Texas Association of Latino Administrators and Superintendents, Emelda Menendez, Gilberto Menendez, Jose Olivares, Florinda Chavez, Joey Cardenas, Proyecto Azteca, Reform Immigration for Texas Alliance, Workers Defense Project, Paulita Sanchez, Jo Ann Acevedo, David Lopez, Diana Martinez Alexander, Jeandra Ortiz, Roy Charles Brooks, Sandra Puente, Jose R. Reyes, Shirley Anna Fleming, Louie Minor, Jr., Norma Cavazos, Felipe Gutierrez, Phyllis Goines, Eva Bonilla, Clara Faulkner, Deborah Spell, Beverly Powell, Mexican American Legislative Caucus (MALC), Texas State Conference of the NAACP, Fair Maps Texas Action Committee, OCA-Greater

Houston, North Texas Chapter of the Asian Pacific Islander American Public Affairs Association, Emgage, Khanay Turner, Angela Rainey, Austin Ruiz, Aya Eneli, Sofia Sheikh, Jennifer Cazares, Niloufar Hafizi, Lakshmi Ramakrishnan, Amatullah Contractor, Deborah Chen, Arthur Resa, Sumita Ghosh, Anand Krishnaswamy, Trey Martinez Fisher, Veronica Escobar, Sheila Jackson Lee, Alexander Green, Jasmine Crockett, Eddie Bernice Johnson, and the United States of America, through the United States Department of Justice.

The Defendants in the consolidated district court cases are the State of Texas, Governor Greg Abbott, Lieutenant Governor Dan Patrick, Texas Secretary of State John Scott, and Deputy Secretary of State Jose A. Esparza.

The district court proceedings below are consolidated as *League of United Latin American Citizens, et al. v. Abbott, et al.*, No. 3:21-cv-00259-DCG-JES-JVB (W.D. Tex.). The Fifth Circuit proceeding is *League of United Latin American Citizens, et al. v. Representative Ryan Guillen, et al.*, No., 22-50407 (5th Cir.).

RULE 29.6 STATEMENT

Under Supreme Court Rule 29.6, Respondents each represent that they do not have any parent entities and do not issue stock.

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INTRODUCTION

Applicants seek a stay pending their appeal of a non-appealable interlocutory discovery order, over which there is no relevant circuit split, and which did not even address the fact-bound questions of state legislative privilege that Applicants would like this Court to review. The Court should decline the invitation and allow discovery to proceed in these time-sensitive redistricting cases, which are before a three-judge court on a highly expedited schedule necessary to enable complete review before the 2024 election cycle begins. Meanwhile, the three-judge court's order will ensure that any information Applicants assert is privileged will remain under seal and confidential until their privilege claim has been fully adjudicated.

I. The decision Applicants appeal is not appealable at all. "[O]ne to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt." *United States v. Ryan*, 402 U.S. 530, 532 (1971). Nor is an order to disclose privileged information immediately appealable. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009). The courts of appeals that have addressed the question unanimously agree that these jurisdictional limitations generally apply to orders enforcing subpoenas directed to third parties in civil litigation, even where a privilege is asserted. *See, e.g.*, *In re Flat Glass Antitrust Litig.*, 288 F.3d 83, 90 (3d Cir. 2002); *A-Mark Auction Galleries, Inc. v. Am. Numismatic Ass'n*, 233 F.3d 895, 897–98 (5th Cir. 2000); *Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1405 n.16 (5th Cir. 1993); *Dove v. Atl.*

Cap. Corp., 963 F.2d 15, 17 (2d Cir. 1992); *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 122 (4th Cir. 1994); *Corporación Insular de Seguros v. Garcia*, 876 F.2d 254, 256 (1st Cir. 1989).

The Eleventh Circuit, and now the Fifth, apply a narrow exception for nonparties' claims of governmental privilege. *See* App.13 n.1; *In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015). But most circuits to consider the issue reject such an exception as inconsistent with this Court's cases. *See Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 84 (1st Cir. 2021); *Corporación Insular de Seguros*, 876 F.2d at 257–59; *Newton v. NBC*, 726 F.2d 591, 593–94 (9th Cir. 1984); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 176–81 (2d Cir. 1979). And Applicants do not attempt to defend a governmental-privilege exception here. Rather, they broadly assert that the order is appealable simply because it is directed at a third party, Application 5, a position that every circuit to consider the question has rejected. *See* cases cited *supra*.

II.A. Jurisdiction aside, Applicants do not make the showing required to obtain a stay pending appeal. The Court is unlikely to grant certiorari because there is no circuit split in this dispute over fact-bound discovery issues, with an inadequate record and serious barriers to review of any underlying privilege question.

Applicants argue that there is a split over the substance of state legislative privilege between the Fifth Circuit on the one hand and the First, Ninth, and Eleventh Circuits on the other. But the three-judge court's order did not decide any question of legislative privilege. App.5, 14. It merely held that Applicants are not entirely exempt from being deposed, including because these are redistricting cases

focused (in part) on Applicants' own districts, so there are "relevant areas of inquiry that fall outside of topics potentially covered by state legislative privilege." App.4. Indeed, Representative Lujan's deposition will concern *only* those topics because Representative Lujan was not in office when the challenged legislation was passed. No circuit has held that state legislators may never be deposed, even about subjects falling outside the scope of legislative privilege. Nor is there a circuit split over the "admirably deliberate and cautious approach" that the three-judge court adopted to adjudicate any disputes over legislative privilege that do arise, App.15, because no other circuit has ever addressed similar procedures, although they have been used by district courts before, *see* App.4; *Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015). And even if the substance of the legislative privilege were implicated here, there is no clear split over that, either: Applicants object to how the Fifth Circuit *describes* the state legislative privilege, but all circuits agree that it is a qualified privilege that may be overcome where appropriate, and Applicants do not identify any analogous cases that have come out differently in different circuits.

The record is also insufficiently developed to enable this Court's review of any substantive question of privilege. The three-judge court has made no ruling on any concrete issue of privilege because the record was inadequate to allow it to do so. App.2. If the Court grants a stay, it will freeze the record in its inadequate state and prevent any meaningful decision on the scope of privilege. And if the Court were to

grant review, the jurisdictional issue discussed above might splinter the Court and preclude a majority opinion on the merits.

II.B. Even if the Court reviews, it is unlikely to reverse on the merits. Applicants seek a sweeping ruling exempting them from being deposed at all, even about nonprivileged topics. There is no support for such an exemption. The legislative immunity cases on which Applicants rely are irrelevant because no one is suing Applicants. *See, e.g.*, *United States v. Gillock*, 445 U.S. 360, 372 (1980) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). They face only the limited burden of being deposed, to which even sitting Presidents are subject in appropriate circumstances. *Trump v. Vance*, 140 S. Ct. 2412, 2427 (2020); *Clinton v. Jones*, 520 U.S. 681, 708 (1997). And the process the three-judge court laid out for adjudicating privilege claims is reasonable under the particular facts here, where Applicants have relevant testimony to offer that is not even potentially privileged, *see Thornburg v. Gingles*, 478 U.S. 30, 37 (1986), and where the Court's precedent makes the subjective intent of legislators directly relevant to Respondents' constitutional claims, *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980), and where Applicants have asserted an extraordinarily broad conception of the legislative privilege that has already interfered with the three-judge court's ability to assess legislative motivation, Supp.App.50 n.14, and that would have made a farce of any deposition at which Applicants could refuse to answer questions on legislative privilege grounds.

II.C., D. Applicants do not face irreparable harm absent a stay, and the equities favor allowing the case to proceed. The burden of sitting for a deposition is limited,

and the three-judge court's procedure ensures that any assertedly privileged information will remain secret, on pain of sanctions, until the court addresses the privilege claim. In contrast, a stay would disrupt this case's expedited schedule, potentially preventing adjudication of Respondents' claims before the start of the 2024 election.

III. Applicants alternatively request a stay pending a mandamus application, but there is no basis for that "drastic" remedy either. *Kerr v. U.S. Dist. Ct. for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). The three-judge court's ruling was reasonable, not a "judicial 'usurpation of power,'" *id.*, and the procedure it adopted ensures that privilege claims will be carefully adjudicated before any assertedly privileged material becomes public. Much as in *Kerr*, the three-judge court's ruling enables Applicants to "assert the privilege more specifically" as to particular information and have the court review the information in camera before any privilege claim is overruled and any material made public. *Id.* at 404. That provides an adequate alternative remedy, *id.*, and if that is not enough for Applicants, they may disobey the court's order and obtain review via contempt—a longstanding requirement that limits the disruption of interlocutory review by requiring the aggrieved litigant to decide whether "the importance of the issue and the risk of adverse appellate determination . . . warrant being branded as a contemnor." *Nat'l Super Spuds, Inc.*, 591 F.2d at 180 (Friendly, J.).

IV. Finally, there is no basis for a stay pending this Court's decision in a different redistricting case, *Merrill v. Milligan*, No. 21-1086 (U.S.). *Milligan* has

nothing to do with the legislative privilege, the sole issue that has been appealed here, and it could not possibly moot the need for Respondents to depose Applicants, because it will address only the scope of Section 2, and not Respondents' claims under the Fourteenth and Fifteenth Amendments, as to which Applicants' testimony may be most relevant.

BACKGROUND AND PROCEDURAL HISTORY

In October 2021, the Texas Legislature enacted bills that redrew the state's congressional, state Senate, state House of Representatives, and Board of Education districts. Multiple sets of private plaintiffs (the "Private Respondents") filed separate lawsuits for injunctive relief, alleging that the new maps discriminate against voters of color in violation of the United States Constitution and Section 2 of the Voting Rights Act. Among the claims raised by Private Respondents are claims that the electoral maps were enacted with discriminatory intent. The United States filed a similar suit of its own, and all ten cases were consolidated in the Western District of Texas in El Paso before a three-judge district court (Judges Jerry Smith, Jeffrey Brown, and David Guaderrama). The three-judge court set an expedited schedule—with a discovery deadline of July 15, 2022, and trial set to begin on September 28, 2022—to ensure that full review may be completed before the 2024 election starts. Supp.App.67, 69.

Discovery has proceeded apace. The parties have produced documents, answered interrogatories, and begun scheduling depositions. But when the United States served deposition subpoenas upon Applicants, three members of the Texas

Legislature, they moved to quash, arguing that "legislative privilege and immunity" categorically protects them, and by extension other legislators, from sitting for any depositions at all. Supp.App.71. And when Private Respondents served deposition subpoenas upon Applicants, Applicants moved to quash those too. Supp.App.91.

On May 18, 2022, the three-judge court unanimously denied both motions. App.1. The court emphasized that Applicants have relevant information that is not even potentially privileged. *Id.* at 4. And it explained that "[w]hether state legislative privilege attaches is fact- and context-specific; for the purposes of depositions, 'it depends on the question being posed.'" *Id.* at 2 (quoting *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, Dkt. 102 at 5 (W.D. Tex. Aug. 1, 2011)).

The court therefore ordered the depositions, scheduled for this week, to go forward. *Id.* But it adopted a procedure to preserve Applicants' claims of legislative privilege for adjudication on a more developed record. Applicants may invoke legislative privilege in response to particular questions, and any answer given will be provided subject to the privilege claim and under seal, not to be revealed publicly or relied on by any party until the court addresses the privilege claim. *Id.* at 4-5.

Applicants filed an interlocutory appeal to the Fifth Circuit and moved the three-judge court to stay its ruling pending appeal, Supp.App.104. Without waiting for a ruling from the three-judge court, Applicants also sought a stay from the Fifth Circuit. Both the three-judge court and the Fifth Circuit unanimously denied Applicants' motion for a stay. App.7, 13.

The Fifth Circuit explained that Applicants were unlikely to succeed on the merits because the three-judge court had properly concluded that "'there are likely to be relevant areas of inquiry that fall outside of topics potentially covered by state legislative privilege' and that the issues relating to the privilege were 'not yet ripe for decision,' since 'no questions have been asked, and no answer given.'" App.14-15. It emphasized that "the district court did not deny that state legislative privilege might apply to this case." App.14. And it praised the three-judge court for its "admirably deliberate and cautious approach to the legislative privilege issue." App.15. Concurring only in judgment, Judge Willett found no appellate jurisdiction to review the issue. App.14–15 n.1.

ARGUMENT

This Court lacks jurisdiction to consider Applicants' request for a stay pending appeal, and Applicants do not show their entitlement to a stay under the governing standards.

I. The Court lacks jurisdiction to grant a stay pending appeal because the three-judge court's order is not appealable.

As Judge Willett concluded below, Applicants' request for a stay pending appeal fails at the threshold, because the three-judge court's denial of the motion to quash is not a final decision of a district court and is not appealable under the collateral order doctrine. App.13–14 n.6. This Court has no certiorari jurisdiction unless there is a pending appeal from an appealable order. *See Nixon v. Fitzgerald*, 457 U.S. 731, 741–43 (1982). And absent certiorari jurisdiction, the Court has no power to issue a stay pending appeal, either. *See* 28 U.S.C. § 2101(f) (authorizing a

stay "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari"); *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999) (holding that a case that is beyond a court's "jurisdiction to review" is beyond the 'aid' of the All Writs Act in reviewing it"). The Court therefore lacks jurisdiction over Applicants' request for a stay pending appeal.

A. The denial of the motion to quash is not a final decision.

The denial of the motion to quash is not appealable as a "final decision[]." 28 U.S.C. § 1291. "A final decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Hall v. Hall*, 138 S. Ct. 1118, 1123-24 (2018) (quoting *Ray Haluch Gravel Co. v. Cent. Pension Fund*, 571 U.S. 177, 183 (2014)). The order denying the motion to quash is not "final" in that sense—litigation in the three-judge court continues.

Applicants argue that there is an exception when a subpoena is directed at a non-party. This Court, and the courts of appeals that have considered the issue, unanimously reject such an exception. "[O]ne to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt." *Ryan*, 402 U.S. at 532; *see also Cobbledick v. United States*, 309 U.S. 323, 323 (1940). And while *Ryan* arose in the grand jury context, courts of appeals consistently apply that same principle to non-party subpoenas in civil cases, too. *See, e.g.*, *A-Mark*, 233 F.3d at 897–98 (rejecting the argument that "the discovery order appealed from is a final order because it finally resolves [the non-party's] discovery obligation, which was the only issue presented to the district

court"); *Nat. Gas Pipeline Co. of Am.*, 2 F.3d at 1405 n.16 ("A discovery order, even one directed at a non-party, is not a final order and hence not appealable."); *Dove*, 963 F.2d at 17 ("A non-party witness ordinarily may not appeal directly from an order compelling discovery . . . ."); *Corporación Insular de Seguros*, 876 F.2d at 256 ("Discovery orders, whether directed at parties or at non-parties to the underlying litigation, are not generally appealable as 'final decisions of the district courts.'" (quoting 28 U.S.C. § 1291)); *MDK, Inc.*, 27 F.3d at 122 (following "a long line of cases holding that courts of appeals lack jurisdiction to review orders compelling discovery of nonparties."); *Flat Glass*, 288 F.3d at 90 (rejecting the argument that *Cobbledick* is limited to grand jury subpoenas).

B. The denial of the motion to quash is not appealable under the collateral order doctrine.

The denial of the motion to quash also is not appealable under the "collateral order doctrine." The collateral order doctrine expands the final judgment rule to allow the immediate appeal of "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk Indus.*, 558 U.S. at 106 (quoting *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 545-46 (1949)). But this Court held in *Mohawk* that "the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege." 558 U.S. at 114. As this Court explained in *Mohawk*, "the limited benefits of applying 'the blunt, categorical instrument of § 1291 collateral order appeal' to privilege-related disclosure orders simply cannot justify the likely institutional costs." *Id.* at 112 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994)). And it reiterated that "the

class of collaterally appealable orders must remain narrow and selective in its membership." *Id.* at 113 (quotation marks omitted).

Applicants argue that a different rule should apply to orders directed at nonparties. But the courts of appeals that have considered the issue unanimously reject any such generally applicable exception. *See A-Mark*, 233 F.3d at 898–99; *Corporación Insular de Seguros*, 876 F.2d at 256–57; *MDK Inc.*, 27 F.3d at 120–22; *Flat Glass*, 288 F.3d at 88–90. Applicants' argument for a blanket exception to *Mohawk* for orders directed at third parties, Application 5–6, asks the Court to reverse that unanimous consensus without even acknowledging the contrary precedent.

The Fifth and Eleventh Circuits have adopted a narrow exception to *Mohawk* for certain privilege claims. In *Whole Woman's Health v. Smith*, 896 F.3d 362, 367–68 (5th Cir. 2018), the Fifth Circuit held that a district court's rejection of a third party's First Amendment privilege claim was a reviewable collateral order, relying on "precedent holding that interlocutory court orders *bearing on First Amendment rights* remain subject to appeal pursuant to the collateral order doctrine" after *Mohawk*. (Emphasis added). But as Judge Willett concluded below, that case "is distinguishable because it concerned a very different type of privilege, one resting on the First Amendment." App.14 n.1. And *Whole Woman's Health* could not possibly have adopted the broad exception for third parties that Applicants urge because prior, controlling Fifth Circuit cases rejected such an exception. *See A-Mark*, 233 F.3d at 898–99; *Nat. Gas Pipeline Co. of Am.*, 2 F.3d at 1405 n.16.

The Eleventh Circuit in *In re Hubbard* adopted a narrow exception to *Mohawk* for nonparties who "assert[] a governmental privilege." *Hubbard*, 803 F.3d at 1305. And Judges Higginson and King applied that same exception in finding jurisdiction to consider Applicants' appeal here. App.13 n.1. Unlike the *Whole Woman's Health* exception, a government privilege exception could cover Applicants' appeal. But the Eleventh and now Fifth Circuits stand alone in recognizing such an exception—the majority of circuits to consider such an exception have rejected that approach. *See Am. Trucking Ass'ns*, 14 F.4th at 84 (legislative and deliberative process privilege); *Corporación Insular de Seguros*, 876 F.2d at 257–59 (legislative privilege); *Newton*, 726 F.2d at 593–94 ("government privilege"); *Nat'l Super Spuds, Inc.*, 591 F.2d at 176–81 ("governmental privilege").

This rejection of a governmental privilege exception to *Mohawk* makes sense. The Court's reasoning in *Mohawk* applies equally to legislative and governmental privileges: the issue can be reviewed after final judgment, and a litigant who feels strongly about his or her privilege claim can defy the discovery order and obtain immediate review via contempt. *Mohawk*, 558 U.S. at 111. And the strongest argument for allowing an immediate appeal here—that the privilege "provides a 'right not to disclose the privileged information in the first place'" that is violated absent immediate review—was just as present in *Mohawk*, where the Court rejected it. *Id.* at 109.

Thus, Applicants' argument for jurisdiction here would require the Court to overrule the majority of the circuits that have considered a significant jurisdictional

question and contradict at least the reasoning of its decision in *Mohawk*, without briefing on the merits or even an acknowledgment from Applicants that most circuits have rejected their jurisdictional argument. Judge Willett was correct below: there is no jurisdiction over Applicants' appeal under the collateral order doctrine or otherwise. This Court therefore lacks jurisdiction to grant a stay pending appeal.

II. Applicants are not entitled to a stay pending appeal.

To obtain a stay pending appeal, Applicants must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). They make no such showing.

A. The Court is unlikely to grant certiorari because there is no circuit split and no developed record, and the jurisdictional question will at least complicate review on the merits.

1. There is no relevant circuit split.

Applicants' assertion of a circuit split over state legislative privilege ignores both the limited scope of the three-judge court's order and the factual and legal differences between the cases they cite and the order below. The three-judge court's order expressly did not "decid[e] any issue of state legislative privilege." App.5. Rather, it held that the Applicants were likely to have "relevant, non-privileged information" that justified deposing them regardless of the privilege issue, App.4, and it adopted a procedure to adjudicate any privilege claims Applicants might make, by requiring that any purportedly privileged answers be sealed and not be disclosed to

anyone else until the court rules on the privilege claim, on threat of severe sanctions. App.4–5. There is no circuit split on either Respondents' ability to depose Applicants or the procedure adopted by the three-judge court.

First, there is no circuit split over whether state legislators may be deposed about relevant information that falls outside the scope of state legislative privilege. Applicants cite cases from the First, Ninth, and Eleventh Circuits, but none presented that question. *See Am. Trucking Ass'ns*, 14 F.4th 76; *Lee v. City of L.A.*, 908 F.3d 1175 (9th Cir. 2018); *Hubbard*, 803 F.3d 1298. In *American Trucking*, no party disputed that "if the legislative privilege applies, the discovery requested by those subpoenas falls within its scope." 14 F.4th at 87. In *Lee*, the plaintiffs argued that legislative privilege was "a qualified right that should be overcome in this case," not that the privilege was inapplicable to the discovery they sought. 908 F.3d at 1187. And *Hubbard* did not involve depositions, only document subpoenas, but the Eleventh Circuit still emphasized that the challenged subpoenas' "sole reason for existing was to probe the subjective motivations of the legislators who supported" the challenged law, the core of legislative privilege. 803 F.3d at 1310. None of those cases suggests that a legislator may not be deposed about other relevant topics. *Cf. EEOC v. Wash Suburban Sanitary Comm'n*, 631 F.3d 174, 183 (4th Cir. 2011) ("The possibility that the agency may one day wander into impermissible terrain is not sufficient reason to halt what thus far seems a permissible inquiry.").

Second, there is no circuit split over the procedure the three-judge court adopted to adjudicate Applicants' privilege claims. The procedure is not a novel one—

as the three-judge court noted, the court in the last round of litigation over Texas redistricting used the same approach initially, App.4, and at least one other district court has used it as well, *see Nashville Student Org. Comm.*, 123 F. Supp. 3d at 971. But the Fifth Circuit's stay decision—finding the procedure "admirably deliberate and cautious," App.15—is the first from a court of appeals to address it. There is therefore no circuit split over the procedure, and no basis for the Court to review it.[1]

Lacking a split over the actual subject of the three-judge court's ruling, Applicants attempt to manufacture a split over the scope of state legislative privilege and the circumstances in which it may be overcome. Application 17–21. But there have been no rulings on those questions in this case. All that the three-judge court held about the scope of the privilege is that there are *some* relevant topics unrelated to legislative motivation that justify deposing Applicants—topics "such as political behavior, the history of discrimination, and socioeconomic disparities." App.4. Applicants take no serious issue with that fact-bound conclusion, and they identify no circuit split over it. And the three-judge court said nothing about whether and under what circumstances the privilege might be overcome, explaining that such a determination would "depend on more detailed and nuanced facts than those currently before the Court." App.3. The "multifactor balancing test" that Applicants fear, Application 21, has made no appearance in these cases to date.

[1] The three-judge court's approach is consistent with the First and Ninth Circuit decisions entirely quashing deposition subpoenas because, as explained above, those cases involved depositions in which the proposed subject matter was wholly privileged, such that no similar procedure was needed.

In any event, there is also no substantial circuit split over the scope of legislative privilege or the circumstances in which it may be overcome. Applicants object to the Fifth Circuit's description of the privilege as one that "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017). But the cited circuits all agree that state legislative privilege is qualified and may be overcome where appropriate. *Am. Trucking Assn's*, 14 F.4th at 88; *Hubbard*, 803 F.3d at 1311; *Lee*, 908 F.3d at 1187. Applicants do not identify any actual cases that have come out differently under the Fifth Circuit's articulation rather than another circuit's. And the multifactor test that is Applicants' real target started in S.D.N.Y., not the Fifth Circuit, and it has not been adopted or rejected by *any* circuit court. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003).

2. There is no developed record to enable a decision about state legislative privilege.

Precisely because the three-judge court did not decide any issue of legislative privilege, there is no developed record here that would allow the Court to clarify the scope of state legislative privilege or the circumstances in which it may be overcome. Even the three-judge court explained that it was "not positioned to rule on what information may or may not be the subject of state legislative privilege" given the state of the record. App.2. That is precisely why the three-judge court adopted the procedure it did: to create a record that would allow for the orderly determination of

difficult questions of privilege. App.4–5. Granting a stay would freeze the record in its present, inadequate state, making it extraordinarily difficult for this Court to make any concrete determination of privilege. It would also require the Fifth Circuit and this Court to make those privilege determinations in the first instance, without the benefit of the three-judge court's views.

As a result, even if the Court believes clarification of legislative privilege issues is needed, allowing the depositions to proceed and the three-judge court to adjudicate any privilege objections would provide a far better vehicle for the Court's review.[2]

3. The jurisdictional issue would, at a minimum, complicate review on the merits.

For the reasons given above, the three-judge court's denial of the motion to quash is not an appealable order, so the Court lacks jurisdiction to review it. *Supra* Part I. But even if a majority of the Court concludes otherwise, the presence of a serious question of appellate jurisdictional question that divided the Fifth Circuit panel below and that has divided the courts of appeals will pose a significant barrier to this Court's ability to successfully address any underlying privilege issues in this case. If the Court were to grant certiorari, it would have to address the antecedent jurisdictional issue first. And if the members of the Court divide on that issue, the case may yield no majority opinion on the merits. That complication makes it less likely that the Court will grant certiorari in this appeal, and it raises the specter of a

[2] There may be jurisdictional barriers to interlocutory review of the three-judge court's privilege determinations, but as explained above, those barriers are at least equally present in this appeal. *Supra* Part I. At a minimum, the issue will be reviewable by this Court after final judgment pursuant to 28 U.S.C. § 1253.

dismissal as improvidently granted if the Court were to grant review despite the jurisdictional issue.

For that reason, too, if the Court does want to address the legislative privilege question, it should wait until the appeal after final judgment under 28 U.S.C. § 1253. By then, the Court will have a complete record on the legislative privilege issue, which the three-judge court will have addressed. And there will be no dispute about the Court's jurisdiction that could interfere with a ruling on the merits.

B. The Court is unlikely to reverse on the merits.

If the Court does grant certiorari, it is unlikely to reverse on the merits. The three-judge court's decision is correct. Applicants are not entirely exempt from being deposed, they possess relevant information that is not even potentially privileged, and the three-judge court's procedure for resolving Applicants' privilege claims is reasonable and appropriate.

Applicants argue that they may not be deposed at all, on any subject. There is no support for such a sweeping privilege. It is true that state legislators are generally immune from civil suit for their legislative acts. *Gillock*, 445 U.S. at 372 (citing *Tenney*, 341 U.S. 367). But no one is suing Applicants, so they face neither the "consequences of litigation's results" nor "the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Instead, they face only the limited burden of appearing for a deposition—a burden they share with every member of the public who might have relevant evidence. *See Trump*, 140 S. Ct. at 2420 ("In our judicial system, 'the public has a right to every man's evidence.'"). Even sitting Presidents are subject to judicial process in appropriate circumstances, despite the

"additional distraction" responding to a subpoena might cause. *Id.* at 2427 (emphasis omitted); *see also Clinton*, 520 U.S. at 708 (reversing a stay of a civil trial against a sitting President despite "the fact that a trial may consume some of the President's time and attention").

Applicants possess relevant, unprivileged information about which they may indisputably be deposed. Under this Court's precedent, the constitutional claims in these redistricting cases unavoidably turn in part on the subjective motivations of the Texas Legislature. *See Mobile*, 446 U.S. at 62 ("[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."). But that is not the only issue in the cases about which Applicants have relevant information. Respondents also assert discriminatory results claims under Section 2 of the Voting Rights Act, as to which Applicants' political activities, supporters, knowledge of Texas politics, and knowledge of voting-related discrimination and disparities are all relevant. *Gingles*, 478 U.S. at 37. And those same issues are also relevant to the circumstantial portion of the well-established *Arlington Heights* framework for determining the presence of discriminatory purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977) (holding that disparate "impact of the official action" and the "historical background" for it are among the relevant factors). Indeed, for Representative Lujan, those non-legislative issues will be the *sole* subject of his deposition, because Representative Lujan was not in office when the challenged legislation was passed and has no privileged information to provide. The three-judge court was thus correct to find there

were "relevant areas of inquiry that fall outside of topics potentially covered by state legislative privilege." App.4.

The process the three-judge court adopted to resolve any legislative privilege objections that arise during depositions is also reasonable under the circumstances here, and this Court is unlikely to reverse it. As the three-judge court explained, it is not yet "positioned to rule on what information may or may not be the subject of state legislative privilege," the scope of which is "fact- and context-specific," nor on whether the privilege should be overcome based on the federal interests in this case. App.2, 3. The three-judge court's inability to address the issue in advance resulted from Applicants' litigation strategy, in which they overwhelmingly focused on seeking a blanket exemption from any depositions at all, and devoted only two vague paragraphs to the possibility of a protective order limiting the scope of those depositions, in which they made no effort at all to apply the established legislative privilege standard. Supp.App.80–81. Moreover, as the three-judge court already knew from the preliminary injunction hearing, Texas legislators have here taken an extraordinarily broad position on the scope of state legislative privilege, contending that they may testify, at trial, about their public acts and statements about the challenged legislation, while refusing to answer any questions on any subject that falls outside the public record. Supp.App.49–50 & n.14. After experiencing that approach in the preliminary injunction hearing, the three-judge court explained that it "raise[d] serious questions about whether [it] (or any court) could ever accurately and effectively determine intent." Supp.App.50 n.14. Given Applicants' broad position

and that experience, the three-judge court had good reason to conclude that allowing Applicants to refuse to answer questions they believed were legislatively privileged would result in blanket invocations of the privilege equivalent to no deposition at all.

The three-judge court therefore adopted a common-sense solution that had been used before in redistricting litigation and elsewhere: Applicants must answer even questions they believed called for legislatively privileged information, but they would do so under seal, subject to a strict confidentiality order and the explicit threat of sanctions should the answers become public in any way. App.4–5; *see also Nashville Student Org. Comm.*, 123 F. Supp. 3d at 971. The court could then adjudicate the claims of legislative privilege in the context of specific questions and answers, rather than in the abstract, while also ensuring that privileged information did not become public. App.5.

Applicants complain that the "cat is out of the bag" once their answer is given, Application 1 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.)). But the three-judge court's procedure prevents that result, by prohibiting any use or disclosure of assertedly privileged information until the three-judge court rules on the claim. In contrast, in *Kellogg Brown & Root*, the district court had ruled that the contested materials were not privileged at all—they would "have been released" absent immediate relief. *See* 756 F.3d at 761. Applicants cite no precedent rejecting the three-judge court's approach, and this Court has approved of the use of "protective orders . . . to limit the spillover effects of disclosing sensitive information" as part of the adjudication of privilege claims. *Mohawk*, 558 U.S. at 112.

Finally, while the three-judge court did not yet rule that any privileged information should be released, it was correct to anticipate that possibility. The state legislative privilege is a common law privilege derived from comity, and it must yield where "important federal interests are at stake." *Gillock*, 445 U.S. at 373. Applicants attempt to distinguish *Gillock* because it was a criminal case, but Respondents' claims under the Fourteenth and Fifteenth Amendments and the Voting Rights Act, raise at least equally paramount federal interests. The Civil War Amendments authorize "intrusions . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States" that might be impermissible in other contexts. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976). And unlike in most of the cases Applicants cite, many legal claims here depend on a showing of subjective legislative purpose. *Compare Mobile*, 446 U.S. at 62 ("[A]ction by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."), *with Hubbard*, 803 F.3d at 1312 ("the First Amendment does not support . . . a challenge to an otherwise constitutional statute based on the subjective motivations of the lawmakers who passed it") *and Am. Trucking*, 14 F.4th at 90 ("[T]his is a case in which the proof is very likely in the eating, and not in the cook's intentions.").

This Court's statement in *Tenney* that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators," 341 U.S. at 377, must be understood in the context of the First Amendment claim there at issue. The same cannot be true in the context of claims under the Fourteenth and Fifteenth

Amendments, as to which this Court's holdings *require* an inquiry into legislative motivation, based on "such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. The three-judge court's experience during the preliminary injunction hearing led it to believe that invocation of the legislative privilege might make such a determination impossible. Supp.App.50 n.14. If so, then "comity [must] yield[]" to the "important federal interests" in enforcing the Civil War Amendments, and the privilege must be overcome. *Gillock*, 445 U.S. at 373. Thus, while the three-judge court did not yet determine whether the privilege will be overcome, it was correct to recognize that it could be.

C. Applicants do not face irreparable harm.

Applicants do not face irreparable harm without a stay. They argue that once they answer questions over which they assert privilege, "the cat is out of the bag." Application 1. But again, the three-judge court's order prevents that result, by prohibiting the dissemination of any answers that are given subject to privilege until the court rules on the privilege claim. App.4–5. Applicants do not explain why that procedure is inadequate.

That leaves Applicant's argument that the limited burden of sitting for a deposition warrants a stay. But the Texas Legislature is not in session. And as explained above, Applicants may properly be deposed about many issues that are not even potentially privileged. Any burden from sitting for a deposition is thus not attributable to any issue of legislative privilege. And if the burden of requiring a sitting President to defend against civil litigation is not enough to require a stay during the President's term of office, *Clinton*, 520 U.S. at 707–08, then the limited

burden on a state legislator of a single deposition while the Legislature is out of session should not be allowed to interfere with the expedited schedule for determining these important cases on the merits.

D. The equities support denial of the Application.

"In close cases," the Court also "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. The equities weigh against Applicants' here. A stay will severely harm Respondents by delaying the resolution of this time-sensitive case. Discovery closes in fewer than 60 days, and trial is set for September. Supp.App.67. And there is a great deal of discovery to take in these ten consolidated cases: The three-judge court has permitted each side 75 depositions (or no more than 325 hours of deposition testimony). Supp.App.114. Much of that discovery, and many of those depositions, will be of Texas legislators. A stay of such depositions pending appeal will therefore delay the close of discovery, and ultimately the trial. Such a delay would have serious consequences. Already, under the present schedule, one set of elections will be held under districts that Respondents allege discriminate on the basis of race in violation of federal law; delay raises the prospect that a second set of elections—out of just five sets that will ever occur under the challenged maps—may also take place.

III. There is no basis for a stay pending a mandamus petition.

Applicants alternatively urge the Court to grant a stay pending a mandamus petition. To obtain such a stay, they must show (1) "a fair prospect that a majority of the Court will vote to grant mandamus" and (2) "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 558 U.S. at 190.

Applicants do not meet the requirements for a writ of mandamus. Mandamus relief is a "drastic" remedy "to be invoked only in extraordinary situations" amounting to a judicial "'usurpation of power.'" *Kerr*, 426 U.S. at 402. To obtain a writ of mandamus, Applicants would need to show (1) a "clear and indisputable" entitlement to relief, (2) "no other adequate means to attain" that relief; and (3) that "the writ is appropriate under the circumstances," *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004). Applicants make no such showing.

First, as explained above, the three-judge court's ruling was correct and consistent with this Court's precedent, so Applicants have no clear and indisputable entitlement to relief. *Supra* Part I.B.

Second, Applicants have other means to protect their assertedly privileged information outside of writ of mandamus from this Court. For one, they can use the three-judge court's procedure, under which any assertedly privileged testimony will be sealed, with all participants prohibited from using or disclosing it in any way, until the three-judge court rules on the privilege objection. This Court recognized in *Mohawk* that protective orders could "limit the spillover effects of disclosing sensitive information," reducing the need for interlocutory review. 558 U.S. at 112. And in denying mandamus in *Kerr*, the Court emphasized that the petitioners could "assert the privilege more specifically" and seek "[i]n camera review of the materials by the District Court," 426 U.S. at 404—precisely what the three-judge court's order allows here.

If Applicants feel that the three-judge court's procedure is insufficient to protect their privilege, they can defy the order and obtain immediately review via civil contempt. That possibility itself preludes mandamus here. *See, e.g.*, *Flat Glass*, 288 F.3d at 91 (denying mandamus where non-party could obtain relief "by standing in contempt"); *Corporación Insular de Seguros*, 876 F.2d at 256 (denying mandamus by subpoenaed legislators and explaining that if they "wish to challenge the discovery orders, they will have to take the usual course in such matters: defy the order and run the risk of being held in contempt."). Requiring defiance and contempt is not an empty gesture—it serves to limit the disruption of interlocutory review by requiring the aggrieved party to decide whether "the importance of the issue and the risk of adverse appellate determination . . . warrant being branded as a contemnor." *Nat'l Super Spuds, Inc.*, 591 F.2d at 180 (Friendly, J.); *see also Corporación Insular de Seguros*, 876 F.2d at 258 ("[T]he best way to minimize the delay of litigation, while at the same time preserving the right to appeal illegal or inappropriate discovery orders, is to put the witness to the acid test. The witness must decide if his reasons for resisting the court order are good enough—and his resolve strong enough—to incur the risk of a contempt citation.").

Finally, the issuance of a writ of mandamus is not appropriate under the circumstances. Applicants rely on *Cheney*'s separation of powers discussion. Application 25. But *Cheney* concerned a discovery request to the Vice President, and thus interference with "a coequal branch" of government. *Cheney*, 542 U.S. at 382. As this Court has held, "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." *Gillock*, 445 U.S. at 370. Applicants also rely on their immunity "from the burden of defending themselves," Application 25 (quoting *Dombrowski*, 387 U.S. at 85), but again, they are not defendants, and no one is seeking to hold them liable for anything.

IV. There is no basis for a stay pending the Court's decision in *Milligan*.

In the alternative, Applicants seek a stay pending the Court's decision in *Merrill v. Milligan*, No. 21-1086 (U.S.). But *Milligan* relates to the substance of Section 2 claims under the Voting Rights Act—it has nothing to do with legislative privilege, the sole subject of the only pending appeal in this case.

Applicants' argument is a transparent attempt to manufacture immediate appellate review over the three-judge court's separate, and unreviewable, case-management decision denying a motion by the defendants to stay these cases until the Court decides *Milligan*. *See* Supp.App.116–31. The defendants did not appeal and could not have appealed that case-management decision. And the fact that a different appeal raised by different parties is now (improperly, as explained above) pending does not change the unreviewability of that separate decision.

In any event, there is no basis for a stay of Applicants' depositions until *Milligan* is decided. *Milligan* cannot possibly moot either this case or the need to depose Applicants, because it concerns solely claims under Section 2, not the intentional discrimination claims to which the challenged depositions are most directly relevant. Even for Section 2, as Justice Kavanaugh observed in his concurrence in the order granting a stay in *Milligan*, "[t]he stay order does not make

or signal any change to voting rights law." *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring). Moreover, a stay of Applicants' depositions pending the resolution of *Milligan* sometime next year would render the close of discovery in less than two months and the September trial date impossible, and could preclude resolution of these cases on the merits before the 2024 election.

There is no overlap between the substantive Section 2 issue in *Milligan* and the Applicants' appeal, which relates solely to their legislative privilege. And no matter what the Court says about Section 2 in *Milligan*, the need to depose Applicants' regarding Respondents' constitutional claims, which rest on a separate legal foundation, will remain.

CONCLUSION

The Court should deny Applicants' application for a stay pending appeal.

Respectfully submitted,

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