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.

REPLY IN SUPPORT OF 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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REPLY

Respondents tell the Court not to worry—that state legislators can be deposed in this redistricting dispute, as they have been before, and that there is no harm in the district court's novel "procedure" ordering their privileged testimony. *See* U.S. Resp. 1-3; Pls. Resp. 14-15. Respondents are right about that one thing. Without a stay, up to 75 Texas legislators could be deposed. Each will be taken away from their legislative duties, from ongoing campaigns, and their many other obligations as elected public officials to prepare for and sit for depositions (and perhaps do it all over again after this Court's decision in *Merrill*). By court order, the state legislators are compelled to defend their actions as legislators not at the ballot box but under oath for many hours in a court proceeding. Worse, every one of those legislators has been ordered to answer all questions in full, over legislative privilege objections.[1] For a third-party legislator, that's the ballgame. Once the legislators sit for their depositions, the harm is done. That harm does damage to the "the public good" too. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Our system of representative democracy depends on letting legislators be legislators, protected from defending themselves in endless litigation versus at the ballot box. *See, e.g.*, *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

[1] That "procedure," App. 4, makes the forthcoming depositions even more extraordinary than a Texas trial court's approach in the last decennial. There, the court eventually revised its procedure to at least permit deponents not to answer legislatively privileged questions. *See Perry v. Perez*, 2014 WL 106927, at *3 (W.D. Tex. Jan. 8, 2014).

All signs point toward postponing depositions, requiring Respondents to exhaust other discovery before resorting to such extraordinary discovery of legislators. That, in turn, will afford time for appellate review of the serious questions presented by the court order, now blessed by a Fifth Circuit panel, compelling state legislators to sit for depositions and give privileged testimony over their objections. If there were any doubt that deposing legislators is unwarranted at this time, consider what happened just today. The district court dismissed without prejudice myriad claims including the United States' claims involving Representatives Guillen's Lujan's districts.[2] They were the legislators slated to be the first two deponents tomorrow and Wednesday, until Respondents changed course late this afternoon. Respondents have now stated that they will reschedule those first two depositions to proceed *after* amended complaints are filed. *See* U.S. Suppl. Memorandum. But still, Respondents are proceeding with the next deposition of a legislator (Applicant and House Member Brooks Landgraf). That deposition will occur as early as May 31, 2022. Respondents' eleventh-hour change alleviates the need for relief by tomorrow morning, but interim relief as soon as practicable is still necessary given that Representative Landgraf's deposition will be proceeding as early as next week, with "many" more to follow according to Respondents.[3] Accordingly, the legislators now request that **relief issue as soon as practicable and ideally by Friday, May 27, 2022.**

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[2] Order 60, *LULAC v. Abbott*, 3:21-cv-259 (W.D. Tex. May 23, 2022), ECF 307; *see also* Application 8 (describing claims).

[3] Pls. Resp. to Legislator's Emergency Mot. for a Stay Pending Appeal 18, *LULAC v. Rep. Guillen*, No. 22-50407 (5th Cir. 2022) (filed May 20, 2022).

Targeting state legislators for such extensive third-party discovery might be familiar to a string of trial courts, cited by Respondents, only because they have evaded review. The "procedure" here is privilege-defying. It would have been foreign to the Founders. It is irreconcilable with *Tenney* and progeny. And today still, it is deemed (wisely) impermissible in other courts, unburdened by the redistricting-is-different fallacy.

But without a stay, that privilege-defying approach will persist here and elsewhere. To be clear, and contrary to Respondents' arguments, the legislators are not seeking any "categorical prohibition" on discovery at this time. U.S. Resp. 4. The legislators are asking that legislators' depositions be postponed to facilitate further review, with ample time to resume if depositions are ultimately deemed appropriate. Only a stay or similar relief can permit that long-overdue review to reconcile the divergent approaches to state legislators' immunity and privilege. It is an issue of national importance affecting all state legislators, the constituents whom they serve and, more broadly, the delicate balance of federal-state relations and our system of representative democracy. No countervailing concerns outweigh the importance of those issues presented and the imminent and irreparable harm to Texas legislators should depositions proceed as planned. The underlying litigation challenges districts to be used two years from now in 2024 elections; but the legislators' depositions begin as early as next week absent a stay. There is ample time. And Respondents' arguments, which are largely devoted to their competing views on the merits, merely

confirm that further review is necessary. The legislators respectfully request that the Court grant their application.

I. There Is Plainly Jurisdiction to Grant Relief.

The legislators' application explains that there is jurisdiction. Application 4-7. Respondents' quibbling over the way to style the legislators' request for the appellate review does not change that. *See* U.S. Resp. 26-28; Pls. Resp. 8-13.[4] Whether styled as an interlocutory appeal under §1291 or as a petition for writ of mandamus, there is jurisdiction for this Court to stop the depositions now pending the disposition of further appellate review. *See, e.g.*, *Cheney v. U.S. Dist. Ct. for the D.C.*, 542 U.S. 367, 378-79 (2004) ("we need not decide whether the Vice President also could have appealed the District Court's orders under *Nixon* and the collateral order doctrine"); *see also Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 111-12 (2009) (even if interlocutory appeal was not available to a party, not reaching a third-party, mandamus was still an "established mechanism[]" for continued "appellate review"). The Court has stayed such discovery targeting government officials before. Indeed, the Court has done so in the United States' own cases, contrary to the United States' arguments made here now. *See, e.g.*, *In re Dep't of Commerce*, 139 S. Ct. 16 (2018) (staying deposition); *In re United States*, 138 S. Ct. 371 (2017) (staying disclosure of

[4] The private plaintiffs-Respondents repeatedly state (at 8, 13) that Judge Willett definitively "concluded" there was no jurisdiction. He did not. He said he was "unconvinced" about the court's jurisdiction over the ultimate appeal, and the majority of the panel decided otherwise based on binding circuit precedent that ably distinguishes this Court's decision in *Mohawk* (involving a defendant to the underlying litigation) from the circumstances here (involving a third-party legislator). App.13 n.1; *see Whole Woman's Health v. Smith*, 896 F.3d 362, 367-68 (5th Cir. 2018).

agency documents pending disposition of appeal and affording applicants sufficient time to file petitions for review). It can do so again here.[5]

The Court has the undisputed power to grant relief in aid of its future jurisdiction, both over the legislators' pending legislative privilege appeal as well as this Court's ultimate review of the underlying reapportionment litigation. *See* 28 U.S.C. §§1651, 1253, 1254. Respondents' remaining jurisdictional arguments are both meritless and premature. They can be fully briefed as part of the pending appeal.

II. Respondents' Merits Arguments Confirm a Stay is Warranted.

Respondents make various arguments that the legislators are wrong on the merits. But Respondents' views on the merits do not undermine the first question that the Court confronts here—whether there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari" and a fair prospect that the Court will reverse, or "a fair prospect that a majority of the Court will vote to grant mandamus." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). On these questions, the legislators prevail.

A. Of course what is occurring here merits this Court's review. There is a cemented circuit split on a question of serious importance for every state legislature in the country. Applicants have absolutely not mischaracterized the law of the other

[5] The United States' attempt to distinguish the legislators here as only "part-time" (at 31) does nothing to change the calculus on jurisdiction or on the balance of the harms, *infra*. One will search in vain for a carve-out in *Tenney* and progeny for the "part-time" legislator. That argument ignores that Texas legislators continue to serve on committees that meet and hold public hearings even when the legislature is not in session, that they campaign, and—most importantly—that they are elected to serve their constituents at all times.

circuits, as Judge Higginson suggested in denying a stay. *See* App. 15 n.2; *see also* U.S. Resp. 21. What is occurring here is irreconcilable with the Ninth Circuit's decision *Lee* and the Texas Supreme Court's decision in *Perry*. Both were also redistricting cases. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (racial gerrymandering); *In re Perry*, 60 S.W.3d 857, 858-59 (Tex. 2001). Both emphatically concluded that legislative immunity and privilege prohibited targeting those acting in a legislative capacity with discovery for the plaintiffs' redistricting challenges. *Lee*, 908 F.3d at 1187-88 ("plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances'" (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)); *Perry*, 60 S.W.3d at 859-60, 862 (collecting various federal cases and ordering quashed deposition notices seeking documents and testimony regarding redistricting). Indeed, the only material difference between this case and *Lee* is that *Lee* involved *city councilmembers*, not state legislators. *See Lee*, 908 F.3d at 1181; *accord Arlington Heights*, 429 U.S. at 270 (involving Village's Plan Commission and Village board members). Even in those circumstances—where the intrusion to federalism and comity is admittedly less severe and where the recognition of analogous privileges for local legislators are newer—legislative immunity and privilege safeguarded the legislative actors. *Cf. Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890) (no Eleventh Amendment immunity for county defendant); *compare Bogan v. Scott-Harris*, 523 U.S. 44 (1998) ("we *now* hold that local legislators are likewise absolutely immune" (emphasis added)), *with Tenney*, 341 U.S. at 373-75 (detailing pre-founding state constitutions expressly privileging state legislators). It necessarily

follows here—where state legislators' privilege would have been "taken as a matter of course by those who severed the Colonies from the Crown and founded our nation"—the same general rules applied in *Lee* apply to state legislators here too. *Tenney*, 341 U.S. at 372. There is an indisputable split of authority, the importance of which calls for immediate resolution.[6]

Respondents suggest that *Lee* and other cases implicated in the courts' varying approaches to legislative privilege are different. As for *Lee*, they argue that "the factual record" in *Lee* "[fell] short of justifying' an 'exemption to the privilege' because the plaintiffs had failed to make a sufficient showing' to justify the substantial intrusion into the legislative process." U.S. Resp. 24 (quoting *Lee*, 908 F.3d at 1188). *Lee*, 908 F.3d at 1188 (quoting *Vill of Arlington Heights*, 429 U.S. at 268 n.18). That observation just undermines Respondents' arguments. So far here, Respondents have assembled *no* "factual record" at all. There are allegations made in ten complaints and, until today, there were ten pending motions to dismiss those complaints. *See* Application 7-9; *compare Lee*, 908 F.3d at 1181-82 (reviewing case at summary judgment). Less than 24 hours before the first deposition was set to begin—and one of

[6] The United States contends (at 21, 24) that this Court's denial of certiorari for the plaintiffs denied legislator discovery in *Lee* "underscore[s] that review is unlikely." In fact, it cuts exactly the other way. Before last week, courts of appeals including the Ninth Circuit in *Lee* have largely protected legislators from defending themselves in litigation probing their legislative intent. But now? The Fifth Circuit has weighed in on the other side. The panel has said that deposing up to 75 legislators and requiring them all to give privileged testimony is "admirably prudent, cautious, vigilant, and narrow." App.16. That is irreconcilable with *Lee* and, given the implications here for the Texas legislature and in every future case, it is a split of authority that cannot go unaddressed.

many reasons why extraordinary legislator depositions should not be proceeding at all without further appellate review—the district court dismissed myriad claims.[7] Moreover, to the legislators' knowledge, Respondents have not subpoenaed anyone but legislators for depositions, and the discovery of documents to date has been targeted almost entirely at legislators, their staff, and other legislative officials. Application 9-10 & n.19. Respondents have rebuffed "alternative information sources available," including the robust public record, and have never "alleged or demonstrated any extraordinary circumstance that might justify" what would be an "unprecedented incursion into legislative immunity" in other courts, including the Supreme Court of Texas. *Perry*, 60 S.W.3d at 861-62 (noting that "[*a*]*t a minimum*, *Arlington Heights* suggests that all other available evidentiary sources must first be exhausted before extraordinary circumstances will be considered" for legislator depositions (emphasis added)). If circumstances were not sufficiently extraordinary in *Lee* to depose local legislators based on the factual record once the case reached summary judgment, the circumstances cannot possibly be sufficiently extraordinary here to depose state legislators at this stage of the proceedings.

More broadly, what is occurring here is also irreconcilable with the treatment of legislative immunity and privilege applied in other cases, redistricting or

[7] Today, discussed *supra*, the district court issued a lengthy order dismissing many claims without prejudice, including all claims by the United States except one. *See generally* Order, *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex. May 23, 2022), ECF No. 307. And still, Applicant Representative Landgraf's deposition will proceed as early as next week. That late-breaking order, along with the unknown amended complaints to come, will necessarily affect the scope of discovery. And it is all the more reason to postpone legislators' depositions for further appellate review.

otherwise. Respondents repeatedly argue that the courts below have decided nothing yet. *See* U.S. Resp. 2; Pls. Resp. 8. They believe review is premature, and they suggest that no one can know whether there will in fact be a split of authority when all is said and done. That ignores the facts on the ground. The courts below have compelled Texas legislators to sit for depositions and give privileged testimony, while other federal courts refuse to call legislators to testify, much less answer every question over their objections. These divergent approaches raise—now—the central question presented here. It is a question that requires review before depositions proceed per that "procedure" and the harm is done: When, if ever, is it appropriate for federal courts to apply a bespoke version of legislative privilege to state legislators based on little more than "redistricting is different"?[8] Surely, the constitutional claims underlying the Eleventh Circuit's *Hubbard* decision or the First Circuit's *American Trucking* decision were not subject to their own bespoke rules. In all of these civil disputes, redistricting or otherwise, state legislators are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85. For good reason—evidence of legislative purpose ordinarily comes

[8] Likewise, the United States' arguments (at 23-25) that legislators' privilege in civil suits brought by the United States should be distinguished from suits brought by private plaintiffs is a question for the merits. But it is surely premature to declare that the United States' involvement in this suit forecloses *a stay* of depositions before any appellate court can even get to the merits. This Court, after all, has qualified legislative privilege only one time: when the United States brings a *federal criminal prosecution* against state (or federal) legislators. *See* Application 20 (discussing *United States v. Gillock*, 445 U.S. 360 (1980)). This is surely not that. In this Court's own words, it has "drawn the line at *civil* actions." *Gillock*, 445 U.S. at 373-74. And this case—just like *Lee*, *Hubbard*, and others—falls on the privilege-preserving side of that line.

from the public record. *See Arlington Heights*, 429 U.S. at 267-68 (discussing evidence of purpose based on "[t]he historical background of the decision," the "sequence of events leading up to the challenged decision," or "legislative or administrative history" including "contemporary statements by members of the decisionmaking body"). By contrast, testimony about the motives of a few legislators, revealed perhaps for the first time in depositions but never to their legislative colleagues, is no substitute for evidence of legislative purpose. *See* Application 31-32 (citing *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349-50 (2021); *United States v. O'Brien*, 391 U.S. 367, 384 (1968)). If it were, that would contradict the weighty presumption that the legislature as a whole is entitled the presumption of good faith, including in redistricting cases. *See Miller v. Johnson*, 515 U.S. 900, 915-16 (1995) (noting that "the presumption of good faith that must be accorded legislative enactments," among other evidentiary factors "requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race"); *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018).

For all of these reasons and those in the legislators' application, there are substantial questions here long overdue for appellate review. Based on all this Court and others have said about the scope of legislative privilege, the legislators are likely to prevail when those questions are decided on the merits. Legislative privilege is no privilege at all if up to 75 Texas legislators can be compelled to sit through depositions, offering privileged testimony about the innermost workings of the legislative

process over their own privilege objections. A stay is required so that those substantial questions do not again evade review.

B. Respondents' arguments dismissing legislative immunity are meritless. U.S. Resp. 16-17. They repeat the district court's error—that whatever protections a legislator might have as a function of legislative immunity, legislative privilege could be "strictly construed" when a legislator is the subject of third-party discovery. App.2 (stating "questions confronting this Court are ones of state legislative privilege, not immunity").

That too deviates from this Court's precedents and those by other courts of appeals. Legislative immunity and privilege are twin safeguards and mutually reinforcing. This Court has described "[t]he privilege of legislators to be free from arrest or *civil process* for what they do or say in legislative proceedings." *Tenney*, 341 U.S. at 372 (emphasis added); see also *id.* (describing early state constitutions declaring "'freedom of speech, and debates or proceedings in the Legislature ought not be impeached in *any other court*'" and "that freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people that it cannot be the foundation *of any action*" (emphasis added)). As other courts of appeals have observed, subpoenaing a legislator to answer for his legislative acts poses the same threats to legislative independence and imposes the same burdens on his office by "detract[ing] from the performance of official duties" as would serving a legislator as a defendant. *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015); *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011)).

For this reason, the United States' arguments about Representative John Lujan (at 18) are particularly unavailing. Representative Lujan is a sitting legislator and is entitled the same protections as any other sitting legislator. The United States cites no authority for the proposition that Representative Lujan's legislative acts since he was sworn in (the month after the legislation was enacted) are entitled any less privilege, nor that his impressions about redistricting legislation specifically are entitled any less privilege. Deposition questions will necessarily ask Representative Lujan to pre-judge, under oath, future redistricting legislation that could come before the Legislature again at its forthcoming first regular session after the 2020 Census.[9] And in any event, the resolution of the legislative privilege issues here is about more than Representative Lujan's deposition (which, as of this afternoon, Respondents are rescheduling for after amended complaints are filed). The resolution of those issues will dictate Representative Landgraf's forthcoming deposition and the "many" other depositions that Respondents say are to come—up to 325 hours under oath before counsel for the United States and more than 60 plaintiffs.[10]

III. Mandamus would not be premature, and in any event a stay is at least warranted.

Respondents also quibble with whether mandamus would be premature. U.S. Resp. 33-35; Pls. Resp. 24-27. It is not, but first things first. None of those arguments undermines the legislators' request for a *stay* pending further appellate review. For

[9] *See* Defs. Mot. to Stay 1-2, *LULAC v. Abbott*, No. 3:21-cv-259, ECF 241 (discussing possibility of repassing redistricting legislation).

[10] Pls. Resp. to Legislator's Emergency Mot. for a Stay Pending Appeal 18, *LULAC v. Rep. Guillen*, No. 22-50407 (5th Cir. 2022) (filed May 20, 2022).

all the reasons in the legislators' application and those here, the stay factors are surely met.

With respect to the legislators' alternative request that this Court could construe this application as a petition for writ of mandamus and order the deposition subpoenas to be quashed for now, that too would be appropriate. Such an order would merely abide by *Arlington Heights*' decades-old expectation that calling *village board members*, let alone up to 75 Texas state legislators, is reserved for the "extraordinary."[11] And for the reasons already briefed, the mandamus factors are met. *See* Application 23-26. The notion that the legislators can merely follow the district court's procedures or face contempt (contrary to *Hubbard* and others) warrants no response. See Pls. Resp. 25-26.

IV. The balance of harms demands a stay.

A. No Respondent can credibly deny that irreparable harm will occur if depositions proceed. And yet, the United States writes off any such harm as "negligible." U.S. Resp. 35. Specifically, Respondents assert that there can be no irreparable harm to the legislators because the court-ordered "procedure"—compelling legislators to answer over privilege objections and designating that testimony as confidential for as long as the district court is willing to keep it confidential—creates sufficient "safeguards." U.S. Resp. 4. As they tell it, the "cat is [*not*] out of the bag," *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014), "the bag remains tightly

[11] *See Arlington Heights*, 429 U.S. at 268; *accord Lee*, 908 F.3d at 1187-88 ("plaintiffs generally barred from deposing legislators, even in 'extraordinary circumstances'").

cinched." U.S. Resp. 28-29. If that were true, then surely the United States would have been willing to proceed with the Commerce Secretary's deposition in the census litigation or the privileged document production from agency officials in the DACA litigation. Tellingly, the United States sought a stay of that discovery before it occurred, a direct recognition that the bell cannot be un-rung if discovery proceeds here. *See* Application 28 (discussing *In re United States*); *In re Dep't of Commerce*, 139 S. Ct. at 16-17. For all the reasons already briefed and consistent with all of the authorities already cited, excluding testimony that has already been given does not redress the extraordinary intrusion to the legislators' own immunity and privilege. *See* Application 29 (collecting cases for the proposition that the harm to the third party the intrusion of the deposition itself).

B. On the other side of the ledger, Respondents' timing concerns make no sense. All the legislators seek here is a stay of the depositions pending further appellate review (or, if the Court is inclined, construing this application as a petition for writ of mandamus and quashing the depositions for now, *supra*). There are no timing issues that could conceivably foreclose postponing depositions. As Respondents acknowledge, they seek relief related to the 2024 elections, not the 2022 elections. *See, e.g.*, U.S. Resp. 32. The United States' discussion of *Purcell* (at 32-33) is speculative at best, and irrelevant at worst. Taken to its logical endpoint, to invoke *Purcell* now would mean that legislative privilege issues such as those here would always be unreviewable. In short, there are roughly two years between now and when the

challenged districts are to be used. There is ample time for a long overdue appeal of the issues presented here.

CONCLUSION

For the foregoing reasons and those in the legislators' application, a stay of the depositions is warranted either pending further appellate review or this Court's decision in *Merrill*. In the alternative, the Court can construe this stay application as a mandamus petition and order the deposition subpoenas quashed.

Respectfully submitted,

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