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.

APPENDIX TO PRIVATE RESPONDENTS' JOINT OPPOSITION TO EMERGENCY APPLICATION FOR STAY

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United States District Court
for the Western District of Texas
El Paso Division

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, ***Plaintiffs*,** **v.** **GREG ABBOTT, *in his official capacity as Governor of the State of Texas*, *et al.*,** ***Defendants*.**	§ § § § § § § § § § §	**No. 3:21-CV-259-DCG-JES-JVB** **[Lead Case]**
ROY CHARLES BROOKS, *et al.*, ***Plaintiffs*,** **v.** **GREG ABBOTT, *in his official capacity as Governor of the State of Texas*, *et al.*,** ***Defendants*.**	§ § § § § § § § § § §	**No. 1:21-CV-991-LY-JES-JVB** **[Consolidated Case]**

PRELIMINARY-INJUNCTION
MEMORANDUM OPINION AND ORDER

This case concerns a district of the Texas Senate centered in southern Tarrant County. Until recently, Senate District ("SD") 10 was contained entirely within Tarrant County. But as part of the recent redistricting, the Texas Legislature redrew the district, removing portions of Tarrant County and adding seven rural counties. The new district is significantly more Republican and

significantly more Anglo.

Plaintiffs seek a preliminary injunction barring Texas from using the newly enacted map in the 2022 election cycle. Though Plaintiffs have also alleged that the new map has discriminatory effects that violate Section 2 of the Voting Rights Act ("VRA"), they do not press that theory in seeking this injunction. Instead, they advance two overlapping theories: The legislature engaged in intentional dilution of minority voting power, and it engaged in racial gerrymandering.

This three-judge Court conducted a four-day hearing involving thirteen witnesses and 175 exhibits to assess Plaintiffs' request for preliminary relief. As explained below, Plaintiffs have not made the showings necessary to entitle them to a preliminary injunction.

Most importantly, they have not demonstrated a likelihood of success on the merits—although the new senate map may disproportionately affect minority voters in Tarrant County, and though the legislature may at times have given pretextual reasons for its redistricting decisions, Plaintiffs have pointed to no evidence indicating that the legislature's true intent was racial. On the remaining preliminary-injunction factors, Plaintiffs have demonstrated that they would suffer an irreparable injury, but they have failed to demonstrate that either the balance of equities or the public interest weighs in their favor.

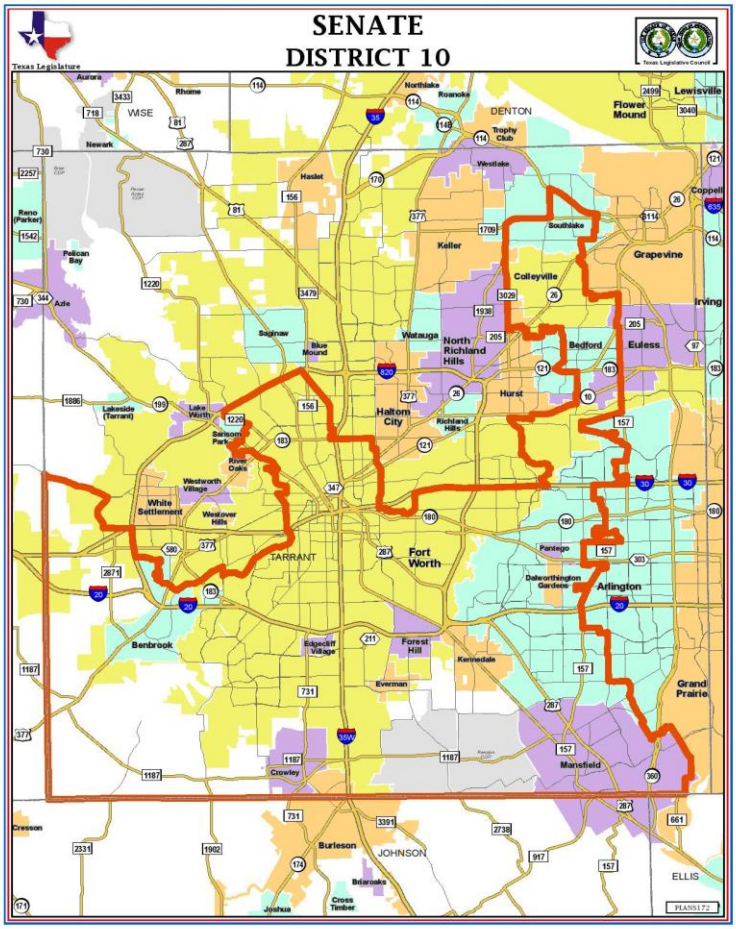
Because Plaintiffs have failed to carry their burden, the Court DENIES a preliminary injunction. Also, having considered Plaintiffs' Rule 65(a)(2) motion to consolidate these preliminary findings with a final merits determination, the Court DENIES that motion as well.

CONTENTS

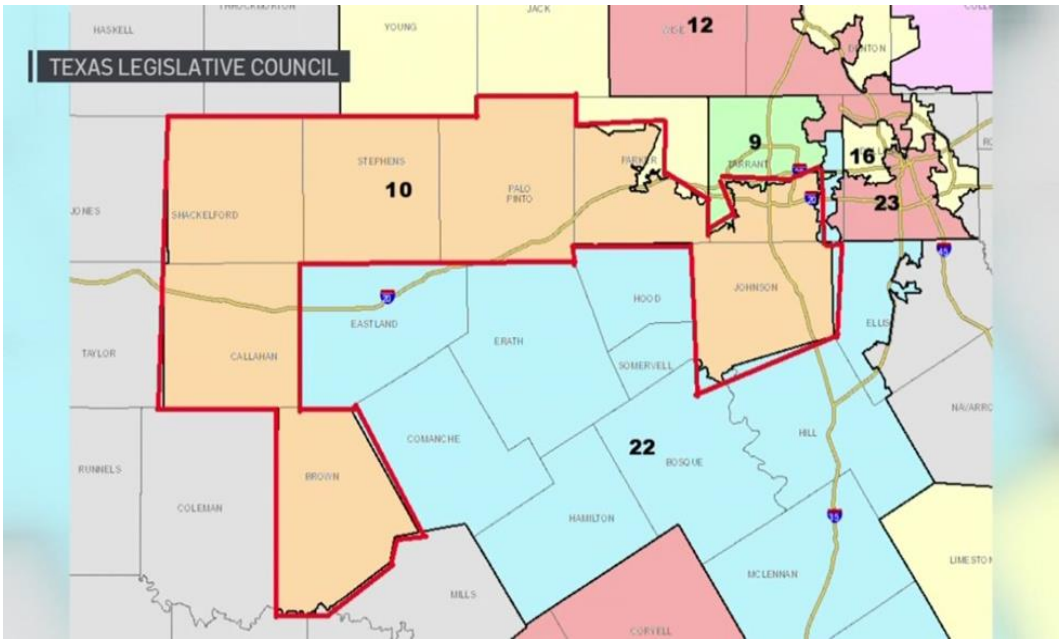
I. BACKGROUND

A. Senate District 10

SD 10 is one of thirty-one districts that elect members of the Texas Senate. Benchmark SD 10 (that is, the district as it existed per the 2010 census) was entirely within Tarrant County, as shown below:



The new SD 10, however, is, to say the least, more geographically dispersed—in addition to a reduced portion of Tarrant County, in the northeast corner of the district, the district includes all or part of seven less-populous counties to the south and west. The new SD 10 is shown below:



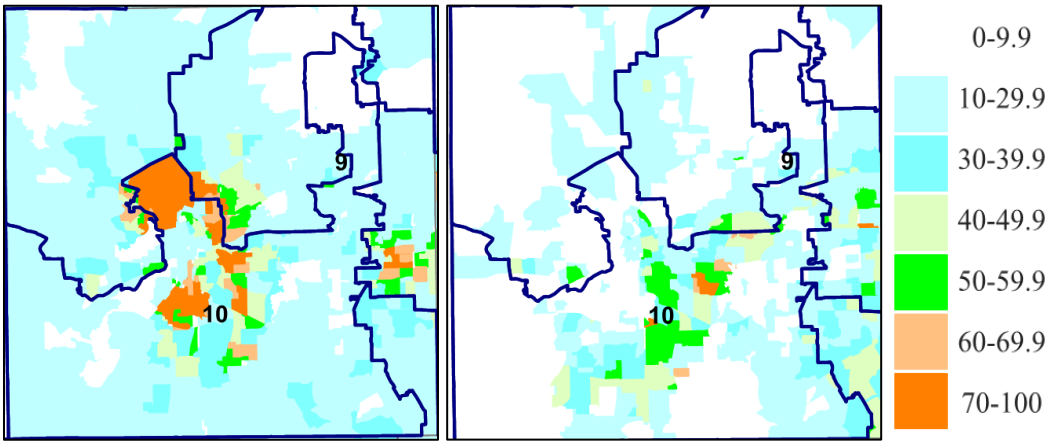
The district is currently represented by Senator Beverly Powell, a Democrat, and has experienced partisan swings for at least two decades. It was once a Republican bastion, and initially remained one after the 2001 redistricting cycle, when it was redrawn to roughly its benchmark borders. But in 2008, it elected Senator Wendy Davis, a Democrat. The seat then flipped back to Republicans in 2014, and flipped yet again in 2018, when Senator Powell was elected. The district's recent electoral history is summarized in Defendants' Exhibit 17:

Raw Data*

Year	R	D	Margin (R)
2002	58.7	39.9	18.8
2004	59.3	40.1	19.2
2008	47.5	49.9	-2.4
2012	48.9	51.1	-2.2
2014	52.8	44.7	8.1
2018	48.2	51.7	-3.5

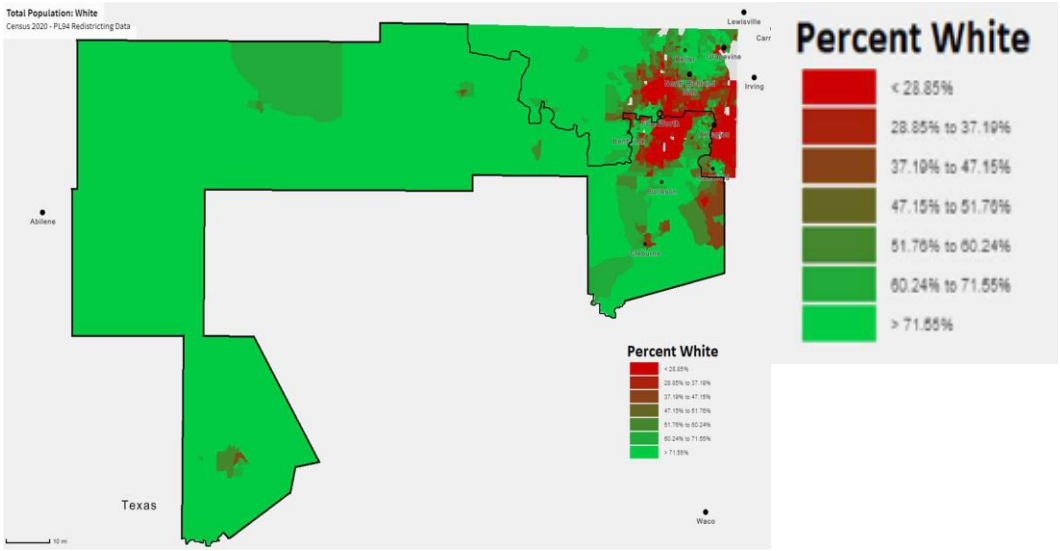
In addition to its partisan performance, benchmark SD 10 is notable, for this Court's purposes, for its racial and ethnic makeup. According to the 2015–2019 ACS,[1] a source credited by both parties, benchmark SD 10 is 61.5% minority and 39.5% Anglo; more specifically, it is 32.2% Hispanic, 21.5% Black, and 5.7% Asian. Its voting age population ("VAP") is 43.9% Anglo, 28.8% Hispanic, 20.3% Black, and 5.5% Asian. Its *citizen* voting age population ("CVAP") is 53.9% Anglo, 20.4% Hispanic, 20.9% Black, and 3.6% Asian. Pls' Ex. 44 at 4. The district was thus not majority-minority by CVAP according to the five-year ACS figures, but the parties dispute whether it may have since become majority-minority. The Court returns to that dispute below.

Plaintiffs' Exhibits 66 and 68 illustrate the Hispanic (left) and Black (right) population distribution, measured by VAP, overlaid on the benchmark map of Tarrant County:



[1] ACS stands for "American Community Survey." It is an annual report the Census Bureau produces by sampling roughly 2% of all American households. Though the report is less thorough than the decennial census, which seeks to survey *all* American households, its annuality keeps it more timely. The ACS also collects data, such as citizenship status, that the decennial census does not. Five-year figures like these combine the results of five consecutive ACS reports, producing a result that is less current than the most recent ACS but has a sample size five times larger. R. at 2:118–19, 121.

As the Court noted above, the new SD 10, compared to the benchmark, is both significantly more Republican and significantly more Anglo. The counties appended to Tarrant County are populated mostly by rural Anglos who tend by a large margin to vote Republican. Pls.' Ex. 44 at 10. With those voters added to the district and many in the Fort Worth area removed, the district's 2020 presidential election result would have been quite different. President Biden won 53.1% of the vote in the benchmark district, but President Trump would have won 57.2% under the new map. Defs.' Ex. 11, 16. In terms of race, the new district is still only 49% Anglo, compared to 28.2% Hispanic, 17.7% Black, and 3.4% Asian. But Anglos constitute 53.3% of VAP and 62.2% of CVAP. Pls.' Ex. 44 at 6. Plaintiffs' Exhibit 44 provides a visualization of the Anglo population's distribution in the new district:



B. Previous Litigation

SD 10 has been subject to redistricting litigation before. Most notably for our purposes, the district was the sole state senate district at issue in a 2012 decision by the U.S. District Court for the District of Columbia. *See Texas v. United States*, 887 F. Supp. 2d 133, 162 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 570 U.S. 928 (2013) (hereinafter "*Texas Preclearance Litig.*"). That court refused

to allow Texas to redraw SD 10 along lines similar to the current plan. *See id.* at 163–66.

That case was decided under the "preclearance" framework established by Section 5 of the VRA. Under that framework, which has since been invalidated, *see Shelby County v. Holder*, 570 U.S. 529, 557 (2013), certain states, including Texas, were required to seek preapproval for changes to their election rules, including redistricting. Importantly, the states seeking preclearance bore the burden to show that their proposed changes were nondiscriminatory. *See Texas Preclearance Litig.*, 887 F. Supp. 2d at 163.

In the 2012 decision, the three-judge district court concluded that Texas had not carried its burden to show that the redrawing of SD 10 was enacted without discriminatory intent. *Id.* at 166. In reaching that conclusion, the court considered emails, procedural omissions, and differing treatment of senators from majority-minority districts, suggesting that supporters of the redrawing acted secretively and were not in fact open to outside input on the new senate map. *See id.* at 163–66. That court's decision applied a legal standard different from the one at issue here, and this Court, of course, is not bound by its findings of fact. But the decision was public knowledge, and it would plausibly have been known to many of those who served in the Texas Senate when it was decided.

On the other hand, SD 10 featured less prominently in the series of redistricting cases heard last decade by a different three-judge court within this district. Notably, the district was not at issue in *Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017) (three-judge court). That decision concerned Texas's federal congressional map rather than its state senate map. *See id.* at 873. Thus, though the court found impermissible racial discrimination in the drawing of congressional districts around Fort Worth, *see id.* at 938, it did not address SD 10, and its decision is not part of SD 10's litigation history.

C. The 2021 Redistricting Process

The details of Texas's redistricting process are key to this Court's analysis of whether the legislature acted with discriminatory intent. So the Court revisits

that process below. This introductory section is only a high-level summary.

The Texas Legislature ordinarily conducts redistricting during its regular session immediately following the release of the U.S. Census data. But this year, the COVID–19 pandemic delayed that release by several months. So on September 7, 2021, which was promptly after the census data was made public, Governor Abbott called a special thirty-day session of the legislature to consider reapportionment beginning on September 20. Defs.' Ex. 25.

But legislators had been discussing potential district lines long before that. Of particular note are three meetings between the staffs of Democratic Senator Powell, who represents SD 10, and Republican Senator Joan Huffman, who chaired the redistricting committee.

The first meeting occurred on February 12, 2020, between staffers for both senators. Pls.' Ex. 22 at 1. Rick Svatora, deputy chief of staff to Senator Powell, took handwritten notes. *Id.* According to those notes, Sean Opperman, chief of staff to Senator Huffman, told his counterparts to expect "very little change" because SD 10 was already close to ideal size. Pls.' Ex. 23 at 2.

The second meeting, which included both senators and members of their staffs, occurred on November 19, 2020. Pls.' Ex. 6 at 2. There, Garry Jones, chief of staff to Senator Powell, recalls that either Opperman or Senator Huffman acknowledged that SD 10 was majority-minority. *Id.*

The third meeting was September 14, 2021, after Governor Abbott had called the special session, between both senators and staff, including Anna Mackin, special counsel to Senator Huffman and an attorney with experience representing Texas in redistricting litigation. *Id.* at 3. At that meeting, Senator Huffman and her staff revealed their plans to redraw SD 10 by adding several rural counties. Pls.' Ex. 2 at 2.

Senator Powell objected and, as part of her argument against the plan, handed the participants copies of maps of the district shaded to indicate the distribution of racial groups. *Id.* at 2–3. As she did so, Senator Powell read aloud the headers of each map; Senator Huffman looked at each map and asked that all

present initial and date the maps, which they did. *Id.* at 3. Jones recalls Mackin's remarking that the conversation was making her "uncomfortable." Pls.' Ex. 6 at 4. In addition to those meetings, Senator Powell and her staff sent various letters and emails to Senator Huffman and her staff, and to the Senate more generally, detailing the racial implications of the proposed changes to SD 10. Pls.' Ex. 11.

Senator Huffman, meanwhile, insisted that she was not considering race at all in her redistricting decisions. During an October 4 hearing, she remembered the September 14 meeting differently from the way Plaintiffs describe it—she claimed that she had looked at the racially shaded maps for "less than a second" and that when she realized each had racial data, she "turned it over flat and . . . said, 'I will not look at this.'" Pls.' Ex. 41 at 17.

Senator Powell and Jones expressly contradict that narrative. Similarly, Opperman responded to an email from Jones to say that he had closed the attachments immediately after realizing they contained racial data. Pls.' Ex. 12. Senator Huffman admitted she was aware that "there are minorities that live all over this state" but insisted she "blinded [her]self to that as [she] drew these maps." Pls.' Ex. 41 at 21. After drawing the maps, she ensured that they underwent a legal compliance check to avoid violating the VRA. *Id.* at 8.

Senator Huffman's office then released the full Senate plan on September 18. Pls.' Ex. 15. But she then announced amendments significantly affecting the shape of SD 10 on September 23, the day before a scheduled public hearing on the Senate plan. Defs.' Ex. 58 at 4–5. During that hearing, on September 24, Senator Huffman stated,

> My goals and priorities in developing these proposed plans include first and foremost abiding by all applicable law, equalizing population across districts, preserving political subdivisions and communities of interest when possible, preserving the cores of previous districts to the extent possible, avoiding pairing incumbent members, achieving geographic compactness when possible, and accommodating incumbent priorities also when possible.

Id. at 2. Plaintiffs draw attention to the absence of "partisan advantage" from her

list of considerations. At that hearing and subsequent ones, many members of the public testified, including prominent individuals from benchmark SD 10 who complained of the reduction in minority voting strength. Pls.' Ex. 16 at 2–20.

On September 28, the committee rejected an amendment that would have restored benchmark SD 10. Pls.' Ex. 54 at 10–13. Meanwhile, Senator Huffman claimed that "addressing partisan considerations" had been one of her redistricting criteria. Defs.' Ex. 62 at 2. Later, during an October 4 floor debate, Senator Huffman described the race-neutral process related above and again listed the criteria she used—without mentioning partisanship. Pls.' Ex. 41 at 7. But there, Senator Powell was asked by a fellow Democrat, "Do you believe that your district is being intentionally targeted for elimination as it being a Democratic trending district?" She answered, "Absolutely, absolutely." Pls.' Ex. 41 at 49.

The Senate passed Senator Huffman's plan as amended, but one Republican voted against it. *Id.* at 66. That was Senator Kel Seliger, who chaired the Senate redistricting committee in the last round of districting but who is now at odds with many in his own party. Defs.' Ex. 40. Senator Seliger explains his choice by claiming that the stated redistricting criteria (not including partisanship) were "pretext" and that "it was obvious to [him]" that the redrawing of SD 10 violated the VRA and the Constitution. Pls.' Ex. 1 at 2–3. Senator Seliger later clarified, however, that his main objection to SB 4 concerned the redrawing of his own district—SD 31—rather than SD 10. R. at 4:48–49. Meanwhile, three Democrats—Senators Hinojosa, Lucio, and Zaffirini—voted for the plan but signed a statement claiming that the redrawing of SD 10 violated the VRA. Pls.' Ex. 40 at 5–6.

SB 4 proceeded to the House, where it passed on a compressed time schedule, despite the objections of various Democratic representatives. Defs.' Ex. 60 at 237–56, 279. Defendant Governor Abbott signed the bill into law.

D. Procedural History

This action is one of several consolidated before this three-judge court. The first was filed on October 18, 2021, by the League of United Latin American

Citizens (LULAC), along with other organizations. Dkt. 1. The *LULAC* plaintiffs are individual voters and a coalition of organizations that seek an injunction against the maps for the State House, State Senate, Congress, and State Board of Education. Dkt. 1. The *LULAC* plaintiffs argue that the newly enacted plans would violate their civil rights by unlawfully diluting the voting strength of Hispanics. Dkt. 1. Because the suit challenges the apportionment of congressional and state legislative districts, a three-judge court was convened in that action under 28 U.S.C. § 2284(b). Dkt. 3.

This case was filed on November 3 in a separate division of the same federal district. *Brooks v. Abbott*, No. 1:21-cv-991 (W.D. Tex.). On November 19, the Court issued an order consolidating *LULAC* with six additional cases,[2] including the case involving the *Brooks* plaintiffs' challenge to SD 10. Dkt. 16.

Meanwhile, on November 15, Texas filed its first motion to dismiss the *LULAC* plaintiffs, in part arguing that Section 2 of the VRA does not confer a private cause of action. Dkt. 12 at 16. Then, on November 19, Texas moved to dismiss another group of plaintiffs, including the organization Voto Latino, again arguing in part that Section 2 of the VRA does not confer a private cause of action. Dkt. 22 at 1.

The *Brooks* plaintiffs moved for a preliminary injunction as to SD 10 on November 24. Dkt. 39. They contend that the legislature unlawfully broke up a minority crossover district. *Id.* at 3–5. Texas moved to dismiss the *Brooks* plaintiffs' claims on November 29, maintaining that the complaint did not allege facts sufficient to show the legislature's discriminatory intent, Dkt. 43 at 10–13, or facts to maintain a disparate-impact claim, *id.* at 2–10.

On November 30, the United States submitted a Statement of Interest

[2] Those cases are (1) *Wilson v. Texas*, No. 1:21-CV-943 (W.D. Tex.); (2) *Voto Latino v. Scott*, No. 1:21-CV-965 (W.D. Tex.); (3) *MALC v. Texas*, No. 1:21-CV-988 (W.D. Tex.); (4) *Brooks v. Abbott*, No. 1:21-CV-991 (W.D. Tex.); (5) *Texas State Conference of the NAACP v. Abbott*, No. 1:21-CV-1006 (W.D. Tex.); and (6) *Fair Maps Texas Action Committee v. Abbott*, No. 1:21-CV-1038 (W.D. Tex.).

under 28 U.S.C. § 517, expressing its support for the availability of a private cause of action to enforce Section 2 of the VRA. Dkt. 46 at 1. On December 3, this Court partially denied Texas's motion to dismiss the *LULAC* plaintiffs for want of a private cause of action, concluding that, under current caselaw, Section 2 includes a private cause of action. Dkt. 58 at 1–2.

The Court held the *Brooks* plaintiffs' motion for a preliminary injunction in abeyance on December 2 to conduct a scheduling conference, Dkt. 56 at 1–2, which occurred on December 7, Dkt. 76. That same day, the court set a briefing schedule for the *Brooks* plaintiffs' motion for a preliminary injunction. Dkt. 70 at 1–2. The following day, the Court set a hearing date for the motion to be on January 25, 2022. Dkt. 77.

The Court dismissed the complaint of another plaintiff, Damon Wilson, on December 3, 2021, for lack of standing. Dkt. 63 at 1–3. Wilson tried to amend his complaint on December 13. Dkt. 86. Because he failed to request the Court's leave before filing an amended complaint and because he would not have been able to establish a concrete injury-in-fact, the Court struck the amendment and dismissed his action on February 8, 2022. Dkt. 187 at 5.

Texas moved to dismiss two more complaints, those of the *MALC* and *NAACP* plaintiffs, on December 9. Dkts. 80, 82. The next day, the Court consolidated *United States v. Texas*, No. 3:21-CV-299 (W.D. Tex.), with the present case. Dkt. 83. On December 15, the Court consolidated *Fischer v. Abbott*, No. 3:21-CV-306 (W.D. Tex.), with the present case. Dkt. 92.

After receiving proposed scheduling orders from the parties, the Court set the scheduling order for the consolidated cases on December 17. Dkt. 96. A final trial on the merits was set for September 27, 2022. Dkt. 96 at 4. The scheduling order was amended on December 27, 2021, with the trial date changed to September 28, 2022. Dkt. 109.

Texas objected to several of the *Brooks* plaintiffs' preliminary-injunction exhibits on December 20, 2021. Dkt. 103. The *Brooks* plaintiffs timely filed their witness and exhibit lists as well as their designation of expert witnesses on January 7,

2022. Dkts. 129–131. Texas timely filed its witness and exhibit lists and designation of expert witnesses on January 14. Dkts. 140–142. Both sides filed amended exhibit lists on January 24. Dkts. 157, 160. The next day, the *Brooks* plaintiffs filed a second amended list, and the day after that, Texas filed a second amended list. Dkts. 162, 167.

The Court denied Texas's motion to dismiss the *Brooks* plaintiffs' complaint on January 18, holding that they had pleaded plausible discriminatory-effects and discriminatory-intent claims. Dkt. 144 at 1–2.

The parties in the other consolidated actions announced that they would not pursue a preliminary injunction, leaving the *Brooks* plaintiffs as the only parties seeking that relief. The Court held a hearing on the motion for a preliminary injunction from January 25 until January 28. Dkts. 183–186. The Court heard testimony from, among others, two expert witnesses from Plaintiffs, one expert witness from Defendants, and Senators Powell and Huffman. During the hearing, Plaintiffs argued that, if Senator Huffman testified, she would entirely waive her legislative privilege. R. at 5:147–48. Defendants replied that she would not testify as to privileged conversations, but only as to public statements. R. at 5:149–51. The Court determined on the record that she would not categorically waive her privilege by testifying. R. at 5:152.

Meanwhile, the parties raised other objections to one another's exhibits but eventually withdrew all but one of those objections. R. at 8:4–5. The one exception was Plaintiffs' Exhibit 102, a transcript of text messages that Defendants contended was hearsay, had not been properly authenticated, and lacked relevance. *Id.* at 8:4. The Court admitted that exhibit but noted that it would assign it due weight in light of those objections. R. at 9:4.

On February 1, 2022, the Court denied Plaintiffs' motion for a preliminary injunction in a brief order. Dkt. 176 at 3. The Court issued that order promptly to permit the March 1, 2022, primary to be conducted on schedule as designated by statute. The Court promised to state its reasoning "in a forthcoming opinion," *id.*, and does so in the instant memorandum opinion and order.

II. GOVERNING LAW

A. Standard of Review

A plaintiff seeking a preliminary injunction must make four showings: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). In evaluating those requirements, this Court is mindful that preliminary injunctions are "extraordinary remed[ies] never awarded as of right." *Id.* at 24. Thus, Plaintiffs have the burden of persuasion and are required to "clearly carr[y]" it "on all four requirements." *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005) (quotation omitted).[3]

B. Intentional Vote Dilution and Racial Gerrymandering

Plaintiffs advance two legal theories to demonstrate likelihood of success on the merits: (1) Defendants have engaged in intentional vote dilution; and (2) Defendants have engaged in racial gerrymandering. Plaintiffs do *not* press, at least at this stage, their theory that Defendants have committed a purely statutory violation of Section 2 of the VRA. Understanding the implications of that choice requires a brief review of voting rights caselaw.

The VRA was enacted in 1965. Among its several provisions was Section 5, which has since been invalidated, and Section 2, which is most relevant for our

[3] A recent Supreme Court concurrence has suggested that a higher showing might be required where, as here, a plaintiff seeks to enjoin an impending election. Under that test, Plaintiffs would have to establish that "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). But that test is not the law, and even if it were, it would not be necessary to apply it here because the Court concludes that Plaintiffs have failed to make the more traditional showing. Thus, the Court applies the standard four preliminary-injunction requirements.

purposes. As initially enacted, that section provided that "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437. In *City of Mobile v. Bolden*, a plurality read that language as having "an effect no different from that of the Fifteenth Amendment." 446 U.S. 55, 61 (1980) (plurality opinion). And that was a problem for voting-rights plaintiffs, because facially neutral state actions violate the Fifteenth Amendment "only if motivated by a discriminatory purpose." *Id.* at 62.

Partly in response to that decision, Congress amended Section 2 in 1982, adding a new subsection. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, § 3, 96 Stat. 131, 134, *codified in relevant part at* 52 U.S.C. § 10301. That subsection clarified that a violation was established if "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by" all racial groups such that their "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).

The Supreme Court interpreted that new language in *Thornburg v. Gingles*, to mean that Section 2, unlike the Constitution, could be violated even if a state did not act with a racial motive. 478 U.S. 30, 35 (1986). The Court also took a broad view of discriminatory effect, such that Section 2 generally requires the creation of legislative districts where a racial minority is (1) large and geographically compact, (2) politically cohesive, and (3) otherwise unable to overcome bloc voting by the racial majority. *See id.* at 50–51. "*Gingles* claims," as they are sometimes called, are regularly brought by voting-rights plaintiffs today, including Plaintiffs here, who listed a discriminatory-effects claim in their initial complaint. Dkt. 7 Ex. 7 at 27.

But in seeking a preliminary injunction, Plaintiffs do not present their *Gingles* theory. Instead, they rest primarily on a theory of intentional vote dilution—that is, the kind of theory that would have been viable even before the 1982 amendments. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481–82 (1997)

(explaining the amendments' effect). Such theories are seldom pursued because, at least according to conventional wisdom, they are more difficult to prove than are effects-only Section 2 claims. *See, e.g.*, *Harding v. County of Dallas*, 948 F.3d 302, 313 n.47 (5th Cir. 2020). We do not speculate on why Plaintiffs have made this choice, but we observe that it presents this Court with a relatively undeveloped body of precedent. *See Perez*, 253 F. Supp. 3d at 942.

As distinguished from the more specialized set of doctrines that has arisen from the *Gingles* caseline, intentional-vote-dilution theories call for the application of general constitutional principles. The theoretical origin of those principles is not entirely obvious. Although *Bolden* spoke of the Fifteenth Amendment, *see Bolden*, 446 U.S. at 60–61 (plurality opinion), *Reno* suggested that both the Fourteenth and Fifteenth Amendments were relevant to the constitutionality of vote dilution, *see Reno*, 520 U.S. at 481.[4]

Despite that ambiguity, courts evaluating intentional-discrimination claims in the voting-rights context fall back on doctrines established in Equal Protection cases. *See id.* at 481–82. And in that context, discriminatory purpose means more than awareness of a discriminatory effect—instead, it requires a plaintiff to establish that a state decisionmaker acted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Still, the decisionmaker need not explicitly spell out its invidious goals—a court may sometimes infer discriminatory intent where an act has predictable discriminatory consequences. *See id.* at 279 n.25; *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009). In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266–68 (1977), the Court listed five factors that courts may look to in drawing such inferences: (1) discriminatory effect, (2)

[4] *Compare Backus v. South Carolina*, 857 F. Supp. 2d 553, 569 (D.S.C. 2012) (three-judge court) (discussing uncertainty about the Fifteenth Amendment's role), *with Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000) ("[T]he Supreme Court has rejected application of the Fifteenth Amendment to vote dilution causes of action.").

historical background, (3) the sequence of events leading up to a challenged decision, (4) departures from normal procedure, and (5) legislative history.[5] But the Court stressed that those factors are not exhaustive and that the inquiry is highly sensitive and fact-bound. *See id.* at 266–68.

Turning to Plaintiffs' second theory of liability, the history of racial gerrymandering claims is more straightforward. The seminal case is *Shaw v. Reno*, 509 U.S. 630 (1993). There, in an attempt to comply with *Gingles*, North Carolina had drawn two unnaturally shaped Black-majority congressional districts. *See id.* at 635–36, 655–56. The Supreme Court held that the plaintiffs could challenge those districts under the Fourteenth Amendment's Equal Protection Clause insofar as "they rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Id.* at 649.

The Court has since clarified that, to succeed in such a challenge, plaintiffs must show that race was the "predominant factor" in redistricting, such that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). If such a showing is made, the state must demonstrate that its use of race was narrowly tailored to a compelling interest. *See Shaw*, 509 U.S. at 653.

Shaw began a pattern in which plaintiffs brought racial gerrymandering claims *in opposition to* perceived excesses under *Gingles*. Sometimes those plaintiffs are Republicans who oppose the creation of majority-minority districts that are predicted to favor Democratic candidates. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 957 (1996) (plurality opinion). At other times they are Democrats who fear that states are packing their minority co-partisans into as few districts as possible. *See, e.g.*,

[5] The factors are sometimes enumerated differently, including by various panels of the Fifth Circuit. One tally treats procedural and substantive departures from normal procedure as separate prongs, with discriminatory effect as a distinct "starting point." *See, e.g.*, *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 639–40 (5th Cir. 2021) (plurality opinion) (quoting *Arlington Heights*, 429 U.S. at 266). This Court adopts the enumeration listed elsewhere, *see, e.g.*, *Fusilier v. Landry*, 963 F.3d 447, 463 (5th Cir. 2020), primarily because it better aligns with the parties' briefing. That decision is organizational and has no effect on the underlying legal or factual analysis.

Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 260 (2015). As a result, the doctrine associated with racial gerrymandering is relatively easy to disentangle from Section 2 jurisprudence.

But while Plaintiffs' theories may have different origins and tend to be deployed differently, they have strong substantive overlap. Both require Defendants to have acted purposefully to diminish the voting strength of minorities in SD 10, and both are rooted at least partly in the Fourteenth Amendment. Indeed, it would not be impossible to read *Shaw* and later racial-gerrymandering cases as merely elaborating upon the intentional-vote-dilution theory sketched in *Bolden* and *Reno*. But the Fifth Circuit continues to treat intentional vote dilution as a legal harm distinct from racial gerrymandering, *see, e.g.*, *Harding*, 948 F.3d at 312, as does the Supreme Court, *cf. Shaw*, 509 U.S. at 652; *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (describing the two theories separately). And this Court does so as well.

There are several differences between intentional vote dilution and racial gerrymandering, the most important of which for present purposes is quantitative: Plaintiffs must make a stronger showing to demonstrate racial gerrymandering than to show intentional vote dilution. While intentional discrimination means only that a decisionmaker acted "at least in part" with a discriminatory purpose, *Feeney*, 442 U.S. at 279, racial gerrymandering requires that the decisionmaker "subordinated" other redistricting considerations to race, *Miller*, 515 U.S. at 916. Thus, Plaintiffs may show intentional vote dilution merely by establishing that race was *part* of Defendants' redistricting calculus, but to show racial gerrymandering they must go further and prove that race *predominated* over other considerations such as partisanship.[6] If, as we conclude, Plaintiffs fail to make the first showing, they logically cannot make the second.

There are also a few qualitative differences between intentional vote

[6] *Miller*, 515 U.S. at 916, stated only that race must subordinate "traditional . . . districting principles," a category from which, perhaps naively, partisanship is often omitted. But later decisions clarify that a partisan motive can defeat a racial-gerrymandering claim. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

dilution and racial gerrymandering that are less relevant at this stage. The two theories differ in how they conceive of a plaintiff's legal injury.

The injury in an intentional-vote-dilution claim is the same as it is for any other intentional-discrimination claim: The state has subjected minorities to invidious discrimination. *See, e.g.*, *Bolden*, 446 U.S. at 62 (plurality opinion). The injury inflicted by racial gerrymandering is more abstract. That injury arises when district lines "reinforce[ ] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw*, 509 U.S. at 647. That difference was important to this Court's determination of which Plaintiffs had standing to bring which claims, *see* Dkt. 119 at 3–5, though it does not alter the merits.

Separately, racial gerrymandering has traditionally been subject to a narrow-tailoring defense, while intentional vote dilution has not. *See, e.g.*, *Perez*, 253 F. Supp. 3d at 891, 962 (conducting a narrow-tailoring analysis in the racial-gerrymandering context but not in the intentional-vote-dilution context). The theoretical basis for that difference is less clear, but the Court does not confront that uncertainty here because Defendants have not presented a narrow-tailoring defense to either theory.

Thus, the most relevant distinction between Plaintiffs' two theories at this stage is that, though both require discriminatory intent, racial gerrymandering requires a stronger showing. If Plaintiffs fail to demonstrate a likelihood of success on their intentional-vote-dilution theory, they will automatically fail on their racial-gerrymandering theory. Because the Court concludes that Plaintiffs do fail on their first theory, we do not separately consider the second one.

C. Discriminatory Effect and the Role of *Gingles*

As explained above, this is not a *Gingles* action. But *Gingles* addresses discriminatory effect, which is required for any showing of intentional discrimination. Defendants therefore contend that, in order to prevail, Plaintiffs must show that benchmark SD 10 satisfied the three *Gingles* requirements. Thus, Defendants say, Plaintiffs cannot prevail unless SD 10's minority voters are

(1) numerous and compact, (2) vote cohesively, and (3) are systematically outvoted by the surrounding Anglo communities.

We disagree with the Defendants' understanding of the requirements. Plaintiffs may show discriminatory effect *without* making a full *Gingles* showing. As noted above, *Gingles* and its progeny do not articulate general legal principles for intentional discrimination but, instead, offer an interpretation of one section of the VRA. *Gingles* itself reached that interpretation by relying heavily on legislative history and scholarship interpreting the VRA. *See Gingles*, 478 U.S. at 48–51. As critics of the decision have been quick to point out, it is not clearly rooted in the VRA's plain text and is even further removed from the text of the Constitution. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 895–98 (1994) (Thomas, J., concurring in the judgment).

The intentional-vote-dilution analysis, meanwhile, is derived from the Constitution, and the *Arlington Heights* framework deployed in that analysis states merely that effects are discriminatory when they "bear[ ] more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Incorporating the *Gingles* framework into the intentional-vote-dilution analysis, thereby constitutionalizing the *Gingles* factors, would thus be an unnatural result, and it is not one that this Court accepts.

This conclusion finds support in *Bartlett v. Strickland*, 556 U.S. 1 (2009). That case concerned the application of Section 2 of the VRA to "crossover districts"—that is, districts where a minority "is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 13 (plurality opinion). A plurality of the Supreme Court held that Section 2 does not require the creation of crossover districts. *Id.* at 25–26. It reasoned primarily from the third prong of *Gingles*, which requires that the majority votes in a bloc to defeat minority-preferred candidates. *Gingles*, 478 U.S. at 51. Because, in a crossover district, a portion of the majority votes with the minority, it cannot be the type of district required by *Gingles*. *See Bartlett*, 556 U.S. at 16 (plurality opinion).

But the *Bartlett* plurality cautioned in *dictum* that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 24. The plurality thus concluded both that *Gingles* does *not* require the creation of crossover districts and that the Constitution *might* be violated if a state intentionally destroyed a crossover district. *Id.* Under that reasoning, it must be possible for a state to violate the Constitution by dismantling a district that does not meet all three *Gingles* requirements. Though we are not bound by the *dictum* of a Supreme Court plurality, *Bartlett*'s reasoning provides persuasive authority against applying the *Gingles* framework to intentional-vote-dilution claims.

Defendants maintain that not considering the *Gingles* factors here conflicts with the approach taken by the Eleventh Circuit, but we disagree. The relevant case, *Johnson v. DeSoto County Board of Commissioners*, 72 F.3d 1556 (11th Cir. 1996), was grounded expressly in the VRA and not the Constitution. The *DeSoto* court, relying on *Voinovich v. Quilter*, 507 U.S. 146 (1993), reasoned from the key distinction between Section 2 and Fourteenth Amendment redistricting violations: The former do not require intent. *See DeSoto*, 72 F.3d at 1561–62. Because intent is not an element of a Section 2 violation, it followed that intent was not sufficient to establish a Section 2 violation. *See id.* at 1564.

That circuit's later decisions have thus required Section 2 plaintiffs alleging discriminatory intent to make a *Gingles* showing. *See, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1201 (11th Cir. 1999); *see also Thompson v. Kemp*, 309 F. Supp. 3d 1360, 1366–67 (N.D. Ga. 2018) (three-judge court). But *DeSoto*'s reasoning strongly suggests that that requirement is strictly statutory, so inapplicable to the constitutional theory here.[7] Moreover, the Ninth Circuit has addressed the issue more squarely and does not require a *Gingles* showing where

[7] It is also worth noting that the Eleventh Circuit did not have the benefit of the Supreme Court's guidance in *Bartlett* when it decided *DeSoto* and *Burton*. The Eleventh Circuit decided those cases in 1996 and 1999, respectively, while the Supreme Court decided *Bartlett* in 2009.

intentional discrimination is alleged. *See Garza v. County of Los Angeles*, 918 F.2d 763, 769–71 (9th Cir. 1990). The three-judge panel in Texas's previous redistricting cycle adopted the Ninth Circuit's approach, *see Perez*, 253 F. Supp. 3d at 944 (addressing statutory claims). This Court now does the same.

So, though Plaintiffs must show discriminatory effect to prevail on their intentional-vote-dilution theory, *see Harding*, 948 F.3d at 312, this Court concludes that that discriminatory effect does not require the benchmark district to meet all, or any, of the *Gingles* requirements for a Section 2 district.

III. FINDINGS AND ANALYSIS

A. The *Arlington Heights* Factors

1. Discriminatory Effect

To show a discriminatory effect in the context of intentional vote dilution, Plaintiffs must demonstrate that the redrawing of SD 10 "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington*, 426 U.S. at 242). As this Court will explain, experts on both sides agree that voting in SD 10 is racially polarized—the Black and Hispanic electorate tends to vote Democrat, while Anglos tend to vote Republican. Similar patterns exist nationally. Almost any gerrymander that favors Republicans would therefore tend to lessen the voting strength of minorities relative to Anglos, and yet partisan gerrymandering is beyond the power of federal courts to police. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). Indeed, almost any gerrymander that favors Democrats would tend to lessen the relative voting strength of Anglos, whose voting rights are no less protected by the Constitution. *See, e.g.*, *Harding*, 948 F.3d at 306.

But this Court is loath to conclude that partisan gerrymandering creates an effectively automatic discriminatory effect for purposes of *Arlington Heights*, and this case does not require the Court to do so. Instead, the Court observes that the redrawing of SD 10 disperses the district's minority voters—irrespective of whether one conceives of them as a coalition—such that the candidates they support are far less likely to win election. Although a *Gingles* theory would require more, the Court concludes that Plaintiffs likely will demonstrate that the action they challenge produces a discriminatory effect. The Court begins by reviewing the testimony of the parties' expert witnesses.

a) Credibility Determinations

First, the Court finds the factual testimony of Plaintiffs' expert, Dr. Barreto, credible. Dr. Barreto is well-versed in conducting Ecological Inference Analysis to analyze racially polarized voting. R. at 2:109. His extensive record of academic research has focused on racial voting patterns. Pls.' Ex. 105 at 1–6. The Court accepted him as an expert without objection. R. at 2:122–23.

Dr. Barreto testified credibly that Black and Hispanic voters overwhelmingly prefer Democratic candidates in general elections. R. at 2:137–38. On direct examination, Dr. Barreto ably explained the methodology behind the figures in his report highlighting the disparity in general-election voting patterns between Anglo and minority voters. R. at 2:123–43, 3:4–35. Dr. Barreto used publicly available data from the Texas Legislative Council to conduct his analysis. R. at 2:115–16.

The Court is agnostic as to Dr. Barreto's factual determination that benchmark SD 10 is likely a majority-minority district by CVAP today. Pls.' Ex. 44 at 4; R. at 2:113, 3:58. Dr. Barreto explained how SD 10's minority population was rapidly growing before the September 2021 redistricting legislation. Pls.' Ex. 44 at 3. He admitted that the most recent ACS data, which is from 2019, do not reflect that SD 10 is a majority-minority district, R. at 3:70–74, but he credibly hypothesized that, projecting growth forward to today, SD 10 is likely a majority-minority district. Apart from asserting without elaboration that he "did calculations," R. at 3:73–74, he did not offer any mathematical support for that hypothesis, and so we are left to treat it as merely possible.

We give little weight to Dr. Barreto's ultimate conclusions. He maintained, throughout his testimony, that the only relevant factor in determining whether Black and Hispanic citizens vote as a cohesive group is how they vote in general elections. *E.g.*, R. at 3:107–08. Although that may be a defensible position in political science, whether general elections are sufficient to satisfy the legal criterion of voter cohesion is outside Dr. Barreto's stated field of expertise. Though we take his expert opinion into account, and though we agree that voter behavior in general elections is relevant, defining voter cohesion is ultimately a legal question reserved to the Court.

We also note that, as is forgivable in an adversary system, Dr. Barreto showed signs of partiality to his side's position. For instance, Dr. Barreto spoke of Dr. Alford's analysis in strongly negative terms, R. at 3:121, 8:70, but his rebuttal testimony suggested he had exaggerated. Specifically, Dr. Barreto implied that the data provided by Dr. Alford were analytically useless, but the main defect seemed

to be a solvable one: Dr. Alford had botched the dataset's key, such that results for the two candidates were swapped. R. at 7:102–03. While that reflects insufficient rigor on Dr. Alford's part, the Court does not accept that it justified Dr. Barreto's hyperbole. Similarly, Dr. Barreto claimed that he had generated "quite different" results using data from the same source as Dr. Alford, R. at 8:70, but Dr. Barreto never explained his own results. The Court observes that Dr. Barreto's testimony, though he is highly qualified and by no means disingenuous, must be viewed critically.

Second, we credit the testimony of Plaintiffs' other expert, Dr. Cortina, that the legislature could have drawn another map, such as the one submitted by Plaintiffs as Alternative Plan 4, that added a Republican-leaning senate district without depriving minority voters in SD 10 of the ability to elect the candidate of their choice. The Court accepted Dr. Cortina, without objection, as an expert on voter behavior. R. at 5:100. His testimony about the Plan 4 map was clear and persuasive as far as it went. But we do not treat that testimony as demonstrating that an alternate map could better or even equally serve the partisan interests the Texas Senate's Republican majority sought to accommodate by redrawing SD 10.

Dr. Cortina testified that he assumed a likely 10% margin of victory rendered a voting district "safe." R. at 5:109–10. He explained that, using the 10% number, both Alternative Plan 4 and Plan 2168 provide Republicans the same number of safe senate districts. R. at 5:113. He added that Alternative Plan 4 would even enable Republicans potentially to carry an additional district. R. at 5:114. As Defendants pointed out, in making his calculations Dr. Cortina looked only at the results from statewide races and only as far back as the 2018 elections. R. at 5:131. Dr. Cortina did not account or purport to account for senate-specific election results going back further than the last few years.

We credit Dr. Cortina's testimony that using his methodology, it is possible to produce a map favorable to Republicans other than Plan 2168. But Dr. Cortina also testified that he did not know which plans were considered by the legislature in September or whether the legislature took into account partisan considerations other than likely margin of victory. R. at 5:136–37. Nothing in his testimony

conflicts with Dr. Alford's subsequent testimony that it makes sense for the majority party, when it is attempting to strengthen its hold on a legislative body, first to address swing districts, and that SD 10—of all the State's Senate districts—was the swing district Republicans could most easily convert to Republican-leaning. R. at 7:56–58.

Dr. Cortina also showed admirable restraint in his conclusions. Defendants stressed that Dr. Cortina made no predictions about how the alternative maps would perform in future state senate elections. R. at 5:134. That was despite the fact that, in a more colloquial setting, many would comfortably predict that districts Senator Ted Cruz won by ten points in 2018 will likely elect Republican state senators in the future. The Court interprets Dr. Cortina's reticence as reflecting a commitment to stating only conclusions that he could establish empirically.

Third, we find the testimony of Dr. Alford—the Defendants' expert—credible. Dr. Alford has long been recognized for his expertise and experience in political science generally, and that expertise extends to redistricting. R. at 7:42–43. He has appeared as an expert witness in previous voting-rights cases and was accepted as an expert in this case without objection. R. at 7:42–43.

Dr. Alford testified that though the Black and Hispanic electorate votes cohesively in general elections—as both prefer Democrats over Republicans—that cohesion is not as evident in primary elections. R. at 7:46–50. The Court gives credit to Dr. Alford's conclusion that primary elections are relevant to analyzing divisions within political coalitions and that partisan affiliation is the main driver of voter behavior in general elections. The Court finds relevant and helpful Dr. Alford's analysis concerning the 2014 Democratic primary in SD 10, in which Black and Anglo voters preferred the Anglo candidate and Hispanic voters preferred the Hispanic candidate. Defs.' Ex. 34 at 4–5. But the Court gives limited weight to Dr. Alford's ultimate suggestion that minority voters in SD 10 do not vote cohesively, R. at 7:49–51, both because Dr. Alford analyzed only one (dated) primary election in arriving at that conclusion, R. 7:48, 77, and, as already mentioned, defining voter cohesion is ultimately a legal question reserved for the Court.

The Court also considers credible Dr. Alford's testimony concerning Alternative Plan 4. He testified that it made sense for the Senate Republican majority to look first to shore up its chance of winning SD 10, given that it was a swing district based in a Republican county. R. at 7:44, 57. Dr. Alford also testified that the Senate Republican majority may have had other legitimate partisan interests, which it sought to serve by redrawing SD 10, that may not have been achieved by another map, such as Plan 4. R. at 7:59, 135–37. The Court also credits Dr. Alford's uncontradicted testimony that, according to the most recent ACS data, SD 10 is not a majority-minority CVAP district, R. at 7:45, though that conclusion does not rule out that the district has become majority-minority since those data were taken in 2019.

The Court also observes that Dr. Alford's apparent digressions into advocacy were more striking than even Dr. Barreto's. Particularly during cross-examination, Dr. Alford tended to go beyond just presenting statistical conclusions: He provided legal and political opinions favorable to Defendants.

Among other things, Dr. Alford expressed moral distaste for the legal theory of political cohesion among minorities, remarking, for instance, that Congressman Marc Veasey, who is Black, had "stole[n]" what was once a Hispanic district. R. at 7:120–21. He also made clear that his conclusions regarding SD 10 resulted from his (or at least his colleagues') analysis of only one election—the 2014 primary. R. at 7:116. Dr. Alford's nonetheless expressed confidence in the conclusion because, he said, it was consistent with wider research on the way the Black and Hispanic electorate votes; he needed only ensure that SD 10 was not a "unicorn." R. at 7:116. While that may be correct, the Court's confidence in Dr. Alford's findings regarding SD 10 is less than it would be if he had conducted a more thorough analysis.

b) CVAP, VAP, and Total Population

As explained above, the precise racial breakdown of SD 10 can be read different ways depending on which population metric one uses and on how one analyzes trends since the latest ACS report. Those differences are important

because the destruction of a majority-minority district, particularly one controlled by one racial group, would be a relatively clear discriminatory impact. *Cf. Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (noting that at-large election schemes have discriminatory effects because they prevent the existence of majority-minority districts). On the other hand, if a group's share of a district were reduced from, say, 10% to 5%, that group's political power would be weakened in only an abstract sense. The Court considers whether minority groups may be aggregated for this analysis below, but first the Court addresses whether Plaintiffs have carried their burden to show that benchmark SD 10 was majority-minority. We conclude that they have not.

The first question the Court must decide is whether total population, VAP, or CVAP is the relevant metric. We agree with the parties that it is CVAP. The Supreme Court has not always been pellucid on this subject. For instance, the plurality in *Bartlett* referred to VAP, 556 U.S. at 18, but the dissent characterized the plurality as discussing CVAP, *id.* at 27 (Souter, J., dissenting). In *Gingles*, meanwhile, the Court used neither term; it may have been thinking in terms of total population. *See Gingles*, 478 U.S. at 50.

One decision that does navigate that confusion is *LULAC v. Perry*, 548 U.S. 399 (2006). In that case, Texas had redrawn a congressional district such that the Hispanic CVAP fell below 50%, even as the total Hispanic population stayed above 50%. *Id.* at 424. The Court noted that use of CVAP as the relevant metric "fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates." *Id.* at 429.

Plaintiffs here press a constitutional theory rather than one based on Section 2, but the reasoning still applies. Both statutory and constitutional cases in this area concern the unequal allotment of political power, and that power depends on numbers of voters rather than total population. Further support lies in the fact that the new SD 10 is *still* majority-minority by total population, Pls.' Ex. 44 at 6, and yet both parties agree that it is less likely to elect minority-preferred Democrats.

If total population is not the correct metric because it does not capture

actual voting power, then surely VAP is inferior to CVAP. And indeed, neither party seriously disputes that conclusion. In cross-examining Dr. Barreto, Defendants' counsel pushed the position that CVAP was the appropriate metric, and Dr. Barreto never managed to squarely disagree. R. at 3:65. In the absence of dispute, the Court concludes that CVAP is the best metric currently before the Court for determining racial voting power in SD 10.

The second question is whether benchmark SD 10 was majority-minority by CVAP at the time of redistricting. Dr. Barreto says it was. As proof, he offers only the "steady decline in [the] Anglo share of the district's CVAP, and the lag inherent in the 5-year ACS estimates." Pls.' Ex. 44 at 4.

But Dr. Barreto did not show the work he used to infer that the Anglo population had fallen below 50% by 2021. Pls.' Ex. 44 at 4; R. at 3:73–74, 8:77–78. That omission gives the Court pause. According to the statistics cited by Dr. Barreto, the Anglo share of the district fell from 57.7% in about 2013 to 53.9% in about 2017. Pls.' Ex. 44 at 4.[8]

From those data alone, the Court cannot conclude that benchmark SD 10 is a majority-minority district by CVAP. The Court should not engage in *sua sponte* econometric modeling, and Dr. Barreto's bare conclusion is inadequate, his impressive expertise notwithstanding.

c) Political Cohesiveness

As explained, this Court finds that SD 10 was not majority-minority at the time of redistricting when judged by the most relevant metric. SD 10 is also unlike the prototypical *Gingles* district in another way—no single minority comes close to 50% of CVAP. The Fifth Circuit does allow different minority groups—say, Black and Hispanic voters—to be aggregated to form "coalition districts," provided that those districts meet the other *Gingles* factors. *See Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988). The law in the Fifth Circuit is less clear on whether the

[8] These are the "midpoint" years of the five-year ACS reports. Dr. Alford stressed, and the Court accepts, that these are not "snapshots" of the years in question, and the Court uses them here only as rough approximations. R. at 7:71.

second *Gingles* factor—political cohesiveness—can be met without considering primary elections, a point that the parties hotly dispute.

But as this Court has noted, in seeking an injunction the Plaintiffs do not present a *Gingles* theory, so they are not required to show that SD 10 meets the *Gingles* requirements. Instead, they rely on the more generic Equal Protection framework in *Arlington Heights*, which finds discriminatory effects more readily.[9] Thus, while the Court appreciatively credits the testimony of Drs. Barreto and Alford about the contexts in which SD 10's minorities do and do not vote for the same candidate, that is the end of the purely factual inquiry.

Whether Black and Hispanic voters in SD 10 are politically cohesive enough to constitute a coalition under *Gingles* and *Campos* is a question of law, and, at least in the Fifth Circuit, the relative legal significance of general and primary elections remains undecided.[10] We have no occasion to make that decision here. Rather, we conclude that Plaintiffs may prevail on this prong by showing a discriminatory impact on either Black or Hispanic voters (or any other racial group), regardless of the level of political cohesion between those groups.

d) Conclusion on Discriminatory Effect

Instead of looking to any of the *Gingles* factors, this Court applies the first factor of *Arlington Heights*, asking whether the redrawing of SD 10 "bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington*, 426 U.S. at 242). As noted above, that test gives rise to a serious line-

[9] *See Arlington Heights*, 429 U.S. at 269 (stating that the impact of a zoning decision was "arguably" discriminatory because it tended to exclude members of income groups that were more heavily minority); *see also Washington*, 426 U.S. at 245–46 (referring to the "disproportionate impact" of a test that was passed at a higher rate by Anglos than Blacks).

[10] Other courts have reached the issue when evaluating theories other than intentional vote dilution. *Compare, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y.) (per curiam) (three-judge court) (concluding that divergence in primaries defeats a showing of political cohesion), *aff'd*, 543 U.S. 997 (2004) (mem.), *with, e.g.*, *Texas Preclearance Litig.*, 887 F. Supp. 2d at 174 (concluding that "shared voting preferences at the primary level would be powerful evidence of a working coalition, but it is not needed to prove cohesion").

drawing problem in the redistricting context because, given that race and partisanship correlate (however unevenly) throughout the United States, almost every reallocation of voting power at the hands of either party will tend to bear more heavily on some races and less on others. But it does not follow that every redistricting gives rise to discriminatory effect of constitutional dimensions.

Fortunately, the facts of this case are dispositive enough that we need not draw any bright line between discriminatory and nondiscriminatory partisan shifts. Even without concluding that SD 10 is majority-minority and even without attempting to aggregate its different minority groups, it is apparent that the cracking of the district bears more heavily on Black and Hispanic voters[11] than it does on Anglos. Both groups have been reduced as a percentage of the district's CVAP—Blacks from 20.9% to 17% and Hispanics from 20.4% to 17.5%. Pls.' Ex. 44 at 4, 6. And while reductions of that magnitude might be academic in other contexts, in SD 10 they make a substantial difference.

As both parties' experts freely admit, SD 10's Black and Hispanic voters tend to favor Democrats and oppose Republicans. R. at 2:137–38, 7:123–24. Where previously the district often elected Democrats, it is now likely to elect Republicans. Thus, both groups have been substantially diminished in their ability to influence SD 10's elections. Those removed from the district have, of course, been added to other, nearby districts, but those districts are, like the new SD 10, Republican-leaning. Thus, the redrawing of SD 10 results not just in an incremental diminishment in minority voting strength but also in the loss of a seat in which minorities were able to elect candidates they preferred.

When Texas previously attempted to redraw the district along similar lines, a different district court concluded that there was "little question" that the impact was discriminatory within the meaning of *Arlington Heights*. *Texas Preclearance*

[11] This is not to suggest that the redrawing of SD 10 does not bear especially heavily on Asians or members of other minority groups. But the impact on Black and Hispanic voters is especially easy to assess because those groups are relatively well-represented in SD 10 and because both parties have focused on those groups in their analysis.

Litig., 887 F. Supp. 2d at 163. That was despite the fact that the district had elected only one Democrat—Senator Davis, in 2008—up to that point. *See id.* at 162–63. Texas had not denied that the redrawing of the district nonetheless constituted discriminatory impact. *Id.* at 164. Here, Defendants *do* deny discriminatory impact, but they do so by relying on the *Gingles* theory that this Court has now rejected. Dkt. 102 at 38–42. Having denied that position, the Court concludes that Plaintiffs will likely be able to demonstrate a discriminatory effect, strengthening an inference of discriminatory intent.

2. Historical Context

The second *Arlington Heights* factor is whether history suggests discriminatory intent. Historical evidence must be "reasonably contemporaneous with the challenged decision." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987). Thus, for purposes of this analysis, this Court is concerned only with Texas's recent history and not with any longer legacy of racial discrimination. But even with that constraint, it is evident that history favors an inference of discriminatory intent.

In every decade since the statute was passed in 1965, federal courts have held that Texas violated the VRA. *Veasey v. Abbott*, 830 F.3d 216, 240 (5th Cir. 2016) (en banc). That includes the most recent redistricting cycle and, most damningly, the 2012 decision holding that, among other violations, Texas had engaged in intentional vote dilution by redrawing SD 10 in a manner similar to that adopted in SB 4. *See Texas Preclearance Litig.*, 887 F. Supp. 2d at 166. As mentioned previously, that case was decided under a now-defunct legal framework and has accordingly been vacated. *See Texas Preclearance Litig.*, 570 U.S. at 928. But while the decision is not legally binding, and the burden of proof was the opposite of what it is now before this Court, that does not undo the historical significance of that three-judge decision. For that reason, the en banc Fifth Circuit has pointed to the case as demonstrating a "contemporary example[ ] of State-sponsored discrimination." *Veasey*, 830 F.3d at 239.

Defendants' contrary argument is feeble. They point out that "those rulings addressed different maps passed by different legislators, and different map

drawers, at different times," Dkt. 102 at 35, but that is what history means. Of course, *these* maps have not been struck down—they have only just been enacted. And as Plaintiffs point out, Senator Huffman was on the 2011 redistricting committee (and Senator Seliger chaired it), suggesting that the principal personalities were not entirely different then. Dkt. 108 at 6. Indeed, Anna Mackin, a staffer for Senator Huffman who played a key role in redrawing SD 10, served as counsel for the defendants in the previous round of redistricting litigation. Pls.' Ex. 25 at 1. If the immediately preceding redistricting cycle is not "reasonably contemporaneous with the challenged decision," *McCleskey*, 481 U.S. at 298 n.20, then it is difficult to imagine what would be.

The Court does not mean to overstate Texas's history of discrimination within the past decade—for instance, the 2012 decision was reached under a framework that required Texas to prove a negative, *see Texas Preclearance Litig.*, 887 F. Supp. 2d at 166, and *Veasey*, though ruling against the state on discriminatory effect, reversed the district court's judgment that Texas had acted with discriminatory intent, *see Veasey*, 830 F.3d at 272. Senator Seliger, for one, continues to maintain that the *Texas Preclearance Litigation* court was factually mistaken in its finding of discriminatory intent, and we have no occasion to address that possibility. R. at 4:27. But in terms of proximity and comparability to the passage of SB 4, it is a close match. Plaintiffs will likely show that historical evidence weighs in favor of an inference of discriminatory intent.

3. Sequence of Events

The remaining *Arlington Heights* factors can be difficult to disentangle. The "specific sequence of events leading up to the challenged decision," *Arlington Heights*, 429 U.S. at 267, could, in a case like this, be construed to include both departures from ordinary procedure and legislative history. But for organizational clarity, the Court focuses, in this section, on events that were not part of the formal, public legislative process. Specifically, we concentrate on the private meetings between Senators Powell and Huffman and their staffs, as well as correspondence involving those individuals.

The first meeting occurred on February 12, 2020—well before the release, in August 2021, of the 2020 census data that would guide the legislature's redistricting process. Neither senator was present, but members of both staffs were. Plaintiffs draw attention to this meeting because of statements made by Sean Opperman, a staffer for Senator Huffman, as recorded by Rick Svatora, a staffer for Senator Powell. Specifically, Opperman said that SD 10 was "very close to ideal" population and so there would likely be no major changes to the district. R. at 2:13. To the contrary, the final plan *did* include major changes to SD 10. Svatora thus feels that he was not told the truth during the meeting. R. at 2:24.

The second meeting occurred on November 19, 2020, and was attended by both senators and their staffs. That meeting was short, but one of Senator Powell's staffers remembers that either Opperman or Senator Huffman verbally acknowledged that SD 10 was "majority-minority." Pls.' Ex. 6 at 2. Maps of the district were present, and those maps included boxes with basic racial data, though the maps did not illustrate how racial minorities were distributed throughout the district. Pls.' Ex. 6 at 2.

The third meeting occurred on September 14, 2021, after the 2020 census had been released and the legislature had been called into special session. Both senators and their staffs were present. Senator Huffman unveiled the redrawn SD 10—that version approximated the final configuration of the district in Tarrant County but included a different combination of rural counties. R. at 4:154. Senator Powell testifies that she asked no questions about the map, instead informing Senator Huffman that she "c[ould] clearly see what you're attempting to do here." R. at 4:84. Senator Powell and her staff had come prepared with maps of the benchmark district that highlighted its racial composition. These were handed around and, at Senator Huffman's request, all those present initialed them. R. at 4:129–30. As the discussion went on, Anna Mackin, a member of Senator Huffman's staff, remarked that she felt "uncomfortable." R. at 4:84.

Finally, in addition to these meetings, there were several messages exchanged between Senator Powell's staff and the legislature more broadly. On August 19, 2021, before the last meeting, Opperman sent senate staffers a link to a

redistricting Dropbox, which included the maps with basic racial data that had been present at the November 2020 meeting. Pls. Ex. 6 at 2. On September 16, 2021, two days after the meeting in which Senator Huffman unveiled the new map, Senator Powell's staff emailed Senator Huffman's staff with a letter expressing concerns about the plan's racial impact and attachments illustrating those impacts. Pls.' Ex. 6 at 4. Opperman responded to say that he had stopped looking at the documents once he realized they contained racial data. Pls.' Ex. 6 at 5.

We do not find or infer discriminatory intent from those events. It is not inherently suspicious that plans would change in the nineteen months between February 2020 and September 2021, especially when one considers that the census was conducted and its data were released within that timeframe. And even assuming that Senator Huffman's staff withheld information from Senator Powell's staff, that omission would be unsurprising given that the redrawing of SD 10 was deleterious to Senator Powell's political prospects.

Nor is it suspicious that Senator Huffman and her staff were exposed to racial data on SD 10. That exposure does not contradict Senator Huffman's assertion that she willfully "blinded [her]self" to race in drawing the maps. R. at 6:113. And even if Senator Huffman and her staff were fully aware of race in their redistricting,[12] that in itself does not merit any nefarious inference. *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.").

4. Procedural and Substantive Departures

Now this Court focuses on departures from ordinary legislative procedure in the leadup to the passage of SB 4. The parties agree that redistricting would

[12] And they well might have been. Racial data can remain "fixed in [a mapdrawer's] head" even when they are not present on a computer screen, *Harris*, 137 S. Ct. at 1477, and Senator Huffman and her staff are knowledgeable civil servants who doubtless have some awareness of the state's demographics. Indeed, as noted previously, one member of Senator Huffman's staff was counsel in previous litigation where the racial demographics of Tarrant County were at issue. Pls.' Ex. 25 at 1.

normally have occurred during a regular, biennial session of the Texas legislature over a longer timeframe but that in this case it occurred within the more limited timeframe of a special session. The parties disagree, of course, about whether the court may infer discriminatory intent from that irregularity.

"Departures from the normal procedural sequence . . . might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267. But they also might not. During the last round of redistricting litigation, the Court in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), reversed a decision of the three-judge district court and touched on a similar point. Specifically, the Texas legislature had enacted redistricting bills in a special session, over a far shorter timeframe than would normally be the case. *See id.* at 2328. But although the three-judge court treated that brevity as an indication that the legislature had acted in bad faith, the Supreme Court disagreed. *See id.* at 2328–29. It pointed out that the legislature "had good reason to believe that" the plans it enacted "were sound," *id.* at 2329, because those plans had been issued by a court, *see id.* at 2327. That innocuous and plausible alternative explanation meant that no nefarious inference could be drawn from the legislature's rush.

The circumstances here are different—the Texas Legislature was not enacting a court-issued senate plan but rather one of its own making—but the situations are alike in that Defendants present alternative explanations for the brevity of the session in which SB 4 was passed. They posit two alternative theories: (1) The legislative process was abbreviated because the COVID–19 pandemic caused a delay in the publication of census results; and (2) the process was abbreviated because Texas Republicans feared that their Democratic colleagues might break quorum, as they had done earlier in 2021 to prevent the passage of an election-reform bill.

The Court finds Defendants' first explanation persuasive. The COVID–19 pandemic has had disruptive effects in many ways. The taking of the 2020 decennial census was one of them. By statute, the Census Bureau was required to publish the results of the census on April 1, 2021. *See* 13 U.S.C. § 141(c). Regular sessions of the Texas Legislature occur once every two years and last for no more

than 140 days. TEX. CONST. art. III, §§ 5, 24. Those sessions begin "on the second Tuesday in January of each odd-numbered year." TEX. GOV'T CODE ANN. § 301.001. The legislature may be convened outside that timeframe only in special sessions called by the Governor, which are limited to thirty days. TEX. CONST. art. III, § 40.

Ordinarily, those dates and numbers leave the legislature with time to complete redistricting during its regular session. Representative Chris Turner, a witness for Plaintiffs, testified that the redistricting process ordinarily can take about two months—twice as long as a special session. R. at 5:61. So the legislature faced a problem when the Census Bureau, citing challenges caused by the pandemic, delayed publication of the results until after the regular session had already ended. R. at 5:59. The legislature was thus forced to redistrict during a special session, which did not provide the ordinary amount of time.

It was thus unavoidable that the legislature would depart from its ordinary procedures during the 2021 redistricting, for reasons that had nothing to do with discriminatory intent. The Plaintiffs' claim of discriminatory intent stemming from the delay is extraordinarily weak. For Plaintiffs to show that procedural departures here are suggestive of such intent, they must point to some other indication of nefarious purpose. But they have not.

Plaintiffs note that the Texas Senate conducted only limited public hearings about the redrawing of SD 10, Dkt. 39 at 16 (describing a "rushed process"), and that the Senate slightly redrew the district (removing Young County but not altering the district within Tarrant County) before convening to discuss it, R. at 4:138, 156; Dkt. 39 at 18. Plaintiffs also observe that the Texas House spent just one day considering the senate plan, providing significantly less opportunity for public discussion and amendments than would usually be the case. R. at 5:39–43. While those steps may have been atypical, all of them suggest a legislature pressed for time.

Because the Court concludes that the pandemic more than adequately explains Texas Republicans' decision to rush the redistricting process, we need not

evaluate Defendants' secondary explanation that Republicans feared Democrats would break quorum.

Plaintiffs point to another procedural irregularity: that Senator Huffman allegedly did not consider race in drawing the new senate map but later submitted her proposed map to the Texas Attorney General's office, which apparently made no changes to it. Dkt. 108 at 12. But Plaintiffs have not developed that point. Crucially, none of their witnesses testified that the ordinary procedural course was distinct from the one advanced by Senator Huffman.

5. Legislative History

The Court turns finally to statements made on the floor of the legislature before the passage of SB 4. The parties have directed the Court to several hearings and statements that may be relevant. The Court reviews each in turn and, in doing so, is informed primarily by the public record and by the testimony of Senator Powell. Senator Huffman, the other main legislative antagonist, asserted her legislative privilege to the fullest extent possible, with the result that she offered no additional comment on legislative matters beyond those she had made publicly.

First is a pair of committee hearings conducted on September 24 and 25, 2021, to receive input from fellow legislators and the public on the redrawing of SD 10. The committee had very recently released a new proposed SD 10, which would have added additional rural counties without altering the district lines within Tarrant County. R. at 4:138, 156. At the nonpublic hearing, Senator Huffman read from prepared remarks concerning her redistricting methodology:

> My goals and priorities in developing these proposed plans include, first and foremost, abiding by all applicable law, equalizing population across districts, preserving political subdivisions and communities of interest when possible, preserving the cores of previous districts to the extent possible, avoiding pairing incumbent members, achieving geographic compactness when possible, and accommodating incumbent priorities, also when possible.

R. at 4:94.

Then Senator Powell asked Senator Huffman a series of questions about her

methods for drawing the maps, implying that the redrawing of SD 10 was unjustifiable on the stated rationales and would have a disproportionate impact on minority voters. Pls.' Ex. 52 at 10–20. The next day, during the public hearing, a number of officials and concerned individuals testified about the redrawing of SD 10; many of them strongly refuted the premise that the redrawn district combined communities of interest. *See generally* Pls.' Ex. 53.

Second is a September 28 hearing of the redistricting committee. There, Senator Huffman again recited her redistricting criteria but this time added "partisan considerations" to the list. R. at 4:112. That hearing is also notable for the committee's rejection of an amendment that would have restored benchmark SD 10. Pls.' Ex. 54 at 13. In opposing that amendment, Senator Huffman restated that her map complied with the VRA and averred that redrawing SD 10 was warranted to balance population. Pls.' Ex. 54 at 11–12.

Third is a senate floor debate on October 4. Senator Huffman yet again recited her list of redistricting criteria, this time not listing partisanship. R. at 4:116–17. Senator Powell then debated Senator Huffman, interrogating her about why she had redrawn SD 10. Senator Huffman's answers were often evasive. For instance, she repeatedly stated that "all" of the redistricting criteria had informed various decisions, without elaboration. R. at 4:126. She also stated at one point that she believed SD 10 "needed population." R. at 4:125. But SD 10 was slightly overpopulated, and Senator Huffman smiled as she claimed otherwise. R. at 4:125.

Senator Powell also asked Senator Huffman about the September 14 meeting at which Senator Huffman had first revealed the planned redrawing of SD 10. Senator Huffman recalled that meeting quite differently from how Senator Powell and Garry Jones recounted it. R. at 4:128. Additionally, Senator Huffman claimed that, despite "hav[ing] an awareness that there are minorities that live all over this state," she had "blinded [her]self to that as [she] drew these maps." R. at 5:10–11. Later in the same debate, Senator Powell engaged in a friendly colloquy with a Democratic colleague. During that colloquy, Senator Powell expressed concerns about the racial consequences of redrawing SD 10, but she also agreed that the district was "absolutely" "being intentionally targeted for elimination as being

a Democratic-trending district." R. at 5:26–28.

Finally, the Texas House held a hearing on the senate plan on October 10. Republican Representative Todd Hunter, chairman of the redistricting committee, read a version of Senator Huffman's statements of redistricting criteria. That version did not include partisanship. The House voted on the bill later the same day it had been introduced, minimizing opportunities for public testimony or amendments. R. at 5:39–44; Pls.' Ex. 42 at 12–25.

Plaintiffs stress that supporters of SB 4—they focus primarily on Senator Huffman, though they also mention Chairman Hunter[13]—generally did not list "partisan advantage" as one of the goals of SB 4. The one notable exception was the September 28 hearing.

As with the nonpublic events preceding passage of SB 4, described above as the "sequence of events," the legislative history suggests that supporters of the bill were less than forthright about their motivations. The redrawing of SD 10 is a transparent attempt to crack a Democratic-leaning district in greater Fort Worth: It is not consistent with principles such as core retention, geographic compactness, or combining communities of interest. Nor does the Court find it likely that the redrawing was necessary for the sake of population equalization—it certainly is not true that the district itself "needed population," and Senator Huffman's smirk suggests that she may well have known as much.

[13] Defendants protest that "the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). Thus, Defendants argue, even if Senator Huffman were shown to have acted based on discriminatory intent, it would not follow that the other senators and representatives who voted for it had the same intent, and so Plaintiffs' theory would still fail. We find that reading of *Brnovich* somewhat aggressive—though legislators are not "cat's paw[s]," *id.*, statements of discriminatory intent by a committee chair made during floor debate would doubtless be of some weight in judging the intentions of the body as a whole, particularly at this preliminary stage. And this would seem to be especially true where, as here, the committee chair and her team were solely responsible for drafting the map. But because we do not find evidence of discriminatory intent in Senator Huffman's statements, we decline to examine further the extent to which such intent could have been more broadly attributed.

But as with previous prongs, the Court finds that racial discrimination did not motivate the Texas legislature in passing SB 4. Partisan gerrymandering alone cannot support a federal constitutional claim. *See Rucho*, 139 S. Ct. at 2507–08. Plaintiffs have pointed to nothing—no stray remark, secret correspondence, or suspicious omission—that would tend to indicate that Senator Huffman or anyone else acted even partially because of the racial impact of SB 4. Without such evidence, the legislative history of SB 4 does not support the inference that the bill was passed with discriminatory intent.

6. Conclusion on Discriminatory Intent

Though the factors above are organized numerically, the Court stresses again that they cannot be analyzed mechanically. Superficially, the five prongs are split, with three (sequence of events, procedural departures, and legislative history) favoring Defendants and two (discriminatory effect and historical context) favoring Plaintiffs. The *Arlington Heights* inquiry, however, is too sensitive to be reduced to a scorecard. Indeed, inconsistencies in how courts number the *Arlington Heights* factors, *see supra* note 5, would make an additive approach particularly inapposite. Instead, this Court conducts a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including any evidence not captured by the factors listed above. *Arlington Heights*, 429 U.S. at 266.

The Court pauses, however, to summarize its findings so far regarding the effect of SB 4 and the circumstances of its passage. The Court finds that the enactment of SB 4 had a discriminatory effect; it bore more heavily on the Black and Hispanic voters of SD 10, such that those voters will likely no longer be able to elect the candidates whom they tend to prefer. The recent history is suggestive of discriminatory intent; Texas has a long history of losing redistricting cases, and that history includes a finding of discriminatory intent the last time the state redrew SD 10.

Despite that context, however, the Court finds that the circumstances surrounding the passage of SB 4 do not suggest that the legislature acted with discriminatory intent. The specific sequence of events, departures from ordinary

procedure, and legislative history are all consistent with a time-pressed legislature seeking partisan advantage. It is conceivable that the legislature was *also* driven by a hidden racial motive, but the circumstances of SB 4's passage provide no evidence for that conclusion. The bill's discriminatory effect and Texas's litigation history are not enough to make up for that absence.

In sum, this Court concludes that the enumerated *Arlington Heights* factors, when weighed holistically, indicate that Plaintiffs are unlikely to succeed on the merits of their intentional-discrimination claim. They have thus also failed to show a likelihood of success on their racial-gerrymandering claim, which requires even stronger evidence of intent.

The Court reiterates the context in which this finding is made. The Court is not making a final determination on the merits, but, instead, is assessing whether Plaintiffs are *likely* to prevail based on the evidence presented so far. The Court is well aware that extensive discovery is underway in preparation for the trial scheduled for this September. The Court does not foreclose the possibility that new evidence and more complete presentations will result in different findings after trial. Moreover, there are other considerations beyond the impact and history of SB 4 that bear on this Court's inquiry into any discriminatory intent. We turn to those other factors now.

B. Plaintiffs' Alternative Maps

Plaintiffs submit four alternative maps that, they say, achieve Republicans' partisan goals without cracking SD 10. Pls.' Exs. 70, 76, 84, 92. Specifically, those plans give Republicans the same number of seats as SB 4 but ensure that the weakest Republican seat is slightly safer. Dkt. 39 at 40. The Supreme Court has discussed the use of alternative maps in the context of racial gerrymandering, with all nine Justices agreeing that such maps are helpful evidence of legislative intent. *See Harris*, 137 S. Ct. at 1479 (2017); *id.* at 1491 (Alito, J., dissenting). That commonsense observation extends just as easily to intentional vote dilution. But Defendants naturally dispute that Plaintiffs' proposed maps are probative of the state's intent in redrawing SD 10.

The Court begins by addressing several of Defendants' less-convincing objections. First, they stressed, in their briefing and at the hearing, that Plaintiffs' maps were never presented to the legislature. That uncontradicted factual assertion is true but irrelevant.

Defendants cite several cases for their proposed requirement that alternative maps be proffered, but none of them purports to set forth that condition. *See Harding*, 948 F.3d at 309–11; *Harris*, 137 S. Ct. at 1479; *Easley v. Cromartie*, 532 U.S. 234, 255–56 (2001). That absence makes sense given the purpose of alternative maps—they show that "[i]f you were *really* sorting by political behavior instead of skin color (so the argument goes) you would have done—or, at least, could just as well have done—*this*." *Harris*, 137 S. Ct. at 1479. It is not necessary to show that Defendants specifically declined to adopt the alternative plans—rather, the maps illustrate (Plaintiffs say) what a truly partisan legislature *might* have done. And, as Plaintiffs point out, accepting Defendants' conditions for the consideration of maps would impose a perverse burden. It would mean that Plaintiffs were required, between SB 4's proposal and passage, to provide the Texas Senate with a better Republican gerrymander, even as Texas Republicans (as we have seen) were refusing to admit that they were seeking a Republican gerrymander. The Court declines to apply Defendants' proposed test.

Defendants' other objections have shortcomings. Defendants seize on Plaintiffs' failure to include one Republican senator's residence in his district, but that is an apparent oversight that Plaintiffs easily correct in their later maps. Dkt. 102 at 31, Dkt. 108 at 23.

Defendants further suggest that the alternative maps would create a political problem for Republicans by placing Senator Sarah Eckhardt, a Democrat, in a seat where the incumbent Republican hopes to seek higher office, thus allowing Senator Eckhardt to "essentially run as the incumbent." Dkt. 102 at 31. But as Plaintiffs note, their maps would leave Senator Eckhardt in a district with a sizeable Republican advantage, strongly suggesting that a Republican would capture the seat. Dkt. 108 at 22.

Defendants also claim that Plaintiffs "radically realign[ ] Senate districts from nearly end-to-end," but their only examples are the shifting of one county between districts and the shifting of a district border in another county. Dkt. 102 at 32. Even if such objections were more strongly rooted, they still would not form a clear basis for rejecting Plaintiffs' alternative maps. There is no conceivable map that would not be subject to nitpicking on some basis. Maps may nonetheless be useful to show the results that would follow from hypothetical sets of priorities—for instance, an alternative plan could theoretically show what a legislature would have done if its only priority were to maximize the number of districts with more than a certain partisan margin.

But even putting Defendants' narrower objections aside, the Court does not find that Plaintiffs' alternative maps reveal any discriminatory intent on Defendants' part. Though differing in their details, all four of Plaintiffs' proposed maps achieve their allegedly superior partisan outcome in the same way: They crack SD 14, a Democratic bastion located mostly in Travis County, instead of SD 10.

Plaintiffs' theory seems to be that if the legislature truly cared about partisanship and not race, it would have prioritized SD 14 over SD 10. The Court does not buy that logic. According to the Census Bureau, Travis County is about as diverse as Tarrant County—48.9% Anglo (Travis) to 45.3% (Tarrant), by total population. SD 14 itself is 51.9% minority by total population, Pls.' Ex. 57 at 5, less than the 61.5% of benchmark SD 10, R. at 2:138, but still enough that cracking the district would produce about as clear a discriminatory effect.

That the legislature decided to crack one and not the other thus seems to yield no particular inference about the role of race in redistricting or about partisanship's role. If, as Plaintiffs say, cracking SD 14 would have fulfilled Defendants' partisan goals just as well as cracking SD 10, then surely they would have cracked *both* districts. Indeed, because both districts have large minority populations and tend to elect minority-preferred Democrats, a racially motivated legislature might also have cracked both SD 14 and SD 10.

Meanwhile, it is easy to hypothesize countless legally innocuous reasons why the Texas Legislature may have preserved SD 14. SD 10's recent partisan reversals may have made it a more obvious target. The legislature may have wanted SD 14 to function as a vote sink. It may have feared political fallout from destroying a longstanding Democratic bastion. Indeed, saving SD 14 may even have respected traditional redistricting criteria—Plaintiffs' version of that district is about as unnaturally shaped as is the current SD 10. The Court is thus reluctant to draw any inference of discriminatory intent from Plaintiffs' alternative maps.

The Court also notes that the experts superficially differed about how much partisan advantage a district must have to be considered "safe"—when he analyzed Plaintiffs' alternative maps, Dr. Cortina assumed that a Republican margin above 10% was safe, R. at 5:135, but Dr. Alford vehemently rejected that position, R. at 7:131. The Court does not perceive a factual disagreement here—political safety is not an either/or proposition, and it is plausible that Texas Republicans preferred districts that were even safer than those that would have resulted from Plaintiffs' alternative maps.

This Court rejects Plaintiffs' contentions regarding *dictum* in a ruling of the three-judge court in the preceding redistricting cycle. Plaintiffs point to the aside that "[t]he Legislature could have simply divided Travis County and Austin Democrats among five Republican districts" instead of achieving the same advantage by packing Hispanic voters. *Perez*, 253 F. Supp. 3d at 897. Rather than accept that blank check, Plaintiffs say, Defendants instead chose to repeat the same move—cracking SD 10—that a different district court had deemed intentionally discriminatory. *See Texas Preclearance Litig.*, 887 F. Supp. 2d at 166. But as discussed above, neither decision was controlling: *Texas Preclearance Litigation* was decided under the Section 5 standard, while *Perez* concerned congressional, rather than state senate, districts.

Moreover, even if one accepted that Senator Huffman and her staff had read those opinions, the Plaintiffs' desired inference about *Perez* does not follow. If the legislature attached weight to the *dictum* about Travis County (even in the state senate context), and if cracking that county would have equally served its partisan

goals, it surely *would* have cracked SD 14. The same conclusion would follow even if the legislature pursued racial goals exclusively—such a legislature would have cracked SD 10 *and* SD 14, both of which are majority-minority by total population and elect minority-preferred Democrats.

Plaintiffs' desired conclusion follows only if the legislature's primary goal was neither race nor politics, but rather to thumb its nose at the federal judiciary. That is implausible. It is far more likely that the legislature, despite the aside in *Perez*'s discussion of congressional districts, made different decisions about SD 10 and SD 14 for some political reason.

Thus, the Court does not agree that Plaintiffs' alternative plans strengthen an inference of discriminatory intent. Plaintiffs are not required to provide maps at all, *see Harris*, 137 S. Ct. at 1479, and so their failure does not in itself prevent them from succeeding on the merits. But it does mean they are no closer to carrying their burden. Plaintiffs' alternative maps do not meaningfully alter their likelihood of success on the merits.

C. The Presumption of Legislative Good Faith

Finally, although this Court, so far, has attempted to weigh the evidence presented by Plaintiffs evenly, the Court must address the fact that, in this area, the law puts a finger on the scale in favor of Defendants. The legislature is entitled to a presumption that it redistricts in good faith. *See Miller*, 515 U.S. at 915.

The law is less clear, however, on exactly what the presumption of good faith entails. Plaintiffs aver that they have overcome the presumption by showing that the Texas Legislature's stated reasons for the redrawing of SD 10—such as that the district needed population, or that "all of" Senator Huffman's express redistricting criteria informed the decision—were not the real reasons. R. at 9:14. Under Plaintiffs' theory, the presumption can be overcome even without a showing of racial motive—Plaintiffs need only establish that there was *some* undisclosed motive to the redistricting, even if that motive was unrelated to their claims.

That theory has intuitive force and some precedential support. For instance, *Miller*, 515 U.S. at 916, formulates the presumption in relation to

"traditional race-neutral districting principles." When the Supreme Court has listed those principles, it has not included partisanship. *See, e.g.*, *Rucho*, 139 S. Ct. at 2500. Indeed, even where the Court points out that partisan motivations may defeat racial-gerrymandering claims, it still treats those motivations separately from the "traditional" factors. *See Harris*, 137 S. Ct. at 1473. If partisanship is not a traditional redistricting criterion, and a legislature is shown to have had covert partisan motives as it redistricted, the reasoning goes, then it has not redistricted in good faith.

Plaintiffs have put forth substantial evidence that Senator Huffman was particularly less than forthright in explaining why she had redrawn SD 10 as she had. Defendants now insist that partisanship was a major part of her motivation, but Senator Huffman did not give that impression on the senate floor. Of the three times she listed her redistricting criteria, partisanship made the list only once, at the September 28 committee meeting. R. at 4:112. When Senator Powell asked Senator Huffman which of her criteria had led to various decisions, such as the extension of SD 10 into several rural counties, Senator Huffman evasively (and unconvincingly) answered, "All of them." R. at 4:125–26.

Senator Huffman gave an account of her September 14 meeting with Senator Powell that differs significantly from the accounts of either Senator Powell or her staffer—Senator Huffman claimed that she looked at the maps with racial shading for "less than a second" before turning them over and saying, "I will not look at this," while the other witnesses describe nothing of the sort. R. at 4:128. At the October 4 hearing, Senator Huffman insisted that SD 10 had been redrawn because "[the committee] believed [it] needed population." R. at 4:125. SD 10 did not need population, and Senator Huffman smirked as she claimed it did.

Senator Huffman did not rebut any of these allegations. Instead, she asserted legislative privilege to the fullest extent possible and therefore declined to answer questions about her motivation. *See, e.g.*, R. at 7:35–36. Though courts may not draw negative inferences from a criminal defendant's assertion of his Fifth Amendment rights, no similar constraint binds our assessment of a civil witness's assertion of legislative privilege. Senator Huffman could have waived her legislative

privilege, just as Senator Powell did, and the Court would doubtless be better informed.

This case, however, does not present the same circumstances that led a sister court to deem legislative privilege waived. *See Singleton v. Merrill*, 21-CV-1291, 2021 WL 5979516, at *7 (N.D. Ala. Dec. 16, 2021). Thus, in ruling on the assertion of privilege, this Court declined to take the same step here.[14] R. at 5:152. Nevertheless, the Court interprets Senator Huffman's reticence as strengthening the inference that her previously stated reasons for redrawing SD 10 were, at best, highly incomplete and, at worst, disingenuous.

None of that, however, directly supports the proposition that Senator Huffman and her colleagues acted from *racial* motives. And so the Court finds, on the current state of the record, that they did not. Instead, all of the incongruities pointed out by Plaintiffs are consistent with a Republican legislature's seeking to hide its *partisan* redistricting motives.

There is even some direct evidence of such a motive. As noted, Senator Huffman *did* list partisanship as a guiding principle once, at the September 28 committee meeting. R. at 4:112. When Senator Powell questioned her during the October 4 debate, Senator Huffman mentioned several times that she had viewed maps with "partisan shading" or "partisan numbers." R. at 6:95–97. And Senator Powell at one point agreed with a Democratic colleague that her district was being "targeted for elimination as being a Democratic-trending district," though Senator Powell also discussed race in the same colloquy. R. at 5:26–28.

To be sure, Defendants' current theory would mean that Senator Huffman and her colleagues dramatically understated the role of partisanship in their decisionmaking, and that nondisclosure is frustrating from the standpoint of governmental transparency. But "partisan motives are not the same as racial

[14] Though the Court declined to adopt the approach taken in *Singleton* because of distinguishable contexts, the Court is nonetheless concerned about the scope of state legislative privilege as Senator Huffman and Defendants conceive of it. State legislative privilege in this context raises serious questions about whether this Court (or any court) could ever accurately and effectively determine intent.

motives." *Brnovich*, 141 S. Ct. at 2349. Even without applying any presumptions, this Court does not find that any of the Plaintiffs' evidence is *more* consistent with racial motives than it is with exclusively partisan motives.

To act with a primarily partisan motivation while not admitting as much may constitute "bad faith" in a colloquial sense. But the presumption of legislative good faith was articulated, and is often reaffirmed, specifically in the context of alleged racial motivations. *See, e.g.*, *Harris*, 137 S. Ct. at 1474 n.8. Indeed, *Miller* recognized the presumption as applying to allegations of "race-based decisionmaking." 515 U.S. at 915.

Importantly, reading "good faith" too stringently creates line-drawing problems. As Senator Seliger, Plaintiffs' witness, testified, legislators in Texas give incomplete reasons for their votes "[a]ll the time." R. at 4:60. If that is true (and particularly if it is true of legislators generally), then to conclude that the presumption of good faith is surrendered any time legislators are less than candid about their motivations risks nullifying a presumption that, as the Supreme Court repeatedly has cautioned, is not to be treated lightly. *See, e.g.*, *Perez*, 138 S. Ct. at 2325. Thus, in litigation such as this, there are strong reasons to conclude that the presumption of good faith is overcome only when there is a showing that a legislature acted with an ulterior *racial* motive.

Fortunately, deciding the motion for preliminary injunction does not require this Court to choose among the different possible understandings of "good faith" in the context of redistricting. That is because Plaintiffs would fail to show a likelihood of success on the merits even if there were no presumption working against them. Overcoming the presumption of legislative good faith would not shift the burden. *Cf. id.* at 2324 (holding that the burden cannot be shifted by a previous finding of discrimination). Instead, it would mean merely that the issue of legislative intent would be resolved according to the ordinary civil-litigation standard. Plaintiffs would thus have to show that the preponderance of the evidence favored the conclusion that the legislature had acted with discriminatory

intent.[15] For all the reasons stated above, this Court has determined that Plaintiffs are not likely able to do that.

Plaintiffs have presented substantial evidence that at least one member of the Texas Senate did not fully disclose her reasons for supporting SB 4. But they have not presented evidence that that nondisclosure bore any connection to a racial motive or racial intent. Determining whether Plaintiffs have overcome the presumption of legislative good faith thus depends on how that presumption is defined. But because Plaintiffs fail regardless of whether the presumption applies, this Court need not, and does not, attempt to answer that unsettled question of law.

D. Conclusion on Likelihood of Success

Both of Plaintiffs' theories—intentional vote dilution and racial gerrymandering—require them to show that the legislature acted with discriminatory intent. They may make that showing through circumstantial evidence. But after carefully reviewing the evidence presented so far, the Court concludes that they are unlikely to do so.

The *Arlington Heights* factors do not favor Plaintiffs. Though SB 4 bears more heavily on Black and Hispanic voters in SD 10 than it does on Anglo voters, and though recent history suggests that discriminatory intent is a possibility, the circumstances surrounding the passage of SB 4 are uniformly innocuous, at least from the standpoint of discriminatory intent. Plaintiffs seek to add further circumstantial evidence in the form of alternative maps, but those maps are not persuasive. They demonstrate that there was another racially diverse, Democratic district that the legislature could have cracked and did not—but that fact does not alone suggest that race was a consideration in how SD 10 was drawn.

Because Plaintiffs have failed to show a likelihood of success even under a preponderance-of-the-evidence standard, we need not consider whether their evidence of non-racial disingenuousness is sufficient to overcome the legislature's

[15] *Cf. CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (noting that preponderance of the evidence is the "default [burden of proof] for civil cases").

presumption of good faith. Racial and partisan considerations are difficult to disentangle, *see Harris*, 147 S. Ct. at 1473, but even without applying the presumption of legislative good faith, the preponderance of the evidence weighs against any finding that race played a role in the Texas legislature's redrawing of SD 10. On the evidence currently before the Court, Plaintiffs have failed to show that they are likely to succeed on the merits.

E. The Remaining Preliminary-Injunction Factors

1. Irreparable Harm

If Plaintiffs had shown they were likely to succeed on the merits, they would also have established that they were "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. That is because they allege that Defendants have infringed their rights under the Fourteenth and Fifteenth Amendments. *See* Dkt. 39 at 24–25, 41. Violations of those rights inflict irreparable injuries because "the loss of constitutional freedoms 'for even minimal periods of time . . . unquestionably constitutes irreparable injury.'" *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) (omission in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).[16]

But even if Plaintiffs had not alleged constitutional injuries, they still could show that they would be likely to suffer an irreparable injury if their claims were meritorious. According to this Court's current schedule, it will not resolve the merits of Plaintiffs' claims until after the November 2022 election. Thus, even if Plaintiffs won on the merits and the Court ordered the "drastic remedy" of "[s]etting aside an election," *Rodriguez v. Bexar County*, 385 F.3d 853, 859 n.2 (5th

[16] *See also* 13 MOORE'S FEDERAL PRACTICE § 65.22 (3d ed.) (noting that the "deprivation of constitutional rights" has "ordinarily been held to be irreparable"), Lexis (database updated Dec. 2021); 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved . . . , most courts hold that no further showing of irreparable injury is necessary."), Westlaw (database updated Apr. 2021).

Cir. 2004),[17] they would be without properly elected representatives until a new election could be organized and held. Since the 88th Legislature's regular session will occur between January and May 2023,[18] at least some—if not all—of the lawmaking activity for this election cycle would likely have occurred before Plaintiffs' new representative could be seated. That is an injury that cannot be compensated with damages, making it irreparable.

For their part, Defendants do not seriously dispute that Plaintiffs have alleged irreparable injuries. Instead, they reiterate their position that Plaintiffs are unlikely to succeed on the merits of their claims, and Defendants say the Plaintiffs therefore do not face the threat of irreparable injury. Dkt. 102 at 46–47.[19] Because the Court concludes that Plaintiffs are unlikely to succeed on the merits, it agrees with Defendants in some sense. But that is a conclusion based on the merits, not the nature of Plaintiffs' allegation. If they had met their burden on likelihood of success, they would have met it here, too.

2. The Balance of Equities and the Public Interest

Two factors remain. An injunction may issue only if (1) it would not disserve the public interest and (2) the equities favor the movant. *Texas v. United States*, 809 F.3d 134, 150 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016) (per curiam). Plaintiffs have not satisfied their burden on those factors.

"[T]he balance of harm requirement . . . looks to the relative harm to both parties if the injunction is granted or denied." *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 459 (5th Cir. 2016). The public-interest factor looks to "the public consequences [of] employing the extraordinary remedy of injunction."

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[17] Doing so can be appropriate where the election was conducted in a racially discriminatory manner. *See Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984).

[18] *Texas Legislative Sessions and Years*, LEGIS. REFERENCE LIBR. OF TEX., http://lrl.texas.gov/sessions/sessionYears.cfm.

[19] Defendants purport to offer one argument independently of the likelihood-of-success element, but that theory also contests the merits of Plaintiffs' claims instead of the nature of their claimed injury. *See* Dkt. 102 at 46 (second paragraph).

Winter, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

Those factors "overlap considerably," so courts often address them together.[20] And in the related context of interim stays, "[t]hese factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). After all, "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws," and the State's "interest and harm" thus "merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken*, 556 U.S. at 435). The Court therefore considers both factors together. *See, e.g.*, *Texas*, 809 F.3d at 186–87 (the Fifth Circuit doing the same).

Plaintiffs contend that both factors favor them: Because the redistricting plan "violates Plaintiffs' constitutional rights," "Defendants lack any legitimate interest in enforcing [that] plan." Dkt. 39 at 45. Citing *Reynolds v. Sims*, 377 U.S. 533, 586–87 (1964), Plaintiffs say that this Court could enjoin the maps despite the then-approaching primary election, Dkt. 108 at 28. Plaintiffs do not posit that Defendants would suffer no harm from an injunction. But they suggest that the burdens of a new election would be minimal because state legislation has "accounted for" the possibility of a delayed election. Dkt. 108 at 29.

Defendants reply first with *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam), in which the Supreme Court observed that enjoining an election risks "voter confusion" and other costs. That risk only grows "[a]s an election draws closer." *Id.* at 5. The Fifth Circuit has applied *Purcell* rigorously, staying several injunctions during the 2020 election. Dkt. 102 at 48 (collecting cases). Moreover, Defendants convincingly contended that the primary elections were already underway as this Court heard the preliminary-injunction motion, heightening the relevance of *Purcell*'s principle. A delay, Defendants' say, would require election administrators to duplicate their efforts, would increase costs (particularly for small

[20] *Texas v. United States*, 524 F. Supp. 3d 598, 663 (S.D. Tex. 2021) (citing *Texas*, 809 F.3d at 187).

counties), and would require some candidates to change where they seek office. Dkt. 102 at 49. It might further compromise the November 2022 general election. Dkt. 102 at 49. It would confuse voters. Dkt. 102 at 49. And it would "undermine the public's perception of election integrity" by enhancing the risk of tabulation errors and other mistakes, by both voters and election officials. Dkt. 102 at 49.

On this, the Court agrees with Defendants. "[C]ourt changes of election laws close in time to the election are strongly disfavored," *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 567 (5th Cir. 2020) (per curiam), and the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).[21] Those principles apply with equal force in redistricting cases. *See, e.g.*, *Benisek v. Lamone*, 138 S. Ct. 1942, 1944–45 (2018) (citing *Purcell*, 549 U.S. at 4–5); *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurring). Granting the requested injunction would flout those commands.

To assess the propriety of an injunction, this Court must "weigh . . . considerations specific to election cases." *Purcell*, 549 U.S. at 4. The caselaw identifies several relevant considerations. Foremost are the effects on voters and election administration. "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. An injunction may unduly burden election officials, inflicting massive costs and risking mistakes or disenfranchisement. *Tex. All.*, 976 F.3d at 568. Election irregularities reduce voters' confidence in the system and diminish election integrity; abrupt changes thus disserve the public interest. *See id.* at 569. We also must mind the principle, oft repeated by the Fifth Circuit, that the public has a powerful interest in the enforcement of "duly enacted law[s]." *Id.* at 568.

This Court finds that those considerations weigh strongly against an injunction. At the hearing, Defendants' witnesses testified that an injunction would

[21] *See also Frank v. Walker*, 574 U.S. 929 (2014) (mem.); *Veasey v. Perry*, 574 U.S. 951 (2014) (mem.).

overload election officials and confuse and disenfranchise voters. This Court finds those witnesses knowledgeable, compelling, and credible, especially given that Plaintiffs did not attempt to rebut their testimony.

Keith Ingram, the director of the state Elections Division, testified that the March primary was "underway." R. at 7:174. He explained that county officials already had spent months preparing for the election. R. at 7:154. The candidate-filing deadline passed in December, R. at 7:159, and county officials had to program, proof, verify, and mail ballots to meet federal deadlines in January, R. at 7:159–61. Redistricting only added to those burdens. R. at 7:161–62, 164.

Asked whether the election could feasibly be delayed, Ingram replied that a delay was "kind of inconceivable." R. at 7:166. Most concerningly, Ingram testified that up to 100,000 voters had already submitted ballot applications. Some of those applications were rejected; others had been accepted, and some of *those* voters might have already cast their ballots. R. 7:166–67. Unwinding the election would create mass confusion: Voters who had received a ballot would not know whether it would count, and voters who had not received one would not know whether to request a new one or to await the one they had already requested. R. 7:166–67.

Ingram began in his job in 2012, when redistricting delayed an election. R. at 7:151. That delay, he testified, reduced voter trust: Voters "inevitably thought" that moving the election "was a conspiracy on the part of the other team to jerk around their particular candidate." R. 7:167. Ingram suspects the same would occur if this Court enjoined the redistricting maps: "It's very corrosive to the authenticity and legitimacy of the process whenever you change the rules in the middle of the game." R. at 7:173.

Defendants next presented testimony from two county election administrators. Since 2011, Staci Decker has administered elections for Kendall County, a relatively small county in the Texas Hill Country. Record. R. at 8:27. Bruce Sherbet administers elections for Collin County, the state's sixth largest. R. at 8:5–6. Sherbet has nearly fifty years of experience running elections, including almost twenty-five years of service as Dallas County's election administrator. R. at

8:7.

Both Decker and Sherbet testified that much of the work preparing for the March primary was already done. For example, Decker stated that her four-person team had programmed ballots, prepped ballots for mailing to voters, ordered supplies for the election, prepared election-day kits, and contracted for polling locations. R. at 8:30, 32, 43–44. An injunction would require her office to undo much of that work and to mail out new ballots, an expense that Decker says her small county office cannot afford. R. at 8:39–40, 43–44.

Decker substantiated Ingram's concern about voter confusion: In 2012, during the last court-ordered election delay, many voters in her county received multiple ballots, and some of them returned their ballots in the wrong envelopes, which caused their disqualification. R. at 8:49–50. Decker also recalled receiving complaints from voters who did not know when to submit their ballots. R. at 8:50.

Sherbet explained that Collin County was struggling to implement the redistricting plans thanks to supply-chain snarls, new compliance obligations, two special elections, and serious staffing challenges. R. at 8:18–20. Asked whether changing the maps would be "feasible" in time for the March primary, Sherbet responded that any changes would be "very problematic and really confusing." R. at 8:20.

Plaintiffs offer no contrary testimony. They instead press three reasons why this Court should disregard Defendants' showing. All are unconvincing.

First, Plaintiffs suggest that *Reynolds v. Sims* decides this case, because there the Court approved a district court's injunction of a redistricting plan despite an approaching election. Dkt. 108 at 28. But *Reynolds* is distinguishable: The injunction contested there issued several months before the election. *See Reynolds*, 377 U.S. at 542–43. And the majority stressed that a district court "should consider the proximity of a forthcoming election and . . . . endeavor to avoid a disruption of the election process." *Id.* at 585. In fact, the *Reynolds* Court expressly concluded that the injunction imposed no "great difficulty" on the State of Alabama, a finding that the evidence before this Court cannot support. *Id.* at 586.

But even if *Reynolds* might permit an injunction here, the past three decades of Supreme Court precedent would not. In the past three years alone, the Court has repeatedly intervened to stay the hand of district courts that have tried to enjoin elections. *See, e.g.*, *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.); *Clarno v. People Not Politicians Oregon*, 141 S. Ct. 206 (2020) (mem.); *Milligan*, 142 S. Ct. at 879 (mem.). That posture is not nascent; it is decades in the making. *See, e.g.*, *Purcell*, 549 U.S. at 4–5. "[T]he only constant principle than can be discerned from the Supreme Court's recent decisions . . . is that its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis." *Veasey v. Perry*, 769 F.3d 890, 897 (5th Cir. 2014) (Costa, J., concurring in the judgment); *see also id.* at 895 (majority opinion) (making the same point). This Court agrees.

Second, pointing to Section 41.0075 of the Texas Election Code, Plaintiffs contend that Defendants already have accounted for the prospect of delay. That statute created three sets of election dates; which set would take effect would depend on the date that the Texas legislature enacted a redistricting plan. *See* TEX. ELEC. CODE § 41.0075(c)(1)–(3).

The Court does not perceive that statute's relevance. As Plaintiffs appear to acknowledge, Dkt. 108 at 29, the point of the statute was to accommodate *legislative* delays in *enacting* a redistricting plan. The law did not, as Plaintiffs suggest, "protect the state and the public's interest in orderly elections should the primary be delayed" for any *other* reason. Dkt. 108 at 29. Once the Texas Legislature enacted a redistricting plan, Section 41.0075 told election administrators and other officials across the state which election dates would apply. It did not create contingencies for other delays. But even if it had, that would not change our analysis. Plaintiffs do not explain why or how the legislature's anticipation of legal challenges to its redistricting plan would mitigate the harms of an injunction to the public's interest in orderly elections when the elections are underway and ballots are in voters' hands.

Third, Plaintiffs cite the Supreme Court's admonition that "injunctive relief is available in appropriate cases to block voting laws from going into effect." Dkt.

108 at 30 (quoting *Shelby County v. Holder*, 570 U.S. 529, 537 (2013)). But that prompts the question whether this is an "appropriate case[ ]," and the Supreme Court has made clear that a preliminary injunction so close to an election is *not* appropriate.

The core of Plaintiffs' theory seems to be that because they have a meritorious claim, they meet the balance-of-harms and public-interest factors. *See* Dkt. 108 at 27–28; Dkt. 39 at 45–46. That result does not necessarily follow. Even if Plaintiffs *were* likely to succeed on the merits, the Supreme Court and the Fifth Circuit have stressed that a likelihood of success on the merits does not dictate who prevails under the balance-of-harms and public-interest prongs.[22]

That is not to say that Plaintiffs cannot show, after a trial on the merits, that they are entitled to an injunction. But we must heed the consequences of preliminary relief for the March 2022 primaries. Defendants have established that an injunction would confuse and disenfranchise voters, leave candidates in the lurch, stress already overburdened election administrators, and inflict significant costs that would fall most heavily on the state's smallest counties. Plaintiffs had the burden to overcome that showing. They have not done so.

This Court finds that the balance of harms and the public interest favor Defendants. A preliminary injunction will not issue.

F. Conclusion

Plaintiffs have demonstrated that, absent an injunction, the injury they complain of would be irreparable. But they have not shown that they are likely to

[22] The Fifth Circuit has "expressly rejected" the idea that courts must presume that the balance of harms favored a plaintiff who has demonstrated a likelihood of success. *Def. Distributed*, 838 F.3d at 457 (quoting *S. Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 188 (5th Cir. Unit B 1982)). That principle holds when plaintiffs bring constitutional claims. *Id.* at 458 ("Ordinarily, of course, the protection of constitutional rights *would* be the highest public interest at issue in a case. [But] that is not necessarily true . . . ."); *see also Winter*, 555 U.S. at 23 (holding that the district court should have denied an injunction, despite that court's finding a likelihood of success on the merits, because the plaintiffs' injury "is outweighed by the public interest").

succeed on the merits. And they have not established, as to two factors that overlap in this context, either that the balance of equities favors them or that granting an injunction would be in the public interest.

Failure on even one prong is sufficient to conclude that a preliminary injunction shall not issue. *See Planned Parenthood*, 403 F.3d at 329. Thus, a preliminary injunction is inappropriate here, and this Court may not issue one.

IV. PLAINTIFFS' RULE 65(a)(2) MOTION

Plaintiffs have moved to consolidate under Federal Rule of Civil Procedure 65(a)(2), but the Court declines to do so. Both parties made their presentations, and the Court evaluated them, in the context of a limited hearing. As Defendants point out, they were given no warning—until closing statements— that Plaintiffs would move to consolidate, meaning that Defendants had no opportunity to prepare for a hearing that would result in a final judgment. R. at 9:34. That context also informed several of the Court's evidentiary rulings, most notably the decision to admit, without authentication, Plaintiffs' Exhibit 102, which purports to be a log of private text messages.

Moreover, it is not evident what benefit would follow from consolidation. This memorandum and order reflects the Court's opinion that Plaintiffs are not likely to succeed on either their intentional discrimination or racial gerrymandering claim. Admittedly, a final determination could spare the Court from fruitless relitigation of those theories. But on the other hand, newly discovered evidence or authority could lead to the opposite outcome from the one we predict here. And completely redundant presentations remain unnecessary in light of Rule 65(a)(2)'s stipulation that, "Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial."

We trust that Plaintiffs' interest in presenting an effective case will guide them in deciding whether to return to the theories addressed in this order or to rest entirely on their as-yet untested *Gingles* claim. For all these reasons, we deny Plaintiffs' motion to consolidate this action and to issue a final judgment.

V. CONCLUSION

Plaintiffs' motion for a preliminary injunction is DENIED for failure to show a likelihood of success on the merits and failure to show that the balance of equities and the public interest favor an injunction. Plaintiffs' Rule 65(a)(2) motion to consolidate the motion into one for final judgment is also DENIED.

SIGNED on this 4th day of May 2022.

David C. Guaderrama
United States District Judge
Western District of Texas

And on behalf of:

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeals
Fifth Circuit

-and-

Jeffrey V. Brown
United States District Judge
Southern District of Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs*, v. GREG ABBOTT, *in his official capacity as Governor of the State of Texas*, **et al.**, *Defendants.*	§	EP-21-CV-00259-DCG-JES-JVB [Lead Case]
DAMON JAMES WILSON, *for himself and on behalf of all others similarly situated*, *Plaintiffs*, v. STATE OF TEXAS, *et al.*, *Defendants.*	§	Case No. 1:21-CV-00943-RP-JES-JVB [Consolidated Case]
VOTO LATINO, *et al.*, *Plaintiffs*, v. JOHN SCOTT, *in his official capacity as Texas Secretary of State*, **et al.**, *Defendants.*	§	Case No. 1:21-CV-00965-RP-JES-JVB [Consolidated Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, *Texas House of Representatives*, *Plaintiff*, v. STATE OF TEXAS, *et al.*, *Defendants.*	§	Case No. 1:21-CV-00988-RP-JES-JVB [Consolidated Case]

ROY CHARLES BROOKS, *et al.*, ***Plaintiffs,*** **v.** **GREG ABBOTT,** ***in his official capacity as Governor of the State of Texas*****, et al.** ***Defendants.***	§ § § § § § § § §	**Case No. 1:21-CV-00991-LY-JES-JVB** **[Consolidated Case]**
TEXAS STATE CONFERENCE OF THE NAACP, ***Plaintiff,*** **v.** **GREG ABBOTT,** ***in his official capacity as Governor of the State of Texas*****, et al.,** ***Defendants.***	§ § § § § § § § §	**Case No. 1:21-CV-01006-RP-JES-JVB** **[Consolidated Case]**
FAIR MAPS TEXAS ACTION COMMITTEE, *et al.*, ***Plaintiffs,*** **v.** **GREG ABBOTT,** ***in his official capacity as Governor of the State of Texas*****, et al.,** ***Defendants.***	§ § § § § § § § §	**Case No. 1:21-CV-01038-RP-JES-JVB** **[Consolidated Case]**
UNITED STATES OF AMERICA, ***Plaintiff,*** **v.** **STATE OF TEXAS, *et al.*** ***Defendants.***	§ § § § § § § § §	**Case No. 3:21-CV-00299-DCG-JES-JVB** **[Consolidated Case]**

TREY MARTINEZ FISCHER,	§	
	§	
Plaintiff,	§	
v.	§	
	§	**Case No. 3:21-CV-00306-DCG-JES-JVB**
GREG ABBOTT, *in his official capacity as Governor of the State of Texas,* **et al.**	§	**[Consolidated Case]**
	§	
	§	
Defendants.	§	
	§	

SCHEDULING ORDER

In accordance with Federal Rule of Civil Procedure 16, the Three-Judge Court issues the following Scheduling Order:

Preliminary Injunction Schedule

1. All motions for a preliminary injunction shall be filed by **December 13, 2021.** Responses are due **December 20, 2021**. Replies are due **December 23, 2021.**

2. All parties asserting claims for relief shall **FILE** their designation of potential witnesses, designation of testifying experts, and list of proposed exhibits, and shall **SERVE** on all parties, but not file the material required by Federal Rule of Civil Procedure 26(a)(2)(B) by **January 7, 2022.** Parties resisting claims for relief shall **FILE** their designation of potential witnesses, designation of testifying experts, and list of proposed exhibits, and shall **SERVE** on all parties, but not file the materials required by Federal Rule of Civil Procedure 26(a)(2)(B) by **January 14, 2022.** All designations of rebuttal experts shall be **FILED** no later than **January 19, 2022.** Parties are not required to list exhibits they intend to use for impeachment purposes.

3. An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion specifically stating the basis for the objection and identifying the objectionable testimony, not later than **fourteen (14) days** of receipt of the written report of the expert's proposed testimony, or not later than **seven (7) days** of the expert's deposition, if a deposition is taken, whichever is later.

4. The parties shall complete all discovery related to motions for a preliminary injunction by **January 21, 2022.**

5. For the preliminary injunction hearing scheduled for January 25, 2022, on the *Brooks* Plaintiffs' "Motion for a Preliminary Injunction as to Senate District 10," there shall be a **deposition limit of five (5) depositions per side** during the discovery period between the date of this Order and January 21, 2022. Furthermore, there shall be **no written discovery** for purposes of the preliminary injunction, other than subpoenas to third

parties. If necessary due to significant scheduling impediments, parties may take depositions in lieu of live testimony for unavailable witnesses. Any such deposition in lieu of live testimony must be taken by agreement between the parties and reasonable advance notice must be given between January 19 and January 24, 2022.

Trial Schedule

1. The parties shall conduct their Rule 26(f) conference no later than **January 7, 2022.**

2. Initial disclosures required by Rule 26(a) shall be exchanged no later than **January 21, 2022.**

3. The parties shall file all motions to amend or supplement pleadings or to join additional parties by **April 14, 2022.**

4. All parties asserting claims for relief shall **FILE** their designation of testifying experts and shall **SERVE** on all parties, but not file the material required by Federal Rule of Civil Procedure 26(a)(2)(B) by **May 13, 2022.** Parties resisting claims for relief shall **FILE** their designation of testifying experts and shall **SERVE** on all parties, but not file the materials required by Federal Rule of Civil Procedure 26(a)(2)(B) by **June 10, 2022.** All designations of rebuttal experts shall be **FILED**, and both rebuttal reports and reports of rebuttal experts, along with associated materials required by Federal Rule of Civil Procedure 26(a)(2)(B), shall be **SERVED**, no later than **June 24, 2022.**

5. An objection to the reliability of an expert's proposed testimony under Federal Rule of Evidence 702 shall be made by motion specifically stating the basis for the objection and identifying the objectionable testimony not later than **July 29, 2022.** Any responses to such objections shall be filed by **August 24, 2022.**

6. The parties shall complete all discovery on or before **July 15, 2022.** Counsel may by agreement continue discovery beyond the deadline, but there will be no intervention by the Court except in extraordinary circumstances, and no trial setting will be vacated because of information obtained in post-deadline discovery.

7. All dispositive motions shall be filed no later than **July 25, 2022.** Responses to dispositive motions shall be filed no later than **August 15, 2022.** Replies in support of dispositive motions shall be filed no later than **August 29, 2022.**

8. The parties shall exchange and file the pretrial disclosures required by Federal Rule of Civil Procedure 26(a)(3) no later than **September 12, 2022.**

9. This case is set for **TRIAL** before the Three-Judge Court on **September 27, 2022 at 9:00 a.m.** in Courtroom Number 812, on the Eighth Floor of the United States Courthouse, 525 Magoffin Avenue, El Paso, Texas.[1] The Court is blocking out the weeks of

[1] At a later date, the Court may also announce a pretrial conference.

September 27 and October 3, 2022 for trial in the event they are needed. The attorneys and witnesses should do the same.

10. The parties may supplement the trial evidence with data, that is subject to judicial notice, from the November 8, 2022 election. Any party choosing to provide such supplemental evidence must also provide briefing on the legal significance of that evidence. All supplemental evidence and briefing is due by **November 22, 2022.**

So ORDERED and SIGNED on this 17th day of December 2021.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

And on behalf of:

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeal, Fifth Circuit

-and-

Jeffrey V. Brown
United States District Judge
Southern District of Texas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, ***Plaintiffs*,** **v.** **GREG ABBOTT,** *in his official capacity as Governor of the State of Texas*, ***et al.*,** ***Defendants*.**	§ § § § § § § § § § §	**3:21-CV-00259-DCG-JES-JVB** **[Lead Case]**
ALL CONSOLIDATED CASES	§ § § § § § § § § § §	**1:21-CV-00943-RP-JES-JVB** **1:21-CV-00965-RP-JES-JVB** **1:21-CV-00988-RP-JES-JVB** **1:21-CV-00991-LY-JES-JVB** **1:21-CV-01006-RP-JES-JVB** **1:21-CV-01038-RP-JES-JVB** **3:21-CV-00299-DCG-JES-JVB** **3:21-CV-00306-DCG-JES-JVB**

ORDER AMENDING SCHEDULING ORDER

IT IS ORDERED that the United States of America's unopposed "Motion to Amend the Scheduling Order" (ECF No. 105) is GRANTED.

IT IS FURTHER ORDERED that the Scheduling Order (ECF No. 96) is AMENDED as follows: This case is set for a TRIAL before the Three-Judge Court beginning on **Wednesday, September 28, 2022, at 9:00 a.m.** in Courtroom Number 812, on the Eighth Floor of the United States Courthouse, 525 Magoffin Avenue, El Paso, Texas. The Court is blocking out the remainder of that week, including Saturday, October 1, 2022, and is further blocking out the week of October 3, 2022, including Saturday, October 8, 2022, with the EXCEPTION of Wednesday, October 5, 2022, in the event any or all of those days are needed.

So ORDERED and SIGNED on this 27th day of December 2021.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

And on behalf of:

Jerry E. Smith **United States Circuit Judge** **U.S. Court of Appeals, Fifth Circuit**	*- and -*	**Jeffrey V. Brown** **United States District Judge** **Southern District of Texas**

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]
UNITED STATES OF AMERICA, *Plaintiff,* V. STATE OF TEXAS, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 3:21-cv-00299 [Consolidated Case]

LEGISLATORS' MOTION TO QUASH OR MODIFY DEPOSITION SUBPOENAS AND MOTION FOR PROTECTIVE ORDER

INTRODUCTION

The United States wants three sitting legislators to be its very first deponents. But legislators engaged "in the sphere of legitimate legislative activity" are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). It is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney*, 341 U.S. at 377. Redistricting cases are no exception. At the very least, the subpoenas to depose the legislators should be modified or a protective order entered that limits or stays the depositions. The United States' extraordinary discovery request also presents the opportunity for the Court to consider whether the subpoenas ought to be quashed altogether.

BACKGROUND

In December 2021, the U.S. Department of Justice sued to invalidate Texas's newly enacted state house and congressional redistricting plans. Its only claim is that the redistricting legislation violates Section 2 of the Voting Rights Act. *See* Compl. ¶¶161-67, *United States v. Texas*, No. 3:21-cv-299, ECF 1. The United States is pursuing extensive third-party discovery, issuing more than 25 third-party subpoenas to legislators, staff members, other officials, and the Texas Legislative Council for all redistricting-related documents. *See generally* Ex. A. to Mot. to Quash TLC Subpoena, *LULAC v. Abbott*, No. 3:21-cv-259, ECF 219-1.

The United States now wishes to depose three sitting legislators "on topics pertinent to the Voting Rights Act enforcement action [it] ha[s] brought against the 2021 Texas House Plan." *See* Ex. A at 7 (4/28/2022 email from D. Freeman); *see also* Ex. B (Rep. Guillen deposition subpoena); Ex. C (Rep. Landgraf deposition subpoena); Ex. D (Rep. Lujan deposition subpoena). The complaint alleges the house redistricting legislation "results in a denial or abridgment" of voting rights "on account of

race…." Compl. ¶166 (quoting 52 U.S.C. §10301(a)). The complaint specifically challenges the following house districts:

- **House District 118:** The United States alleges that the San Antonio-area district "eliminates Latino voters' opportunity to elect representatives of their choice," while averring that the Hispanic Citizen Voting Age Population (CVAP) of the district is between 56.4 and 57.5 percent. Compl. ¶¶104, 111. The United States complains that the district elected a Latino Republican in 2016 and 2021 special elections—Representative John Lujan—and he is "not the Latino candidate of choice." *Id.* ¶108. Representative Lujan is one of the three legislators whom the United States now wishes to depose. *See* Ex. D (subpoena).

- **House District 31:** The United States alleges the South Texas district "reduces Latino population share," while averring that the Hispanic CVAP of the district is between 64.5 and 66.6 percent. Compl. ¶¶117, 123. The complaint states that Latino voters have "reelected their preferred candidate by a comfortable margin" but complains that he has now "switched parties." *Id.* ¶¶117, 120. That incumbent is Representative Ryan Guillen, whom the United States now wishes to depose. *See* Ex. B (subpoena).

- **El Paso and West Texas House Districts:** The United States alleges that the 2021 redistricting legislation removed a Latino opportunity district from El Paso County (existing District 76), and overpopulated other El Paso-area districts (deviating from ideal by roughly 4.25 percent). Compl. ¶¶131, 139.

The complaint does not allege that invidious discriminatory intent motivated the house redistricting legislation; the complaint is based on effects alone. *Compare* Compl. ¶166 (house districts), *with id.* ¶¶164-65 (alleging impermissible legislative "purpose" and effect of congressional districts); Opp'n to Mot. to Quash TLC Subpoena, ECF 227 at 11-12 (distinguishing congressional districts claims).

Texas moved to dismiss the United States' complaint and later moved to stay this litigation pending the Supreme Court's decision in *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1086. *See* ECF 111; ECF 241. The motion to dismiss, arguing that the complaint fails to state a Section 2 claim, is pending. The motion to stay, explaining that the Supreme Court will be considering anew what Section 2 requires of States in redistricting (and what the Equal Protection Clause prohibits),[1] has been denied. ECF 246.

[1] *See Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of stay); Merits Br. of Secretary Merrill, *Merrill v. Milligan*, No. 21-1086, bit.ly/39nC1Iy.

The United States now intends to subpoena Texas House Representatives Ryan Guillen, Brooks Landgraf, and John Lujan for depositions later this month—the first depositions that the United States seeks in this case. *See* Ex. B (noticing 5/19/2022 deposition for Rep. Guillen); Ex. C (noticing 5/24/2022 deposition for Rep. Landgraf); Ex. D (noticing 5/25/2022 deposition for Rep. Lujan). The legislators are not named defendants in any complaint, nor have they intervened. Their only connection to the litigation is as house members; two were in office when the State enacted the house redistricting legislation, while the third (Rep. Lujan) was not sworn into office until after the bill passed. The United States has already subpoenaed all redistricting-related documents from each of these representatives and two dozen other third parties. In response, subpoena recipients have produced non-privileged documents and invoked applicable privileges for others.

Counsel have met and conferred. The United States asserted that depositions could "encompass numerous matters over which"—according to counsel—"any common law state legislative privilege applicable in federal courts does not apply." Ex. A at 7 (4/28/2022 email from D. Freeman). Counsel later elaborated that it was entitled to depose the legislators about the *Gingles* standard,[2] including discussion of "population patterns, political behavior, the history of discrimination, socioeconomic disparities, campaign tactics, and other matters." *See* Ex. A at 1 (5/3/2022 email from D. Freeman). The legislators' counsel explained that there were alternative, less intrusive means for the United States to obtain whatever non-privileged, relevant material it believes it could obtain from deposing legislators. Ex. A at 8 (4/27/2022 email from P. Sweeten). In response, counsel for the United States said it was not open to alternatives at this time. *See* Ex. A at 2 (5/2/2022 email from W. Thompson).

[2] *See Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986) (discussing factors from 1982 Senate Report that "typically may be relevant to a §2 claim," though "neither comprehensive nor exclusive," including "history of voting-related discrimination," "racially polarized" voting, "exclusion of members of the minority group from candidate slating processes," or "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process," among others).

ARGUMENT

Legislative privilege and immunity safeguard the legislative process. They are safeguards older than the country itself. *See United States v. Johnson*, 383 U.S. 169, 178-82 (1966) (discussing history of English analog and importance of legislator independence). At the founding, legislative privilege and immunity were "deemed so essential" that these safeguards were "written into the Articles of Confederation and later into the Constitution." *Tenney*, 341 U.S. at 372. Still today, they protect legislators from inquiries about what motivated or informed their legislative acts, based on the elementary principle that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Id.* at 377; *see, e.g.*, *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997) ("An inquiry into a legislator's motives for his actions, regardless of whether those reasons are proper or improper, is not an appropriate consideration for the court."); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018) (rejecting redistricting "Plaintiffs['] call for a categorical exception whenever a constitutional claim directly implicates the government's intent," which "would render the privilege 'of little value'" (quoting *Tenney*, 341 U.S. at 377)); *In re Hubbard*, 803 F.3d 1298, 1307-08, 1315 (11th Cir. 2015) (quashing subpoenas for legislators' documents); *Reeder v. Madigan*, 780 F.3d 799, 804 (7th Cir. 2015) (raising concerns that it would be "nearly impossible for a legislature to function" without privilege).

These protections are already well-known to this Court. Consistent with centuries of precedent, at the preliminary injunction stage, this Court already ruled that a legislator could testify about that "within the public record," but anything beyond the public record would require a waiver of legislative privilege. PI Tr. 152:1-5 (Vol. 5) ("Senator Huffman will be allowed to testify to everything within the public record; and if she goes outside the public record, she will waive her privilege."); *accord Tenney*, 341 U.S. at 373-77; *Dombrowski*, 387 U.S. at 85; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-74 (2019) (refusing to permit extra-record discovery, including deposition, of Commerce Secretary after staying order compelling deposition, *In re Dep't of Commerce*, 139 S. Ct. 16 (2018)); *In re*

Stone, 986 F.2d 898, 904 (5th Cir. 1993) (explaining that officials "could never do their jobs" if subject to such discovery because they would be less willing to explore all options before them, lest they "be subpoenaed for every case involving their agency"). The Court prohibited plaintiffs from questioning the testifying senator about her mental impressions or opinions regarding legislation, or what otherwise motivated or informed her or others during the legislative process. *See, e.g.*, PI Tr. 152:2-7 (Vol. 6); PI Tr. 25:6-10 (Vol. 7); PI Tr. 29:6-20 (Vol. 7).

Applying those protections again here, movants request that this Court quash or modify the subpoenas to depose sitting legislators. And should any depositions proceed, movants request that this Court enter a protective order prohibiting the United States from deposing legislators about privileged matters, including matters beyond the public record. Relatedly, movants request an administrative stay to postpone the depositions until this Court resolves this motion.

I. At the very least, an order modifying the subpoenas or a protective order is warranted.

There is good reason to quash the subpoenas altogether, *infra* Part II. The United States has not been able to articulate any relevant, non-privileged information that it expects to obtain from the legislators' depositions that could warrant such intrusive and comity-frustrating discovery. Whatever "numerous matters" the United States envisions it could explore by deposing legislators, those matters are either privileged or discoverable through less intrusive means. At the very least, and in light of the obvious legislative immunity and privilege concerns raised by such depositions, the legislators request that the subpoenas be modified or a protective order issued as follows.

A. The legislators request that the Court require the United States to first exhaust less intrusive means to discover whatever it is that the United States hopes to discover regarding the house redistricting legislation before resorting to "extraordinary" depositions of legislators. *Vill. of Arlington Heights v. MHDC*, 429 U.S. 252, 268 & n.18 (1977). An extensive public record regarding the house

redistricting legislation and the resulting boundaries are readily available to all parties.[3] At this stage of the proceedings, it is implausible that it is necessary to depose Representatives Guillen, Landgraf, and Lujan (and presumably others to come) to answer questions to confirm that the public record says what the public record says.

Exhausting alternative means of discovery is especially warranted in light of counsel's stated purpose for the legislators' depositions. Counsel intends to depose the legislators regarding the house redistricting legislation. *See* Ex. A at 7 (4/28/2022 email from D. Freeman). The United States' allegations regarding that legislation are focused on effects (or "results" alone); the United States does not allege that the legislation was imbued with improper purpose. *See* Compl. ¶166; Ex. A at 4 (5/2/2022 email from D. Freeman) (describing "results claims"); ECF 227 at 10-11 (distinguishing intent-based claims for congressional districts). As pled, the legality of those districts will be largely left to expert opinion about their so-called "effects," to the extent relevant under the Voting Rights Act. There is no utility at this stage of the proceedings to depose sitting legislators about such results-based claims. *See, e.g.*, *Am. Trucking Ass'n, Inc. v. Alvitti*, 14 F.4th 76, 88-90 (1st Cir. 2021) (quashing subpoenas to depose state lawmakers because Dormant Commerce Clause claim was predominantly focused on effect of state law, not purpose). The United States has not and likely cannot articulate why already-

[3] *See, e.g.*, TX HB1, Texas Legislature Online, capitol.texas.gov/BillLookup/History.aspx?LegSess=873&Bill=HB1 (containing bill history for passage of Texas house districts, including committee report and relevant house journal excerpts); "Texas Redistricting," redistricting.capitol.texas.gov/ (landing page for redistricting materials, including redistricting process and recordings of and notices for all redistricting hearings); "DistrictViewer," dvr.capitol.texas.gov/ (containing more than 100 plans for house and congressional districts, publicly introduced or submitted by legislators or members of the public throughout the legislative process); "Capitol Data Portal," data.capitol.texas.gov/ (containing redistricting datasets, including datasets for enacted plans and proposed alternatives); Texas House Journal, journals.house.texas.gov/hjrnl/home.htm (record of events occurring in the Texas House); Texas House Redistricting Committee, house.texas.gov/committees/committee/?committee=C080 (committee webpage containing various public materials).

issued document subpoenas, an extensive public record, and forthcoming expert discovery are insufficient for such claims.

Deposing a legislator would be "extraordinary" in any case and ordinarily barred by legislative privilege. *Arlington Heights*, 429 U.S. at 268 & n.18. It is all the more extraordinary for the United States to demand the depositions of three legislators as its opening foray here. To the extent plaintiffs deem it necessary to further discuss that which is in the public record or to seek other non-privileged information, the United States can do so in ways far less intrusive than deposing a legislator. *See, e.g.*, *In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001) (relying on *Arlington Heights* for admonition that "all other available evidentiary sources must first be exhausted before extraordinary circumstances will be considered"); *Austin Lifecare, Inc. v. City of Austin*, 2012 WL 12850268 (W.D. Tex. Mar. 20, 2012) (quashing deposition notices based, in part, on finding that "Plaintiffs have alternative methods for discovering the information they seek," including the public record); *Harding v. Dallas*, 2016 WL 7426127, at *8-9 (N.D. Tex. Dec. 23, 2016) (finding no extraordinary circumstances warranted deposing county redistricting commissioners); *see also In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995) ("exceptional circumstances must exist before the involuntary depositions of high agency officials" (quotation marks omitted)). At this stage, the burdens of deposing legislators well outweigh any conceivable benefit to be gained by questions regarding the already-public record, the *Gingles* standard, or whatever other unenumerated non-privileged matters the United States intends to cover in a deposition.

B. The legislators further request that any legislative depositions be stayed until the Court decides Defendants' pending motion to dismiss the United States' complaint, which could affect the permissible scope of any depositions. *Cf. Hubbard*, 803 F.3d at 1304 (holding motions to quash in abeyance until motion to dismiss decided); *see also Bickford v. Boerne Indep. Sch. Dist.*, 2016 WL 1430063, at *1 (W.D. Tex. Apr. 8, 2016) (staying discovery pending the disposition of the motion to dismiss under the trial court's "broad discretion and inherent power to stay discovery until preliminary

question that may dispose of the case are determined"). The motion argues that that the United States has failed to state any Voting Rights Act claim regarding the house redistricting legislation, ECF 111 at 18-24—the intended topic of discussion at depositions, Ex. A at 4, 7 (4/28/2022 and 5/2/2022 emails from D. Freeman). If granted in whole or in part, the United States' asserted basis for deposing the legislators disappears in whole or in part.

C. Relatedly, especially in light of counsel's assertion that depositions are warranted to ask legislators about the Supreme Court's complex *Gingles* standard, Ex. A at 1-2, the legislators request that the Court stay or limit any depositions of legislators pending the Supreme Court's decisions in *Merrill v. Milligan*, No. 21-1086, and *Merrill v. Caster*, No. 21-1087. Even though these cases will not be stayed altogether pending *Merrill*, the more specific question remains: should depositions of legislators in particular be permitted pending *Merrill*? It would be unusual to depose a legislator about *Gingles* in the ordinary case given that expert witnesses are typically deployed for such a task.[4] It is all the more unusual to depose a legislator about *Gingles* now given that the Supreme Court is considering when and how *Gingles* applies to cases involving single-member districts in a way that is consistent with the statutorily required showing that districts are "not equally open" based on the "totality of circumstances." 52 U.S.C. §10301(b). Further confirmed by Alabama's merits brief filed last week, the pendency of *Merrill* sows further doubt about what possible relevance, if any, legislators' depositions about the house districts could serve here. *See generally* Br. of Secretary Merrill at 42-52, 71-80, *Merrill v. Milligan*, No. 21-1086, bit.ly/39nC1Iy (interpreting statutory "totality of circumstances" terminology, arguing for clarification of *Gingles*, proposing race-neutrality as the §2 benchmark, and arguing in the alternative that §2 does not apply to single-member districts).

[4] *See, e.g.*, *Rose v. Raffensperger*, 2022 WL 205674, at *11 (N.D. Ga. Jan. 24, 2022) (discussing use of *Gingles* expert testimony in challenge to statewide election procedure).

In short, there is a substantial risk that deposing legislators now will prove itself to have been completely unnecessary after *Merrill*. Alternatively, there is substantial risk that deposing legislators now will not be the last of it, should the Supreme Court clarify §2 in such a way that the United States demands to depose legislators yet again in light of *Merrill*. Either way, such depositions would be premature and unduly burdensome at this time. *See, e.g.*, *Whitford v. Vos*, 2019 WL 4571109 (7th Cir. July 11, 2019) (staying deposition of Speaker of Wisconsin Assembly pending *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), and then vacating district court's order compelling deposition in light of *Rucho*); *see also, e.g.*, Order, *Thomas v. Merrill*, 2:21-cv-1531 (N.D. Ala. Mar. 21, 2022), ECF 61 (staying VRA challenge to state-level districts pending *Merrill*).

D. In the alternative, if any depositions are to proceed, the legislators request a protective order limiting depositions to inquiring about non-privileged information within the public record. That limitation abides by this Court's prior ruling. *See* PI Tr. 152:1-5 (Vol. 5). As discussed throughout this motion, that ruling is consistent with binding precedent; civil discovery cannot probe the minds of legislators, their staff, or others acting in a legislative function about their legislative acts. *See infra* Part II.B. To the extent the "numerous matters" that the United States would like to discuss would in fact implicate privileged information, *see* Ex. A at 7 (4/28/2022 email from D. Freeman), the legislators request a protective order prohibiting such inquiries. And should the United States pursue such an inquiry anyway, the legislators request that the protective order confirm that deponents may invoke privilege and choose not to answer, after which the United States can decide whether to raise its disagreement about the scope of the privilege in a motion to compel. *Accord Perez v. Perry*, 2014 WL 106927, *3 (W.D. Tex. Jan. 8, 2014).

Relatedly, to the extent those "numerous matters" would include questioning Representative Guillen about the United States' allegation that he "switched parties," Compl. ¶117,[5] movants request a protective order excluding any such questions. In addition to implicating legislative and First Amendment privileges,[6] such an inquiry is irrelevant to the United States' §2 claim. Section 2 is about voting rights denied or abridged "on account of race," not politics. 52 U.S.C. §10301(a). Claims fail when the "animating issue … is partisan, not racial." *LULAC v. Abbott*, 369 F. Supp. 3d 768, 786 (W.D. Tex. 2019) (relying upon *Whitcomb v. Chavis*, 403 U.S. 124 (1971), and *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993)), *aff'd*, 951 F.3d 311 (5th Cir. 2020). "Section 2 is a balm for racial minorities, not political ones—even though the two often coincide." *Clements*, 999 F.2d at 853-54. It "does not guarantee that nominees of the Democratic Party will be elected, even if [minority] voters are likely to favor that party's candidates. Rather, §2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats." *Id.*

II. Legislators cannot be called to testify about legislative acts absent extraordinary circumstances.

In light of Supreme Court precedent and recent decisions by other courts applying that precedent, there is good reason to quash the subpoenas altogether.

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[5] Representative Guillen currently represents House District 31, where Latino voters have repeatedly elected Representative Guillen as their candidate of choice, by the United States' own admission. Compl. ¶117. The United States' qualm is that Representative Guillen has "switched parties." *Id.*

[6] Such questions chill protected First Amendment conduct. For example, in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), the Ninth Circuit issued a writ of mandamus to prohibit subpoenas for defendant-intervenors' internal campaign communications. The Ninth Circuit explained that because such discovery could chill the First Amendment right to associate, the information must meet "a more demanding standard"—it must be "highly relevant" to the claims, "carefully tailored to avoid unnecessary interference with protected activities," and "otherwise unavailable." *Id.* at 1161; *accord In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 481 (10th Cir. 2011) (prohibiting discovery of lobbying communications). Here, political association should have no relevance; and even if it could be conceivably relevant, deposing a third-party legislator is a most extraordinary first step in seeking such discovery.

A. Subpoenas compelling sitting legislators' testimony should be quashed based on legislative immunity and privilege.

1. State legislators are absolutely immune from civil suit. *Tenney*, 341 U.S. at 376-77; *see Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) ("It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities."); *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731-34 (1980) (same). That immunity protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski*, 387 U.S. at 85. It "provides legislators with the breathing room necessary to make these choices in the public's interest" and "reinforc[ing] representative democracy" by "allow[ing] them to focus on their public duties by removing the costs and distractions attending lawsuits" and "shield[ing] them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). Thus, a state legislator acting within the sphere of legitimate legislative activity may not be required to testify, "whether or not legislators themselves have been sued." *Hubbard*, 803 F.3d at 1308; *see Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 ("Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes…. Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued.").

Accordingly, courts have deemed state legislators absolutely immune from testifying about their legislative acts, including in depositions. And redistricting disputes are no exception. *See, e.g.*, *Lee*, 908 F.3d at 1186-87 (barring depositions of legislative actors in redistricting-related Equal Protection Clause case); *In re Perry*, 60 S.W.3d at 860-62 (canvassing state and federal law, explaining that "courts have affirmed that the doctrine generally shields legislative actors not only from liability, but also from being called to testify about their legislative activities," and concluding that it was an abuse of discretion to deny motion to quash depositions of redistricting board members); *Marylanders for Fair*

Representation v. Schaefer, 144 F.R.D. 292, 299 (D. Md. 1992) (finding "[w]ithout question" that Maryland House and Senate were "acting 'within the sphere of legitimate legislative activity' in failing to enact an alternative redistricting plan" such that legislators "deserve all of the protection the *Tenney* court extended to them" and "entirely barr[ing]" "*any* inquiry"); *see also, e.g.*, *Bagley v. Blagojevich*, 646 F.3d 378, 396-97 (7th Cir. 2011) (finding governor acted in legislative capacity and barring deposition); *M Sec. & Invs., Inc. v. Miami-Dade Cnty.*, 2001 WL 1685515, at *1-2 (S.D. Fla. Aug. 14, 2001) (quashing deposition subpoena of local legislator in Equal Protection Clause case). Here too, there is no basis for demanding that third-party legislators bear that burden of defending themselves in such depositions, *see Dombrowski*, 387 U.S. at 85, especially when plaintiffs haven't even attempted to get relevant, non-privileged discovery through other means, *supra*.

2. For the same reasons, legislative privilege, springing from legislative immunity, also counsels in favor of quashing the subpoenas. "[J]udicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and will be "frequently barred by privilege" except for "extraordinary circumstances." *Arlington Heights*, 429 U.S. at 268 & n.18. That privilege applies with "full force" even in cases where legislators' motives are at the "factual heart" of plaintiffs' claims. *Hubbard*, 803 F.3d at 1310-11.

Applied here, even if the Court finds that third-party legislators are not altogether immune from the deposition subpoenas, the subpoenas should be quashed as overly burdensome and for targeting privileged or protected information.[7] Any conceivable benefit of deposing the legislators cannot

[7] Counsel for the United States has stated that he does "not intend to delve into matters covered by *bona fide* assertions of legislative privilege," Ex. A at 4 (5/2/2022 email from D. Freeman), and that there are "numerous matters over which any common law state legislative privilege applicable in federal courts does not apply," *id.* at 7 (4/28/2022 email from D. Freeman). That beggars belief. The United States has chosen three legislators to be its first deponents; its complaint challenges legislation; and it intends to ask the legislators about that legislation. In all events, the United States' most recently filed brief on related privilege issues reveals that its view on "*bona fide* assertions of legislative privilege" is out-of-step with binding Supreme Court precedent, *infra* Part II.B.

outweigh the burdens of deposing them *See* Fed. R. Civ. P. 45(d)(1); Fed. R. Civ. P. 26(c)(1) (court may "issue an order to protect … [a] person from annoyance, embarrassment, oppression, or undue burden or expense"); *see, e.g.*, *W. Life Ins. v. W. Nat'l Life Ins.*, 2010 WL 5174366, at *2-4 (W.D. Tex. Dec. 13, 2010); *RE/MAX Int'l, Inc. v. Century 21 Real Estate Corp.*, 846 F. Supp. 910, 912 (D. Colo. 1994). Any relevant testimony will be privileged or available from other sources, making the deposition an unduly burdensome exercise poised to harass state legislators.

B. There is no bespoke test for legislative privilege in voting rights cases.

The legislators anticipate that the United States will argue that legislative privilege is so qualified that Voting Rights Act plaintiffs are free to depose sitting state legislators with few, if any, limitations. While federal courts have stated that legislative privilege is qualified in some circumstances, *Jefferson Cmty. Health Care Ctrs Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017), there is no basis for whittling the privilege down to nonexistent in redistricting cases.

The origins for qualifying legislative privilege are the Supreme Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), and other criminal cases. *See, e.g.*, *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 94 (S.D.N.Y. 2003) (relying on application of privilege in criminal case of *Trammel v. United States*, 445 U.S. 40, 51 (1980)). On its own terms, *Gillock* qualified legislative immunity and privilege for *federal criminal prosecutions*, not civil cases such as this one. 445 U.S. at 474; *accord Gravel v. United States*, 408 U.S. 606, 627 (1972) ("[W]e cannot carry a judicially fashioned privilege so far as to immunize *criminal conduct* proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a *federal criminal statute*." (emphasis added)); *Trammel*, 445 U.S. at 51 (qualifying spousal privilege in federal criminal prosecution); *In re Grand Jury*, 821 F.2d 946, 948 (3d Cir. 1987) (federal criminal grand jury investigation). *Gillock* itself distinguished criminal cases from civil cases: "in protecting the independence of state legislators, *Tenney* and subsequent cases on official immunity have drawn the line *at civil actions*." 445 U.S. at 373 (emphasis added). Whatever

important federal interests might justify a more qualified privilege in the enforcement of "criminal statutes," *id.*, they are absent here in this civil action.

But already in this litigation, the United States has transported the Supreme Court's qualification of legislative privilege in criminal matters to this civil matter—endorsing a multi-factor balancing test first deployed by a New York district court in a redistricting dispute. *See* ECF 227at 10-11 (citing *Rodriguez*, 280 F. Supp. 2d 89). To decide whether privilege applies, that test balances "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable" in deciding whether privilege applies. *Id.*[8] It bears little resemblance to binding Supreme Court precedent regarding the scope of legislative immunity and privilege in civil cases, and applying it here to *abrogate* legislative privilege would be serious error.

1. As an initial matter, such a balancing test was not initially conceived as basis for *deposing* a sitting legislator who is a third-party to litigation. In *Rodriguez* itself, the court emphasized that plaintiffs were "*not* seeking any depositions of legislators or their staffs." 280 F. Supp. 2d at 96 (emphasis added). *Rodriguez* and other cases initially applying it involved document discovery. And even then, the privilege largely held. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *10-11 (N.D. Ill. Oct. 12, 2011) (refusing to compel privileged documents "concerning the motives, objectives, plans, reports and/or procedures used by lawmakers" or "the identities of persons who participated in decisions regarding the [challenged] Map"); *Rodriguez*, 280 F. Supp. 2d at 103 (denying

[8] *Jefferson Community Health Care Centers*, 849 F.3d at 624, *Veasey v. Perry*, 2014 WL 1340077, at *1 n.3 (S.D. Tex. Apr. 3, 2014), and *Perez*, 2014 WL 106927 at *2, cited *Rodriguez* favorably. *Jefferson Community* cited *Rodriguez* in dictum that privileges are not absolute. *Veasey* did not involve redistricting. Discussed *infra*, *Perez* did involve redistricting and applied *Rodriguez* to conclude that the case did not justify "discarding the privilege"—meaning a legislator's testimony could not be compelled. *Perez*, No. 5:11-cv-360 (W.D. Tex. July 11, 2014), ECF 1138 at 1-2.

motion to compel privileged documents "to the extent that the plaintiffs seek information concerning the actual deliberations of the Legislature—or individual legislators—which took place outside [the citizen-legislator redistricting committee]"); *Hall v. Louisiana*, 2014 WL 1652791, at *12 (M.D. La. Apr. 23, 2014) (applying *Rodriguez* but quashing legislator deposition subpoenas). It would be especially inappropriate to apply *Rodriguez* in this case to compel the *depositions* of legislators, when plaintiffs have already sought substantial document discovery from such legislators and when the United States has not otherwise explored alternative, less intrusive, less extraordinary discovery.

2. Lessons learned since last decennial's *Perez v. Perry* litigation are also instructive. The court cited *Rodriguez* in a dispute over legislative depositions. 2014 WL 106927 at *2.[9] The court's protocol was to permit deponents to "choose not to answer specific questions, citing the privilege," after which plaintiffs could choose to file a motion to compel. *Id.* at *3. Plaintiffs later filed a motion to compel one legislator's testimony, and the court applied *Rodriguez* as a *shield* the privileged testimony, not as a *sword* to require it. *See Perez*, No. 5:11-cv-360 (W.D. Tex.), ECF 1138 at 1-2.

Since *Perez*, courts have continued to limit legislative discovery, including in redistricting cases. In *Lee*, relying on the Supreme Court's decision in *Tenney*, the Ninth Circuit affirmed an order barring depositions of public officials acting in a legislative capacity, even though plaintiffs' claims were intent-based claims that race predominated in redistricting. 908 F.3d at 1187. Similarly, the Eleventh Circuit in *Hubbard* ordered a district court to quash subpoenas for legislators' documents relating to the passage of legislation, even though plaintiffs' claims were intent-based claims that the legislation was retaliatory. 803 F.3d at 1302-03, 1315. The Eleventh Circuit stated that privilege applied with "full

[9] Initially in *Perez*, the privilege dispute involved subpoenas for four legislative staff members. *Perez*, No. 5:11-cv-360 (W.D. Tex.), ECF 62 at 2 n.1. Defendants requested a protective order but did not ask to quash the depositions. *Id.* at 7. Opposing any protective order, plaintiffs endorsed *Rodriguez*'s balancing test, *e.g. id.*, ECF 87 at 6-7, and Defendants' later motion for reconsideration did not challenge the application of *Rodriguez*, *id.*, ECF 930.

force against requests for information about the motives for legislative votes and legislative enactments," even if such information was at the heart of plaintiffs' claim. *Id.* at 1310-11. The court refused to require "the lawmakers to peruse the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied to those documents" and ordered that the motion to quash be granted on remand. *Id.* at 1311, 1315; *see also, e.g.*, *Am. Trucking*, 14 F.4th at 89-90 (quashing legislator depositions). More recently in the census litigation, the Supreme Court refused to permit discovery beyond the administrative record, akin to the public record here, including refusing plaintiffs' request to depose the Secretary of Commerce. *See Dep't of Commerce*, 139 S. Ct. at 2573-74; *In re Dep't of Commerce*, 139 S. Ct. at 16-17. Finally, even though intent was at the heart of plaintiffs' claims in the *Gill v. Whitford* partisan gerrymandering litigation, the Seventh Circuit stayed and ultimately vacated an order compelling the deposition of the Speaker of the Wisconsin Assembly. *See Whitford*, 2019 WL 4571109 at *1.

The court in *Perez* ultimately concluded that redistricting claims were not a basis for ignoring legislative privilege. Other courts have since refused to permit plaintiffs to depose legislators. Here too, there is no basis for requiring legislators' depositions at this time.

3. Most fundamentally, any bespoke test curtailing legislative privilege in Voting Rights Act cases is at odds with binding precedent, *supra*. And to what end? The United States does not allege that the house redistricting legislation was imbued with any improper purpose. And even if it had, the Supreme Court has repeatedly held that, as a "principle of constitutional law," courts cannot "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). That is so even in cases turning on legislative purpose. *Id.* at 382-83 (rejecting that three Congressmen's statements in the legislative history established illicit congressional purpose). It is a "fundamental principle" that courts may not "void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of

Congressmen said about it." *Id.* at 383-84; *see Arizona v. California*, 283 U.S. 423, 455 (1931) ("Into the motives which induced members of Congress to enact the [statute], this court may not inquire."); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."); *Am. Trucking*, 14 F.4th at 90 (quashing depositions and describing "inherent challenges of using [deposition] evidence of individual lawmakers' motives to establish that the legislature as a whole enacted [law] with any particular purpose"). Why? Because the Supreme Court has insisted that courts presume legislatures act with good intent and afford them a presumption of legislative good faith including in redistricting disputes. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995). The same rules apply in Voting Rights Act cases. *Id.*; *see Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018) (presumption "not changed by a finding of past discrimination"); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (legislators are not agents of one another; rather, each has "a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools").

CONCLUSION

For the foregoing reasons, the legislators respectfully request that the Court stay the depositions until it resolves this motion. The legislators further request an order quashing or modifying the subpoenas. In the alternative, movants respectfully request a protective order prohibiting the depositions from probing the minds of legislators on privileged matters, including matters beyond the public record.

Date: May 4, 2022

Respectfully submitted,

/s/ J. Michael Connolly

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CERTIFICATE OF CONFERENCE

I certify that counsel conferred with counsel for the United States regarding the subject of this motion. Counsel for the United States indicated it opposed any motion to quash or modify the subpoena, which confirms opposition to the relief sought here.

/s/ J. Michael Connolly
J. MICHAEL CONNOLLY

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 4, 2022, and that all counsel of record were served by CM/ECF.

/s/ J. Michael Connolly
J. MICHAEL CONNOLLY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]

LEGISLATORS' MOTION TO QUASH OR MODIFY PRIVATE PLAINTIFFS' DEPOSITION SUBPOENAS AND MOTION FOR PROTECTIVE ORDER

INTRODUCTION

Private plaintiffs in these consolidated cases join the United States in the pursuit to depose three sitting legislators before deposing anyone else. The legislators already moved to quash or modify subpoenas served by the United States, or in the alternative for a protective order. ECF 259 ("Mot."); ECF 277 ("Reply"). For the same reasons, the legislators request the same relief for subpoenas served by the private plaintiffs, which seek to depose the same legislators on the same dates. *See* Ex. A (Rep. Guillen subpoena); Ex. B (Rep. Landgraf subpoena); Ex. C (Rep. Lujan subpoena). The legislators' privilege arguments are no more "remarkable"[1] than binding Supreme Court precedent on the subject or decisions by courts of appeals abiding by that precedent. Legislative privilege and immunity safeguard the legislative process—safeguards "so essential" that they were written into state and federal constitutions. *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951). Legislators engaged "in the sphere of legitimate legislative activity" are protected "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). For that reason, even in cases involving allegations of intentional discrimination, other courts of appeals have "concluded that the plaintiffs are generally barred from deposing legislators, even in 'extraordinary circumstances.'" *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018); *accord Am. Trucking Ass'n, Inc. v. Alvitti*, 14 F.4th 76, 90-91 (1st Cir. 2021); *In re Hubbard*, 803 F.3d 1298, 1315 (11th Cir. 2015).

BACKGROUND

Private plaintiffs brought the following suits, since consolidated, to enjoin redistricting legislation for congressional, senate, house, and/or State Board of Education (SBOE) districts:

- **The LULAC plaintiffs** (3:21-cv-259) challenge congressional, senate, house, and SBOE redistricting legislation. LULAC Second-Am. Compl., ECF 237. Among other allegations, they allege that legislation violates §2 of the VRA and the Fourteenth Amendment for failing to maximize majority-Latino house and congressional districts in certain locales and for

[1] Pls. Opp'n to Legislator's Mot. to Quash United States' Subpoenas 2, ECF 272 ("Pls. Opp'n").

weakening Latino voting strength in HD 31, 37, 90, and 118. *Id.* ¶¶7, 134-40, 142-45, 163-68. Their complaint also includes a malapportionment claim for house districts in West Texas, while averring that the aggregate population deviation of the house plan is less than 10%. *Id.* ¶¶148-50, 182-85; *but see Brown v. Thomson*, 462 U.S, 835, 842 (1983) ("apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations"); *White v. Regester*, 412 U.S. 755, 764 (1973) ("we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9% when compared to the ideal district"). Defendants have until May 18, 2022, to answer or move to dismiss.

- **The MALC plaintiffs** (1:21-cv-988) challenge congressional, house, and SBOE redistricting legislation. MALC First-Am. Compl., ECF 247. With respect to congressional districts, MALC challenges CD 15 and 23, even though both districts exceed 50% HCVAP. *Id.* ¶¶156, 160. MALC also alleges that certain Dallas/Tarrant and Harris County districts should be redrawn to increase Latino voting strength. *Id.* ¶¶163-66. With respect to house districts, MALC challenges the failure to add opportunity districts in different locales and the configuration of El Paso house districts, mirroring the United States' allegations. *Id.* ¶¶89-97. MALC also challenges HD 31, 37, 80, 90, 118, and 145, all of which MALC avers maintain HCVAP exceeding 66%, 77%, 77%, 49%, 56%, and 55% respectively. *Id.* ¶¶101, 110, 117, 126, 131, 140; *see also id.* ¶120 (conceding that legislation "would *not* make HD 80 unwinnable by the Latino/Spanish language community candidate of choice" (emphasis added)). MALC further alleges that the number of majority-Latino congressional, house, and senate districts is disproportionate to the Latino citizen voting age population. *Id.* ¶¶167, 176-79; *but see* 52 U.S.C. §10301(b) ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). The complaint concludes that the congressional, house, and SBOE districts violate §2 and the Fourteenth and Fifteenth Amendments, *id.* ¶¶238-45, and that house districts are unconstitutionally malapportioned, *id.* ¶¶246-49. Defendants have until May 18, 2022, to answer or move to dismiss.

- **The Brooks plaintiffs** (1:21-cv-991) challenge changes to SD 10, as well as HD 54, 55, and 118, and congressional districts in Dallas/Fort Worth and Houston. Brooks First-Am. Compl., ECF 236. The complaint alleges that SD10, HD 54, HD55, and HD 118 violate §2 of the VRA and the Fourteenth and Fifteenth Amendments, *id.* ¶¶211-26, 236-52, and that the failure to create a congressional coalition district and another majority-Latino congressional district violates §2, *id.* ¶¶227-35. This Court denied plaintiffs' preliminary injunction motion regarding SD 10. ECF 176, 258. Defendants have until May 18, 2022, to answer or move to dismiss.

- **The Voto Latino plaintiffs** (1:21-cv-965) allege that congressional and house redistricting legislation violates §2. Voto Latino First-Am. Compl., ECF 235. The complaint does not include intentional discrimination claims. *Id.* ¶¶155-63. They challenge the resulting concentration of Latino voters in CD 15, 16, 20, 21, 23, 27, 28, 34, and 35 as either too high or too low. *Id.* ¶¶78-89. They fault the legislation for failing to create additional majority-minority or coalition districts in Dallas, Houston, and Tarrant County, *id.* ¶¶90-101, and for failing to disperse (and thereby maximize) Latino votes in Harris County, *id.* ¶¶102-06. Defendants have until May 18, 2022, to answer or move to dismiss.

- **The Texas State Conference of the NAACP** (1:21-cv-1006) has filed a complaint premised on the theory that redistricting legislation can violate §2 for failure to maximize voting strength

for "people of color" generally, or "POC CVAP." NAACP Compl. ¶¶27-28, No. 1:21-cv-1006, ECF 1. The complaint alleges in conclusory terms that "[t]he vast majority of voters of color in Texas vote cohesively" and that §2 prohibited "add[ing] more white voters" to districts. *Id.* ¶¶96, 101. Reciting the number of representatives by race, the complaint alleges that myriad senate, house, and congressional districts with majority "POC CVAP" are disproportionate to the overall population. *Id.* ¶¶106-204; *but see* 52 U.S.C. §10301(b) (disclaiming proportionality as basis for claim). The complaint concludes that senate, house, and congressional redistricting legislation violates §2 and the Fourteenth and Fifteenth Amendments, including for failure to create "minority coalition districts." *Id.* ¶¶205-30. Defendants' motion to dismiss, including for lack of standing and for failure to state a claim, is pending. *See* ECF 82, 107, 117.

- **The Fair Maps Texas Action Committee plaintiffs** (1:21-cv-1038) allege that the congressional, senate, and house redistricting legislation "discriminate[s] against voters of color by failing to create additional districts that afford opportunities for voters of color to elect their candidates of choice, whether by single racial or ethnic group or by voting in coalition…." Fair Maps Compl. ¶83, No. 1:21-cv-1038, ECF 1. The complaint describes "imbalance in representation" and states that "Black, Latino, and AAPI voters continue to be proportionality [*sic*] underrepresented in the Texas legislature and congressional delegation." *Id.* ¶¶85, 110, 112, 147; *but see* 52 U.S.C. §10301(b) ("nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"). The complaint concludes that congressional, senate, and house redistricting legislation violates §2, including for failure to maximize majority-minority districts and for failure to create coalition districts, as well as the Fourteenth and Fifteenth Amendments. *Id.* ¶¶151-61. Defendants' motion to dismiss the complaint, including for lack of standing and failure to state a claim, is pending. *See* ECF 181, 191, 193.

- **Plaintiff Fischer** (3:21-cv-306) challenges only CD 35 as a violation of §2 and the Equal Protection Clause. *See* Fischer First-Am. Compl. ¶¶92, 139, ECF 217 ("Plaintiff is *only* challenging the enacted configuration of CD 35 in SB 6."). Defendants' motion to dismiss Rep. Fischer's amended complaint is pending. ECF 233, 260, 267.

- **The Escobar plaintiffs** (3:22-cv-22) challenges neighboring CD 16 and 23 as violating §2 and the Equal Protection Clause. Escobar Compl., No. 3:22-cv-22, ECF 1. After Defendants moved to dismiss the complaint, plaintiffs filed a motion to amend. ECF 223, 229. The motion has been granted but the amended complaint has not yet been re-docketed. Defendants have until May 18, 2022, to answer or move to dismiss.

- **Plaintiff-Intervenors** allege that CD9, 18, and 30 violate §2 and the Equal Protection Clause based in part on allegations of retrogression. Johnson First-Am. Compl., ECF 209. Defendants have moved to dismiss, including because the complaint does not allege that Black voters are unable to elect their candidate of choice in those congressional districts. ECF 225.

Until late last month, there was relatively little discovery of third-party legislators by the private plaintiffs. A few weeks ago, the LULAC plaintiffs issued subpoenas for legislative documents, and subpoena recipients will be producing non-privileged, responsive documents and invoking applicable

privileges for others. The NAACP has since issued similar subpoenas. Then last week—before the ink was dry on the document subpoenas and after the United States issued deposition subpoenas for Texas House Representatives Ryan Guillen, Brooks Landgraf, and John Lujan—the private plaintiffs issued their own deposition subpoenas for the same representatives. *See* Exs. A-C.

Counsel have met and conferred. Counsel for the legislators asked what basis there could be for deposing a sitting legislator now and whether plaintiffs would be open to alternatives. *See* Ex. D at 6-7 (5/9/22 email from J. DiSorbo). In response, Plaintiffs stated they believe depositions should proceed on May 24 and 25 even without a ruling from this Court, unless this Court issues an interim stay. *Id.* at 2 (5/12/22 email from T. Meehan). Plaintiffs further stated that they plan to ask legislators otherwise-privileged questions about what motivated them during the redistricting process, about the *Gingles* standard, and other topics that plaintiffs could not enumerate during the parties' meet and confer. *Id.* at 1-2 (5/12/22 email from T. Meehan; 5/13/22 email from D. Fox). Meanwhile, Plaintiffs filed a brief in support of the United States' opposition to the legislators' motion to quash the United States' deposition subpoenas. *See generally* Pls. Opp'n, ECF 272. In that brief, they distinguished their intent claims from the United States' effect claims, endorsed a non-binding multi-factor balancing test that has evaded appellate review, and suggested that an adverse inference would be appropriate if legislators invoke privilege. *Id.* at 4-5, 7-11.

ARGUMENT

The legislators incorporate by reference the arguments made in their pending motion (ECF 259) and reply brief (ECF 277) regarding the United States' deposition subpoenas. As an initial matter, the legislators request interim relief postponing the depositions to allow for adequate time to brief and decide the pending motions. *See* Reply 2-3. Plaintiffs' insistence that depositions proceed even without a ruling from this Court transgresses Rule 45's requirement that they take reasonable steps to avoid undue burden and cost and risks mooting the issues pending before this Court. *Id.*

On the merits, the legislators have not asked for a categorical ban on legislator depositions for cases of all types and in all circumstances, contrary to plaintiffs' arguments (Pls. Opp'n 3-4). The legislators have instead moved for orders quashing or modifying the subpoenas in light of the particular circumstances here. *See* Reply 1-2. Among other reasons, plaintiffs must pursue alternative means of discovery before attempting the "extraordinary" step of deposing sitting legislators. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *see, e.g., Austin Lifecare, Inc. v. City of Austin*, 2012 WL 12850268, at *2 (W.D. Tex. Mar. 20, 2012) (quashing deposition subpoenas based, in part, because "Plaintiffs have alternative methods for discovering the information they seek," including the public record); *see In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001) (relying on *Arlington Heights* for requirement that "all other available evidentiary sources must first be exhausted"). Plaintiffs' first move cannot be legislator depositions. It remains to be decided whether certain plaintiffs have standing or whether certain plaintiffs have even stated a claim; Defendants haven't even had an opportunity to move to dismiss recently amended pleadings, *supra*, let alone know what the rules will be for plaintiffs' redistricting claims after the Supreme Court decides *Merrill v. Milligan*, No. 21-1086. *See* Mot. 7-9. At this time, quashing the deposition subpoenas altogether would be consistent with the practice of other courts abiding by the Supreme Court's privilege precedents. *Id.* at 10-17. At the very least, should any depositions proceed, the legislators request a protective order prohibiting deposing legislators about privileged matters, including matters beyond the public record. *Id.* at 9-10.

I. Intent claims do not trump legislative privilege.

Plaintiffs contend that their allegations of intentional discrimination (as compared to the United States' effects-only claim) allow them to probe what motivated the legislators: "In intent cases, knowledge about what motivated a decisionmaker at the time of the decision is relevant and subject to discovery." Pls. Opp'n 4; *see also* Ex. D at 2 (5/12/22 email from T. Meehan). They wrongly suggest

that refusal to answer questions about intent warrants an adverse inference. Pls. Opp'n 5.[2] And they wrongly contend that if privilege were to bar intent-based inquiries, that "would effectively bar any court from 'ever accurately and effectively determin[ing] intent.'" *Id.* (quoting Op. 50 n.14, ECF 258).

A. Legislative privilege no less applies to intentional discrimination claims than it does to other claims. The privilege applies with "full force" even in cases where legislators' motives are at the "factual heart" of plaintiffs' claims. *Hubbard*, 803 F.3d at 1310-11, 1315 (quashing subpoenas). Plaintiffs' "categorical exception whenever a constitutional claim directly implicates the governments intent … would render the privilege 'of little value.'" *Lee*, 908 F.3d at 1188; *see Am. Trucking*, 14 F.4th at 90 (describing "inherent challenges of using [deposition] evidence of individual lawmakers' motives to establish that the legislature as a whole enacted [law] with any particular purpose"). That is consistent with the Supreme Court's repeated observation that courts generally must "equate[]" protections afforded to federal legislators with protections afforded to state legislators for constitutional claims brought under §1983, Plaintiffs' constitutional claims included. *Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 732-33 (1980); *see Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). While legislative privilege must bend for *federal criminal prosecutions*, the Supreme Court has never qualified state legislators' privilege as plaintiffs would in a civil matter such as this one. *See* Mot. 13-14 (discussing *Gillock*).

B. In these proceedings already, this Court rejected that privilege must bend to claims of intentional discrimination. The Brooks plaintiffs asked this Court to preliminarily enjoin SD 10 based on intentional discrimination claims. *See* Mot. for Prelim. Inj., ECF 39 at 24-43. At the hearing, this Court ruled that a state senator could testify about that "within the public record," but anything

[2] Fully explained in the legislators' reply brief in support of the motion to quash the United States' deposition subpoenas, any adverse inference would be legal error. Reply 8-10; *see, e.g.*, *In re WR Grace & Co.*, 729 F.3d 332, 348 (3d Cir. 2013) ("A negative inference should not be drawn against Grace merely because it chose to protect the privacy of attorney-client communications."); *Jaffee v. Redmond*, 51 F.3d 1346, 1358 (7th Cir. 1995) (remanding for new trial after erroneous adverse inference instruction).

beyond the public record would entail a waiver of legislative privilege. PI Tr. 152:1-5 (Vol. 5) ("Senator Huffman will be allowed to testify to everything within the public record; and if she goes outside the public record, she will waive her privilege."). The Court sustained objections to questions about the senator's mental impressions or opinions regarding legislation, or what otherwise motivated or informed her or others during the legislative process. *See, e.g.*, PI Tr. 152:2-7 (Vol. 6); PI Tr. 25:6-10 (Vol. 7); PI Tr. 29:6-20 (Vol. 7).

That ruling is consistent with Supreme Court precedent and the approaches taken by the courts of appeals in similar circumstances. *See Tenney*, 341 U.S. at 373-77; *Dombrowski*, 387 U.S. at 85; *see also In re Stone*, 986 F.2d 898, 904 (5th Cir. 1993) (warning officials "could never do their jobs" if subject to such discovery because they would be less willing to explore all options before them, lest they "be subpoenaed for every case involving their agency"). For example, in a recent redistricting challenge involving allegations of race-based intent, the Ninth Circuit followed its general rule that legislators could not be deposed. *See Lee*, 908 F.3d at 1187-88. Similarly, the Eleventh Circuit refused to require legislators to turn over privileged documents precisely *because* the legislators' privileged subjective intent could not be disentangled from the plaintiffs' claim. *See Hubbard*, 803 F.3d at 1310-11; *accord Am. Trucking Ass'n*, 14 F.4th at 91 (quashing deposition subpoenas); *Biblia Abierta v. Banks*, 129 F.3d 899, 905 (7th Cir. 1997) ("An inquiry into a legislator's motives for his actions, regardless of whether those reasons are proper or improper, is not an appropriate consideration for the court.").[3]

Plaintiffs disagree, based in part on a footnote in this Court's preliminary injunction opinion. *See* Pls. Opp'n 4-5. The Court recently said that it was "concerned about the scope of state legislative privilege" because "[s]tate legislative privilege in this context raises serious questions about whether this Court (or any court) could ever accurately and effectively determine intent." Op. 50 n.14.

[3] Plaintiffs have relied on the passing observation in *Jefferson Community Health Care Centers* that legislative privilege is strictly construed—inconsistent with Supreme Court precedent and straying from other appellate courts. That *dictum* does not require anything different of courts in the Fifth Circuit. *See* Reply 5-6.

The Supreme Court has answered those concerns. As a starting point, even "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 377. "The privilege would be of little value" if legislators could be subject to "the hazard of a judgment against them based upon … speculation as to motives." *Id.* There are instead alternative means for probing legislative purpose, detailed by the Supreme Court in *Arlington Heights*—a case also involving allegations of invidious intent. 429 U.S. at 267-68. Those alternatives include "[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"—all materials from the public record. *Id.* Importantly, the Supreme Court cautioned that proving legislative purpose did not entail probing the minds of decisionmakers except in extraordinary circumstances: "In some extraordinary instances, the members might be called to the stand to testify concerning the purpose of the official action, although *even then such testimony frequently will be barred by privilege.*" *Id.* at 268 (emphasis added); *accord Lee*, 908 F.3d at 1188 ("*Arlington Heights* itself also involved an equal protection claim alleging racial discrimination—putting the government's intent directly at issue—but nonetheless suggested that such a claim was not, in and of itself, within the subset of 'extraordinary instances' that might justify an exception to the privilege"). After all, such "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Arlington Heights*, 429 U.S. at 268 n.18. Simply put—the Supreme Court has already disclaimed that testimony from legislators is necessary to a court's truth-seeking mission regarding legislative purpose, versus other more reliable alternatives.[4]

[4] Plaintiffs have argued that *Arlington Heights* doesn't mean what it says because the decision elsewhere notes that board members were in fact questioned in discovery. Pls. Opp'n 4. *Arlington Heights* does not specify whether such discovery entailed depositions, whether public officials challenged or appealed any such discovery orders, whether there was any privilege waiver, or other relevant factors including whether the calculus would have been different had state legislators been the target of discovery. But here's what the Court's decision does say: the district court in *Arlington Heights* "forbade questioning Board members about their motivation at the time they cast their votes." 429 U.S. at 270 n.20. It is forbidden here too.

There is good reason that any one legislator's motivations or impressions are protected. The probative value is weak at best, while the affront to federalism and comity is at its zenith. Evidence of any one legislator's intent cannot be conflated with the legislature's purpose as a whole. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349-50 (2021); *accord Am. Trucking*, 14 F.4th at 90 (noting that the "Supreme Court has warned against relying too heavily on such evidence" of "individual lawmakers' motives to establish that the legislature as a whole [acted] with any particular purpose"). For "[w]hat motivates one legislator to make a speech about a statute," let alone his internal thoughts and impressions, "is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [courts] to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). Evidence of legislative purpose is instead divined from the public record, *see Arlington Heights*, 429 U.S. at 267-68, alongside the presumption that legislatures act in good faith, *see Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018). Understood in that way, legislative privilege helps ensure that litigation remains focused on that which motivated the legislature as a whole, consistent with the obligation that courts not "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive" by one or a few. *O'Brien*, 391 U.S. at 383-84.

II. The Court must reject Plaintiffs' balancing test.

Plaintiffs endorse the flawed balancing test employed by some district courts, which has largely evaded appellate review. *See* Mot. 13-17. It has never been endorsed by the Supreme Court, nor employed by courts of appeals in analogous cases including the Ninth Circuit's redistricting decision in *Lee*. Illustrated by plaintiffs' own application of that test, Pls. Opp'n 7-10, it is easily manipulated to reduce privilege to a nullity. Plaintiffs' balancing of benefits and burdens for deposing legislators looks little different than the balancing that would occur under Rule 45 and other generally applicable federal

discovery rules.[5] It makes no sense, in light of *Tenney* and progeny, that legislators would be entitled no greater protection than any other target of third-party discovery.

Plaintiffs, moreover, are wrong that *Rodriguez*, the district court decision first adopting the nebulous multi-factored legislative privilege test, used it to justify legislative depositions. Pls. Opp'n 10. Exactly the opposite: the court emphasized that plaintiffs were "*not* seeking any depositions of legislators or their staff." 280 F. Supp. at 96 (emphasis added); *see also id.* (noting legislators had not moved to dismiss). Even in *Veasey v. Perry*, the privilege dispute initially involved legislators' documents, not depositions. 2014 WL 1340077, at *1 (S.D. Tex. Apr. 3, 2014). And in *Perez*, the Court refused to apply *Rodriguez* in a way that pierced legislative privilege entirely, contrary to plaintiffs' demands here. *See* Mot. 14-15 & n.8. At this stage of the proceedings—with motions to dismiss yet to be filed, with the Supreme Court currently considering the metes and bounds of redistricting claims, and with all parties having failed to first exhaust other discovery alternatives, *see* Reply 2 n.3; Ex. D at 2 (5/12/22 email from T. Meehan)—it would be error on top of error to apply *Rodriguez* to justify legislator depositions, let alone depositions exploring legislators' motivations and impressions regarding redistricting legislation.

CONCLUSION

The legislators respectfully request that the Court issue an interim order postponing depositions pending resolution of these related motions. The legislators further request that the Court quash or modify the subpoenas, or in the alternative enter a protective order.

[5] *Compare Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (first factor considers "relevance of the evidence sought to be protected,"), *with* Fed. R. Civ. P. 26(b)(1) (limiting "scope of discovery" generally to "relevant" material); *compare Rodriguez*, 280 F. Supp. 2d at 101 (second factor considers "availability of other evidence" and third factor considers "'seriousness' of the litigation and the issues involved"), *with* Fed. R. Civ. P. 45(d)(1) (requiring parties to avoid undue burden or expense when subpoenaing third parties), *and* Fed. R. Civ. P. 26(b)(1) (considering "importance of the discovery in resolving the issues").

Date: May 13, 2022

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that counsel conferred with counsel for plaintiffs regarding the subject of this motion. Counsel for plaintiffs indicated they oppose any motion to quash or modify the subpoena, which confirms opposition to the relief sought here.

/s/ Taylor A.R. Meehan
TAYLOR A.R. MEEHAN

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 13, 2022, and that all counsel of record were served by CM/ECF.

/s/ Taylor A.R. Meehan
TAYLOR A.R. MEEHAN

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]
UNITED STATES OF AMERICA, *Plaintiff,* V. STATE OF TEXAS, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 3:21-cv-00299 [Consolidated Case]

LEGISLATORS' EMERGENCY MOTION TO STAY
LEGISLATORS' DEPOSITIONS PENDING APPEAL

House Members Ryan Guillen, Brooks Landgraf, and John Lujan are third parties to this redistricting litigation. The United States and all private plaintiffs in these consolidated suits issued subpoenas to depose these legislators. The legislators moved to quash the subpoenas. *See* Mot. to Quash United States' Subpoenas, ECF 259; Reply in support of Mot. to Quash United States' Subpoenas, ECF 277; Mot. to Quash Plaintiffs' Subpoenas, ECF 278. This Court has denied the motion. ECF 282. The legislators now intend to seek immediate relief from the Fifth Circuit. Accordingly, the legislators request a stay of the depositions pending the Fifth Circuit's review. *See* Fed. R. App. P. 8(a)(1).

A stay is necessary so that the legislators do not forfeit arguments underlying their motion to quash. Depositions are noticed for May 24 and May 25, 2022, and the United States and private

plaintiffs will not postpone. Whether those depositions can proceed, including whether legislators must answer privileged questions by the United States' and plaintiffs' counsel under seal, indisputably raises "serious legal questions" about the scope of legislative immunity and privilege. *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011). Because the legislators have presented a "substantial case on the merits" and the equities heavily favor a stay, a stay is warranted. *Id.*

Background

The United States issued its first set of deposition subpoenas to depose Representatives Guillen, Landgraf, and Lujan—each of whom is a third party to these consolidated redistricting disputes. *See* ECF 259-1 (Guillen subpoena); ECF 259-2 (Landgraf subpoena), ECF 259-3 (Lujan subpoena).[1] To the legislators' knowledge, the United States has not subpoenaed any party or any other third parties at this time. The legislators moved to quash the deposition subpoenas, ECF 259, at which point private plaintiffs issued deposition subpoenas to depose the same House members. *See* ECF 278-1 (Guillen subpoena); ECF 278-2 (Landgraf subpoena), ECF 278-3 (Lujan subpoena).

The Court has denied the legislators' motion to quash the deposition subpoenas. ECF 282. Its order prescribes a deposition procedure requiring the legislators to "appear and testify for depositions, even if it appears likely that legislative privilege may be invoked in response to certain questions." ECF 282 at 4. Questions may be objected to on the basis of privilege, but despite the objection "the deponent invoking the privilege must then answer the question in full." *Id.* The privileged answers will be deemed confidential and then later examined by the Court under seal in future motions to compel. *Id.* at 5.

The United States' and private plaintiffs' have noticed the legislators' depositions for May 24 and May 25, 2022. The legislators asked the parties to postpone the depositions pending this Court's

[1] Since issuing the subpoenas, the United States and plaintiffs agreed that Representative Guillen's subpoena, initially noticed for May 19, 2022, could be taken instead on May 24, 2022. The United States and plaintiffs have refused requests to further postpone depositions to accommodate time for this Court's ruling and now appellate review.

decision, and the parties refused. *See* ECF 278-2 (Ex. B). After the Court's ruling, the United States and private plaintiffs confirmed that they continue to oppose a motion to postpone the depositions, now pending the Fifth Circuit's review. Accordingly, the legislators seek a stay of the depositions in this Court pending the legislators' request for review in the Fifth Circuit. *See* Fed. R. Civ. P. 8(a)(1). Given the exigency, the legislators also intend to seek immediate relief from the Fifth Circuit by filing an emergency stay motion in the Fifth Circuit tomorrow morning.

Argument

Courts consider four factors for a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation marks omitted). Those factors are not to be applied "in a rigid, mechanical fashion." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983). For example, "where there is a serious legal question involved and the balance of the equities heavily favors a stay ... the movant only needs to present a substantial case on the merits." *Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011); *see, e.g.*, *Baylor*, 711 F.2d at 40 (granting stay in case presenting "serious legal question that could have a broad impact upon federal/state relations"); *Vine v. PLS Fin. Servs., Inc.*, 226 F. Supp. 3d 708, 718 (W.D. Tex. 2016) (granting stay including because order involved issue "of first impression before the Fifth Circuit"). Applying those factors here, a stay of the legislators' depositions pending appeal is warranted.

1. The legislators are likely to succeed on the merits. For all of the reasons already briefed, it is extraordinary for legislators to be called to testify in litigation challenging legislation. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). And even in those "extraordinary instances," "such testimony frequently will be barred by privilege." *Id.* (citing *Tenney v. Brandhove*, 341 U.S. 367

(1951); *United States v. Nixon*, 418 U.S. 683, 705 (1974)). Since the first state constitutions, legislators have been "protected not only from the consequences of litigation's results, but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *see Tenney*, 341 U.S. at 372-75 (detailing state constitutional provisions). That includes being called to testify as third parties in depositions. *See, e.g.*, *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018) (concluding "plaintiffs are generally barred from deposing local legislators, even in 'extraordinary circumstances'"); *see E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) ("Because litigation costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued."); *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015) (applying unqualified privilege "whether or not legislators themselves have been sued").

Further warranting a stay pending review, the legislators' arguments undoubtedly entail "serious legal question[s]" compelling a stay. *Weingarten*, 661 F.3d at 910; *see Baylor*, 711 F.2d at 40. There is a deepening split of authority about the scope of legislators' immunity and privilege. The First, Ninth, and Eleventh Circuits have rejected attempts to depose legislators or subpoena their documents; they have not required legislators to sit for depositions and assess privilege after-the-fact. *See Lee*, 908 F.3d at 1187-88 (affirming district court's refusal to make legislators sit for depositions in redistricting dispute with intent claims); *Am. Trucking Ass'n, Inc. v. Alviti*, 14 F.4th 76, 88-90 (1st Cir. 2021) (quashing legislator depositions); *In re Hubbard*, 803 F.3d at 1315 (quashing document subpoenas and refusing to burden legislators with detailed privilege log requiring "lawmakers to peruse the subpoenaed documents, to specifically designate and describe which documents were covered by the legislative privilege, or to explain why the privilege applied"); *accord Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 299 (D. Md. 1992) (concluding legislators "deserve all of the protection the *Tenney* court extended to them" and "entirely barr[ing]" "*any* inquiry"). Likewise, the Texas Supreme Court has rejected attempts to depose legislative officials in analogous circumstances. *See In re Perry*,

60 S.W.3d 857, 858, 862 (Tex. 2001) (concluding plaintiffs failed to establish extraordinary circumstances warranted an exception to legislative privilege and immunity to depose officials in redistricting dispute). On the other side of the ledger, as detailed by the United States and private plaintiffs, other district courts instead employ a multi-factored balancing test regarding the scope of legislative privilege, which ordinarily leads those courts to permit depositions of legislators or subpoenas for their documents. *See* ECF 282 at 2-3.

The subject of this split of authority—the scope of a state legislators' immunity and privilege—is also undoubtedly serious, meriting "a detailed and in depth examination" by the Fifth Circuit. *Baylor*, 711 F.2d at 40. The Fifth Circuit has not previously considered the issues presented here—issues raising serious questions of federal-state relations of nationwide importance. That is, when may litigants bypass legislative privilege as it is ordinarily applied and instead compel state legislators not only to sit for depositions but also to answer their privileged questions? *See, e.g.*, *Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 723-33 (1983) ("equat[ing]" protections afforded to state legislators in §1983 litigation with those afforded to federal legislators); *compare Hubbard*, 803 F.3d at 1307-08 (prohibiting discovery of legislators in case alleging First Amendment violation); *Am Trucking*, 14 F.4th at 91 (prohibiting depositions of legislators in case alleging Dormant Commerce Clause violation). That is no small question. The Supreme Court has described legislative privilege as "'indisputably necessary'" and "firmly established in the States" at the time of the founding. *Tenney*, 341 U.S. at 373 (quoting II Works of James Wilson 38 (Andrews ed. 1896)). Then and now, legislative privilege "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* That it is "not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." *Id.*; *Arlington Heights*, 429 U.S. at 268 n.18 ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the

workings of other branches of government"). Whether Texas legislators or redistricting can work an exception to that rule—so far qualified by the Supreme Court only in federal *criminal* cases[2]—is a quintessential question of serious legal importance warranting the Fifth Circuit's review. So that this important question does not continue to evade review, and given the substantial federalism and comity interests at stake, a stay is warranted.

2. The legislators will be irreparably injured absent a stay. The legislators' very argument is that legislative immunity and privilege prevent the United States and private plaintiffs from calling the legislators to testify by deposition at this time in this case. *See* ECF 259 at 11-13; ECF 277 at 2-8. Without a court-ordered stay of the depositions pending appeal, the United States and private plaintiffs' position is that the legislators must sit for depositions next Tuesday and Wednesday, on May 24 and 25, 2022. The legislators will then be required to provide answers to the United States' and private plaintiffs' privileged questions under seal. ECF 282 at 4-5.

Once those depositions occur, pursuant to those procedures, the harm is done. *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) ("appeal after final judgment will often come too late because the privileged materials will already have been released" and "'the cat is out of the bag'"); *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705 (9th Cir. 2022) ("the harm to [former Secretary] DeVos is the intrusion of the deposition itself, and so the harm is not correctable on appeal, even if her testimony is excluded at trial"); *see also In re United States*, 542 F. App'x 944, 947 (Fed. Cir. 2013) (unpublished) ("The right to not appear during deposition would be lost if review was denied until final judgment."). Bypassing alternative means of discovery, requiring a legislator to sit for a deposition, and further requiring legislators' answers to privileged questions under seal transgresses

[2] *See United States v. Gillock*, 445 U.S. 360, 373 (1980); *accord Gravel v. United States*, 408 U.S. 606, 627 (1972) ("[W]e cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute." (emphasis added)); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (qualifying spousal privilege in federal criminal prosecution).

the very purposes of legislative privilege and immunity. It burdens the legislators with defending themselves in litigation over legislation, rather than sparing legislators from such discovery absent extraordinary circumstances. *Dombrowski*, 387 U.S. at 85; *see Tenney*, 341 U.S. at 377 (privilege necessary to safeguard legislative independence by immunizing legislators "from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good, for "[o]ne must not expect uncommon courage even in legislators"). Among other harms, pressing ahead no less harms the legislators' ability to "focus on their public duties," and "discharge th[ose] public duties without concern of adverse consequences outside the ballot box." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181; *Lee*, 908 F.3d at 1187.

3. Staying depositions pending the Fifth Circuit's review will not substantially injure the other parties. There is ample time for the legislators to seek review before the depositions proceed. Indeed, one of the legislators' primary arguments here has been that the United States and private plaintiffs have other discovery to take; they should never have subpoenaed the legislators as their *very first* deponents. *See* ECF 259 at 6-7; ECF 277 at 1-2 & n.3; *see, e.g.*, *In re Perry*, 60 S.W.3d at 861-62 (relying on *Arlington Heights* for requirement that "all other available evidentiary sources must first be exhausted before extraordinary circumstances will be considered," noting that "plaintiffs have alternative information sources available" and that "plaintiffs have neither alleged nor demonstrated any extraordinary circumstance that might justify what would appear to be an almost unprecedented incursion into legislative immunity"); *Austin Lifecare, Inc. v. City of Austin*, 2012 WL 12850268, at *2 (W.D. Tex. Mar. 20, 2012) ("Plaintiffs have alternative methods for discovering the information they seek," including the public record). The United States and private plaintiffs have not offered any reason why they cannot pursue that alternative discovery while the Fifth Circuit considers reviews the legislators' immunity and privilege arguments. *Accord Baylor*, 711 F.2d at 40 (concluding "a delay of the investigation pending appeal will not substantially harm the investigatory process"). Discovery does not close in this case

until July 15, 2022, or later by agreement of the parties. Counsel for the legislators even offered to extend discovery for purposes of these legislator depositions should they be ruled permissible—with no response from the United States or private plaintiffs. *See* ECF 277 at 2-3; ECF 277-2 (5/12/22 email from T. Meehan).

4. Finally, the public interest favors a stay. As the Supreme Court observed decades ago in *Tenney*, legislative privilege serves "the public good." 341 U.S. at 377. The privilege is necessary to safeguard legislative independence, something "deemed so essential for representatives of the people" that it was codified in the federal constitution, and state constitutions before that. *Id.* at 372-77. It harms the public to put their legislators to the choice of forfeiting their legislative immunity and privilege and sitting for a deposition, thereby subjecting legislators to defending themselves not only at the ballot box but also here in litigation. *See Baylor*, 711 F.2d at 40 (finding stay will serve public interest to avoid "put[ting] Baylor Medical Center to the choice of foregoing its legal position or losing all Medicaid and Medicare funding until the appellate process has run its normal course," including because the "interest of the Medicaid and Medicare recipients would be seriously compromised").

Presumably, plaintiffs will contend that this is the extraordinary case, different from others. But history has proven that to be false. Time and again in Voting Rights Act disputes, Texas legislators have been ordered to sit for depositions as if those suits are exempt from the ordinary protections of legislative immunity and privilege. *See* ECF 282 at 2-3 (citing past VRA disputes). Indeed, the United States and plaintiffs' primary argument here has been that because legislators have been deposed before, it can happen again here. The scope of the legislators' immunity and privilege should not continue to evade the Fifth Circuit's review, as it did in past VRA disputes. A stay is warranted.

Conclusion

For the foregoing reasons, the legislators seek a stay of the depositions pending the Fifth Circuit's review of the denial of the legislators' motion to quash the deposition subpoenas.

Date: May 18, 2022

Respectfully submitted,

/s/ Taylor A.R. Meehan

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CERTIFICATE OF CONFERENCE

I certify that counsel conferred with counsel for the United States and private plaintiffs regarding the subject of this motion. Counsel indicated they opposed any motion to stay the depositions pending the Fifth Circuit's immediate review, which confirms opposition to the relief sought here.

/s/ Taylor A.R. Meehan
TAYLOR A.R. MEEHAN

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on May 18, 2022, and that all counsel of record were served by CM/ECF.

/s/ Taylor A.R. Meehan
TAYLOR A.R. MEEHAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,	§	
***Plaintiffs*,**	§	
EDDIE BERNICE JOHNSON, *et al.*,	§	**EP-21-CV-00259-DCG-JES-JVB [Lead Case]**
***Plaintiff-Intervenors*,**	§	**&**
v.	§	
GREG ABBOTT, *in his official capacity as Governor of the State of Texas*, **et al.,**	§	**All Consolidated Cases**
Defendants.	§	

ORDER MODIFYING SCHEDULING ORDER

Before the Court are the United States' "Motion to Modify Scheduling Order" (ECF No. 206), Defendants' "Cross Motion to Modify Scheduling Order" (ECF No. 211), and Defendants' "Opposition to the United States' Motion to Modify Scheduling Order" (ECF No. 212). The United States and Defendants both request that the Court modify the Scheduling Order (ECF No. 96) to include instructions on the number and/or timing of depositions that Plaintiffs and Defendants will be permitted to take during discovery. The parties principally disagree over how to frame the deposition limits: Should there be a cap on the number of depositions and total hours of deposition testimony? (The United States' request.) Or should there only be a cap on the total hours? (Defendants' request.)

After due consideration of the parties' arguments, the Court finds that good cause exists to modify the Scheduling Order. The Court modifies the Scheduling Order to permit no more than 75 depositions or no more than 325 hours of deposition testimony.

Accordingly, **IT IS ORDERED** that the United States' "Motion to Modify Scheduling Order" (ECF No. 206) is **DENIED**.

IT IS FURTHER ORDERED that the Defendants' "Cross Motion to Modify Scheduling Order" (ECF No. 211) is **GRANTED** in part and **DENIED** in part.

IT IS FURTHER ORDERED that the Scheduling Order (ECF No. 96) shall be modified to include the following:

Number and Timing of Depositions

Pursuant to Federal Rule of Civil Procedure 30(a)(2)(A)(i), the parties may depose any person, including any party, without further leave of the Court unless the depositions would result in more than 75 depositions or more than 325 hours of deposition testimony being taken under Rule 30 by the Plaintiffs collectively, or by the Defendants collectively. Further, the parties may depose any expert witness disclosed by an opposing party pursuant to Rule 26(a)(2) without regard to these limitations, but otherwise in accordance with the terms of Rule 30. This modification of the Scheduling Order shall not alter or amend any of the dates and deadlines in the Scheduling Order, including the July 15, 2022 deadline for completion of all fact discovery.

So ORDERED and SIGNED on this 7th day of April 2022.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

And on behalf of:

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeals, Fifth Circuit

-and-

Jeffrey V. Brown
United States District Judge
Southern District of Texas

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]

MOTION TO STAY

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INTRODUCTION

The Supreme Court has repeatedly stated that "[r]edistricting 'is primarily the duty and responsibility of the State,' and '[f]ederal-court review of redistricting legislation represents a serious intrusion on the most vital of local functions." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). To minimize that intrusion and preserve the resources of the Court and the parties, Defendants respectfully request a stay of these consolidated redistricting cases pending the Supreme Court's decision in *Merrill v. Milligan*, No. 21-1086 (U.S.), consolidated with *Merrill v. Caster*, 21-1087 (U.S.), lest this Court decide this case and then be required to decide it again. When the Supreme Court announced it would be giving plenary review in those consolidated cases, multiple members observed that the Court's Voting Rights Act case law "is notoriously unclear and confusing," and that "*Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of stay); *id.* at 882-83 (Roberts, C.J., dissenting from grant of stay). There is no reason to press ahead in these Voting Rights Act cases when the Supreme Court, in deciding *Merrill*, is poised to "resolve the wide range of uncertainties arising under *Gingles*." *Id.* at 883 (Roberts, C.J., dissenting from grant of stay).

Staying these proceedings will also preserve the resources of the Court and the parties in an additional way: Between now and the 2024 elections, the Texas Legislature will enact legislation regarding state legislative seats as required by article III, section 28 of the Texas Constitution. A stay of these proceedings ensures that the Court will be reviewing the legislation actually to be used in the next election, again with the benefit of the Supreme Court's forthcoming "resol[ution] of the uncertainties arising under *Gingles*" in cases challenging districts as violative of the VRA. *Id.* Due to that state constitutional requirement, the statutes that Plaintiffs currently challenge will be defunct before this Court can order effective relief. Specifically, article III, section 28 of the Texas Constitution

requires that "[t]he Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25 and 26 of" Article III of the Constitution. In this instance, due to the U.S. Census Bureau's delays in releasing the necessary data, that first regular session is the 2023 regular session. The State has already acknowledged that while federal law required the State to reapportion *sooner* than 2023, that does not relieve the State of its obligation to enact redistricting legislation in 2023 as required by its Constitution. Br. for Appellants at 17–18, 41–48, *Abbott v. Mex. Am. Legislative Caucus*, No. 22-0008 (Tex. 2022) ("MALC Br.").

Because the relief at issue here is necessarily directed at the 2024 elections, *cf. Merrill*, 142 S. Ct. 789, further litigation regarding the 2021 redistricting process at the present time will create an unjustified drain on the Court's and the parties' resources. There is every reason to await the Supreme Court's forthcoming *Merrill* decision, likely to dictate a new rule of decision to be applied in these very cases. Pressing ahead with litigation here is wasteful, prejudicial, and unnecessary. In the interim, the State will also be enacting the actual legislation that will govern in the 2024 elections. Once both events occur, there will be ample time to decide Plaintiffs' claims before the next election.

BACKGROUND

I. The 2021 Redistricting

Last year, Texas faced a dilemma: under federal law, the U.S. Census Bureau is obligated to release a "decennial census of [the] population," on the first day of April "every 10 years." 13 U.S.C. § 141(a); *see also* U.S. Const. art. I, § 2, cl. 3 (empowering Congress to carry out the census "in such Manner as they shall by Law direct"). And the Texas Constitution *requires* that the Legislature use that data "at its first regular session after [its] publication" to apportion the State according to the requirements of both state and federal law. Tex. Const. art. III, § 28. Failure to do so will cause the Legislature to forfeit its redistricting authority to a Board composed largely of executive-branch

officials. *Id.* But due to "COVID-19-related delays," the Census Bureau was late in delivering the census data[1]—so late that the Texas Legislature was unable to begin the redistricting process during its 87th regular session, which ran from January 12, 2021, to May 31, 2021.[2]

In light of Texas's significant change in population, Governor Greg Abbott called a special session of the Legislature to enact a redistricting plan in advance of the 2022 elections rather than wait for the special session in advance of the 2023 elections. Tex. Gov. Proclamation No. 41-3858, 87th Leg., 3d C.S. (2021). During that special session, the Legislature drew the maps currently before the Court, which the Governor signed into law on October 25, 2021.

II. Parallel State Litigation

In November 2021, a group of current and potential members of the Texas Legislature sued the State on the theory that by seeking to comply with federal law, it had violated section 28 of the Texas Constitution. MALC Br., *supra*, at 8–9. The Defendants explained in their brief in that case that complying with the federal-law requirement to redistrict in advance of the 2022 election did not obviate the State's state-law obligation to redistrict in 2023. *Id.* at 48–53; *see* Tex. Const. art. III, § 28.[3]

III. This Litigation

These consolidated suits challenge Texas's redistricting plans as violations of the Voting Rights Act, along with related Equal Protection Clause claims. Now, the majority of the plaintiff groups are seeking to amend their complaint to add new plaintiffs, new defendants, new claims, and new facts about the challenged maps. *See* ECF 226 (MALC); ECF 228 (Voto Latino); ECF 229 (Escobar); ECF 230 (LULAC); ECF 231 (Brooks). All plaintiffs are seeking wide-ranging discovery into the thought

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1 Press Release, United States Census Bureau, *Census Bureau Statement on Redistricting Data Timeline* (Feb. 12, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data.

2 Tex. Legislative Council, *Dates of Interest: 87th Legislature*, https://tlc.texas.gov/docs/legref/Dates-of-Interest.pdf; see also Tex. Const. art. III, §§ 5(a), 24(b).

3 *See also* Oral Argument at 12:00-13:02, *Abbott v. Mex. Am. Legislative Caucus*, No. 22-0008 (Tex. 2022), https://tinyurl.com/yc5jhpex.

processes and deliberations of Texas's 87th Legislature—notwithstanding that Texas has acknowledged that it must revisit the current redistricting in the 88th Legislature.

The United States has since taken the lead in discovery, issuing wide-ranging document subpoenas for more than a dozen Texas officials. The only cause of action in the United States' complaint, filed in December 2021, is the alleged violation of Section 2 of the Voting Rights Act. *See* Compl. ¶¶ 161–67, *United States of America v. Texas*, No. 3:21-cv-299, ECF 1 ("Compl."). With respect to the State's new congressional districts, the United States complains that "Texas designed the two new [congressional] seats to have Anglo voting majorities," "intentionally eliminated a Latino electoral opportunity [district] in Congressional District 23," "failed to draw a seat encompassing the growing Latino electorate in Harris County," and "surgically excised minority communities from the core of the Dallas-Fort Worth Metroplex (DFW) by attaching them to heavily Anglo rural counties, some more than a hundred miles away"—all in violation of Section 2. *Id.* ¶¶ 3, 161–67. With respect to the State's new house districts, the United States complains that Texas violated Section 2 when it allegedly "replaced Latinos in House Districts 118 and 31 with high-turnout Anglo voters" and "reduc[ed] the number of districts in which Latinos make up a citizen voting-age population majority from six to five" in El Paso and West Texas. *Id.* ¶ 4. Simply put, the United States—echoing other Plaintiffs' allegations—believe that Section 2 compelled Texas to draw different districts than those enacted.

The State's motion to dismiss the United States' complaint remains pending. *See* ECF 111.[4] The State's motion explains that the United States failed to state a Section 2 violation with respect to the regions identified in the complaint, including the claim that the El Paso majority-Latino house districts should have numbered six instead of five. *Id.* at 22–23 (El Paso and West Texas); *see also id.* at 3–6 (CD 23); *id.* at 16–18 (Harris County); *id.* at 19–20 (HD 118); *id.* at 20-22 (HD 31). The State's

[4] Unless otherwise specified, all docket numbers refer to docket entries on the consolidated docket, No. 3:21-cv-259 (W.D. Tex.).

motion also preserves the argument that the complaint should be dismissed in its entirety because Section 2 does not apply to redistricting. *Id.* at 24 (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (Thomas, J. concurring); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 294-98 (2015) (Thomas, J., dissenting); *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (Thomas, J., concurring in the judgment); *Holder v. Hall*, 512 U.S. 874, 892-93 (1994) (Thomas, J., concurring in the judgment)).

In the interim, the Supreme Court has announced that it will be providing much-needed clarification about what Section 2 requires of States (and what the Equal Protection Clause prohibits) in the context of redistricting. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of stay) (describing "the underlying question" in *Merrill* as "whether a second-majority minority congressional district … is required by the Voting Rights Act and not prohibited by the Equal Protection Clause"). In consolidated cases regarding Alabama's congressional districts, the Supreme Court will be deciding whether a federal district court erred by requiring Alabama to draw two majority-Black districts where it instead drew only one. *See generally Merrill v. Milligan*, No. 21-1086 (U.S.); *Merrill v. Caster*, No. 21-1087 (U.S.). The Court decided to grant plenary review in *Merrill* after a federal district court enjoined Alabama from using its enacted districts in the next election. In its emergency application, the State argued that the district court's application of Section 2, applying the *Gingles* factors and ignoring the actual "totality of circumstances," 52 U.S.C. §10301(b), exceeded all constitutional bounds. And the State argued that Section 2, if correctly conceived by the district court in that case, could not constitutionally apply to redistricting. The very same statutory and constitutional questions plague Plaintiffs' allegations here.

ARGUMENT

A stay is warranted pending the Supreme Court's resolution of *Merrill* and the Legislature's resolution of its redistricting obligations in 2023. Principles of fairness and judicial economy counsel against pressing ahead with redistricting litigation in such circumstances.

Staying these cases is within the Court's inherent power and discretion. *See, e.g.*, *Landis v. N. Amer. Co.*, 299 U.S. 248, 254 (1936). Consideration of "(1) the potential prejudice to the non-moving party; (2) the hardship and inequity to the moving party if the action is not stayed as well as the (3) judicial resources that would be saved . . . ," further confirm that a stay is warranted. *Sparling v. Doyle*, No. 3:13-cv-323, 2014 WL 12489985, at *2 (W.D. Tex. Mar. 3, 2014) (Guaderrama, J.); *see Clinton v. Jones*, 520 U.S. 681, 706 (1997). All factors weigh in favor of a stay here.

I. The Supreme Court's Decision in *Merrill* Will Directly Affect the Course of these Proceedings.

The Supreme Court's resolution of the Section 2 questions raised in *Merrill*—including the fundamental questions of when additional majority-minority districts are required and when Section 2 can even constitutionally apply to redistricting—will directly affect the course of this litigation. There is thus every reason to stay pending the Supreme Court's decision in *Merrill* to preserve all parties' resources as well as this Court's.

When the Court announced it would be giving plenary review of the Section 2 claims and constitutional issues in *Merrill*, Justice Kavanaugh, Chief Justice Roberts, and Justice Kagan issued separate opinions all confirming that the Court's forthcoming decision would provide (much-needed) clarification of the States' VRA obligations when it comes to redistricting. Justice Kavanaugh, joined by Justice Alito, stated that clarification of the "notoriously unclear and confusing" Section 2 caselaw is much needed. *Merrill*, 142 S. Ct. at 881. The Chief Justice agreed "that *Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Id.* at 882–83 (citing various cases and articles). He added that *Merrill* will "resolve the wide range of uncertainties arising under *Gingles*" when hearing the case on the merits. *Id.* at 883. And Justice Kagan described the Court's intervention in *Merrill* as being based on the "view that the law needs to change." *Id.* at 889.

There is every reason to believe that the current rules governing a Section 2 claim in the

context of redistricting will not be the governing rules following the Court's decision in *Merrill*, and this Court should use its inherent power to stay these proceedings. *See, e.g.*, *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009) (stay is appropriate when "a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case"). There is little to no potential prejudice to the non-moving parties if the Court stays these cases pending the Supreme Court's resolution of *Merrill*. This Court has already adjudicated the only request for a preliminary injunction in advance of the 2022 elections. ECF 176. All remaining requests for relief necessarily pertain to the 2024 elections. *Merrill*, 142 S. Ct. 879 (vacating injunction of Alabama's enacted districts in advance of 2022 elections). There would be ample time for the Court to oversee discovery, adjudicate these cases, and issue a decision well in advance of the 2024 primary if it awaits clarification from the Supreme Court regarding the proper standards for Section 2 claims.[5]

On the other side of the ledger, should the cases proceed before the Supreme Court decides *Merrill*, the State faces special hardship. Without a stay, the State will be effectively required to defend itself *twice* against Plaintiffs' claims—first under the current Section 2 regime and later under any clarified regime. That includes substantial and costly discovery burdens. For its part, the United States has already subpoenaed more than two dozen Texas officials. Similarly, the LULAC plaintiffs have issued subpoenas for eight Texas officials and is seeking six more. The Plaintiffs have anticipated an extraordinary number of depositions, and they have been allotted 75 fact depositions or up to 325 hours of deposition testimony for fact witnesses. ECF 220. With *Merrill* poised to change the very rules that govern Plaintiffs' claims, there is no basis to press on with such discovery in addition to all

[5] Briefing in *Merrill* will be complete in the next few months, and the Court will then hear argument in the fall. Recently, the Supreme Court has decided redistricting cases roughly four months after oral argument. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529 (2013) (argued Feb. 27, 2013, decided June 25, 2013); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015) (argued Nov. 12, 2014, decided March 25, 2015); *Bethune-Hill v. Va. St. Bd. of Elections*, 137 S. Ct. 788 (2017) (argued Dec. 5, 2016, decided March 1, 2017); *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (argued Dec. 5, 2016, decided May 22, 2017); *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (argued April 24, 2018, decided June 25, 2018). Applied here, the Court would most likely issue its decision in *Merrill* between February and March—roughly a year before the State's primary elections.

of the other trappings of defending against Plaintiffs' complaints.

Finally, and most importantly, a stay would save tremendous judicial resources for this Court. It would avoid the risk of fully litigating these cases, including substantial discovery, only to have to do it all over again under new rules. (Or worse, only to find out that all of those efforts were for naught because Section 2 cannot constitutionally apply to redistricting—as the State has already argued in its motion to dismiss and as Alabama has argued before the Supreme Court.) The Supreme Court will clarify longstanding uncertainties in *Merrill* about the very arguments Plaintiffs make here: When is an additional majority-minority district required? And what limitations does the Constitution place on the VRA in such circumstances? *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of stay).

Should this Court decide those claims now, applying the "notoriously unclear and confusing" *Gingles* factors, *id.*, there is a substantial likelihood that the Supreme Court would vacate and remand that decision on appeal in light of *Merrill*.[6] When, for example, a non-prevailing party takes an appeal from a decision of this Court, then that appeal would be pending at the Supreme Court at the same time *Merrill* is before the Supreme Court. The Supreme Court would likely hold any such appeal pending its decision in *Merrill*. Once the Supreme Court decides *Merrill*, the Supreme Court would likely dispose of appeals or petitions for certiorari raising Section 2 issues—including any pending appeal in this case—by granting, vacating, and remanding (or "GVR") in light of *Merrill*. *See, e.g.*, *Dick v. Oregon*, 140 S. Ct. 2717 (2012) (GVR in light of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *Collins v. City of Norfolk*, 478 U.S. 1016 (1986) (GVR in light of *Thornburg v. Gingles*, 478 U.S. 30 (1986)); *City of Bridgeport v. Bridgeport Coalition for Fair Representation*, 512 U.S. 1283 (1994) (GVR in light of *Johnson v. De Grandy*, 512 U.S. 997 (1994)); *Tyus v. Bosley*, 512 U.S. 1249 (1994) (same). For this reason, too, it

[6] If the Court issues a decision in late fall, as the scheduling order anticipates, any appeal of that decision would be before the Supreme Court simultaneous with the Supreme Court's consideration of Merrill, which is likely to be argued in October.

preserves the parties' and this Court's resources, to await the Supreme Court's forthcoming guidance in the Alabama cases first and then decide the issues presented here, rather than risk trying and deciding the issues presented here two times over.

For all of these reasons, a stay is warranted so that this Court will have the Supreme Court's forthcoming decision in *Merrill first* and *then* decide the issues presented here, rather than risk trying and deciding the issues presented here twice.

II. The Legislature's State-Law Requirement to Redistrict in 2023 Could Moot this Case and Renders Further Litigation on the Current Maps Improper

A stay is also warranted because the State is constitutionally obligated to enact redistricting legislation in 2023 for the legislative districts. Allowing further litigation to proceed now, when there will be an intervening Supreme Court decision in *Merrill* and legislation before the 2024 elections at issue, makes little sense. Adjudicating Plaintiffs' claims before that intervening legislation arguably exceeds the Court's jurisdiction. At minimum, it would be an unnecessary and intrusive examination of one of the State's "most vital of local functions." *Perez*, 138 S. Ct. at 2324 (quoting *Miller*, 515 U.S. at 915–16).

A. Plaintiffs Have No Prospective Injury

These cases present important questions touching on one of the most fundamental aspects of our government: how those who govern us are to be selected. And there is a "natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Hollingsworth v. Perry*, 570 U.S. 693, 704-05 (2013). But if this Court were to proceed with litigation now, it would be unable to afford effective relief.

Plaintiffs challenge the State's existing redistricting legislation, enacted in 2021, but that legislation will apply only to the 2022 elections for legislative districts and not the 2024 elections (for which there will be new legislation). Plaintiffs have already adjudicated their claims with respect to the 2022 elections, *supra*, and any remaining relief will necessarily be directed at the 2024 elections.

Enjoining the existing districts in advance of the 2022 elections would contravene well-established rules. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006); *see, e.g.*, *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of stay) (collecting various cases where the Supreme Court "has often stayed lower federal court injunctions that contravened th[e] principle" that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election").[7]

Because the 2022 election cycle is the only cycle to which the current legislation will apply, the only relief that the Court could provide with respect to the redistricting legislation is an impermissible advisory opinion. Because plaintiffs could obtain, at most, prospective relief, they cannot obtain relief absent a prospective injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983); *cf. Cook v. Randolph County*, 573 F.3d 1143, 1155 (11th Cir. 2009) (citing *Palmer v. Bd. of Educ. of Cmty. Unit Sch. Dist. 201-U*, 46 F.3d 682, 686 (7th Cir. 1995)) (Section 2 of the Voting Rights Act does not create a cause of action for money damages). Such prospective relief does not exist here because any injury that goes beyond the 2022 elections is yet to be seen. The relevant legislation for the 2024 elections will be forthcoming in 2023 and does not yet exist. Well established rules of justiciability, including ripeness and "the rule against advisory opinions" prevents adjudication of such vague and inchoate harms which lack the "clear concreteness provided when a question emerges precisely framed and necessary from a decision." *Flast v. Cohen*, 392 U.S. 83, 96–97 (1968); *see S.C. State Conf. of NAACP v. McMaster*, No. 3:21-cv-3302, 2021 WL 5282843, at *5 (D.S.C. Nov. 21, 2021) (holding that claims challenging malapportioned electoral maps were "not yet ripe" and "stay[ing] proceedings to give the Legislature the opportunity to timely perform its redistricting duties").

B. Litigation Should Not Proceed in Advance of 2023 Legislation

Even if the Court has jurisdiction to entertain further litigation about the existing districts,

[7] *See also, e.g.*, *DNC v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Mem.) (Kavanaugh, J., concurring); *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Mem.); *RNC v. DNC*, 140 S. Ct. 1205 (2020); *Veasey v. Petty*, 574 U.S. 951 (2014); *Frank v. Walker*, 574 U.S. 929 (2014).

including the congressional districts, there is no reason to conduct discovery on Plaintiffs' claims two times over. Proceeding with discovery and all of the other trappings of litigation, when there will be additional legislation in 2023, is unwarranted. Whatever motivated the Legislature in 2021, moreover, does not "carr[y] forward" to subsequent legislation. *Perez*, 138 S. Ct. at 2325. The motives of an earlier Legislature are not to be imputed to later Legislatures. *Id.* at 2325; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (rejecting "cat's paw" theory of liability for legislators and claims of voting-related discrimination); *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) ("What motivates one legislator . . . is not necessarily what motivates scores of others . . . ."). After the State enacts new legislation, Plaintiffs will necessarily need to replead their complaint to attempt to "overcome the presumption of legislative good faith" to plausibly show, for example, that any such new legislation is imbued "with invidious intent." *Perez*, 138 S. Ct. at 2325. The discovery to which Plaintiffs are entitled is tied to the nature of those allegations. *E.g.*, *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011) (quoting Fed. R. Civ. P. 26(b)(1)). So again, there is no reason to press ahead now only to have more to do later.

In this instance, Plaintiffs are already fielding substantial discovery requests. As explained in detail in a pending motion to quash by individual subpoena recipients, *see* ECF 219, the United States has subpoenaed the Lieutenant Governor, the Speaker of the Texas House, and twenty-four other legislators and staff broadly seeking all forms of legislative and other privileged information relating to the 2021 redistricting process. Counsel has already produced over 17,000 pages of documents on their behalf. The LULAC plaintiffs have also issued subpoenas to various legislators, similarly seeking documents and information relating to the 2021 legislative redistricting process. And Defendants have received extensive and overbroad party discovery from the United States, and LULAC, NAACP, Voto Latino, and Fair Maps plaintiffs. Responding to the subpoenas and other discovery requests entails

substantial burden for these individual legislators and officials,[8] and yet Plaintiffs will be poised to do it all over again when new legislation is passed. Staying these proceedings will avoid this unwarranted drain on the resources of the parties and the Court.

* * *

There is ample time to resolve Plaintiffs' claims once the Supreme Court has clarified the range of redistricting claims that can be brought against the State's redistricting plans. The current formulation of *Gingles* and the VRA more broadly is on borrowed time. It would be of no benefit to the parties or to this Court to litigate Plaintiffs' claims under that test when the Supreme Court will be providing much-needed clarification well before the next round of elections. Moreover, staying proceedings will allow this Court to adjudicate Plaintiffs' claims based on the actual legislation that will govern in that next round of elections. There is no basis for pressing ahead now in light of all that is to come between now and the 2024 elections.

CONCLUSION

Defendants respectfully request that the Court grant the motion to stay and hold these cases in abeyance pending the Supreme Court's decision in *Merrill* and the 88th regular legislative session.

[8] For example, Defendants and the individual subpoena recipients anticipate that there will be substantial disagreement about applicable privileges. The subpoenas received to date are replete with discovery requests intended to probe the minds of individual legislators and other state officials. *But see Veasey v. Abbott*, 830 F.3d 216, 287–88 (5th Cir. 2016) (Jones, J., dissenting in relevant part); *Brnovich*, 141 S. Ct. at 2350. Adjudicating whether the discovery currently sought is both an appropriate area of inquiry and not subject to privilege is likely to be a burdensome task. The Court should not wade into that morass before knowing what rules will even govern the next election cycle.

Date: April 20, 2022

Respectfully submitted.

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COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on April 20, 2022, and that all counsel of record were served by CM/ECF.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for plaintiffs regarding this motion. Counsel for each of the plaintiff groups indicated they are opposed to the relief sought here.

/s/ Patrick K. Sweeten
PATRICK K. SWEETEN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, ***Plaintiffs*,** **EDDIE BERNICE JOHNSON, *et al.*,** ***Plaintiff-Intervenors*,** **v.** **GREG ABBOTT,** *in his official capacity as Governor of the State of Texas*, **et al.,** ***Defendants*.**	§ § § § § § § § § § § § § §	**EP-21-CV-00259-DCG-JES-JVB** **[Lead Case]** **&** **All Consolidated Cases**

ORDER

The Court has carefully considered Defendants' "Motion to Stay" (ECF No. 241). It is **DENIED**.

So ORDERED and SIGNED on this 22nd day of April 2022.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

And on behalf of:

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeals, Fifth Circuit

-and-

Jeffrey V. Brown
United States District Judge
Southern District of Texas