IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

GEORGIA STATE CONFERENCE OF THE NAACP, et al. *Plaintiffs*, v. STATE OF GEORGIA, et al. *Defendants*.	Case No. 1:21-CV-5338-ELB-SCJ-SDG
COMMON CAUSE, et al., *Plaintiffs*, v. BRAD RAFFENSPERGER *Defendant*.	Case No. 1:22-CV-00090-ELB-SCJ-SDG

PLAINTIFFS' OPPOSITION TO THE LEGISLATURE PARTIES' MOTION FOR PROTECTIVE ORDER

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PLAINTIFFS' OPPOSITION TO THE LEGISLATURE PARTIES' MOTION FOR PROTECTIVE ORDER

In their Motion for a Protective Order ("Motion," Dkt. 82-1), the Legislature Parties[1] state that the legislative privilege is "essential to representative democracy" because it "preserve[s] the independence and integrity of the legislature." Motion at 10. But the Eleventh Circuit has acknowledged that "a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests." *In re Hubbard*, 803 F.3d 1298, 1311 (11th Cir. 2015). This case presents a prototypical example of when that privilege must yield.

The Supreme Court has cautioned that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). In this case, Plaintiffs allege that Georgia's Congressional, State House, and State Senate maps are racial gerrymanders, violating their rights under the U.S. Constitution. *See* Amended Complaint ¶¶ 313-19, Dkt. 59. To succeed on a racial gerrymandering claim, "the plaintiff must prove that race was the predominant factor *motivating* the legislature's decision to place a significant number of voters within or without a

[1] The Legislature Parties include Senator John Kennedy, Representative Bonnie Rich, Director Gina Wright, the Senate Reapportionment and Redistricting Committee, the House Reapportionment and Redistricting Committee, and the Legislative and Congressional Reapportionment Office.

particular district." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quotation marks excluded, emphasis added). Plaintiffs also allege that Georgia's new maps do not comply with Section 2 of the Voting Rights Act in part because the lawmakers and their map drawers intentionally diluted the voting strength of Black, Latinx, and Asian American and Pacific Islander ("AAPI") voters in specific regions. *See* Dkt. 59, ¶¶ 320-44. To support this claim Plaintiffs must show that the legislature acted with a discriminatory *purpose*. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977).

To prove their case, Plaintiffs seek documents and testimony from the Legislature Parties. For example, Plaintiffs seek documents and testimony that explain why Congressional District-14 spans from the northwest edge of Georgia into the Atlanta-Metro area; why Senate District-48—where Michelle Au was elected in 2020 as Georgia's first AAPI State Senator—was drawn to have a majority-White population; and why House District-164, which sits in the suburbs of majority-minority Savannah, stretches to the western edge of Bryan County, which is majority-White. Documents and testimony that explains why the maps bear these characteristics will reveal whether race predominated the map drawing process and whether the maps were drawn with racial animus.

The Legislature Parties seek to deprive Plaintiffs of the most probative evidence regarding the discriminatory intent behind the redrawing process by

claiming the evidence is absolutely protected by legislative privilege. Not so. The privilege does not apply to factual information or to documents and testimony with third-parties that postdate the map-drawing process. *See infra* § I. Moreover, the legislative privilege must yield in light of the important federal interests at stake. *See infra* § II.[2] Alternatively, if this Court does not deny the Legislature Parties' motion on the merits, it should deny their motion for failing to follow this Court's Order and order the Legislature Parties to follow Plaintiffs' initial proposal to assess the privilege claims after documents are produced and depositions occur. *See infra* § III.

On August 9, 2022, the Court held a conference on the Legislature Parties' legislative privilege objections. The Court ordered (1) Plaintiffs to provide the Legislature Parties with a list of specific topics that they intend to raise during depositions, and (2) the Legislature Parties to provide Plaintiffs with a list of specific types of documents that they contend should be withheld. The Plaintiffs followed this Order. *See* Declaration of Jacob Canter ("Canter Decl."), Ex. A. The Legislature Parties did not.

Rather than, as ordered by this Court, provide a list of specific categories of

[2] To facilitate the Court's review of sections I and II, Plaintiffs have prepared an exhibit that identifies every deposition topic that Plaintiffs offered to the Legislature Parties and every document request issued to the Legislature Parties. *See* Declaration of Jacob Canter, Ex. C. This exhibit identifies each topic and request that is not covered by the privilege, and also explains why each topic and request seeks relevant information.

documents that the Legislature Parties contend are protected by the legislative privilege, the Legislature Parties make a blanket assertion of legislative privilege, propose to provide a privilege log at some unidentified date in the future. The Legislature Parties' failure to comply with this Court's Order is prejudicing Plaintiffs. Rather than allow the Legislature Parties to continue to delay and prejudice Plaintiffs, the Court should either deny the Legislature Parties' Motion on the merits or direct the parties to follow Plaintiffs' initial proposal to assess the privilege claims after documents are produced and depositions occur.

I. Plaintiffs are Entitled to the Discovery They Seek [3]

A. The Legislative Privilege Does Not Apply to Facts and Certain Communications Sought

i. The Legislative Privilege Does Not Cover Facts

The Legislature Parties assert that the legislative privilege applies to everything sought by Plaintiffs. But the legislative privilege does not apply to facts. This includes "[f]actual matter collected for the information and use of legislators," "[f]actual summaries in an advisory communication," and any "information which does not reveal the content of communications." *Florida Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 267-68 (N.D.

[3] The Legislature Parties reference certain objections to Plaintiffs' requests including overbreadth and burden. Motion at 8-9. Because their Motion for a Protective Order is brought on the basis of legislative privilege only, Plaintiffs do not respond here to those meritless objections.

Fla. 1995); *see also Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011) ("[C]ourts have allowed discovery of documents containing factually based information used in the decision-making process or disseminated to legislators or committees.") (citation omitted).

For these reasons, deposition topics related to, for example, when and how the maps were drawn (Canter Decl, Ex. A at 3 (Topic Nos. 1, 3)), who drew the maps (Topic No. 2), how map-drawers were trained (Topic No. 9), and factual information reflected in the maps (Topic Nos. 15, 17) are not covered by the privilege. *See also* Canter Decl, Ex. A at 3-5 (Topic Nos. 1-4, 6-9, 11-12, 15, 17, 22-25, 29, 33, 35, 38-39, 41, 44-47). And for the same reason, neither are documents related to, for example, "statistical or mathematical analysis, spreadsheets or diagrams" about the maps (ECF No. 82-8, RFD Nos. 4, 9, 14) and "the use of race, the use of political party information, traditional redistricting principles, or compliance with the [VRA]" (ECF No. 82-8, RFD Nos. 3, 8, 13). *See also* ECF No. 82-8, RFD Nos. 1, 2, 5-7, 10-12, 15-18.[4]

Thus, the Legislature Parties should be ordered to produce any requested documents and testify regarding the facts underlying the map-drawing process.

[4] The RFDs in the document subpoena to Director Wright includes all of the document requests issued to the Legislature Parties. *See* Dkt. 82-8. Also, to the extent any documents responsive to these topics reach beyond facts to the opinions or motivations behind the map-drawing decisions, they should be produced for the reasons explained in § II.

ii. The Legislative Privilege Only Covers Communications with Non-Legislators That Were "Part of the Formulation of Legislation"

The legislative privilege does not protect legislator's communications with third parties that are not "part of the formulation of legislation." *Thompson v. Merrill*, 2020 WL 2545317, at *3 (M.D. Ala. May 19, 2020); *see also League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 454 (N.D. Fla. 2021).

First, this means that the privilege does not apply to a legislator's communications with third parties after the legislature voted to pass the law. This can relate to deposition topics regarding, for example, communications about the map's impact on persons and communities in Georgia (Canter Decl, Ex. A at 3 (Topic Nos. 18-21)) and communications about why the final maps were selected, as long as those communications postdate the vote (Topic No. 30). *See also* Canter Decl, Ex. A at 3-6 (Topic Nos. 10, 13-21, 27-32, 37, 41-43, 50, 61-63, 69, 71-78). Many of the document requests seek post-vote materials also—for example, invoices reflecting payments made to third party map consultants (ECF No. 82-8, RFD Nos. 5, 10, 15) and documents memorializing the political effects of the new maps after they have become law (ECF No. 82-8, RFD Nos. 3, 8, 13). *See also* ECF No. 82-8, RFD Nos. 2, 7, 12.

Second, if the communications were not "part of" the legislation's formulation, they are not subject to the privilege. This means that communications

with non-legislators that were merely related to the redistricting process generally—as opposed to being part of the formulation of the particular maps—are not protected by the privilege. *See Merrill*, 2020 WL 2545317, at *3 (concluding that the privilege covers communications with non-legislator members of an exploratory committee *solely because* the committee was "engaged in the proposal, formulation, and passage of legislation").

The third and fourth sets of topics that Plaintiffs offered the Legislature Parties relate to the redistricting process generally (Canter Decl, Ex. A at 5-6 (Topic Nos. 51-69)) and to "race, economics, and politics in Georgia" (Topic Nos. 70-78). Not one of these topics, therefore, is covered by the privilege. Specific topics herein include, for example, efforts to comply with Federal and State laws before the map-drawing began (Topic No. 54), the selection of map-drawers (Topic No. 51), the selection of data used to draft the maps (Topic No. 52), and political influence amongst the White community and the minority communities in Georgia (Topic Nos. 70-74).

Relatedly, the document requests about money spent on the maps (ECF 82-8, RFD Nos. 5, 10, 15), and that relate to preparations for Georgia's map-drawing process generally (ECF 82-8, RFD Nos. 2, 7, 12) are not covered by the privilege.

Thus, the Legislature Parties should be ordered to produce any requested documents and testify regarding non-privileged communications with third parties.

B. The Speech or Debate Clause of the U.S. Constitution Does Not Apply Here

The Legislature Parties argue that the Speech or Debate Clause of the U.S. Constitution provides the basis for a Protective Order from the discovery sought by Plaintiffs. Motion at 10. Not so. They admit that the Speech or Debate Clause applies only to members of Congress. *Id*. The Speech or Debate Clause does not apply to state or local legislators, either directly or via incorporation in federal common law. *See United States v. Gillock*, 445 U.S. 360, 368-73 (1980).

Instead, "both state legislative immunity and privilege are not founded on the United States Constitution, but rather are based on an interpretation of the federal common law that is necessarily abrogated when the immunity or privilege is incompatible with federal statutory law." *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 334 (E.D. Va. 2015). The clause does not "afford[ ] analogous protections to state legislators." Motion at 10.[5]

Furthermore, the Legislature Parties bear the burden to show that the

[5] None of the cases cited by the Legislature Parties supports this proposition. *Supreme Ct. of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 731 (1980), involved the legislative immunity, not legislative privilege. *Tenney v. Bradhove*, 341 U.S. 367 (1951), predates *Gillock* by 29 years, and in *Gillock* the Supreme Court expressly rejected a "broad[]" reading of *Tenney*, noting that this case too addressed "whether state legislators were immune from civil suits." 445 U.S. at 371. And neither *Hubbard* and *Scott* state that the legislative immunity is "analogous" to the Speech or Debate Clause—they just state the unsurprising proposition that their origins are similar. *See In re Hubbard*, 803 F.3d at 1310 n.11; *Scott v. Taylor*, 405 F.3d 1251, 1254 (11th Cir. 2005).

documents and testimony sought are covered by the legislative privilege. *See* Fed. R. Civ. Proc. 45(e)(2). Plaintiffs have made a blanket assertion of legislative privilege, and by failing to comply with this Court's order to identify specific categories of documents that are purportedly privileged, the Legislature Parties have failed to meet their burden to show the legislative privilege applies.

II. The Legislative Privilege Must Yield Here to the Federal Interests

Assuming that the Legislature Parties could meet their burden to show that specific documents and testimony are covered by the legislative privilege, there is no dispute between the parties to this motion that the privilege is not absolute. *See* Motion at 17 n.5 ("[T]he question of whether the privilege is absolute or qualified in civil actions is not before the Court on this motion"); *In re Hubbard*, 803 F.3d at 1311 ("[A] state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests . . . ."); *Lee*, 340 F.R.D. at 455 ("Both the Eleventh Circuit and the Supreme Court have explained that a state lawmaker's privilege may give way to important federal interests . . . .") (citations omitted). And in this case—where the Legislature Parties are not threatened with civil liability—the important interests at stake must be balanced solely against the burden of disruption that compliance with the subpoenas may cause.

The Legislature Parties acknowledge that district courts within the Eleventh Circuit have applied the five-factor test outlined in *Rodriguez v. Pataki*, 280 F. Supp.

2d 89, 100-01 (S.D.N.Y. 2003), "as a means of weighing federal interests against the importance of the legislative privilege." Motion at 18-24. For example, the Northern District of Florida recently applied this five-factor test in *Lee*, "to determine whether the legislative privilege must give way to Plaintiffs' need for the evidence they seek." *Lee*, 340 F.R.D. at 456. The five *Rodriguez*/*Lee* factors are:

> (1) whether the evidence Plaintiffs seek is relevant, (2) whether other evidence is available, (3) whether the litigation is sufficiently "serious," (4) whether the government is involved in the litigation, and (5) whether upholding the subpoena defeats the legislative privilege's purpose.

Id. "The person invoking the privilege does bear the burden of proving its existence." *In re Grand Jury Investigation*, 842 F. 2d 1223, 1225 (11th Cir. 1987); *see also Lee*, 340 F.R.D. at 453 (applying burden to proponents of legislative privilege). The Legislature Parties cannot meet their burden on any of these factors.

A. The Evidence Plaintiffs Seek Is Relevant

The first *Rodriguez*/*Lee* factor is whether the evidence sought is relevant. The evidence sought is not only relevant, it is core to Plaintiffs' claims. Plaintiffs allege racial gerrymandering and discriminatory purpose and vote dilution claims under the Voting Rights Act. To succeed on a racial gerrymandering claim, "the plaintiff must prove that race was the predominant factor *motivating* the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 137 S. Ct. at 1463 (quotation marks excluded, emphasis added). Central to Plaintiffs'

Section 2 discriminatory purpose claim is showing that the legislature acted with a discriminatory *purpose*. *See Village of Arlington Heights*, 429 U.S. at 266-268.

Evidence from the Legislature Parties is needed to litigate both claims. Every deposition topic and document request is relevant to these elements. The Legislature Parties do not dispute that direct evidence regarding the Legislature Parties motivation in enacting the challenged maps is relevant, but rather merely argue that Plaintiffs should be limited to circumstantial evidence.

Courts have naturally held that "the subjective motivations of [the law's] sponsors are highly relevant to" proving intent-based voting rights claims. *Lee*, 340 F.R.D. at 457. Therefore, direct evidence of the purposes and motivations behind the particular decisions made about draft and final maps is the most probative evidence available. For example, deposition topic Nos. 26-28 and document request Nos. 2, 7, and 12 cover the review and consideration of comments from non-map drawers, such as political leaders in Georgia, on how the maps should be drawn. *See* Canter Decl, Ex. A at 4; ECF No. 82-8. And topic Nos. 10, 13, 14, and 37 and document request Nos. 3, 8, and 13 seek testimony and materials related to the directions—whether formal or informal—that map drawers were given, as well as the motives behind those directions. *See* Canter Decl, Ex. A at 3-4; ECF No. 82-8.

Plaintiffs provided the 78 topics to the Legislature Parties in four sets. *See* Canter Decl, Ex. A at 3-6. The first set (Topic Nos. 1-32) relates to maps that were

prepared during the map-drawing process.[6] These questions go to legislative intent: how the maps were drawn, who participated in the map-drawing, the discussions map-drawers had together and with others, and the analyses completed to determine whether maps were satisfactory. The requests for documents on the "notes, requests, opinions, thoughts, or views about the maps, the lines drawn, or the district shapes" go towards legislative intent, too. *See* ECF No. 82-8, RFD Nos. 2, 7, 12.

The Supreme Court has pointed to evidence from the map-drawing process to show legislative intent in a redistricting case. *See Cooper*, 137 S. Ct. at 1468-69 (evidence included that lawmakers expressed that the district "must include a sufficient number of African-Americans," and that this "objective was communicated in no uncertain terms" to the legislature's map-drawing consultant). The second set (Topic Nos. 33-50) relates to data regarding the maps, as do document request Nos. 4, 9, and 14. If these requests are covered by the privilege, they are highly relevant because they reveal the actually racial makeup of the maps and whether the Legislature Parties were aware of each map's effects on minority and White communities in Georgia. *See e.g.*, Canter Decl, Ex. A at 4, Topic No. 34

[6] To be clear, some of these topics ask for testimony, either wholly or in part, that is not covered by the privilege. *See supra* § I.A. Nonetheless, to the extent the Court concludes that the privilege does apply to these topics, they should be produced on the alternate basis discussed in this section of the brief. *See* Canter Decl. Ex. C (listing deposition topics and RFPs referenced in each section).

(what content was included on the maps); Topic No. 40 (what was discussed about the map data); ECF No. 82-8, RFD Nos. 4, 9, 14 (seeking "[a]ll data considered or relied on to draw" the maps).

The third set (Topic Nos. 51-69) relates to the redistricting process generally, and the fourth set relates to race, economics, and politics in Georgia (Topic Nos. 70-78). Again, to the extent any of these topics are within the privilege, they are highly relevant to proving Plaintiffs' claims. For example, documents and testimony related to who will draw the maps (Topic No. 51) and where the data to analyze the maps comes from (Topic No. 52) are highly probative to showing whether the legislature prioritized race when making decisions about where to place the lines. *See e.g.*, *Cooper*, 137 S. Ct. at 1475-78 (relying on testimony from the map-drawing consultant to determine whether race predominated process). Also, documents and testimony related to population growth in Georgia (Topic Nos. 75, 76) and the economic activities of communities in Georgia (Topic Nos. 77, 78) are highly probative to showing whether the line-drawing decisions were made to support or harm the economic or political opportunities for certain communities. *See e.g.*, *Caster v. Merrill*, 2022 WL 264819, at *20 (N.D. Ala. Jan. 24, 2022) (communities of interest in redistricting includes communities that share economic ties).

The Legislature Parties cite three cases to argue that evidence of motive is not relevant to a legislature's motive and purpose. *See* Motion at 19-21. None of these

cases supports this proposition. First, two of the three cases do not relate to redistricting, or even to voting rights. *See Palmer v. Thompson*, 403 U.S. 217 (1971) (whether city violated the constitution by closing a public pool instead of integrating it); *U.S. v. O'Brien*, 391 U.S. 367 (1968) (whether a law criminalizing draft card burning is constitutional). And while *Greater Birmingham Ministries* relates to Alabama's voter ID law, the court there acknowledged that the plaintiffs "must determine" whether the law was passed "with an intent to discriminate against Alabama's minority voters." *Greater Birmingham Ministries v. Secretary of State for the State of Ala.*, 992 F.3d 1299, 1319 (11th Cir. 2021).

Factor 1 therefore strongly favors the privilege yielding.

B. The Evidence Plaintiffs Seek Is Not Available Elsewhere

Where the party "alone will possess much of the evidence Plaintiffs seek," this factor weighs in favor of the privilege yielding. *Lee*, 340 F.R.D. at 457. This is the case here because "[i]n the redistricting context, the real proof is what was in the contemporaneous record in the redistricting process," and the Legislature Parties are the most likely to possess this proof. *Johnson*, 2018 WL 2335805, at *5 (citation omitted). And even if other parties *might* have this evidence, where the other parties have "been nothing if not recalcitrant in the face of [ ] efforts to obtain information," courts weigh this factor in favor of the privilege yielding. *Lee*, 340 F.R.D. at 457.

Indeed, for several of Plaintiffs' requests, as far as Plaintiffs are aware, only

the Legislature Parties possess responsive documents and information. For example, Topic Nos. 22-23, 45, 47, 51-52, and 55-58 all ask about information that was solely in the possession of the legislators and their staff leading the map-drawing process.[7] *See* Canter Decl, Ex. A at 3-5. Similarly, document request Nos. 2, 7, and 12 seek materials in support of the drafting of the maps that would not necessarily have been shared with other parties, such as internal notes and comments about the maps. *See* ECF No. 82-8, RFD Nos. 2, 7, 12. And if the Legislature Parties did not rely on outside consultants to prepare the maps, then evidence regarding every single one of Plaintiffs' topics, and nearly every one of the document requests, are solely within the Legislature Parties' possession and control. *Id*.[8]

The Legislature Parties cite *Lee* and argue that the publicly-available information already produced is adequate. *See* Motion at 21-22. The documents which the Legislature Parties have produced do not change the analysis. The vast majority (over 90%) of the 447 documents that the Legislature Parties have produced are publicly-available and reveal little about the actual map-drawing process. These

[7] For example, Topic Nos. 22 and 23 asks about what information was shared with the map-drawers, which necessarily requires knowledge that those receiving the information do not possess. *See* Canter Decl., Ex. A at 3. Also, Topic Nos. 55-58 ask about information from before the map-drawers were brought into the process. *Id*. at 5.

[8] This reinforces another reason why the Legislature Parties' delay in producing responsive materials prejudices Plaintiffs. Even if there were third parties that possessed these documents, Plaintiffs do not know yet who they are, and Plaintiffs will have limited time to seek documents from them once this dispute ends.

documents include public meeting minutes, agendas, lists of committee attendees, press releases, and videos of committee hearings. The few documents that relate to specific maps are black-and-white copies that include no information about when they were drafted, who drafted them, any analyses about them, or any other information that can be used to interpret them. The Legislature Parties have not produced *anything* as to their motivation and purpose. That is solely within their control and, as explained above, is needed for Plaintiffs' claims. *See supra* § II.A.

Factor 2 therefore strongly favors the privilege yielding.

C. The Litigation Is Sufficiently Serious for the Privilege to Yield

The Legislature Parties "recognize that voting rights litigation is serious." Motion at 22-23. Nonetheless, they state that this factor is "neutral" because the legislative privilege is also serious. *Id*. at 22.

The Legislature Parties mischaracterize how courts assess this factor. The point is not that the privilege is also serious. Instead, this factor weighs in favor of the privilege yielding if the case-at-bar—and the documents and testimony being sought for purposes of this case—is serious enough to overcome the privilege. *See Lee*, 340 F.R.D. at 457 (factor weighs in favor of the plaintiffs because "voting-rights litigation is especially serious"); *Bethune-Hill*, 114 F. Supp. 3d at 341 ("Courts have readily recognized the seriousness of the litigation in racial gerrymandering cases" and "[t]his factor weighs heavily in favor of disclosure") (citation omitted); *Johnson*,

2018 WL 2335805, at *5 (finding that this factor "weigh[s] in favor of disclosure" because the "case involves questions regarding the impact of [the state's] current apportionment plan on the constitutional rights of [the state's] citizens."). Voting is "regarded as a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Therefore, this case presents the most "serious" set of facts for the legislative privilege to yield.[9]

D. The Government Is Involved in This Litigation

The Legislature Parties agree that the Government is involved in this litigation. *See* Motion at 23. This fact favors the privilege yielding because the role of government in this litigation is direct. The gerrymandering and Section 2-intent claims focus on "the motive and intent" of the state legislature when it re-drew and effected the voting districts at issue. *See* Order at 11, *League of United Latin Am. Citizens, et al. v. Abbott*, 3:21-cv-00259-DCG-JES-JVB (ECF No. 467) (Jul. 25, 2022) (citations omitted). "The Legislators' role in the allegedly unlawful conduct is direct, and therefore militates in favor of disclosure." *Id*. (cleaned up) (citing *Favors v. Cuomo*, 2015 WL 7075960, at *11 (E.D.N.Y. Feb. 8, 2015)).

The Legislature Parties argue that a court can "quash or limit a subpoena if the subpoena imposes an undue burden or requires the disclosure of privileged or

[9] To the extent the specific deposition topics relate to this factor, Plaintiffs note that each topic proffered is highly relevant to proving their claims *See supra* § II.A. Thus, the seriousness of the litigation is supported by the discovery requests.

other protected matter, provided that no exception or waiver applies." Motion at 8 (*citing* Fed. R. Civ. Proc. 45(d)). However, the Legislature Parties do not fall within the meaning of non-parties that Rule 45 intended, which encompasses an independent third-party to the action. Here, Plaintiffs' suit against the State stems from actions taken by the those in the Legislature Parties. In other words, although the Legislature Parties are not a party to this suit, their strong connection to the underlying facts at issue makes them far from an independent third-party.

Even if a court were to find that Legislature Parties are true independent third-parties, this does not protect them from producing discovery. In fact, FRCP 45 provides that "a nonparty may be compelled to produce documents and tangible things or to permit an inspection." Fed. R. Civ. Proc. 34(c); *see* 8B WRIGHT & MILLER FED. PRAC. & PROC. § 2209 (2010). Factor 4 thus also strongly favors the privilege yielding.

E. Upholding the Document and Deposition Requests Does Not Defeat the Legislative Privilege's Purpose

Legislative privilege exists to "encourage frank and honest discussion among lawmakers." *Lee*, 340 F.R.D. at 458 (quoting *Comm. For a Fair & Balanced Map*, 2011 WL 4837508, *8). To this end, the Legislature Parties raise two concerns about Plaintiffs' requests. *See* Motion at 23-24. ***First***, the Legislature Parties state that

> Permitting the unrestrained depositions of Movants and requiring the production of all communications related to the redistricting process will unquestionably serve to discourage members of the General

> Assembly from engaging in free and frank communications with other members of the General Assembly and their constituents.

Id. at 23. This concern does not withstand scrutiny. Plaintiffs allege that the Legislature Parties drew the maps with a racially discriminatory purpose. There is no governmental interest in the legislature engaging in free and frank communications about a discriminatory intent to deny certain groups their right to fair representation. And the Legislature Parties do not explain why sitting for depositions[10] or producing documents "discourage . . . free and frank communications." They simply assert that discouragement will occur. But the Legislature Parties cannot be chilled by the fear of liability because they are not parties to this suit and no liability is at stake—only the legislative privilege is at issue here, not the legislative immunity. *See e.g.*, *Baldus v. Brennan*, 2011 WL 6122542, at *2 (E.D. Wis., Dec. 8, 2011) (finding that the privilege did not apply and stating that "the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans," coupled with the high relevance of requests, outweighed any potential future "chilling effect" on the legislature).

If, instead, the Legislature Parties are discouraged solely by the acts of having to produce documents and sit for depositions, then this time-and-resources concern

[10] Depositions which, to be clear, are not "unrestrained," but are based on a list of 78 specific topics that the Legislature Parties have had since August 19, 2022. *See* Canter Decl, Ex. A at 3-6.

must be balanced against the significant interests at stake in this case and the critical importance that their documents and testimony provide. For purposes of the documents, the discouragement is zero because the Court already directed the Legislature Parties to review the documents at issue.[11] And for purposes of the depositions, Plaintiffs have already disclosed to the Legislature Parties the specific topics that will be investigated.

Second, the Legislature Parties state that

> [C]ompelling testimony of legislators threatens the ability of legislators to privately obtain information essential to their legislative decision-making and to confer with other legislators . . . It is highly probable that legislators will refrain in the future from seeking the information they need to effectively legislate if such communications and legislative materials are subject to disclosure to litigants.

Id. at 24. This concern also does not withstand scrutiny. The parties are participating in discovery under a protective order, *see* Dkt. 76, and the Legislature Parties are free to designate documents as confidential or highly-confidential.

Accordingly factor 5 favors the privilege yielding.

* * *

All five factors point strongly in favor of the privilege yielding. The Court should find that the privilege yields with respect to all of Plaintiffs' document and testimony requests that fall within the privilege's ambit.

[11] If the Legislature Parties have not already reviewed these documents, then they have violated the Court's order.

III. In the Alternative, This Court Should Deny the Motion for Failure to Follow Its Order and Impose Plaintiffs' Initial Proposal

A. The Legislature Parties' Failure to Follow the Court's Direction Prejudices Plaintiffs

The Court set a schedule for this Motion which was intended to allow the parties to offer competing views on how the interests in this litigation balance against *specific categories* of deposition topics and documents. This Court ordered the Legislature Parties to provide Plaintiffs with a list of specific types of documents that they contend should be withheld based on the privilege and provided the Legislature Parties four weeks to complete this task. This Order was consistent with FRCP 45(e)(2), which requires a party invoking a privilege to "describe the nature of the withheld documents, communications, or tangible things in a manner that . . . will enable the parties to assess the claim." *See also Bethune-Hill*, 114 F. Supp. 3d at 34 ("[T]he proponent of a privilege must demonstrate specific *facts* showing that the communications were privileged") (citation omitted, emphasis added).

The Legislature Parties did not follow this Order. The Legislature Parties have not given the Plaintiffs any information about their documents, and the Motion includes no details either. Rather, the Motion makes the very sorts of abstract and unspecific statements about the documents and balancing analysis that this briefing schedule was supposed to prevent. *See e.g.*, Motion at 22-23. The failure to follow the Court's direction forces Plaintiffs to draft their opposition brief without

information about what the Legislature Parties seek to shield.

It is too late to start this dispute over, and the Legislature Parties' proposal to provide a privilege log at some unspecified date in the future only highlights the prejudice their failure to comply with the Court's order has caused. Any further delay would make it even harder for Plaintiffs to prepare their case under the tight schedule needed to ensure that trial ends with sufficient time before the 2024 election.[12] The Legislature Parties seek to force Plaintiffs to either proceed with depositions without relevant documents, or cause further delay that would make it difficult to logistically schedule depositions, with the holidays in November and December, and the Georgia General Assembly session starting in January. Any additional delay would make it harder to obtain essential documents and to complete important depositions with enough time to rely on these materials to make further discovery investigations.

The Legislature Parties' failure to follow the Court's direction has already prejudiced Plaintiffs. The Legislature Parties' motion should therefore be denied and the Court should order the Legislature Parties to follow the Plaintiff's original proposal. Taking this step is within the Court's discretion. *See, e.g.*, *Enenmuo v.*

[12] It is also worth stressing that—despite being given four weeks to investigate their documents—it is unclear if the Legislature Parties have made any efforts to understand what documents are in their possession. Plaintiffs are further prejudiced if the Legislature Parties are given another four weeks (or more) to investigate their documents before producing them, when the Court had already provided them with ample opportunity to do so.

Hildreth, 2020 WL 13528573, at *1 (N.D. Ga. Jun. 24, 2020) ("The Court has broad discretion in controlling the discovery process of the cases before it."); *Bozeman v. Per-Se Techs., Inc.*, 2006 WL 8431279, at *2 (N.D. Ga. May 23, 2006) ("Whether to enter a protective order is within the sound discretion of the [trial] court.").

B. Plaintiffs' Original Proposal for Addressing the Legislative Privilege is the Most Efficient Way to Evaluate Privilege and Prevent Further Prejudice

Given the Legislature Parties' disregard of this Court's Order, the Court should direct the parties to follow Plaintiffs' initial proposal, which is that the legislative privilege claims should be assessed after the documents have been produced and after the depositions have occurred, during which time the documents and testimony would be subject to strict confidentiality protections. *See* Dkt. 81-1 at 4 (describing Plaintiffs' proposal). At the August 9, 2022, hearing, the Court agreed that this proposal provides appropriate safeguards for the privilege, and would promote judicial efficiency, but declined to grant this proposal because the Legislature Parties did not accept it. The Legislature Parties failed to follow this Order and provide the specific information requested by the Court, thereby causing unnecessary delay, wasting judicial resources, and prejudicing Plaintiffs. The Legislature Parties should not be allowed to delay the production of documents and testimony any further and should be ordered to fully comply with the subpoenas.

C. The Legislature Parties' Proposals Prejudice Plaintiffs and Cause Further Delay

The Legislature Parties made a proposal after Plaintiffs provided their list of specific topics. *See* Canter Decl., Ex. B. This proposal would have prevented Plaintiffs from asking questions core to proving their case. For example, Plaintiffs would have been prohibited from asking questions about "members' motive or intent in drawing, sponsoring, presenting, supporting or opposing any proposed map," whether that motive was communicated by, among, or between "members of the Georgia General Assembly and staff of the General Assembly, including employees of the Office of Legislative and Congressional Reapportionment" or between "members of the Georgia General Assembly and any constituent" or any member's "subjective motivation or intent." In short, their proposal was to preclude Plaintiffs from accessing testimony that goes to the core of a racial gerrymandering claim and a Section 2-intent claim, both of which require evidence on purposes and motivations. *See Cooper*, 137 S. Ct. at 1462-63; *Village of Arlington Heights*, 429 U.S. at 266-68. This direct evidence of intent is the most probative evidence that even if it were privileged, it would need to be produced in this case. Therefore, Plaintiffs rejected this initial proposal during a meet and confer.

Perhaps realizing the inadequacy of their initial proposal, the Legislature Parties Motion made a new proposal, that had not been communicated to Plaintiffs before it was filed. *See* Motion at 5-6. Rather than identify with specificity the types

of documents that would be withheld—as the Court ordered—the proposal just says that any documents which any legislator contends is privileged will be placed on a privilege log. The Legislature Parties seek to further delay the identification of specific documents and force Plaintiffs to proceed with depositions without the relevant documents. This proposal thus only serves to delay and prejudice Plaintiffs.

IV. Conclusion

Plaintiffs respectfully request that the Court deny the Legislature Parties' Motion because the legislative privilege does not apply or—under these circumstances—yields in full. *See supra* §§ I, II. In the alternative, because the Legislative Parties failed to comply with this Court's discovery order, Plaintiffs request that the Court order the Legislature Parties to comply with Plaintiffs' subpoenas consistent with Plaintiffs' initial proposal. *See supra* § III.

/s/ Kurt Kastorf
Kurt Kastorf (Georgia Bar No. 315315)
KASTORF LAW LLP
1387 Iverson St., Suite 100
Atlanta, GA 30307
Telephone: (404) 900-0030
kurt@kastorflaw.com

Toni Michelle Jackson*
Astor H.L. Heaven*
Keith Harrison*
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW
Washington, D.C. 20004

Telephone: (202) 624-2500
tjackson@crowell.com
aheaven@crowell.com
kharrison@crowell.com

Jon Greenbaum*
Ezra D. Rosenberg*
Julie M. Houk*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1500 K Street NW, Suite 900
Washington, D.C. 20005
Telephone: (202) 662-8600
Facsimile: (202) 783-0857
jgreenbaum@lawyerscommittee.org
erosenberg@lawyerscommittee.com
jhouk@lawyerscommittee.com

Counsel for Plaintiffs
GEORGIA STATE CONFERENCE
OF THE NAACP, et al.

**Admitted pro hac vice*

CERTIFICATE OF SERVICE AND COMPLIANCE WITH LOCAL RULE 5.1

I hereby certify that on September 23, 2022, I electronically filed the foregoing PLAINTIFFS' OPPOSITION TO THE THIRD PARTY'S MOTION FOR PROTECTIVE ORDER, which has been prepared using 14-point Times New Roman Font, with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record.

I further certify that the within and foregoing has been prepared in accordance with Local Rule 5.1(C) and is in a 14-point Times New Roman font.

Respectfully submitted this 23rd day of September, 2022

/s/ Kurt Kastorf
Kurt Kastorf
Counsel for Plaintiffs