UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANNE HARDING, RAY HUEBNER, GREGORY R. JACOBS, MORGAN MCCOMB, AND JOHANNES PETER SCHROER Plaintiffs,	§	
V.	§	C.A. NO. 3:15-CV-00131-D
COUNTY OF DALLAS, TEXAS CLAY LEWIS JENKINS, in his official Capacity as County Judge of Dallas County, et al., Defendants,	§	

BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND REQUEST FOR ORAL HEARING

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TO THE HONORABLE JUDGE OF SAID COURT:

Defendants, County of Dallas, Texas, Clay Lewis Jenkins, in his capacity as County Judge of Dallas County, Texas, and Theresa Daniel, Mike Cantrell, John Wiley Price, and Elba Garcia, in their capacity as County Commissioners (hereinafter collectively referred to as "Defendants") and file this Brief in Support of their Response to Plaintiffs' Motion to Compel, ECF No. 42, 43 and Request for Oral Hearing, and would respectfully show the Court as follows:

I. INTRODUCTION

A. Case Background

Plaintiffs' Complaint is based on the enactment of the 2011 Dallas County Commissioners' Court District Map and allegations relating to actions of Defendants in their official capacities. To date, Plaintiffs have failed to show any threshold evidence of discriminatory effect or intent on the part of Defendants.

In fact, Plaintiffs stated at deposition that (1) they all identify with the Republican Party[1]; (2) they have never been prohibited from voting in Dallas County elections[2]; (3) there is no history of official discrimination against the Anglo population in the area of public accommodations[3]; (4) Anglos in Dallas County do not bear the effects of past discrimination in areas such as education, employment

[1] Defendants' Appendix (Def. App.), pp. 5, 7, 9, 11, and 13, Interrogatory No. 14
[2] Def. App., pp. 14, 19, 24, 29, and 34, Request for Admissions No. 1
[3] Def. App., pp. 22, 27, 32, 35, and 37, Request for Admissions No. 12

and health which hinder their present ability to participate in the political process[4]; (5) Dallas County elections for Dallas County Commissioners Court are racially polarized[5]; (6) Dallas County Commissioners Court held public hearings to solicit public input with respect to its 2011 Redistricting plan[6]; and (7) three of the five defendants (Commissioners Daniel, Cantrell and Judge Jenkins) are members of the Anglo Community[7]. Moreover, lead Plaintiff Harding admitted in deposition that the three Anglo members of the Commissioners Court, or 60% of the Court, were members of the Plaintiffs' class.[8] In fact, none of the individual Plaintiffs participated in the public hearings held on the adopted plan and none offered proposed alternative plans or suggested changes to the plans being considered.[9]

These admissions alone call into question the viability of Plaintiffs' claim and mitigate the strength of their motion to cast aside decades of legislative privilege and attorney-client privilege doctrine. Plaintiffs are seeking to depose the named Defendants in this matter, the County Judge and the County Commissioners, as well as a representative of Dallas County. Plaintiffs have not sought the depositions

[4] Def. App., pp. 16, 21, 26, 31, and 36, Request for Admissions No. 14
[5] Def. App., pp. 17, 22, 25, 32, and 35, Request for Admissions No. 11
[6] Def. App., pp. 18, 23, 28, 33, and 38, Request for Admissions No. 22
[7] The plaintiffs identify the class of non-Hispanic White ("Anglo") as persons identified as such in the 2010 United States Census. These Defendants have identified themselves as non-Hispanic Anglo in the 2010 US Census
[8] Def. App., p. 43:19-43:23
[9] Def App., pp. 15:24 - 16:8, 26:21 - 27:8 (Harding); 19:4- 20:5 (Jacobs); 15:20 - 16:11, 22:23- 23:5, 28:17-28:21 (Morse); 13:9 -14:3, 21:3- 21:15 (Schroer); 18:6- 18:18, 25:12- 25:18 (Heubner)

of any other individuals other than the named Defendants and County representative; nor have Plaintiffs pursued alternative, less-burdensome discovery mechanisms to obtain this information from Defendants.

B. Procedural History

Plaintiffs' Motion could give the impression, whether intentional or not, that Defendants have delayed in responding to what it believes have been burdensome and overbroad discovery requests. Despite the tenuousness of Plaintiffs' liability claims, in order to avoid bothering the Court with extensive discovery matters, Defendants have voluntarily agreed to enormous discovery processes. For the Court's benefit, below is a brief history of the document production in this case.

In June, 2015, counsel for the parties negotiated over the search term that would be used to harvest e-mails from the Dallas County e-mail server. After some discussion, counsel agreed to search for and log all e-mails on the County server that (1) included the word "redistricting;" and (2) were sent or received April 1, 2010 through December 31, 2012, a date range extended at Plaintiffs' counsel's request. Not unexpectedly, the search returned approximately 184,000 emails. Defendants then went to work logging these emails for application of privilege and producing them on a rolling basis. This arrangement was agreed to by counsel.

In addition to the email search, Plaintiffs requested information from the files of

the individual members of Commissioners' Court. Those files also have been located and logged. Defendants endeavor to locate additional materials and timely supplement whenever more responsive documents have been located and will continue to do so.[10] For example, just this week, Defendants produced additional personal files from the individual members of Commissioners' Court. Also this week, Defendants produced a revised privilege log that recodes some materials as non-privileged and also re-codes materials previously marked legislative privilege but that should have also been marked attorney-client privileged.[11]

While the foregoing document production was underway, in September, 2015, Plaintiffs' counsel requested a search of the County's servers for e-mails concerning the resignation of former Dallas County Election Administrator, Bruce Sherbet. Though Defendants take the position that such discovery requests were completely irrelevant to the issues before this Court, Defendants searched for these documents (again, to avoid taking up court time with a discovery dispute). After agreeing on a time frame for such a search, approximately 3,100 e-mails were discovered, reviewed

[10] For example, Plaintiffs have requested political campaign materials from the individually named defendants, an issue raised in footnote 7 to the Brief in Support of the Motion to Compel. These items are not easy to locate. After a campaign, the staff closes down and disperses. The best files are not retained. Counsel and their clients are going through the process on attempting to locate old campaign materials, which are likely just as accessible by Plaintiffs as Defendants.

[11] Defendants' counsel reviewed the privilege log for communications that involved attorneys who work for Dallas County who also have responsibility to give legal advice. This review resulted in the re-coding.

and logged. Defendants maintain that these documents too are protected by legislative privilege and, in some cases, attorney client privilege. Nevertheless, Plaintiffs have been provided a log of each communication.

In September, 2015, counsel began to exchange correspondence concerning discovery disputes. Counsel spoke extensively about these disputes on several occasions. By October 27, 2015, Defendants' counsel was operating under the belief that all discovery disputes had been resolved except for the production of e-mails pertaining to Matt Angle. *See* Pls.' App. at 79 ("This also memorializes our phone conversation of October 21, 2015, in which we agreed that all issues concerning Defendants' discovery responses appear to have been resolved except those concerning communications involving the expert consultants."). Thereafter, it became clear that a dispute would require resolution concerning the depositions of the individually named Defendants.

Counsel then agreed that the best approach would be to avoid deposition notice exchanges and instead proceed directly to motions. At depositions taken the first week of March, 2016, counsel conferred again concerning the disputes and the best procedure to present this matter to the Court. Defense counsel proposed filing a Motion for Protective Order but Plaintiffs' counsel preferred instead to file a Motion

to Compel. Consequently, after two more months passed, on May 12, 2016, this Motion was filed.

After the motion was filed, Defendants' counsel sought to confer with the Defendants concerning the specific items requested in the Motion to Compel, and also consider the authorities cited for same with the Defendants. The matter was presented to the Commissioners' Court at a properly noticed meeting on June 7, 2016. Counsel then prepared and filed the Response and this Brief in Support.

C. Discovery at Issue

Plaintiffs' Motion seeks to compel Defendants to provide (1) communications with Angle Strategies regarding the development of the District maps despite such communications being protected by Attorney-Client and Legislative Privileges; (2) the individual depositions of Defendants despite the thread bare claims made in this case and the thorough document production of materials that shed light on the plan's intent; and (3) open-ended inquiry through depositions of the Defendants and Angle Strategies personnel without limitation or respect to the doctrine of legislative or attorney-client privilege.

II. LEGAL STANDARDS

The burden to establish relevancy under Federal Rules is on the party seeking the discovery. *See Spiegelberg Mfg., Inc. v. Hancock*, No. 3-07-CV-1314-G, 2007 WL

4258246 (N.D. Tex. Dec. 3, 2007). Once the party seeking discovery establishes that the discovery sought is within the scope of permissible discovery, the burden shifts to the opposing party to show why discovery should not be permitted. *Id. See also Gauthier v. Union Pac. R. Co.*, No. CIVA1:07CV12(TH/KFG), 2008 WL 2467016 (E.D. Tex. June 18, 2008).

Additionally, Federal Rule of Civil Procedure 26(b)(2)(C) provides, in part, that a district court, "must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

> "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit."

Fed. R. Civ. P. 26(b)(1), (2)(C).

The Rules also protect against the disclosure of privileged or otherwise protected information. Federal Rule of Civil Procedure 45(d)(3)(A) provides that a court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies[.]" Fed. R. Civ. P. 45(d)(3)(A)(iii). The burden falls on the proponent of a privilege in federal court to demonstrate sufficient facts to establish the privilege is applicable. *Texas v. United States*, 887 F.

Supp. 2d 133(D.D.C. 2012) (three-judge court), vacated on other grounds, 133 S. Ct. 2885 (2013), ECF No. 128 at 3 (citing *In re Subpoena Duces Tecum*, 439 F.3d 740, 750 (D.C. Cir. 2006)).

As it relates to legislative privilege, each individual official may invoke or waive the privilege for him or herself; it cannot be generally asserted or waived in a blanket fashion. *See ACORN v. County of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *2 (E.D.N.Y. Sept. 25, 2007). *See also Perez v. Perry*, SA-11-CV-360-OLG-JES, 2014 WL 106927, at *2, *7 (W.D. Tex. Jan. 8, 2014), EFC No. 952 at 2, 7.

Finally, courts have enumerated five (5) factors to consider in balancing the interests of the party seeking the evidence with the interests of the individual claiming immunity or legislative privilege.[12] *See Perez v. Perry*, SA-11-CV-360-OLG-JES, 2014 WL 106927, at *2 (W.D. Tex, Jan. 8, 2014), ECF No. 930 at 4. The factors are:

i) the relevance of the evidence sought to be protected;
ii) the availability of other evidence;
iii) the "seriousness" of the litigation of 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 voidable.

Id.

III. ARGUMENT

[12] *See also Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 96 (S.D.N.Y. 2003).

A. Plaintiffs Are Neither Entitled to Depose the Individual Members of Commissioners' Court Nor a Representative of Dallas County.

As an initial matter, the United States District Court for the Southern District of Texas denied Plaintiffs who had advanced claims meritorious enough to justify granting a preliminary injunction (ECF No. 66), the right to depose county employees and the individual members of Commissioners' Court in a Voting Rights Act case challenging the Harris County Commissioners' Court map. *See Rodriguez v. Harris County*, 4:11-2907, ECF No. 88 (S.D. Tex. May 21, 2012) (Def. App. at p. 67). Although that District Court did not elaborate on the reasons supporting its opinion denying the depositions, it likely reached its conclusion for the reasons stated below.

1. Legislative Immunity

a. Legislative Immunity applies to Defendants

Defendants are shielded from being deposed in their official capacities as members of the Dallas County Commissioners Court pursuant to the protection of legislative immunity. Defendants cannot be forced to testify about matters of legislative business. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998). Legislative immunity is governed by Article I, Section 6 of the U.S. Constitution, which provides that, "for any Speech or Debate in either House, [members] shall not be questioned in any other Place." U.S. Const., art. I, § 6. As such, members of

Congress may not be subjected to the judicial process based on their legislative activities.

The Supreme Court has extended this privilege to local legislators. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998) ("it is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities"). In *Bogan,* the Court held that "the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government." *Id. See also Weingarten Realty Investors v. Silvia*, 376 Fed. Appx. 408, 410 (5th Cir. 2010) ("legislative immunity [. . .] applies to city council members who are performing legitimate legislative functions") (internal quotations omitted).

There is no dispute that Defendants are being sued "in their official capacities as County Commissioners" and County Judge. Pls.' Second Am. Compl. (ECF No. 1) at ¶ 9. Furthermore, Plaintiffs' allegations stem from legislative acts of Defendants in their capacity as officials, specifically, the enactment of the most recent Commissioners Court District Map in 2011. *See Id.*, throughout.

Whether or not an act is "legislative" is based on the nature of the act. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). An official's motive or intent is irrelevant to the determination of applicability of legislative immunity. *Id.* ("[t]he claim of an unworthy purpose does not destroy the privilege"). Furthermore, this immunity is

absolute. *See Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 45 (4th Cir. 1988). Thus, the acts upon which Plaintiffs base their Complaint, specifically, the legislative enactment of the 2011 County Map, falls squarely within the realm of actions protected by the legislative immunity scheme of the Constitution, as applied to local legislators through federal and common law.

In recognizing this immunity, the Supreme Court discussed this privilege as emanating from the core principles of the Country's founding, noting that it "has taproots in the Parliamentary struggles [. . .] and was 'taken as a matter of course by those who [. . .] founded our Nation.'" *Id.* at 48-49 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)). Thus, "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Id.* at 52. This includes protection against testimony and depositions against an official's will. [13] *See e.g. Dombrowski v. Eastland*, 387 U.S. 82, 85 (1976) (absolute immunity protects legislators "not only from the consequences of litigation's results but also from the burden of defending themselves"); *Cunningham v. Chapel Hill Indep. Sch. Dist.*, 438 F. Supp. 2d 718, 722-23 (E.D. Tex. 2006) ("local legislators are protected by the testimonial privilege from having to testify about actions taken in the sphere

[13] This protection against depositions applies regardles of whether the suit is for damages or for injunctive relief. *See Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980).

of legitimate legislative activity [. . .] the testimonial privilege is an inherent aspect of the legislative immunity that applies to local legislators"); *Hollyday v. Rainey*, 964 F.2d 1441, 1443 (4th Cir. 1992) ("legislative immunity has full force [where] the suit would require legislators to testify regarding conduct in their legislative capacity").

Courts have also recognized in upholding legislative immunity for local legislators that the threat of liability at the local-level, including the cost, time, inconvenience, and threat of civil liability, especially for part-time, citizen legislators, could significantly hamper and deter those from serving in local government. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).

b. Courts Have Refused Depositions of Local Legislators in these Types of Cases

The Southern District of Texas in handling the challenge to Harris County's 2011 Commissioners' Court map is not the only Court to reject depositions of the local elected officials sued in cases such as this.

In *Chen v. City of Houston*, which involved a Section 2 challenge to the City of Houston's redistricting plan, Judge Nancy Atlas quashed the deposition of a Houston City Council member pursuant to legislative immunity. *Chen v. City of Houston*, 4:97-CV-01180, ECF No. 49, pp. 1, 4 (S.D. Tex. October 31, 1997) (Def. App. at pp. 62-66). Judge Atlas recognized that "judicial inquiries into legislative or

executive motivation represent a substantial intrusion into the workings of other branches of government." Id. at 64 (citation omitted).

Cases around the County reach the same conclusion. In *Simpson v. City of Hampton, Va.*, another Section 2 challenge, the district court held that absolute legislative immunity protected city council members from producing their personal notes and files. 166 F.R.D. 16, 19 (E.D. Va. 1996). Likewise, in *Marylanders For Fair Representation, Inc.*, the court unanimously recognized absolute legislative immunity for the legislators involved in formulating the redistricting plan. 144 F.R.D. 292, 297-99, 305 (D. Md. 1992). The same is true for a case out of New York, *Rodriguez v. Pataki*, in which the district court stated, "[T]o the extent that the plaintiffs seek information concerning the actual deliberations of . . . individual legislators . . .the motion [to compel] must be denied." 280 F. Supp. 2d 89, 103 (S.D.N.Y. 2003).

At the Fifth Circuit, absolute legislative immunity has been held to bar liability and prevent meaningful discovery, even when allegations of legislative intent factor prominently in the case. *Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174 (5th Cir. 1991) (granting absolute legislative immunity "regardless of the allegations of discriminatory intent"). *See also, Chen*, Def. App. p. 66 (rejecting argument that a Section 2 case could not be proved without the requested deposition); *Simpson*, 166 F.R.D. at 18-19 (holding that even though legislative intent is a factor in voting

rights cases, plaintiffs could not use the notes and files of city council members to prove such intent).

As recognized by Judge Atlas in Chen, "Plaintiffs may present any direct evidence of intent they may be able to obtain from other, non-privileged sources, such as records of public proceedings, public statements by [legislators], and evidence provided by [legislators] who elect to waive their testimonial privilege." *Chen*, Def. App. p. 66. Judge Atlas explained that the focus is properly on these materials, because legislative intent must be derived from the actions taken by the legislative body as a whole, rather than from the motivations of individual legislators. Id. at 2. ("[T]he relevant inquiry concerns the intent of the City through its City Council acting as a legislative body, not the intent of any individual councilmember.").

c. Plaintiffs' Cited Authorities are Unpersuasive

Contrary to Plaintiffs' cited authorities, they are not entitled to depose Defendants. In putting forth their argument, Plaintiffs rely heavily on *Benavidez v. Irving Ind. Sch. Dist. (Benavidez II)*, No. 3:13-cv-0087-D, ECF No. 52 (N.D. Tex. 2014) (Def. App. at pp. 68-77). In *Benavidez II*, Hispanic residents challenged the School Districts five (5) single-member, two (2) at-large system for the election of Irving ISD

Board Trustees under § 2 of the Voting Rights.[14] *Id.* Plaintiffs sought to depose the defendant board members.[15] *Id.* at 68-70. This court referred the issue to a magistrate judge. *Id.*, ECF No. 39. In its opinion, the magistrate judge not only emphasized that redistricting is a legislative function, but also that defendants "may not be sued over, or questioned about, actions taken in a legislative capacity." *Id.*,, Def. App. at p. 71 (citing *Chen v. City of Houston,* 9 F.Supp.2d 745, 762 (S.D. Tex. 1998); *In re* Perry, 60 S.W.3d 857, 860 (Tex. 2001); *Supreme Court of VA. v. Consumers Union of U.S. Inc.*, 446 U.S. 719, 732 (1980) ("stating that a legislator entitled to immunity is not only protected from the consequence of litigation but also from the burden of defending himself.")).

In granting defendants' Motion to Quash in part, the magistrate judge prohibited plaintiffs from deposing the defendant officials, save for a few categories that were unrelated to the deliberative and communicative processes they participated in. Def. App. at p. 71 (citing *United States v. Brewster*, 408 U.S. 606, 512, 624-625 (1972)). The plaintiffs were only permitted to inquire into a) statements or communications defendants made that were public, or were made to constituents, lobbyist, special interest groups, non-Trustees or the press related to the adoption of the redistricting

[14] The system previously had a seven (7) member at-large system that was challenged in *Benavidez v. Irving Indep. Sch.l Dist.*, 690 F. Supp. 2d 451 (N.D. Tex. 2010).

[15] Plaintiffs also sought to depose a Geographic Information Specialist (GIS) who worked for defense counsel and assisted in the drawing of the district's map, discussed *infra*.

plan, b) overall legislative purpose, *not* motive of the plan, and c) foundational privilege questions and general inquiries about legislative process, *not* questions about acts the defendants undertook regarding the particular redistricting plan at issue. *Id.* at 4-5.

Plaintiffs in this matter attempt to go far beyond the bounds of the court's parameters in *Benavidez II*, seeking to interrogate Defendants on a wide range of open-ended issues including, but not limited to, "the intent of the contested map, their justifications for the details of the map, and the predicate for public statements made about the map, as well as "other topics" which Plaintiffs have not disclosed to the Court." Pls.' Br. at 12. Time and again courts have held that "questioning a legislator [. . .] to the extent it would require the legislator to reveal his subjective motivations for the underlying legislative activity, is protected, even if an unworthy purpose is attributed to the activity." *Benavidez II*, ECF No. 52 at 4 (citing *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)). What is more, given the particulars of this case and the intermediate issuance of *Veasey* since the Court issued *Benavidez*, as explained *infra*. Defendants should not have to sit for a deposition at all.

Incredibly, Plaintiffs attempt to use *Veasey v. Perry* for their assertion that as applied to local officials, the legislative privilege bends. However, the *Veasey* Fifth Circuit Opinion calls into question whether the intent evidence that would be

potentially discovered by depositions of the Defendants is relevant at all to a discriminatory intent case. Before discussing the circuit opinion, some history of the case is in order.

In the District Court *Veasey* case, the challenge to Texas' voter photo ID law (SB14) under, among other claims, § 2 of the Voting Rights Act, the court found that the legislative privilege applied to legislators, though the privilege was not applicable to shield documents by legislators who had *voluntarily waived* the privilege. *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), ECF No. 226 at 3, Def. App. at 103 (*Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh'g en banc granted*, 14-41127, 2016 WL 929405 (5th Cir. Mar. 9, 2016).

The trial court in *Veasey* discussed two conflicting interests that must be considered through the Five-Factor analysis:

> "On one hand, the importance of eliminating racial discrimination in voting—the bedrock of this country's democratic system of government—cannot be overstated. On the other hand, ensuring that legislators maintain the privilege of confidential communication with their aides, staff members, and other legislators in the discharge of their duties is vital to the legislative process."

Def. App. at p. 103.

The *Veasey* district court went through the Five-Factors balancing framework, and found that based on the specific facts of the case, the factors weighed in favor of

limited and *confidential* disclosure. The court was not willing to "fully pierce the legislative privilege," and permitted the legislators who did not waive the privilege to assert it in their depositions and refuse to testify; the court also refused to permit complete and public disclosure of the documents sought when the privilege was invoked. *Id.* at pp. 105-7.

After the District Court issued final judgment for the Plaintiffs, an appeal was taken. The appellate panel, concurring with the Tenth Circuit, held that "discriminatory intent cannot be ascertained by eliciting opinion testimony from witnesses, often out of context and accumulating those responses as substantive evidence of the motive of the [enactment]." *Veasey v. Abbott*, 796 F.3d 487, 502 (5th Cir. 2015), *reh'g en banc granted*, 14-41127, 2016 WL 929405 (5th Cir. Mar. 9, 2016)[16] (quoting *Dowell by Dowell v. Bd. of Educ. of Okla. City Pub. Schs., Indep. Dist. No. 89*, 890 F.2d 1483, 1503 (10th Cir.1989) *rev'd sub nom. on other grounds, Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237 (1991).

Although the Fifth Circuit in *Veasey* was discussing the unreliability of opponent testimony, in the following lines, the court emphasized that a reliance on "post-enactment testimony" would be concerning, especially given that "courts routinely disregard [pos- enactment testimony] as unreliable." *Veasey v. Abbott*, 796 F.3d at

[16] Given the grant of review *en banc*, the *Veasey* panel decision has been vacated, 5th Cir. R. 41.3, but it remains persuasive authority.

502 (*citing Barber v. Thomas*, 560 U.S. 474, 485–86 (2010) ("And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law.") (also citing *Edwards v. Aguillard*, 482 U.S. 578, 596 n. 19 (1987) ("The Court has previously found the post-enactment elucidation of the meaning of a statute to be of little relevance in determining the intent of the legislature contemporaneous to the passage of the statute.")). The full *Veasey* opinion history weighs against disclosure in this case.

d. The Five-Factors balancing test weighs heavily in favor of protecting Defendants from depositions.

The Five-Factors balancing test that several courts, including *Veasey*, have applied in making determinations about legislative privilege protections weighs strongly in favor of protecting Defendants from being deposed.

1) Relevance of the evidence sought to be protected

Under the first factor, courts may look to the degree of relevance of the evidence to the final issue in the case. For one, some of the information Plaintiffs' seek by deposition, is easily obtainable from other, less intrusive, sources. *See* Fed. R. Civ. P. 26(b). For example, it is wholly unnecessary to depose Defendants about "the success of the Plaintiffs' racial group in electing its preferred candidates over the last decade." Pls.' Br. at 12. This line of inquiry can easily be established by a review of

publicly available information, such as voter statistics and election returns. Moreover, it is usually conducted by Plaintiffs' own experts who review available voting and election data and provide analyses of those results. Even if Plaintiffs were able to show how this inquiry is an appropriate line of questioning for a protected public official, which it is not, this type of question could readily be submitted by way of written discovery.

The other information Plaintiffs' seek is no more relevant to the Court legal and factual inquiry. The depositions and communications that opposing counsel seeks are not only irrelevant to whether or not the redistricting maps have a discriminatory effect and even if they were, such a conclusion is made from a review of publicly available election records by a qualified expert. Lastly, as noted, even if questions on intent were not prohibited, the Fifth Circuit's opinion in *Veasey*, holds that post-enactment statements of legislators are not relevant to show intent. *See infra* at p.18. This factor, therefore, weighs against disclosure.

2) Availability of other evidence

Here, as in *Chen* and *Rodriguez*, the two Southern District of Texas cases, Plaintiffs have access to sufficient discoverable materials to discern the legislative intent of the Commissioners Court, among them:

- the recordings of public hearings, including discussions among citizens and the Commissioners' Court about the considerations undertaken in connection with Plan;
- the recording of the Commissioners' Court meeting at which the Plan was adopted;
- the reports provided to the Commissioners' Court for consideration prior to adoption of the Plan; and
- pages of materials supplied to the U.S. Department of Justice concerning the development and adoption of the Plan.

Thus, according to the authorities, Plaintiffs already have access to what this Court is to consider in determining the legislative intent behind the plan.

Plaintiffs concede that "other evidence is certainly available." Pls.' Br. at 10. Plaintiffs have also stated that although they can obtain what they need through other means, they desire to obtain the Angle Strategies protected communications because it is "more inferential" as to alleged "discriminatory intent" on behalf of Defendants. *Id.* Not only have Plaintiffs failed to present any evidence of discrimination, if there was any, Plaintiffs have indicated that it is otherwise available to them.

What is more, the *Veasey* court noted, "the extent to which inquiry into such sensitive matters is permitted should correspond with the degree to which the intrusion is absolutely necessary," pointing out the "importance of preserving

confidential communication among legislators." *Veasey v. Perry*, ECF No. 226, Def. App at p. 107.[17] Plaintiffs have not shown such intrusion is necessary.

3) The "Seriousness"/importance of the litigation and the issues involved

Third, the Court must consider the level of importance of the documents (or testimony) to the ultimate issue to be decided. While Defendants recognize and assert the timeless importance of the protections that the Voting Rights Act provides, the specific action Plaintiffs bring is not of the caliber that would outweigh other factors being considered. As noted above, this first of its kind lawsuit does not rise to "serious" litigation permitting invasion of the privilege. Indeed, since three of the five County Commissioner Court Members are white, it appears that the white Plaintiffs are simply bringing this case to replace white elected officials they don't like with ones of their own choosing. With all due respect, that is neither a valid constitutional nor statutory claim.

The importance of these depositions to the ultimate issue to be decided is tenuous at best and, therefore, this factor weighs against disclosure.

4) The role of the government in the litigation

[17] Of course the District Court did not know then that the later panel decision in the appeal would hold that legislators' testimony concerning intent should, in the opinion of the Court of Appeals, be given little probative value.

There is no denying the county government is behind the adoption of the challenged plan. The members of the Commissioners Court are parties to this case, and they may be subjected to civil liability in their official capacities based on the claims asserted by Plaintiffs. But, Plaintiffs are not a protected class or minority group that has been historically discriminated against; nor have they faced a history of discrimination (and thus bear no continuing effects of past discrimination). Despite adopting the challenged plan, these Defendants and the predecessors have done nothing against this class of persons that requires a remedy for historical discrimination. Invasion of the privilege is simply not appropriate here.

Plaintiffs' attempt to draw a parallel under this prong to *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 762-766 (S.D. Tex. 2011), where the court found that council members' legislative privilege was qualified. *See* Pls.' Brief, n. 25. However, in *Hobart*, the council members for which the legislative privilege was qualified were not parties to the case, and plaintiffs did not seek to inquire into their motives or thought processes in the legislative process.

5) The possibility of future timidity by government employees

Even in preceding voting rights cases with much stronger interests at issue, this factor tends to weigh against disclosure, as "courts have long recognized that the disclosure of confidential documents concerning intimate legislative activities should

be avoided." *Veasey v. Perry,* 71 F. Supp. 3d at 6. (citing *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011).

Setting aside for a moment that Defendants' immunity strictly bars their depositions in the capacity and manner Plaintiffs desire, if Plaintiffs were permitted to depose each individual member of the Commissioners Court for their legislative actions in this case, it would undermine the freedom of the legislative body, and interfere with their ability to represent the people of Dallas County as intended by historical precedent and the Supreme Court. *See Spallone v. United States*, 493, U.S. 265, 279 (1990).("any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"). As the Fifth Circuit stated in *Weingarten Realty*, "[t]he freedom to make politically-charged legislative decisions like this is why legislative immunity exists"). *Weingarten Realty Investors v. Silvia*, 376 Fed. Appx. 408, at 411 (5th Cir. 2010).

The discovery Plaintiffs seek, by way of deposing Defendants in their official capacity, is barred by legislative immunity and, the specific circumstances upon which Plaintiffs seek to depose Defendants are weighted heavily in favor of protection.

2. The Apex Doctrine Also Affords Protections to Defendants

Similar to the immunity protections granted to each Defendant, both state and federal law recognize the Apex Doctrine, which provides additional protections to Defendants in this instance. *See Gauthier v. Union Pac. R. Co.*, No. 1:07-CV-12, 2008 WL 2467016, 4 (E.D. Tex. 2008) (finding "it proper to quash the depositions of the [ ] executives" until the Plaintiffs "first attempt to obtain the sought information through [ ] less burdensome means of discovery [. . .], including the Rule 30(b)(6) corporate deposition); *See also Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979) (Plaintiffs required to show they cannot obtain the necessary information through other means of discovery).

Pursuant to the Apex Doctrine, in order to compel a high-level official to appear for a deposition, the party seeking the deposition is required to show that even if the official has some knowledge, or knows of some of the discoverable information sought, that is not sufficient to overcome their burden. Rather, the official's knowledge of information sought must be "unique" or "superior." *Gauthier v. Union Pac. R. Co.*, No. 1:07-CV-12, 2008 WL 2467016, at *1 (E.D. Tex. 2008). While the doctrine is frequently applied in a corporate or business setting to prevent the harassment of high-level corporate officials, it has been applied in circumstances to

prevent unnecessary depositions of public officials. *See In re Fed. Deposit Ins. Corp.*, 58 F.3d 1055, 1060 (5th Cir. 1995).[18]

The Fifth Circuit has held that "exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted." *In re Office of Inspector General*, 933 F.2d 276, 278 (5th Cir. 1991). Furthermore, "[t]op executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Id.* Federal circuit courts, as well as the Supreme Court, have also found that, in applying the Doctrine to elected officials, "[h]igh ranking government officials have greater duties and time constraints than other witnesses." *In re United States*, 985 F.2d 510, 512 (11th Cir.), *cert. denied*, 510 U.S. 989 (1993). Furthermore, "the Supreme Court has indicated that the practice of calling high officials as witnesses should be discouraged." *Id.* (citing *United States v. Morgan*, 313 U.S. 409 (1941)).

Defendants, as elected government officials, are, indeed, high-level officials and, therefore, the Apex Doctrine applies. *See e.g. Bogan v. City of Bos.*, 489 F.3d 417, 423

[18] *See also Bogan v. City of Bos.*, 489 F.3d 417, 423 (1st Cir. 2007); *Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199, 203 (2d Cir. 2013); *Chevron Corp. v. Donzinger*, 2013 U.S. Dist. LEXIS 65335, at 6 (S.D.N.Y. 2013); *City of Fort Lauderdale v. Scott*, 2012 U.S. Dist. LEXIS 34719, at 5 n.4 (S.D. Fla. 2012); *Alberto v. Toyota Motor Corp.*, 289 Mich. App. 328, 333, 796 N.W.2d 490, 492 (2010) (citing *Baine v. Gen. Motors Corp.*, 141 F.R.D. 332, 334–335 (M.D.Ala., 1991); *Union Savings Bank v. Saxon*, 209 F.Supp. 319, 319–320 (D.D.C., 1962).

(1st Cir. 2007) (holding that a district judge did not abuse discretion in issuing protective order to prevent deposition of mayor, in civil rights action against municipality, mayor, and its employees under Fourth and Fourteenth Amendments, as mayor was high ranking government official and other available avenues of discovery had not been exhausted to obtain relevant information before deposing mayor).

Plaintiffs have failed to show that any of these officials have unique or superior personal knowledge of discoverable information. What's more, there are less obtrusive means to which the information Plaintiffs are seeking, if any exists, can be obtained. As such, the information Plaintiffs are seeking is not calculated to lead to the discovery of admissible evidence.[19]

Plaintiffs are not permitted to go on a mere fishing expedition for information at the expense of the highest level of officials in this case. Such attempts to seek information, if any of those inquiries are permissible, are better accomplished by way of written questions, or other alternative less intrusive and less burdensome means as the Court sees fit.

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[19] *See Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995); *see also Liberty Mut. Ins. Co. v. Superior Court*, 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363 (1992) ("particularly instructive" to the Crown Central court on apex doctrine guidelines). *In re Alcatel USA, Inc.*, 11 S.W.3d 173 (Tex. 2000) ("there must be some showing beyond mere relevance, such as evidence that a high-level executive is the only person with personal knowledge of the information sought or that the executive arguably possesses relevant knowledge greater in quality or quantity than other available sources.").

B . Plaintiffs Are Not Entitled to the Production of Documents from Counsel's Staff.

1. Background

Plaintiffs' characterization of documents Defendants have produced as "dubious" is an attempt to misconstrue Plaintiffs' own, overly broad, discovery requests, which Defendants have sought to comply with, as burdensome as they have been.

At issue in Plaintiffs' Motion is whether or not Plaintiffs are entitled to specific documents that fall within two categories:

- Email communications between Angle Strategies and Defendants; and
- Email communications between Angle Strategies and redistricting counsel who hired Angle Strategies.

Angle Strategies, specifically Mr. Angle and his staff, were hired by legal counsel (not the Defendants) to not only assist counsel with technical assistance in the development of a new redistricting plan in compliance with federal and state law, but also to assist counsel in communicating with the individual members of Commissioners' Court (particularly when counsel was unable to do so directly). Mr. Angle and his staff only undertook such activities at the specific direction of legal counsel and under counsel's direct supervision, which is precisely what the agreement between legal counsel and the Commissioners' Court provided. Thus, Mr. Angle assisted counsel in his ability to provide legal counsel to the Defendants.

2. Attorney-Client Privilege & Attorney-Work Product Privilege

In attempting to obtain privileged documents, Plaintiffs rely on the court's holdings in *Benavidez II*, where plaintiffs also sought to depose a Geographic Information Specialist (GIS) specialist who worked for defendants' counsel. *See Benavidez* Def. App. at pp. 72-76. The court, however found that the attorney-client privilege applied as to communications between the defendant clients and the GIS specialist. *Id.* at p. 75 (citing *United States v. Davis*, 636 F.2d 1028, n.17 (5th Cir. 1981)). The court held that "the attorney-client privilege protect[ed] [the GIS agent's] communications with Defendants," when counsel's primary task was to render legal services for the defendants and the GIS agent's work was "ancillary to the rendition of those legal services." *Id.* This was true even when, like here, the plaintiffs argued that the GIS agent's assistance was only done in the capacity of a redistricting consultant. *Id.*

The GIS agent's services in *Benavidez II* consisted of "prepar[ing] the districting map and demographic analysis for the District's 2011 redistricting plan." *Id.* That is precisely what Mr. Angle and Angle Strategies did here with regard to the 2011 plan. As noted above, Mr. Angle and Angle Strategies, also at the direction of legal counsel, relayed legal advice to the individual members of Commissioners' Court, (particularly when counsel was unavailable to do so). It is hard to imagine a clearer example of work undertaken within the scope of the attorney-client privilege and the

work product doctrine. Thus, Mr. Angle and Angle Strategies not only took on an advisory and assistance capacity identical to the services the GIS agent had provided to counsel in *Benavidez II*, but they also undertook specific activities to assist legal counsel in providing legal advice to the Defendants.

Plaintiffs argue that unlike the protections afforded the GIS agent in *Benavidez II*, those protections do not apply because Angle Strategies is a "separate consultancy," rather than an agent "employed within the offices of the defendants' legal counsel." [1] Pls.' Br. at 16. However, the applicability of the attorney-client privilege to an attorney's agent does not fail simply because retained legal counsel employs a technical consultant outside his law firm to assist in rendering legal services. The *Benavidez* Court explained that in recognizing "proposed Federal Rule of Evidence 503 and federal common law, the attorney-client privilege extends to confidential communications between the client and his lawyer's representative that are made for the purpose of facilitating the rendition of professional legal services." Def. App. at p. 75, n. 2. [20] This is precisely the role that Mr. Angle and Angle Strategies played here. What's more, "it has never been questioned that the privilege protects

[20] Citing *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994); *United States v. Moscony*, 927 F.2d 742, 751 (3rd Cir. 1991); *United States v. (Under Seal)*, 748 F.2d 871, 874 n.5 (4th Cir. 1984; referencing *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 496 (5th Cir. 2005) (applying proposed Rule 503(d).

communications to the attorney's . . . other agents . . . for rendering his services." *Id.* (quoting 8 Wigmore, Evidence § 2301 (McNaughten Rev. 1961)).

That legal counsel sought outside technical advisors to assist in providing legal services and advice to the Defendant members of County Commissioners' Court has no bearing on the capacity in which that advisory agent served. Rather, the fact that counsel's firm does not have such capacities in house makes it all the more clear that counsel was obtained for the purpose of rendering legal services to Defendants.

Plaintiffs' cite to *Hall v. Louisiana*, attempting to show that the confidential communications are not privileged. *See* Pls.' Br., n. 25. But that reliance is misplaced. In *Hall*, the U.S. District Court for the Middle District of Louisiana held that a plaintiff issuing subpoenas that demanded certain third parties appear for depositions and produce documents, provided insufficient notice and that the subpoenas were over-broad. In reaching its decision, the court found that certain expert documents were discoverable, specifically,

> "Facts or information in [the legislators'] possession that were made available to lawmakers at the time of their decisions, including any information, reports or recommendations provided by outside consultants, experts or lobbyists in consideration of the legislation, as well as any contractual agreements related thereto."

Hall v. Louisiana, 3:12-cv-00657, ECF No. 277, Def. App. at pp. 96-97 (M.D. La. April 23, 2014).

The first portion of the *Hall* opinion held that documents relating to an expert who had been hired by the *Hall* defendants and had previously testified publicly on behalf of the *Hall* defendants, were not barred from discovery. However, unlike the expert in *Hall*, Mr. Angle never testified publicly on behalf of Defendants, and he did not serve in the same capacity as the *Hall* expert. Rather, as noted above, Mr. Angle was employed by Defendants' legal counsel for the purpose of providing additional information and expert analysis to counsel, so that counsel, in turn, could provide sound legal advice to the clients. Furthermore, Mr. Angle's demographic and statistical information in the benchmark map (the pre-2011 plan), as well as draft alternative maps with accompanying data, were all provided to members of the general public at the various public hearings on the redistricting plans in 2011. So there is no need to obtain such publicly available information from Mr. Angle or Angle Strategies.

Second, the information Plaintiffs seek are not limited to "facts and information", such as maps and statistical data made available to lawmakers. Plaintiffs are trying to obtain documents that are attorney-client or attorney-agent confidential communications: those between counsel and his agent/consultant, and those between the agent/consultant and the Defendants undertaken at the specific request of legal counsel.

Furthermore, the *Hall* decision itself states that, per the attorney-client privilege, legislators were not required to "produce any responsive documents or information that contains or involves opinions, motives, *recommendations or advice* about the referenced legislation." Def. App. at p. 87 (emphasis added) (citing *Committee for a Fair and Balanced Map*, 2011 U.S. Dist. LEXIS 117656, 2011 WL 4837508, at *9-10). Requiring the production of communications between legal counsel and the Defendants, or communications between Mr. Angle acting at the behest of legal counsel and the defendant members of the County Commissioners' Court, would plainly breach the attorney-client privilege.

In *Milburn v. U.S.*, 804 F.Supp.2d 544 (W.D. Texas, 2010), the U.S. District Court for the Western District of Texas addressed whether or not communications between an attorney, his client, and the client's accountant and advisors were privileged. *Milburn v. U.S.*, 804 F.Supp.2d 544 (2010). Citing *Upjohn v. U.S.*, 449 U.S. 383 (1981), the linchpin Supreme Court decision governing attorney-client privilege, the *Milburn* court held that communications between an attorney and other professionals, or other documents prepared by the professional for an attorney, are protected under the attorney-client privilege, so long as it is shown that the professional's services enabled the attorney to give legal advice. *Id.* at 548-549. Those circumstances are present here. Furthermore, following *in camera* review in

Milburn, although permitting the discovery of certain documents, including documents pertaining to fee arrangements, the *Milburn* court noted that "the attorney-client privilege 'must include all other persons who act as the attorney's agents[.]'" *Milburn*, 804 F.Supp.2d, 548 (2010) (citing *United States v. Kovel*, 296 F.2d.918, 921022 (2d Cir. 1961) (Friendly, J.).

Furthermore, as the U.S. District Court for the Eastern District of Texas pointed out in *Elec. Data Sys. Corp. v. Steingraber*, No. 4:02 CV 225, 2003 WL 21653414, at *3 (E.D. Tex. July 9, 2003):

> "the [attorney-client] privilege exists to protect not only the giving of professional advice ... but also the giving of information to the lawyer to enable him to give sound and informed advice.... The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."

Id. (citing *Upjohn Co.*, 449 U.S. at 390–91 (citation omitted)). Thus, communications to legal counsel by Mr. Angle reporting information from or to the client group (the individual members of Commissioners' Court) would fall squarely within the scope of the attorney-client privilege.

In *In re Bieter Co.*, 16 F.3d. 929 (8thCir., 1994), the Eighth Circuit considered the issue of whether an independent consultant could be a representative of the client for purposes of applying the attorney-client privilege. *Id.* at 936. Holding in

the affirmative, the court of appeals noted Supreme Court Standard 503(b)[21], which has also been recognized by this Court and the Fourth Circuit,[22] and is similar, if not parallel, to the language of Texas' own rule of evidence, 503(b). The Standard provides,

> "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client."

Supreme Court Standard 503(b). Mr. Angle and Angle Strategies served as the lawyer's agent and/or representative; thus, communications between Mr. Angle and legal counsel, as well as communications between Mr. Angle and the individual members of Commissioners' Court, undertaken at counsel's direction, are privileged and confidential.

The *Bieter Co.* court also pointed to *McCaugherty v. Siffermann*, 132 F.R.D. 234 (N.D. Cal. 1990), in which another district court held that under *Upjohn*, the

[21] 3 Weinstein & Berger, Weinstein's Federal Evidence § 503.01 (2d ed. 1999) ("[A]lthough not enacted by Congress, [Supreme Court Standard 503] is an excellent distillation of the principles governing the application of privilege").

[22] *See United States v. (Under Seal)*, 748 F.2d. 871, 874 n. 5 (4th Cir. 1984).

attorney-client privilege applied to "communications between two independent consultants hired by the client and the client's lawyers just as it would apply to communications between the client's employees and its lawyers," when those two consultants were functional equivalents of employees. *McCaugherty v. Siffermann*, 132 F.R.D. 234 (N.D.Cal. 1990) at 239. Thus, communications between the consultants and the lawyers were deemed confidential communications. *Id.*

In sum, the communications that could be relevant to this case between 1) Angle Strategies and Counsel, and 2) Angle Strategies and Defendants, including communications with Defendants' staff, are fully protected as attorney-client communications and need not be disclosed.[23]

3. Legislative & Deliberative Process Privilege

In addition to the legislative privilege, a similar protection, the deliberative process privilege, is granted for documents, communications, and discussions between legislators and legislative staff, when considering and deliberating over a proposed piece of legislation. The Supreme Court, in *Arlington Heights*, emphasized this right, and the importance of protecting legislators under this principle, stating, "This Court has recognized, ever since *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 130-

[23] *See e.g. Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 133 S Ct. 2886 (2013) (citing *Gravel v. United States*, 408 U.S. 606, 618, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972) ("holding that 'the Speech and Debate Clause applies not only to a Member but also to his aides in so far as the conduct of the latter would be a protected legislative act if performed by the Member himself.'")).

31, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decision maker on the stand is therefore 'usually to be avoided'"" *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), 429 U.S. at 268 n.18 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)).

In this same vein, the court in *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 133 S. Ct. 2886 (2013), in discussing the deliberative process privilege, presented several requirements, which would give protection to documents enumerated in a deliberative process privilege log. In order for the deliberative process privilege to apply the document must be 1) pre-decisional; 2) deliberative; not memorializing or evidencing the final policy; 4) not shared with the public; and 5) cannot be produced in a redacted form. *N.L.R.B. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 209 (D.D.C. 2009).

Furthermore, the privilege is extended to legislative staff when those documents reflect the legislators' own deliberative process and could impact the legislator's ability to speak about the merits of proposed legislation with his or her staff. *Gravel v. United States*, 408 U.S. 606, 618, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972) (holding that "the Speech or Debate Clause applies not only to a Member but also to his aides

insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself")).

Unlike prior Voting Rights Act challenges, however, Plaintiffs contentions remain outside the bounds of normalcy and reasonability. There has never been a case that Defendants' counsel has been able to locate in which it was held that Section 2 was violated and resulted in discrimination against white voters in drawing a redistricting map. Such a finding in this case, in this jurisdiction, would be breathtaking, especially given the fact that whites are not a majority of the population in Dallas County and yet hold 60% of the seats on the Dallas County Commissioners' Court. Plaintiffs' claims are so tenuous that it would not be in the favor of justice to pierce the legislative or attorney-client privileges in this case.

Furthermore, the documents being withheld have been shown through the privilege log that the communications are "pre-decisional" in that they range in date *prior* to the adoption of the final map; they are "deliberative" exchanges between the Defendants, their legislative staffers, and Angle Strategies while serving in a capacity parallel to a legislative aid (or as noted above, as legal counsel's agent). Under, *Veasey,* these materials are not probative on any issue but even if they were, these materials should not be produced.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion should be denied.

Dated this 10th day of June, 2016.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2016, I electronically filed the foregoing document(s) with the Clerk of the United States District Court for the Northern District of Texas, Dallas Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Chad W. Dunn
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