No. 17-1368

In the Supreme Court of the United States

JOSEPH B. SCARNATI, III, IN HIS CAPACITY AS SENATE PRESIDENT PRO TEMPORE, APPELLANT

v.

LOUIS AGRE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, INDIANA, KANSAS, LOUISIANA, OKLAHOMA, SOUTH CAROLINA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Arkansas, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, and Wisconsin.[1] The States have a vital interest in rules governing the proceedings for challenging apportionment of legislative districts. This Court has repeatedly held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

When reapportionment is carried out by a state legislature, the ordinary legal framework for addressing legislative action should apply—including the legislative immunity long recognized by this Court for state legislators and similar in origin and rationale to that accorded federal legislators under the Constitution's Speech or Debate Clause. *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980).

However, in this case the redistricting panel overruled assertions of legislative privilege, ruling that the protection applies less strongly in reapportionment litigation than other civil litigation. The question whether

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[1] Counsel of record received timely notice of intent to file this brief, as required by Rule 37.2(a). While appellees notified amici that they do not consent to this filing, this brief does not require such consent. Under Rule 37.4, "No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of . . . a State . . . when submitted by its Attorney General."

the legislative privilege is qualified in federal redistricting proceedings has resulted in widely disparate rulings across the nation. States thus find themselves facing unpredictable litigation hurdles. The district court's decision warrants review by this Court.

SUMMARY OF ARGUMENT

Federal district courts deciding redistricting cases are at odds on whether legislative immunity is absolute or qualified. These non-precedential opinions, which often do not refer to one another, leave the States with little guidance on conducting their legislative processes and on litigating redistricting cases.

The core purpose of a legislative privilege is to preserve the legislative process from judicial interference and the chilling effects of litigation. That rationale does not allow exceptions for particular subject matters, determined based on open-ended, multifactor tests. Redistricting is at the core of legislative activity—and should thus be within the core of the legislative privilege.

Additionally, the discovery sought by plaintiffs is in a category of evidence that the Court has often discounted: individual legislators' motivations, as opposed to those of the Legislature as a body. Particularly because legislative enactments are accorded a strong presumption of constitutionality, it makes little sense to allow invasive legislative discovery. Plus, this discovery is, by its nature, an unreliable indication of the intent of a multi-member body that conducts thorough proceedings in public. If the evidentiary ruling below stands, it is unclear why the same result would not obtain for lawsuits in any number of areas addressing legislative pur-

pose, from Ex Post Facto Clause litigation to First Amendment litigation to dormant Commerce Clause litigation—making the litigation privilege a shell of itself.

ARGUMENT

I. The Decision Below Exemplifies The Uncertainty That States Face In Asserting Legislative Privilege During Redistricting Litigation.

The district court below allowed discovery of legislative materials, which were then turned over for use in a parallel state-court proceeding—even though that state court had applied state-law legislative privilege to deny the same discovery. That discrepancy highlights the problems with allowing a privilege to be asserted in some forums but not others. *Cf.* Robert J. Palmer, *The Case for a Speech or Debate Privilege for State Legislators in Federal Courts*, 13 Val. U. L. Rev. 501, 531 (1979) (noting that forum shopping is curtailed when the legislative privilege granted under state law is paralleled in federal litigation).

Some 43 States have constitutional legislative-privilege provisions, and the vast bulk of those apply the same standard as the federal Constitution applies to Members of Congress, based on the same separation-of-powers concerns. *See* Steven F. Heufner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 Wm. & Mary L. Rev. 221, 223 (2003); *see also Tenney v. Brandhove*, 341 U.S. 367, 375 (1951) (noting, in 1951, that 41 states had adopted legislative privilege provisions). But if state legislators have a weaker legislative privilege in federal court than in state court,

plaintiffs will be incentivized to file parallel federal litigation, as plaintiffs did here. This use of federal courts as an end-run around the legislative privilege recognized under state law undermines principles of comity and federalism.

Disuniformity on the issue of legislative privilege exists not only between state and federal courts, but among different federal district courts. Some districts courts in redistricting cases hold that the discovery privilege is absolute. *E.g.*, *Chen v. City of Houston*, 9 F. Supp. 2d 745, 762 (S.D. Tex. 1998), *aff'd*, 206 F.3d 502 (5th Cir. 2000) (noting deposition quashed on basis of legislative immunity); *Simpson v. City of Hampton*, 166 F.R.D. 16, 18-19 (E.D. Va. 1996) (council members' notes and files protected by legislative privilege in redistricting case); *Marylanders for Fair Representation*, 144 F.R.D. 292, 296, 298-99 (D. Md. 1992); *Hispanic Coal. on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F. Supp. 578, 583 (E.D. Pa. 1982), *aff'd*, 459 U.S. 801 (1982) (deposition made subject to protective order issued "by reason of legislative immunity"). Other district courts, however, deem the legislative privilege qualified. *E.g.*, *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 11-cv-5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003) (holding that the privilege "is, at best, one which is qualified"). Because the States need a predictable rule of legislative privilege, the Court should note probable jurisdiction.

II. The Legislative Privilege Is Designed To Be Absolute, Preventing Use Of The Judicial Process To Interfere With The Legislative Process.

The need to protect legislators from judicial interference with the legislative process was recognized by the English Parliament in the 1600s and was later enshrined in the United States Constitution. *Tenney*, 341 U.S. at 371-75. The Constitution's Speech or Debate Clause, U.S. Const., art. I, § 6, affords Members of Congress immunity from questioning for their legislative conduct, thus ensuring liberty of speech and deliberation. *Tenney*, 341 U.S. at 372-73.

This protection has two rationales: "first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." *United States v. Gillock*, 445 U.S. 360, 369 (1980) (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975)). Those vital purposes make this privilege "an absolute bar to interference," *Eastland*, 421 U.S. at 503, for conduct within "the sphere of legitimate legislative activity," *Gravel v. United States*, 408 U.S. 606, 624-25 (1972).

Importantly, this legislative privilege is not abrogated simply because the plaintiff asserts a claim of unlawful legislative purpose. *See Tenney*, 341 U.S. at 377 ("The claim of an unworthy purpose does not destroy the privilege." (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810))).

The Speech or Debate Clause applies not only to legislators' voting but also to their fact-gathering and

legislative communications, which are essential to robust legislative debate. *Eastland*, 421 U.S. at 504-05. And the privilege insulates legislators both from liability for and discovery of their communications and conduct in the course of the legislative process. *United States v. Brewster*, 408 U.S. 501, 525 (1972) (noting that the privilege bars "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.").

As a parallel to this protection for Members of Congress, this Court has recognized "that state legislators enjoy a common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980) (discussing *Tenney*). This common-law privilege does not bar federal criminal liability, as distinct from the civil proceedings at issue in *Tenney*. *Gillock*, 445 U.S. at 369. But, in civil proceedings, state legislators' immunity is essentially equal to that of Members of Congress. *Sup. Ct. of Va.*, 446 U.S. at 732; *see* Fed. R. Evid. 501 (directing that common-law evidentiary privileges supported by reason and experience, such as the legislative privilege, should be respected in federal cases). And state legislatures' acts entail the same presumption of good faith as acts of Congress, recognized since *Fletcher v. Peck*. *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405 (1979) (quoting *Tenney*, 341 U.S. at 377 (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 130)).

This important privilege would be undercut if it is qualified by an open-ended test about the particular type of civil dispute at hand. For example, while the attorney-client privilege has a crime-fraud exception, courts do not otherwise pick and choose what type of civil disputes are important enough to discard the privilege. The existence of such an open-ended weighing of the supposed importance of a particular type of proceeding would seriously weaken the free interchange of ideas encouraged by the legislative privilege.

After all, redistricting is not the only field of law turning on analysis of legislative purpose. For example, application of the Ex Post Facto Clause turns on whether "the legislature intended to punish" by enacting a statute. *Smith v. Doe*, 538 U.S. 84, 92-93 (2003). In the First Amendment context, "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). And the existence of an economically "discriminatory purpose" is considered under the dormant Commerce Clause. *Bacchus Imp., Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

In a civil case, if the legislative privilege is treated as qualified based on a putative need for evidence, as in the ruling below, the privilege's applicability in all of these areas of litigation may be called into question—making the privilege a shell of itself. This, of course, would be contrary to *Tenney*'s admonition that "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U.S. at 377; *see* Laurence Tribe, American Constitutional Law 372 (2d ed. 1988) ("Like any privilege, the one the speech and debate clause grants . . .

would be virtually worthless if courts judging its applicability had to scrutinize closely the acts ostensibly shielded. Judicial consideration of alleged improper motivation is thus necessarily an inappropriate mode of analysis for determining the limits of legislative immunity.").

Moreover, the vitality of legislative debate is especially important in the context of redistricting, which is an inherently political function at the core of legislative activity. *E.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). So the legislative privilege should be at its strongest in this context, not its weakest. Allowing legislators to be subpoenaed to testify regarding their individual motivations for supporting a redistricting plan would threaten the vibrancy of legislative fact-gathering, communication, and deliberation, all while undermining the presumption of good faith accorded to legislative acts.

The resulting information, moreover, would not be worth the damage to the institutional integrity of state legislatures. The Court has repeatedly warned about the limited usefulness of the statements by an individual legislator in discerning a multi-member legislative body's purpose. *E.g.*, *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 297 (2010); *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators." (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998))); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 385 (2012) ("[T]he views of a single legislator, even a bill's sponsor, are not con-

trolling." (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980))); *GTE Sylvania, Inc.*, 447 U.S. at 117-18 (1980) ("And ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979))).

If contemporaneous statements of individual legislators are of little value, the post-enactment statements of individual legislators in depositions are even less useful. *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); *Barber v. Thomas*, 560 U.S. 474, 486 (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 questions has become law.") (citation omitted); *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995) (noting statement by Congressman made after legislative process "simply represents the views of one informed person on an issue about which others may (or may not) have thought differently"); *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988) (rejecting use of committee report concerning previously enacted legislation); *Jefferson Cty. Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 165 n.27 (1983) (affording no weight to post-enactment statements); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 279-80 (1947) (rejecting legislators' expressions as "authori[ta]tive representations as to the proper construction of the bill.").

For more than two centuries, the Court has designed review to avoid interrogating the motivations of individual legislators, instead of the intent of the legislative body and relevant legal instrument. The Court "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-31 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). To that end, when there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim). "[Unless] an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," judicial inquiry into purpose may make little "practical sense." *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005); *see also U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (legislative enactments are entitled to a "heavy presumption of constitutionality").

That limited usefulness of the sort of evidence plaintiffs sought here reflects the integrity of the deliberative process. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney*, 341 U.S. at 378 ("In times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed."). Those concerns apply fully in the redistricting context. *E.g.*, *Miller v. Johnson*, 515 U.S. 900, 916

(1995) (noting "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments"). The district courts creating exceptions to legislative privilege for redistricting cases have overlooked the important role of the privilege in keeping courts above the political fray.

Those district courts have also misinterpreted *Gillock*, which held that a federal criminal prosecution allows discovery into state legislative processes alleged to be the subject of a bribe. 445 U.S. at 369. *Gillock* says nothing about civil lawsuits related to core legislative functions. Hence, the Court has expressly distinguished *Gillock* as concerning criminal, as opposed to civil, litigation. *Sup. Ct. of Va.*, 446 U.S. at 733. Moreover, *Gillock* itself reasoned that comity with state governments was more important in civil than in criminal proceedings, 445 U.S. at 373. Likewise, *Gillock* distinguished *Tenney* as upholding legislative privilege in a civil proceeding, as opposed to a criminal proceeding, stating that *Tenney* and its progeny "have drawn the line at civil actions," *id.* at 373. The Court should adhere to that same civil-criminal line here.

Contrary to arguments of plaintiffs below, *Gillock* does not distinguish between an immunity from testifying and an immunity from individual liability. The privilege against testimony derives from substantive immunity from suit. *See Gravel*, 408 U.S. at 618 (clause cannot be given "cramped" reading and must extend to legislative aides with regard to legislative activities); *id.* at 622 (privilege prevents compelled testimony related to legislative acts); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995) (holding

that, under *Gravel*, a party "is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen."). And it applies broadly to prevent judicial proceedings that cause legislators distractions that "divert their time, energy, and attention from their legislative tasks." *Eastland*, 421 U.S. at 503. Cabining the legislative privilege to liability would expose legislators to the chilling effect of being called into court to be questioned over their political actions. And it would smack of giving political opponents a second bite at the legislative apple.

Revealing the thought processes of individual legislators can reveal strategic and policy concerns about particular campaigns and political information about perceived vulnerabilities. Because redistricting litigation is inherently political, the lack of a legislative privilege raises the specter of a losing political party imposing additional costs on the majority party in the form of the expense and difficulty of appearing in court—exactly the type of expense and difficulty the U.S. Constitution and the common-law extension of legislative privilege to state legislators was designed to avoid.

CONCLUSION

The Court should note probable jurisdiction and reverse the decision of the district court.

Respectfully submitted.

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