No. 22-50435

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LA UNION DEL PUEBLO ENTERO, ET AL.,
Plaintiffs

v.

GREGORY W. ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,
Defendants

LULAC Texas; Vote Latino; Texas Alliance for Retired Americans; Texas AFT; United States of America,
Plaintiffs-Appellees

v.

Senator Bryan Hughes; Senator Paul Bettencourt; Briscoe Cain, Texas Representative; Andrew Murr, Texas Representative,
Appellants

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF OF THE LULAC PLAINTIFFS AS APPELLEES

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: July 18, 2022

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[1] The case caption erroneously refers to Voto Latino as "Vote Latino." Plaintiffs-Appellees intend to file a letter with the clerk's office requesting that the caption be corrected.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees do not object to oral argument if the court believes it would be helpful to resolve this appeal.

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INTRODUCTION

Plaintiffs allege that Senate Bill 1 ("SB 1") suppresses voting rights and was motivated by an intent to discriminate against Black and Latino Texans. The appellant Lawmakers—Senators Bryan Hughes and Paul Bettencourt, and Representatives Andrew Murr and Briscoe Cain—assert an unyielding evidentiary privilege that bars *any* inquiry into their motivations for enacting that legislation. But the Lawmakers have a problem: the Supreme Court and this Court have rejected arguments that there is an absolute state legislative privilege and, along with every appellate court to consider the issue, "recognize that the state legislative privilege is qualified." *LULAC v. Guillen*, No. 22-50407, 2022 WL 2713263, at *1 n.2 (5th Cir. May 20, 2022) (collecting authority). The Lawmakers therefore have no basis to categorically refuse production of over 700 documents about the Lawmakers' purposes for enacting SB 1—the central issue in this case.

The district court granted Plaintiffs' motion to compel production of a narrow subset of those documents. Because the privilege is qualified, the district court was tasked with assessing whether the Plaintiffs' interest in obtaining the documents outweighed the considerations underlying the legislative privilege. The Lawmakers raise little reason to second guess Judge Rodriguez's well-supported finding that the Plaintiffs' interests in the "highly relevant" documents outweighed the Lawmakers' qualified privilege.

The Lawmakers also offer no cause to disturb the district court's finding, consistent with widely-recognized law in this Circuit, that documents broadcast to constituents, party activists, and other branches of government are not privileged. That ruling is consistent with the legislative privilege's purpose: to shield lawmakers' deliberations and protect the legislature from rival branches of government. For similar reasons, the district court correctly found the Lawmakers' claims of attorney-client privilege waived or unfounded. They failed to identify *any* attorney-client relationship applicable to these communications, which involved disparate groups of staffers, citizens, and executive departments. Their belated effort to paper together a common legal interest amongst a mishmash of individuals—unsupported by any record evidence—is foreclosed by this Court's precedent and forfeited as an argument.

The Court should not reach these fact-bound discovery issues anyway because it lacks jurisdiction to do so. The Lawmakers do not dispute that the district court's discovery order is not "final" for purposes of 28 U.S.C. § 1291, and it is blackletter law that discovery orders cannot be appealed under the collateral order doctrine. While this Court has applied the collateral order doctrine to discovery orders in rare cases implicating First Amendment rights, legislative privilege—a common law evidentiary privilege—does not implicate such issues. For these reasons, the Court

should dismiss the appeal or, if it finds jurisdiction, affirm the district court's well-reasoned order.

COUNTERSTATEMENT OF JURISDICTION

This Court lacks jurisdiction because the district court's order is not a "final decision[] of [a] district court[] of the United States," 28 U.S.C. § 1291, and is not reviewable under the collateral order doctrine.

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the district court's non-final order granting Plaintiffs' motion to compel is reviewable under the collateral order doctrine.

2. Whether the district court abused its discretion in finding that legislative privilege did not bar compliance with the subpoenas.

3. Whether the district court abused its discretion in finding that the Lawmakers waived legislative privilege.

4. Whether the district court abused its discretion in finding the Lawmakers failed to establish attorney-client privilege over a subset of documents.

COUNTERSTATEMENT OF THE CASE

I. Factual Background

In 2020, county election officials developed commonsense solutions to ensure access to voting during the COVID-19 pandemic. In particular, Harris County, home to more minority residents than any other county in the state, took a number of steps under then-existing Texas law to protect the right to vote. Harris County election

officials sought to ensure that early voting was accessible to all voters, including those whose work schedules preclude them from voting during typical polling hours, by keeping early voting sites open for 24 hours. They developed a drive-thru voting system that allowed thousands of voters to cast their ballots safely without leaving their vehicles. And they undertook extensive efforts to educate residents about their voting options, including by sending absentee ballot applications to registered voters. ROA.5931-32. The efforts of election officials in Harris County and other urban centers in Texas led to unprecedented increases in minority voter turnout. Harris County alone experienced a nearly 7 percent increase in turnout driven mostly by minority voters. Statewide, Texas experienced its highest voter turnout—and one of its closest statewide presidential election margins—in nearly 30 years. ROA.5931-32.

The Texas Legislature responded by restricting or eliminating methods used by minority voters to achieve this historic turnout. The Legislature initially considered a precursor to SB 1 called Senate Bill 7 ("SB 7"), which Lieutenant Governor Patrick stated was drafted because the "last election Harris County went their own way." ROA.5958. The Texas Senate passed SB 7 and called a conference committee with the House, appointing Senator Bettencourt to serve as a conferee. ROA.4469-70. Representative Cain then introduced SB 7 in the Texas House by describing it as a bill intended to protect the "purity of the ballot box"—a phrase that

was added to the Texas Constitution in 1875 to implement the widespread disenfranchisement of Black Texans during Jim Crow. SB 7 died on floor of the House after dozens of lawmakers departed the state in protest over the impact the bill would have on Texas's non-white voters in particular, leaving the lower chamber without a quorum. ROA.5957-58.

The Texas Legislature later passed SB 1 at a special session convened by Governor Abbott. Even though SB 1 was largely a retread of the defeated SB 7, Senator Hughes—the author of SB 1—admitted that he had not spoken with any minority advocacy or civil rights groups about how the legislation would affect voters of color. Representative Murr, who authored the House-version of the legislation, admitted that he was unaware of any voter fraud, stated that the goal of the bill was to target the methods of voting employed by Harris County in the 2020 election, and argued repeatedly that increasing voter turnout was not a proper objective for the State. ROA.5960-62.

SB 1 ultimately passed both chambers along party lines and was signed into law by Governor Abbott. Among its provisions, SB 1:

- Imposes new restrictions on voter registration and removal, including new penalties for noncompliance of voter registrars (Sections 2.04-2.07, and 2.10);

- Eliminates methods of voting, including drive-thru voting centers, 24-hour voting, and straight-ticket voting relied upon by Black and Latino voters (Sections 3.04, 3.09, 3.10, 3.12, 3.13, and 3.15);

- Expands the powers of partisan poll watchers to employ intimidation tactics, limits election officials' ability to remove such partisans, and effectively eliminates ballot drop boxes by requiring that absentee ballots be received by an election official at the time of delivery (Sections 4.01, 4.02, 4.06, 4.07, 4.09, 4.10, 4.12);

- Imposes new restrictions on voting by mail (Sections 5.01-5.04, 5.07, 5.08, and 5.10-5.14);

- Creates obstacles for voters to receive assistance voting by mail or at the polls, including imposing criminal penalties for assistors (Sections 6.01 and 6.03-6.07);

- Creates new criminal penalties relating to voting, going so far as to criminalize efforts by public officials to encourage voters to request applications for absentee ballots (Sections 7.02 and 7.04).

ROA.5963-69.

II. Procedural History

B. Plaintiffs' Complaint

Plaintiffs LULAC Texas, Texas AFT, Texas Alliance for Retired Americans, and Voto Latino ("Plaintiffs") filed suit after SB 1's enactment.[2] The Second Amended Complaint ("SAC") names Texas Secretary of State John Scott, Texas Attorney General Ken Paxton, and various county prosecutors and elections administrators as Defendants. ROA.5930-31.

[2] The Lawmakers accuse Plaintiffs of filing this suit before SB 1 became law. Br. 45. That is false. Plaintiffs filed suit on September 7, 2021, shortly after Governor Abbott signed SB into law. *See* Case No. 1:21-cv-786, ECF No. 1 (W.D. Tex. Sept. 7, 2021).

Plaintiffs principally allege that SB 1 was enacted with discriminatory intent. Count I of the SAC alleges intentional discrimination under Section 2 of Voting Rights Act, which prohibits the enforcement of any "standard, practice, or procedure" that has either the purpose or result of denying or abridging the right to vote on account of race. ROA.5981 (citing 52 U.S.C. § 10301(a)). Plaintiffs allege that "[b]y surgically targeting election practices employed in Texas's largest and most diverse jurisdictions—methods on which the State's Black and Hispanic populations disproportionately rely," SB 1 unlawfully restricts access to the franchise for Black and Hispanic voters. ROA.5982.[3]

C. Plaintiffs' Discovery Requests

On December 15, 2021, Plaintiffs served subpoenas on four state legislators who played critical roles in drafting and advancing SB 1, or its precursor bill (SB 7), through the Legislature: Senator Hughes (SB 1's author), Representative Murr (SB 1's House sponsor), Representative Cain (SB 7's House sponsor and Chair of the House Elections Committee), and Senator Bettencourt (conference committee leader for SB 7). ROA.4469-70, 5953, 5960, 9127-98.

These subpoenas sought, among other things, documents and communications from the Lawmakers concerning criminal conduct in Texas elections; the anticipated

[3] Plaintiffs also allege that SB 1 constitutes an undue burden on the right to vote (Count II), impermissibly restricts free speech and expression (Count III), and violates Section 208 of the Voting Rights Act by denying voters with disabilities and limited language proficiency of the right to assistance by a person of their choice (Count IV). ROA.5983-90.

effects of SB 1 on racial minority groups; and the Lawmakers' communications with third-party groups about SB 1. ROA.9137-9140.

The Lawmakers ultimately produced a privilege log on March 14, 2022, indicating that they had withheld roughly 725 documents, nearly double the number produced, on grounds of attorney-client privilege, work product privilege, legislative privilege, and investigative privilege. ROA.9285-9350, 9476. In its order granting Plaintiffs' motion to compel, the district court described the privilege log as "defective," noting that it "in many instances, is devoid of information concerning where certain documents originated, whom the documents were shared with, and in many cases, only contains conclusory statements to support the assertion of the relevant privilege." ROA.10383. For example, the Lawmakers invoked legislative privilege to withhold what the log describes as a "[p]resentation contained in Senator Bettencourt's personal file for use in considering election legislation," without any indication of the document's creator or recipient, or any relevant details about the context in which it was "presented." ROA.9284 at App186.

The details that do exist in the log make clear that the Lawmakers waived legislative privilege with respect to many documents by sharing them with external parties. Many entries describe documents circulated to or from constituents, party activists, or members of the Texas executive branch. *See* ROA.9284 at App260-76. Nearly two dozen of these documents were, according to the log, received from or

shared with a "non-legislative third-party" or a "third party not employed by the Legislature." *See* ROA.9284 at App260-76; *see*, *e.g.*, ROA.9284 at 260 (withholding an "[a]nalysis of unspecified elections bill, received by legislative staff in a February 9, 2021 email from a third party not employed by the Legislature"). The Lawmakers similarly assert attorney-client privilege and work-product protection over dozens of documents shared with third parties. *See* ROA.9284 at App.277-82.

The parties met and conferred on April 28, 2022, in a final effort to resolve these disputes. ROA.9352-53. That effort was unsuccessful, and Plaintiffs filed a motion to compel on May 3. ROA.9096. Plaintiffs' motion was narrow; it asked the court to compel production of only roughly 200 highly relevant documents, fewer than a third of those withheld by the Lawmakers. It targeted—as best possible, given the log's deficiencies—entries most relevant to the lawsuit, least supported by a claim of privilege, or most obviously waived.

The district court heard argument on May 13. ROA.10616-77. It noted that information was "sometimes completely absent [in] the log" and that the "privilege logs are lacking detail," which frustrated the court's review. ROA.10621:1-7. In response to the court's questioning, the Lawmakers' counsel repeatedly stated that they had not personally compiled the log, reviewed the underlying documents, and were not familiar with basic facts about persons named on the log. ROA.10620:21-24, 10622:3-6, 10624:12-25:7, 1639:17-22, 10653:21-54:5. The court concluded

that the log was so "deficient" that there was justification to "say there's a wholesale waiver of a deficient privilege log[.]" ROA.10654:6, 10665:25-66:1. The court instead elected to review the documents *in camera* to "carefully look at each of the documents [and] assess whether a privilege applies[.]" ROA.10666:2-4.

The Lawmakers subsequently withdrew attorney-client privilege and work product protection claims (but not legislative privilege claims) over several documents. ROA.10319-21.

D. The District Court's Order

The court granted Plaintiffs' motion to compel on May 25, 2022. ROA.10381-97. It found that the Lawmakers waived legislative privilege over 70 documents because they were shared with non-legislative third parties. ROA.10386-88 (finding "the legislative privilege was waived when the State Legislators communicated with parties outside the legislature," including party leaders, lobbyists, and executive officials). The court noted the Lawmakers' communications with the Lieutenant Governor "require[d] closer examination" given his duties as the President of the Texas Senate. ROA.10390-91. But the court found any privilege over these communications were waived because they did not concern any of the Lieutenant Governor's legislative functions, and instead reflected his input on drafting legislation and were "not meaningfully different than the State Legislators' communications with lobbyists or other third parties." ROA.10391. Relatedly, the

court found 23 documents not subject to the privilege because they were produced by a non-legislative third party and an additional six not subject to privilege because the log failed to identify a third party's identity. ROA.10398-49.

The court further found that the Lawmakers failed to justify their assertion of legislative privilege as to 114 documents. ROA.10398-10449. The court acknowledged these materials were subject to a qualified privilege, but found that disclosure was warranted because Plaintiffs' claims served important federal interests and the "highly relevant" documents at issue served a "need for accurate fact finding" that outweighed any harm to the Lawmakers' deliberations. ROA.10391-93. The court considered the factors set forth in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003), and used by district courts throughout the Fifth Circuit. ROA.10392. The court further found 17 documents not subject to the privilege because they contained purely factual matter. ROA.10398-49.

The district court also rejected nearly all of the Lawmakers' assertions of attorney-client privilege. It found that the Lawmakers improperly asserted the privilege over dozens of documents that were received from or shared with individuals outside of any attorney-client relationship, such as communications with the Lieutenant Governor's office. ROA.10394. The court further determined that many communications did not concern legal advice, such as one that "solicited information about incidents of voting misconduct." ROA.10395.

Finally, the district court rejected the Lawmakers' assertions of work-product protection and investigative privilege. ROA.10395-96. The Lawmakers do not challenge these findings on appeal.

The Lawmakers filed a notice of appeal. ROA.10450-51. They subsequently filed a motion to stay the compel order. ROA.10458-60. Plaintiffs agreed not to oppose the motion after the parties agreed upon an expedited appeal briefing schedule. *Id*. The district court granted the motion but reiterated its concerns with the Lawmakers' privilege assertions, going so far as to say that the "vast majority of documents at issue here cannot be validly claimed as privileged." ROA.10461. The district court further emphasized that "[t]he attorneys representing the State Legislators candidly acknowledged at the hearing on this matter that they had not reviewed any of the documents claimed to be privileged," and that "[i]t is not known who conducted the privilege review. . . ." *Id.*

SUMMARY OF THE ARGUMENT

I. The Lawmakers do not dispute that the district court's order is not "final" under 28 U.S.C. § 1291. While they contend that the collateral order doctrine applies, it is a well-settled rule in this circuit that discovery orders may not be appealed under that doctrine because other review mechanisms exist. *See A-Mark Auction Galleries, Inc. v. Am. Numismatic Ass'n*, 233 F.3d 895, 899 (5th Cir. 2000) (collecting cases); *Leonard v. Martin*, 38 F.4th 481, 2022 WL 2353372, at *3 (5th

Cir. 2022). There is a narrow exception to that rule, not applicable here, which applies only when a party's assertion of privilege implicates First Amendment rights. In contrast, the Lawmakers' privilege claim here is, like most federal evidentiary privileges, rooted in common law. Mere invocation of a privilege does not make a discovery order appealable under the collateral order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). This appeal should be dismissed for lack of jurisdiction.

II. If the Court reaches the merits, it should affirm. The Lawmakers' primary argument is based on their claim of an absolute evidentiary privilege that this Court and the Supreme Court have said does not exist. *United States v. Gillock*, 445 U.S. 360, 373 (1980); *Jefferson Cnty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017). While the Lawmakers grasp at out-of-circuit precedent, this Court recently considered those cases and found that they are consistent with the law within the Fifth Circuit. *See Guillen*, 2022 WL 2713263, at *1 n.2. The Lawmakers' misplaced reliance on cases addressing state legislative immunity and the federal Speech and Debate Clause—both of which grant broader protection than the privilege at issue here—does not overcome clear precedent.

Without their claimed absolute privilege, the Lawmakers offer little argument that the district court abused its discretion. Ample grounds supported the court's finding after its *in camera* review that the disputed discovery is "highly relevant" to

Plaintiffs' claims. The Lawmakers speculate that Plaintiffs could prove their claims through other evidence, but the district court found such evidence was likely unavailable. The court also correctly reasoned, supported by extensive case law, that Plaintiffs' claims implicate a paramount federal interest—the fundamental right to vote. *See Williams v. Rhodes*, 393 U.S. 23 (1968). The Lawmakers presented no countervailing evidence of harm to balance against the important federal interest at stake and the relevance of the evidence. And in reaching its decision, the district court appropriately considered the non-dispositive factors set forth in *Rodriguez*—a case this Court has cited favorably.

III. The Lawmakers' remaining quibbles with the court's discovery order show no abuse of discretion. The district court reasonably found many claims of privilege waived over documents shared with lobbyists, advocacy groups, constituents, and other branches of government. The widely-recognized rule in this circuit is that legislative privilege is waived over documents shared outside the legislature. The Lawmakers cite no caselaw holding that they may broadly circulate relevant documents only to refuse to produce them here—and their discussion of "analogous privileges" only confirms the point, as those privileges do not extend to documents shared with third parties.

IV. To the same end, the district court correctly found the Lawmakers' overlapping claims of attorney-client privilege over some documents unfounded

because the Lawmakers failed to identify, never mind show, any attorney-client relationship. Even if they had, third parties were included on nearly every document at issue, waving privilege regardless. While the Lawmakers now claim a common legal interest amongst the various individuals on these communications, that argument is barred by circuit law, unsupported by record evidence, and forfeited.

STANDARD OF REVIEW

This Court "review[s] a district court's discovery decisions for abuse of discretion and will affirm such decisions unless they are arbitrary or clearly unreasonable." *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000). While the Court reviews questions of law *de novo*, the district court is otherwise "afforded broad discretion when deciding discovery matters" and this Court "will only vacate a court's judgment if the court's abuse of discretion affected the substantial rights of the appellant." *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 261 (5th Cir. 2011). The appellant bears the burden of proving abuse of discretion and prejudice. *Id.*

ARGUMENT

I. The Court lacks jurisdiction to review the district court's discovery ruling under the collateral order doctrine.

Federal appellate jurisdiction is limited to review of "final decisions of the district courts of the United States." 28 U.S.C. § 1291. The Lawmakers do not claim that the district court's discovery order is a final decision. Nor could they—a "final

decision ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Hall v. Hall*, 138 S. Ct. 1118, 1123–24 (2018) (quotations omitted). The Court's order granting the Plaintiffs' motion to compel is not "final" in any sense. The case proceeds apace before the district court with trial scheduled for July 2023.

The Lawmakers instead claim this appeal may be heard under the "collateral order doctrine," which permits immediate appeal of "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 545-46 (1949)). But it is a "well-settled rule in this circuit that discovery orders may not be appealed under the" collateral order doctrine. *A-Mark*, 233 F.3d at 899 (collecting cases). "[C]ases are legion that deny immediate appeals under the collateral order doctrine in an array of discovery contexts." *Leonard*, 2022 WL 2353372, at *3 (holding order denying motion to quash subpoena seeking "privileged information" was not appealable collateral order). "Indeed, this court and every other circuit court hold that the collateral order doctrine does not provide jurisdiction over a nonparty's appeal from a discovery order because nonparties have alternative avenues for appellate review." *Id.*

The collateral order doctrine applies "only [to] decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively

unreviewable on appeal from the final judgment in the underlying action." *Mohawk,* 558 U.S. at 106. *Mohawk*—which held that "the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege"—makes clear that mere invocation of privilege does not bring a discovery order within the scope of the doctrine because such orders are not unreviewable on appeal from a final judgment. To the contrary, other review mechanisms exist, including the "long-recognized option" of "defy[ing] [the] disclosure order," which would allow for an immediate appeal of an ensuing contempt order. *Id.* at 110-11. This process removes discovery orders from the collateral order doctrine. *See Cunningham v. Hamilton Cnty., Ohio*, 527 U.S. 198, 204 n.4 (1999); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *A-Mark*, 233 F.3d at 899; *Piratello v. Philips Elecs. N. Am. Corp.*, 360 F.3d 506, 509 (5th Cir. 2004).

The reasoning in *Mohawk* (addressing attorney-client privilege) applies equally to legislative privilege: the issue can be reviewed after final judgment, and a litigant who feels strongly about his privilege claim can defy the order and obtain immediate review via contempt. *Mohawk*, 558 U.S. at 111; *Piratello*, 360 F.3d at 509. Other courts have therefore concluded that orders compelling discovery over a claim of legislative privilege are not immediately appealable. "Contrary to the [Lawmakers'] argument, 'there is no special exception to [this] rule in cases involving claims of legislative or executive privilege." *Am. Trucking Associations,*

Inc. v. Alviti, 14 F.4th 76, 84 (1st Cir. 2021) (quoting *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 257 (1st Cir. 1989)); *see also Powell v. Ridge*, 247 F.3d 520, 524-25 (3d Cir. 2001) (observing other circuits "prohibit immediate review of discovery orders even when privilege issues are involved" and concluding discovery order against state legislators was not immediately appealable).

The Lawmakers' primary argument for allowing an immediate appeal here—that the privilege "provides a 'right not to disclose the privileged information in the first place'"—was equally present in *Mohawk* yet found wanting. *Mohawk*, 558 U.S. at 109. The Supreme Court held that between the possibility of contempt, protective orders, and other means of review, the attorney-client privilege was adequately protected absent immediate appeal under the collateral order doctrine. *Id.* at 109-1212. If, as the Supreme court held in *Mohawk*, such measures are adequate to protect "the oldest and most venerated of the common law privileges," *United States v. Edwards*, 303 F.3d 606, 618 (5th Cir. 2002), then they are surely adequate to protect legislative privilege, which is "at best . . . qualified" rather than absolute. *Jefferson*, 849 at 624.

The cases the Lawmakers point to do not change the matter. This Court recently explained that *Whole Woman's Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018)—the sole Fifth Circuit case the Lawmakers cite in support of jurisdiction—fell within the collateral order doctrine because the order at issue "allow[ed]

discovery against a nonparty with substantial First Amendment implications." *Leonard*, 2022 WL 2353372, at *3; *see also Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 450 n.2 (5th Cir. 2019) (similarly characterizing *Smith*). The subpoena in that case sought information about abortion policies from a group of Catholic bishops, and the bishops "claimed privileges [that] go to the heart of the constitutional protection of religious belief and practice as well as citizens' right to advocate sensitive policies in the public square." *Smith*, 896 F.3d at 368. Their constitutional claim "implicate[d] 'some particular value of a high order' or 'substantial public interest' that would be imperiled or destroyed if review were delayed until after entry of an archetypal final judgment." *Leonard*, 2022 WL 2353372, at *3 (quoting *Mohawk.*, 558 U.S. at 107). Regardless of its scope, the legislative privilege at issue simply does not raise such weighty constitutional concerns—the Lawmakers admit it derives, like most federal evidentiary privileges, from "federal common law, as applied through Rule 501 of the Federal Rules of Evidence." Appellants' Opening Br. (June 21, 2022) ("Br.") at 20-21 (quoting *Jefferson*, 849 F.3d at 624).

In re Hubbard, 803 F.3d 1298, 1306-07 (11th Cir. 2015), is not persuasive because it relies on Fifth Circuit cases that cannot be reconciled with *Mohawk* and "have been disavowed by the Fifth Circuit itself." *Garcia*, 876 F.2d at 258 n.2 (citing *Branch v. Phillips Petrol. Co.*, 638 F.2d 873, 877 (5th Cir. 1981)). Those cases

previously allowed "immediate appeal by a governmental entity where the government is not a party to the lawsuit and asserts some governmental privilege to resist release of the subpoenaed material." *Branch*, 638 F.2d at 877 (citing *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 622 (5th Cir. 1973)).[4] But even at the time, this Court recognized that the reasoning in these cases—"that forced disclosure would irretrievably breach the claim of privilege and render an appeal from final judgment meaningless"—was "similar to [an] argument advanced and rejected by the Supreme Court[.]" *Branch*, 638 F.2d at 878 (first quoting *Cates,* 480 F.2d at 622; then citing *United States v. Ryan*, 402 U.S. 530 (1971)). Precedent made clear "that the government's interest in maintaining some privilege of non-disclosure" is no greater than a private party's because in "each case, the subpoenaed party has an alternative avenue through which to vindicate its rights without sacrificing the interest it seeks to protect." *Id.* at 878-79 (citing *Ryan*, 402 U.S. at 533). The Fifth Circuit's old rule—which permitted the government but not others—to immediately appeal privilege issues contradicted that reasoning.

Whatever limited force remained in these cases was eliminated by *Mohawk*, which expressly held that compelling disclosure of supposedly privileged

[4] Each of those cases also involved *executive* rather than *legislative* privilege. *See id.* at 879 ("'executive' or 'official information' privilege"); *Cates*, 480 F.2d at 622 ("executive privilege"); *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 386 (5th Cir. 1970) (state-law privilege covering unemployment records).

information does not render an order collateral. The *Branch* line of cases is no longer good law and this Court has, appropriately, not applied it since *Mohawk*. *See United States v. Tanksley*, 848 F.3d 347, 350 (5th Cir. 2017) ("If . . . a Supreme Court decision 'expressly or implicitly' overrules one of our precedents, we have the authority and obligation to declare and implement this change in the law." (citation omitted)). While *Hubbard* relied upon these cases, that decision failed to grapple with the Supreme Court's conclusion that "established mechanisms for appellate review" place discovery orders concerning supposedly privileged information outside the scope of the collateral order doctrine. *Mohawk*, 558 U.S. at 112. Numerous courts have declined to follow these cases in view of *Mohawk* and the Fifth Circuit's renunciation of their reasoning. *See, e.g.*, *Garcia*, 876 F.2d at 258 n.2; *Alviti*, 14 F.4th at 84 (declining to follow *Hubbard* and requiring appellants to proceed through advisory mandamus); *In re Vargas*, 723 F.2d 1461, 1465 (10th Cir. 1983) (declining to follow *Branch*); *Charleston Waterkeeper v. Frontier Logistics, L.P.*, No. 2:20-CV-1089-DCN, 2020 WL 7335408, at *4 (D.S.C. Dec. 14, 2020) (declining to follow "the Eleventh Circuit's limited analysis in *Hubbard*" and concluding appellate jurisdiction was likely lacking).

The Lawmakers' final case—*In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014)—confirms the lack of jurisdiction here. There, the appellant sought and received mandamus relief and did not invoke the collateral order

doctrine. *Id.* at 756.[5] In granting mandamus relief, the court noted the Supreme Court "repeatedly and expressly reaffirmed that *mandamus*—as opposed to the collateral order doctrine—remains a 'useful safety valve' in some cases of clear error to correct 'some of the more consequential attorney-client privilege rulings." *Id.* (citing *Mohawk*, 558 U.S. at 110-12) (further noting *Mohawk* held "that attorney-client privilege rulings are not appealable under the collateral order doctrine"). The Lawmakers do not seek mandamus here.

The Lawmakers also cannot show that the district court's order is separate from the merits of "the legality of SB 1." Br. at 2. "While the district court's order compelling discovery may seem a self-contained piece of litigation when viewed in isolation, that view fails to capture the full scope of [the] proceedings." *A-Mark*, 233 F.3d at 898 (quoting *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121 (1994)). Plaintiffs have alleged that SB 1 is unlawful because the Legislature, including the Lawmakers, intentionally discriminated against minority voters. The documents at issue, and the propriety of the Lawmakers' assertions of privilege, bear directly on that question. As the court explained below, "the decisionmaking

[5] The Court did not address jurisdiction and commented on the insufficiency of "appeal after final judgment" solely in the context of whether the petitioner met the mandamus requirement of having "no other adequate means to attain the relief he desires." *Id.* at 760 (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)). To the extent it suggested it was not "adequate" relief for a party to go into contempt to obtain an immediate appeal, that conclusion was based on circuit precedent questioning whether contempt orders provide an opportunity for meaningful pre-final judgment review—all of which were preceded by and contrary to both *Mohawk* and the Fifth Circuit cases above. *Id.* (citing *In re Sealed Case*, 151 F.3d 1059, 1064-65 (D.C. Cir. 1998)).

process" by the Legislature "*is* the case." ROA.10393 (citation omitted). Because this discovery touches on a factual dispute central to Plaintiffs' claim—the legislature's discriminatory intent, *see infra* § II.B.1—it "does not resolve important issues separate from the merits." *A-Mark*, 233 F.3d at 898; *cf. In re Search of Elec. Commc'ns*, 802 F.3d 516, 525 (3d Cir. 2015) (concluding Congressman's invocation of Speech and Debate Clause was not separate from merits because evidence was likely to "substantially affect the merits of the case").

II. The district court did not abuse its discretion in compelling production of highly relevant documents over the Lawmakers' claim of privilege.

A. Legislative privilege for state legislators is not absolute and requires balancing the parties' competing interests.

The rule in this circuit is clear: "the legislative privilege for state lawmakers is, at best, one which is qualified." *Jefferson*, 849 F.3d at 624 (quoting *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 106927, at *1 (W.D. Tex. Jan. 8, 2014)). "Both this Court and the Supreme Court have confirmed that the state legislative privilege is not absolute." *Guillen*, 2022 WL 2713263, at *1 n.2. Because it is qualified, legislative privilege "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jefferson*, 849 F.3d at 624 (quoting *Perez,* 2014 WL 106927, at *1); *accord Trammel v. United States*, 445 U.S.

40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960)). The Lawmakers have no basis for claiming an absolute privilege that fully "shields state legislators from discovery in private, civil litigation into the motives for their legislative acts." Br. at 16; *see also id.* at 19 (similar).

In determining whether legislative privilege applies, courts must "balance" the interests underlying the privilege with any important countervailing interests in disclosure. *See Gillock*, 445 U.S. at 369. In *Gillock*, the Supreme Court held that legislative privilege did not bar prosecutors from introducing evidence of a state representative's support for legislation in a bribery prosecution. The Court explained that while "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function," those concerns "must yield" where "important federal interests are at stake." *Id.* at 373; *see also id.* at 370 (explaining "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power"). "*Gillock* instructs us that any such [legislative] privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides." *In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987); *United States v. Cartledge*, 928 F.2d 93, 96 (4th Cir. 1991); *League of Women Voters of Fla. v. Fla. House of Reps.*, 132 So. 3d 135, 146 (Fla. 2013).

Faced with this Supreme Court and Fifth Circuit precedent, the Lawmakers argue that *Jefferson*'s "reference to the 'qualified' nature of legislative privilege"

was *dictum*. *See* Br. at 17, 31. Not so. *Jefferson* was a tort suit brought by a medical clinic against the Jefferson Parish Council and certain councilmembers who voted to terminate the clinic's lease. The defendants' assertion that the claims "are all barred by legislative immunity and privilege," *Jefferson*, 849 F.3d at 624, was no drive-by argument—the councilmembers pressed it repeatedly in their opening brief, relying on the same Eleventh Circuit case (*Hubbard*) the Lawmakers hang their hats on. *Id.* at 18-26, 32-33, n.70. Their reply brief echoed the same arguments the Lawmakers raise. *Compare* Reply Br. at 6, *Jefferson Cmty. Health Care Ctrs. Inc. v. Jefferson Par. Govn't*, Case No. 16-30875, 2016 WL 6135217 (5th Cir. Oct. 18, 2016), (claiming "factual heart" of claim "strikes at the heart of the legislative privilege by calling for the discovery and disclosure of the councilmembers' motivations" (citing *Hubbard*, 803 F.3d at 1311)), *with* Br. at 24 (similarly arguing subpoenas "strike[] at the heart of the legislative privilege" and that documents here "fall[] within the heartland of the legislative privilege" (quoting *Hubbard*, 803 F.3d at 1310)).

This Court rejected the councilmembers' arguments. It held that legislative *immunity* did not apply because "[l]ocal governing bodies, such as the Parish and its council, do not enjoy immunity from suit." *Jefferson,* 849 F.3d at 624. And it held that legislative *privilege* did not apply because "the legislative privilege for state lawmakers is, at best, one which is qualified" and "accepted only to [a] very limited

extent," and could not bar the adjudication of an entire claim "even assuming" it precluded inquiry into the lawmakers' motivations. *Id.* (quotations omitted). *Jefferson* therefore rejected the councilmembers' sweeping claim of legislative privilege for two reasons: (1) the privilege is qualified and limited; and (2) could not bar the adjudication of an entire claim. *Jefferson*'s discussion of legislative privilege was "necessary to the result [and] constitute[d] an explication of the governing rules of law" and thus "not dictum." *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) (explaining such statements are "not dictum"). And the councilmembers' briefing makes clear the issue was "properly presented and decided in the regular course of the consideration of the cause." *United States v. Adamson*, 665 F.2d 649, 656 n.19 (5th Cir. 1982).

This Court just reaffirmed *Jefferson's* holding that legislative privilege is qualified in a decision the Lawmakers ignore. *See Guillen*, 2022 WL 2713263, at *1-2. Earlier this year a district court denied a motion by Texas legislators to quash deposition subpoenas served on them based on legislative privilege in a redistricting challenge. *See LULAC v. Abbott*, No. EEP-21-CV-00259-DCG-JES-JVB, 2022 WL 1570858, at *1-2 (W.D. Tex. May 18, 2022) (three-judge court). While the court concluded the privilege's applicability would turn on a question-by-question basis, it correctly recognized *Jefferson* as the controlling framework and ordered the depositions to proceed. *Id.* at *1-3.

Declining to stay the order pending appeal, this Court explained the legislators were "not likely to show that the court erred by denying their motion to quash." *Guillen*, 2022 WL 2713263, at *2. The legislators in *Guillen* similarly claimed that *Jefferson* offered only dictum on legislative privilege, but this Court explained that the district court "neutrally followed the law of this circuit," because "[b]oth this court and the Supreme Court have confirmed that the state legislative privilege is not absolute." *Id.* at *1 n.2; *see also id.* at *1 ("Given *Jefferson Community Health* and *Gillock*, we agree with the district court that the state legislative privilege is not so broad as to compel the district court to quash the deposition subpoenas" (cleaned up)). As this Court explained, "the privilege must not be used as a cudgel to . . . prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege." *Id.* at *2 (collecting authority).

The Lawmakers assert that three out-of-circuit opinions have held that legislative privilege absolutely bars any "third-party discovery seeking to probe the legislators' motivations for legislative acts in private, civil litigation." Br. at 21-23 (citing *Alviti*, 14 F.4th at 88-90; *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186-88 (9th Cir. 2018); *Hubbard*, 803 F.3d at 1311-12). These cases say no such thing, and this Court just rejected the same argument in its decision ignored by the Lawmakers:

> [The Texas legislators] mischaracterize the law of other circuits in their brief. Like us and the Supreme Court, the First, Ninth and Eleventh Circuits all recognize that the state legislative privilege is qualified. *See Am. Trucking Associations, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021)

> ("We need not reject altogether the possibility that there might be a private civil case in which state legislative immunity must be set to one side because the case turns so heavily on subjective motive or purpose."); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (rejecting plaintiffs' request for a 'categorical exception' to the privilege and basing its holding on that case's 'factual record'); *In re Hubbard*, 803 F.3d 1298, 1311 (11th Cir. 2015) ("To be sure, a state lawmaker's legislative privilege must yield in some circumstances.").

Guillen, 2022 WL 2713263, at *1 n.2.[6]

At bottom, it is blackletter law that state legislative privilege is qualified, and that the role of the court in evaluating assertions of legislative privilege is to balance "the public good" served by the privilege against the truth ascertaining purpose of litigation. *Jefferson*, 849 F.3d at 624; *see also Alviti*, 14 F.4th at 88; *In re Grand Jury*, 821 F.2d at 957 (similar). The Lawmakers' extensive reliance on cases discussing different doctrines—the *absolute* immunity from suit state legislators enjoy and the broader protections afforded federal legislators under the Speech and Debate Clause—is misplaced. *Gillock* makes clear that whatever similarities these concepts may have, they are *not* co-extensive. *See* 445 U.S. at 366-67 (explaining evidence admissible against state legislator would have been barred against a federal legislator by the Speech and Debate Clause); *see also Jefferson*, 849 F.3d at 624

[6] Even if a circuit split did exist, "the mere existence of a circuit split does not justify overturning precedent." *United States v. Lamon*, 893 F.3d 369, 371 (7th Cir. 2018) (citing *United States v. Waters*, 823 F.3d 1062, 1065 (7th Cir. 2016)); *Ruiz v. A.H. 2005 Mgmt., L.P.*, No. EP-17-CV-197-PRM, 2017 WL 8236265, at *2 (W.D. Tex. Aug. 11, 2017) (similar).

(noting state legislative immunity is "absolute" whereas privilege is "qualified").[7] The Lawmakers' heavy reliance on cases discussing these separate doctrines makes clear the glaring hole in their argument—they identify no case holding that the legislative privilege absolutely bars third-party discovery into legislative purpose.

B. The district court did not abuse its discretion in weighing the competing interests of the parties.

The district court did not abuse its discretion when it evaluated the Lawmakers' assertions of privilege on a document-by-document basis for each of the 226 records at issue based on its own *in camera* review. ROA.10337. The court concluded that for all or part of 114 of these documents, Plaintiffs' "interest in obtaining evidence of the [Lawmakers'] subjective motives outweighed the comity considerations implicated by the subpoenas." *Alviti*, 14 F.4th at 88. The court's careful, document-specific rulings reflect that "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery."

[7] The Lawmakers strain these cases past their breaking point. For example, they contend "the Supreme Court 'generally ha[s] equated' the scope of the privileged afforded to federal legislators via the Constitution and the privilege afforded to state legislators via the common law." Br. at 33 (quoting *Sup. Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980)). That is simply wrong, as *Gillock* makes clear. The case they cite did not discuss privilege—it addressed "absolute legislative immunity." *Consumers Union*, 446 U.S. at 734. In arguing that immunity for state legislators is coextensive with their evidentiary privilege, the Lawmakers cite only to cases addressing the Speech and Debate Clause. *See Gravel v. United States*, 408 U.S. 606 (1972); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995). But "the Supreme Court has unequivocally ruled that the embrace of the clause does not extend to a state legislator." *Cole v. Gray*, 638 F.2d 804, 810 (5th Cir. 1981) (citing *Gillock*, 445 U.S. 360)).

JP Morgan Chase Bank, N.A. v. DataTreasury Corp., 936 F.3d 251, 260 (5th Cir. 2019) (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)).

1. The district court reasonably concluded the LULAC Plaintiffs have a need for "highly relevant" evidence.

Judge Rodriguez acted well within his discretion in finding that Plaintiffs showed a legitimate need for the discovery at issue. As he noted, Plaintiffs allege that SB 1 was enacted with "a racially discriminatory purpose," in violation of, among other laws, Section 2 of the Voting Rights Act. ROA.10392. He concluded the evidence at issue was "highly relevant" because it reflects "the State Legislators' contemporaneous thoughts and motivations in drafting and enacting S.B. 1." *Id.*

That conclusion was eminently reasonable and well within the court's discretion. The subpoenaed Lawmakers played pivotal roles in drafting SB 1 and shepherding it through the Texas Legislature. *See* ROA.4469-70, 5953, 5960, 9127-98; *supra* p. 7. The documents at issue reflect far more than just the impressions of these four key legislators. According to descriptions by Judge Rodriguez following his *in camera* review and by the drafters of the privilege log, these documents include conference committee materials (ROA.10043-45), summaries on negotiations on SB 1 between numerous unknown legislators (ROA.10421), and substantial numbers of documents pertaining to SB 1's effects—the creators and recipients of which remain unknown (ROA.10422, 10426, 10447).

The Lawmakers do not disagree that the evidence at issue is relevant to a Section 2 claim. Nor could they—Congress chose to proscribe purposefully discriminatory voting laws by enacting Section 2. The Supreme Court has made clear that direct evidence of legislative intent—"contemporary statements made by members of the decisionmaking body, minutes of its meetings, [and] reports," along with direct testimony—is likely to be "highly relevant" to such intentional discrimination claims. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). Such materials constitute "proper inquiry in determining whether racially discriminatory intent existed." *Id.* The Lawmakers' documents are also highly relevant to Plaintiffs' remaining claims. Intentional discrimination is a distinct way of proving an *Anderson-Burdick* violation and is also "a factor to consider when determining the level of scrutiny" for such a claim. *See Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-CV-11844, 2017 WL 3390364, at *3 (E.D. Mich. Jan. 19, 2017) (citing *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016)); *see also Mays v. LaRose*, 951 F.3d 775, 783 (6th Cir. 2020) (holding discriminatory law subject to heightened scrutiny under *Anderson-Burdick*); *cf. Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 n.9 (11th Cir. 2019) (noting "discriminatory animus" is relevant to a Fourteenth Amendment challenge to a voting law). The same goes for Plaintiffs' First Amendment claim—establishing a "content-based purpose may be sufficient in certain circumstances to

show that a regulation is content based." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

The Lawmakers' response to the clear relevance of the discovery is to speculate Plaintiffs could, theoretically, prove their case through other evidence. *See* Br. at 25. But evidence of discriminatory intent is highly unlikely to be uncovered elsewhere, as officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982); *Cano v. Davis*, 193 F. Supp. 2d 1177, 1181-82 (2002) (same, and recognizing that statements from "authors of the legislation involved" may "be the best available evidence as to legislative motive"). Moreover, nothing in *Gillock* or the Lawmakers' out-of-circuit case law suggests that the privilege may be overcome only when discovery from legislators is the only available evidence to prove a claim.[8] Plaintiffs

[8] While the Lawmakers point to *Lee*, the plaintiffs there already possessed—in their view—sufficient evidence to prove their discrimination claim. *See infra* p. 39. The *Lee* court also had the benefit of a complete summary judgment record showing that no triable issue of fact existed on the plaintiffs' claims. *See* 908 F.3d at 1185 (noting "demographic data and expert analyses failed to raise a genuine dispute" on plaintiffs' equal protection claim). It is not yet clear in this litigation—with trial scheduled nearly a full year away—what mix of evidence will, or will not, be needed to establish Plaintiffs' claims. That reinforces the strong jurisdictional reasons for declining to hear the Lawmakers' appeal until after final judgment. *Cf. Cunningham*, 527 U.S. at 209; *Mohawk*, 558 U.S. at 106.

"need not 'confine their proof' to circumstantial evidence." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 341 (E.D. Va. 2015) (concluding unavailability of direct evidence weighed in favor of disclosure). The district court did not abuse discretion when it determined that the unavailability of other evidence weighed in favor of disclosure. ROA.10392.

The Lawmakers also contend that the subpoenas seek unnecessary evidence because "a law's constitutionality does not depend on the subjective intent of one (or even four) legislators." Br. at 26 (citing *Brnovich v. DNC*, 141 S. Ct. 2321, 2349-50 (2021)). But Judge Rodriguez—who actually reviewed the documents—described the materials as reflecting more than just the views the four subpoenaed legislators, noting they include conference committee materials and numerous documents exchanged between unidentified legislators. *See supra* pp. 30-32; *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) (describing conference committee materials as "the most authoritative and reliable" indicators of legislative intent). In any event, evidence need not, on its own, be sufficient to prove a claim to be discoverable—it must only be "relevant." Fed. R. Civ. P. 26(b). And records from the Lawmakers—SB 1's chief drafters and proponents—is clearly "relevant" to the issue of legislative intent. *Arlington Heights*, 429 U.S. at 268. While "evidence of any one legislator's intent cannot be conflated with the legislature's purpose as a whole . . . that does not mean evidence

of individual motive is necessarily irrelevant to the question of the legislature's motive." *LULAC*, 2022 WL 1570858, at *2 (cleaned up); *see also Alviti*, 14 F.4th at 90 (rejecting argument "that evidence of individual legislators' motives is always irrelevant per se" to whether "the legislature as a whole enacted [legislation] with any particular purpose").

2. The federal interests at stake outweigh the Lawmakers' interest in the privilege.

The district court correctly held that Plaintiffs' constitutional and statutory claims alleging the Legislature enacted a racially discriminatory voting law reflect weighty federal interests that warrant overcoming the qualified privilege. Each claim implicates "the right to vote—a 'fundamental political right' that is 'preservative of all rights.'" *Williams*, 393 U.S. at 23 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). "[T]he importance of eliminating racial discrimination in voting—the bedrock of this country's democratic system of government—cannot be overstated." *Veasey v. Perry*, No. 13–193, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014). Section 2 itself is nothing less than "the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting." *Bush v. Vera*, 517 U.S. 952, 992 (1996) (quoting S. Rep. No. 97–417, p. 4 (1982)) (O'Connor J., concurring).

These federal concerns warrant overcoming the qualified privilege for the documents here—as Judge Rodriguez noted, "[c]ourts have repeatedly recognized

that such important federal interests include protecting the fundamental right to vote." ROA.10393; *see also Benisek v. Lamone*, 263 F. Supp. 3d 551, 555 (D. Md.), *aff'd*, 241 F. Supp. 3d 566 (D. Md. 2017); *Bethune-Hill*, 114 F. Supp. 3d at 341 (collecting cases); *see also League of Women Voters of Fla.*, 132 So. 3d at 146.

Against these paramount federal concerns, the Lawmakers offered paltry evidence of harm. They identify no evidence to support their claim that they will be chilled or prejudiced by the release of this narrow subset of documents—many of which originated outside the legislature anyway. While each Lawmaker filed a declaration below, not one claimed their legislative activities would be harmed through release of the documents at issue. The Lawmakers offered the district court little to weigh against the important federal interests at stake and Plaintiffs' need for these "highly relevant" documents.

The Lawmakers also contend that the only "federal interest" qualified to overcome the privilege is a criminal prosecution. *See* Br. at 23-29, 31-32. No precedent supports that position. *Gillock* explained the privilege "yields" where "important federal interests are at stake," including but not limited to "the enforcement of federal criminal statutes." 445 U.S. at 373. Thus, "federal enactments," like Section 2, "will prevail over competing state exercises of power." *Id.* at 370. The *Gillock* Court had every opportunity to limit its holding to the criminal context but purposefully chose a broader formulation. Several years earlier

the Court also explained in *Arlington Heights* that in at least some civil cases legislative members may be required to testify. 429 U.S. at 268. Many courts have found that *Arlington Heights* "reinforce[s] the qualified nature of the legislative privilege." *Veasey*, 2014 WL 1340077, at *1; *see also Guillen*, 2022 WL 2713263, at *2; *Alviti*, 14 F.4th at 87; *Citizens Union of City of N.Y. v. Att'y Gen. of N.Y.*, 269 F. Supp. 3d 124, 155 (S.D.N.Y. 2017) ("Case law makes clear the privilege is not absolute." (citing *Arlington Heights*, 429 U.S. at 268)); *Gilby v. Hughs*, 471 F. Supp. 3d 763, 763 (W.D. Tex. 2020); *BBC Baymeadows, LLC v. City of Ridgeland*, No. 3:14CV676-HTW-LRA, 2015 WL 5943250, at *4 (S.D. Miss. Oct. 13, 2015).

While the Lawmakers again point to their out-of-circuit cases, not one held that legislative privilege could not yield to federal interests in civil cases. *See Alviti*, 14 F.4th at 88 (acknowledging "the possibility that there might be a private civil case in which state legislative immunity must be set to one side"); *Hubbard*, 803 F.3d at 1312 n.13 (similar); *Lee*, 908 F.3d at 1187 (similar). "Nothing in *Gillock* suggests these federal interests end there . . . And when cherished and constitutionally rooted public rights are at stake, legislative evidentiary privileges must yield." *S.C. State Conf. of NAACP v. McMaster*, No. 3:21-CV-03302-JMC, 2022 WL 425011, at *5 (D.S.C. Feb. 10, 2022) (rejecting argument that *Gillock* is limited to criminal cases).

3. The district court did not abuse its discretion in considering well-established factors to weigh the relative interests of the parties.

Finally, the Lawmakers argue that the district court was wrong to consider the well-established factors for weighing a legislative privilege claim found in *Rodriguez*, a decision this Court cited approvingly in *Jefferson*. *See* Br. at 34-35. Those factors include (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Rodriguez*, 280 F. Supp. at 101.

Courts across the country have long considered these factors in assessing "whether the legislative privilege should apply in a given case." *League of Women Voters of Mich. v. Johnson*, No. 17-14148, 2018 WL 2335805, at *4 (E.D. Mich. May 23, 2018) (collecting cases); *see also Jackson Mun. Airport Auth. Bryant*, No. 3:16-cv-246-CWR-FKB, 2017 WL 6520967, at *6 (S.D. Miss. Dec. 19, 2017) (collecting cases and noting courts in the Fifth Circuit follow this approach). Many courts in this circuit have used these factors as an "aid" in determining "whether the legislative privilege precludes disclosure," which ultimately requires the court to "balance the interests of the party seeking the evidence against the interests of the individual claiming the privilege." *Perez*, 2014 WL 106927, at *2. The factors are

not exclusive or strictly controlling; they instead serve "the court's goal [of] determin[ing] whether the need for disclosure and accurate fact finding outweighs the legislature's need to act free of worry about inquiry into [its] deliberations." *Veasey*, 2014 WL 1340077, at *2.

The Lawmakers offer little reason to find the district court's consideration of the factors to be an abuse of discretion. They contend they represent a departure from the approaches in *Hubbard*, *Lee*, and *Alviti*. But none of those decisions—which do not govern here—had occasion to consider the *Rodriguez* factors. In any event, their approaches are consistent with the factors. *Alviti*, for example, concluded the legislative privilege turns on whether the requesting party's "interest in obtaining evidence" of a legislator's "subjective motives outweigh[s] the comity considerations implicated by the subpoenas." 14 F.4th at 88. The *Rodriguez* factors likewise weigh the relevance and need for the evidence, the nature of the claims at issue, and the need for legislative autonomy. *See* ROA.10385 (explaining *Rodriguez* factors balance need for disclosure against harm to legislature's deliberations).

The Ninth Circuit in *Lee* acknowledged that the claims at issue raised "serious allegations"—one of the *Rodriguez* factors the Lawmakers dismiss—but found that consideration outweighed because the plaintiffs "f[e]ll short" of justifying discovery into legislative intent. *Lee*, 908 F.3d at 1188. That conclusion made sense there—the plaintiffs conceded before the magistrate that "they ha[d] . . . sufficient evidence

to demonstrate discriminatory intent already," Order Granting Mot. for Protective Order, *Lee v. City of Los Angeles*, No. 12-cv-6618 (C.D. Cal. Sept. 17, 2013), ECF No. 43—and was consistent with the *Rodriguez* factors. Similarly, *Hubbard* found as a "matter of law" that the "subjective motivations of the lawmakers" at issue were not relevant to the plaintiffs' claim and did not warrant discovery. 803 F.3d at 1312. Nothing in these decisions is contrary to how Judge Rodriguez weighed the interests of the parties here.

The Fifth Circuit has also pointed to similar considerations in weighing other qualified privilege claims. It held that in assessing a journalist's qualified state law privilege to not disclose a source, courts should ask "(1) is the information relevant, (2) can the information be obtained by alternative means, and (3) is there a compelling interest in the information?" *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) (citing *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958)). It endorsed factors like "whether the information sought is available through other discovery or from other sources" and "the importance of the information sought to the plaintiff's case" in assessing qualified investigative file privilege claims. *See Coughlin v. Lee*, 946 F.2d 1152, 1160 (5th Cir. 1991) (citing *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973)); *see also* Wright & Miller, 26A Fed. Prac. & Proc. Evid. § 5690 (1st ed.) ("With a qualified privilege, the court has discretion to compel disclosure of matter even if

it is privileged if the court finds that the need for the evidence outweighs the interests that support the privilege."); Fed. R. Civ. P. 26(b)(3)(A) (qualified work product rule permits disclosure upon showing of relevance and substantial need). These are the same considerations the Lawmakers fault the district court for weighing here, but their consideration in similar contexts shows Judge Rodriguez did not abuse his discretion.

III. The district court did not abuse its discretion in finding waiver of legislative privilege.

The district court also did not abuse its discretion in concluding that the Lawmakers waived any legislative privilege claim over 76 communications they had with those outside the legislature. ROA.10403-69. These communications include things like documents "from a third party not employed by the legislature," and "[c]orrespondence from constituents to [a] legislator's staff." ROA.9284 at App197, ROA.9284 at App190. In nearly each case, these documents were shared with some combination of a private citizen or an unknown person not identified in the Lawmakers' privilege log. *See*, *e.g.*, ROA.9284 at App190, ROA.9284 at App166, ROA.9284 at App199. Only a small handful concern records shared with other branches of the Texas state government and no one else.

The Lawmakers do not dispute that these records were widely shared (and often originated) outside the legislative branch. That resolves the issue because courts within this circuit have uniformly found that to "the extent . . . that any

legislator, legislative aide, or staff member had conversations or communications with any outsider (*e.g.*, party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications." *Perez*, 2014 WL 106927, at *2; *see also Gilby*, 471 F. Supp. 3d at 767 (same); *TitleMax of Tex., Inc. v. City of Dall.*, No. 3:21-CV-1040-S-BN, 2022 WL 326566, at *6 (N.D. Tex. Feb. 3, 2022) (similar); *Bryant*, 2017 WL 6520967, at *7 (similar). That rule is rooted in the purpose of the privilege—to "protect[] legislators from possible prosecution by an unfriendly executive and conviction by a hostile judiciary." *Gilby*, 471 F. Supp. 3d at 766–67 (explaining the privilege "serves to preserve the constitutional structure of separate, coequal, and independent branches of government"). The rule is also consistent with this Court's instruction that legislative privilege be "strictly construed," *Jefferson*, 849 F.3d at 624, and with privilege rules generally because "virtually every privilege is waived by disclosure to a third party." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 & n.13 (5th Cir. 1985) (collecting cases); *accord* Wright & Miller, 24 Fed. Prac. & Proc. Evid. § 5507.2 (1st ed.) ("And, of course, a party waives the privilege when the communications are disclosed to a third-party.").

Acknowledging that the materials were shared beyond the legislative sphere, the Lawmakers instead claim a total evidentiary privilege that, in effect, can never be waived, provided a legislator claims a document or communication relates to

some legislative purpose. *See* Br. at 35-41. But they do not cite a single case holding as much and "courts have declined to apply the privilege to communications between legislators and third parties, such as lobbyists or constituents." *Plain Loc. Sch. Dist. Bd. of Educ. v. DeWine*, 464 F. Supp. 3d 915, 921 (S.D. Ohio 2020) (collecting authority); *see also Lee v. Va. State Bd. of Elections*, No. 3:15CV357 (HEH-RCY), 2015 WL 9461505, at *7 (E.D. Va. Dec. 23, 2015) (communications with "Third Parties—such as state agencies, constituents, lobbyists, and other third parties—are not protected by legislative privilege"); *N. C. State Conf. v. McCrory*, No. 1:13CV658, 2015 WL 12683665, at *8 (M.D.N.C. Feb. 4, 2015) (collecting authority). Instead, to "support their assertions, the State Legislators rely on numerous authorities construing the federal Constitution's Speech and Debate Clause and federal legislative immunity." ROA.10387. But the Lawmakers' privilege "stand[s] on different footing" than these doctrines and provides a "less protective" privilege "than their constitutional counterparts." *Alviti*, 14 F.4th at 87.[9]

Lacking authority that actually supports their position, the Lawmakers argue by reference to "analogous privileges," beginning with the President's executive

[9] The Second Circuit's decision in *Almonte v. City of Long Beach*, 478 F.3d 100 (2d Cir. 2007), considered legislative *immunity* and did not address evidentiary privilege. The Lawmakers also, without noting it, cite to a dissenting opinion in *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980), which likewise addressed a county councilmember's immunity from suit in a damages action. The same is true of *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992) (addressing "absolute immunity" as a "complete bar to civil liability for damages").

privilege. Br. at 36. The Lawmakers offer no reason to equate the President's executive privilege, rooted in Article II of the federal Constitution, with their qualified common law privilege. Indeed, then-Judge Kavanaugh explained the Speech and Debate Clause "is a counterpart to the executive privileges that constitute an essential part of the President's 'executive Power' under Article II and that protect the President and the Executive Branch from similar intimidation by the Legislature." *In re Grand Jury Subpoenas*, 571 F.3d 1200, 1208 (D.C. Cir. 2009) (Kavanaugh, J., concurring). The Lawmakers' common law privilege is narrower than these constitutional privileges and is not animated by the same separation of powers concerns.

The Lawmakers also misunderstand executive privilege, which exists to guard against the "risk of inhibiting candor in the *internal* exchanges at the highest levels of the Executive Branch." *Gillock*, 445 U.S. at 373 (citing *United States v. Nixon,* 418 U.S. 683 (1974)) (emphasis added). The Lawmakers place great reliance on *Nixon*, but that case both did not address waiver and *rejected* the President's claim of absolute privilege, compelling the release of records because the "legitimate needs of the judicial process may outweigh Presidential privilege." 418 U.S. at 707. *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997) also undercuts their view. That case held that the President "waived [his] claims of privilege in regard to [] specific documents [he] voluntarily revealed to third parties outside the White House." *Id.* at 741-42.

Indeed, "courts have said that release of a document [] waives these privileges for the document or information specifically released," even if it does not cause a broader subject-matter waiver. *Id.* at 741 (collecting authority). That is the same standard used by the district court—each document it found waived was "voluntarily revealed to third parties" outside the legislature. *See* ROA.10386-10391.

The Lawmakers' analogy to the attorney-client privilege fares no better. *See* Br. at 37-38. It is canonical that a "party waives attorney-client privilege when it voluntarily discloses privileged communications to a third party[.]" *YETI Coolers, LLC v. RTIC Coolers*, LLC, No. A-15-CV-597-RP, 2016 WL 8677303, at *2 (W.D. Tex. Dec. 30, 2016); *see also infra* § IV. They note that privilege may extend to "agents" necessary to facilitate confidential communication, like a translator, though they failed to explain below (and in their opening brief) how the third parties here—constituents, third-party organizations, county officials, party officials, private legal counsel, and other branches of government—were "agents." Br. at 38. The Lawmakers bear the burden to demonstrate that each of these entities served as their "agents"—or were somehow functionally necessary to facilitate communication, like a translator—yet their claim finds not a shred of support in the record.

Finally, the Lawmakers contend that, at minimum, they do not waive legislative privilege by communicating with staff in the Lieutenant Governor's or Attorney General's offices. *See id.* at 39-41. These arguments are academic because

nearly all the communications between the Lawmakers and these offices included additional third parties, such as Alan Vera (a member of the Harris County Republican Committee) or Elizabeth Alvarez (a private attorney). In any event, they cite no authority for this claim, which is contrary to the rule applied in this circuit and contradicts the purpose of the privilege—to protect the Legislature *from* the Executive Branch and "to encourage frank and honest discussion among lawmakers." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-CV-5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011) (explaining legislators "must be able to confer with one another without fear of public disclosure" but that privilege is "waived when the parties holding the privilege share their communications with an outsider").

They also note that—like the Vice President and most other Lieutenant Governors—the Texas Lieutenant Governor has certain legislative responsibilities. But the Lieutenant Governor is nonetheless a part of the Executive Department. *See* Tex. Const. art. IV, § 1 ("The Executive Department of the State shall consist of," among others, "a Lieutenant Governor"); Tex. Const. art. IV, § 1 (lodging his duties within the "Executive Department"); *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995) (recognizing Lieutenant Governor as an "executive officer[]" of Texas). No case within the Fifth Circuit has ever extended legislative privilege to an executive officer like the Lieutenant Governor.

The Lawmakers suggest the privilege may extend to the Lieutenant Governor when he is performing his legislative functions. That, too, is not supported by case law within this circuit.[10] Even if that was the rule, the Lawmakers have failed to make any showing the Lieutenant Governor was acting within such duties here. The Lawmakers gripe that the district court ignored Texas Senate Rule 2.02(d)—a provision they never cited below or in their log. *See* Br. at 40. That rule states that "[o]nly the Lieutenant Governor and members of the Senate may work for or against any proposition before the Senate while on the floor." Tex. S. Rule 2.02(d), S. Res. 1, 87th Leg., 2d C.S. (2021). That provision prescribes no duty to the Lieutenant Governor and merely acknowledges his access to the Senate floor. Even so, nothing in record indicates the communications at issue concern the Lieutenant Governor's *floor activity* in support of the bill. Judge Rodriguez could not have abused his discretion in concluding that "the State Legislators have not shown that the communications at issue involved any of the[] [Lieutenant Governor's] legislative functions." ROA.10391. This after-the-fact rationalization fails to show the

[10] The Lawmakers pointed below to one out-of-circuit decision finding privilege could apply in such instances. *See* Order, *Texas v. Holder*, No. 1:12-cv-128 (D.D.C. May 28, 2012), ECF No. 154. The court nonetheless found, as here, that the State failed to show the Lieutenant Governor was acting within his legislative capacities during the communications at issue. *Id.* Regardless, that decision is not persuasive on its own terms because it errantly relied on state legislative immunity cases. This Court has made clear that the evidentiary privilege at issue is *not* as broad as the absolute immunity legislators enjoy.

Lieutenant Governor was acting within his legislative capacity, which is not a basis for extending the privilege to an executive branch officer in any event.

The same goes for the Office of the Attorney General ("OAG"), an executive office that performs no constitutionally-delegated legislative tasks. The Lawmakers contend legislators sometimes seek legal advice from OAG. Br. at 40-41. That may well be a basis for sometimes claiming *attorney-client privilege*, though the Lawmakers have failed to show that privilege applies here. *See infra* § IV. But it is no reason to extend the *legislative* privilege to the executive branch. The Lawmakers point to no case—in this circuit or elsewhere—granting the privilege such leash.

IV. The district court did not commit clear error in finding the Lawmakers failed to establish attorney-client privilege.

Judge Rodriguez likewise did not commit clear error in finding that 33 documents were not protected by the attorney-client privilege due either to waiver or because the communications were not for the purpose of obtaining legal advice. *See Edwards*, 303 F.3d at 618 (noting application of attorney-privilege "is a fact question" reviewed "for clear error only").

A. The Lawmakers fail to show basic elements of the attorney-client privilege, including the existence of an attorney-client relationship.

The Lawmakers' privilege log failed to identify any attorney-client relationships, offering a jumble of names without explanation as to which individuals solicited legal advice, who provided it, and who was within the scope of

any attorney-client relationship. Their brief *still* does not identify with *who* the Lawmakers held an attorney-client relationship. *See* Br. at 41-42.

The Lawmakers instead cryptically explain that "neither the Lieutenant Governor nor the Attorney General is a stranger to the attorney-client relationship; in this context they are agents of the Legislature, assisting the Legislators in the discharge of their legislative duties." *Id.* at 42. That claim is doubtful on its own terms; nothing in the record reflects that attorneys in the executive branch served as "agents" of the Lawmakers. More importantly, the Lawmakers stop short of claiming the existence of an attorney-client relationship between the Lawmakers and either the Lieutenant Governor's office or the OAG here, and for good reason—nothing in the record reflects the existence of such a relationship.[11]

The Lawmakers suggest an "agency relationship is even clearer with regard to the Texas Legislative Council." Br. at 42. That, again, is not the same as showing an attorney-client relationship. They stress that under Texas law the TLC may *sometimes* have an attorney-client relationship with legislators if certain factors are met. *See* Tex. Gov't Code § 323.017(b). That statute does not govern here, *see Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 495 (5th Cir. 2005), but more importantly the

[11] The Lawmakers note that "[m]any legislators do not have their own counsel on staff" and may sometimes rely on legal advice from OAG. Br. at 40-41. That aside does not speak to whether *these* legislators—several of whom have general counsels according to their log—had an attorney-client relationship with OAG attorneys during these communications. The Lawmakers submitted a declaration from OAG attorney Jonathan White, but he did not claim an attorney-client relationship with the Lawmakers, nor did the Lawmakers' claim one in their declarations.

Lawmakers show no proof that the communications with TLC occurred in the context of an attorney-client relationship. They submitted no declarations from any of the TLC staff identified in their log, and their own declarations do not claim that any of the communications at issue sought legal advice from TLC. ROA.9525-28, 9522-24, 9518-20, 9512-16; *Texas v. United States*, 279 F.R.D. 24, 34 (D.D.C. 2012) (finding no attorney-client relationship between legislators and TLC), *vacated as moot*, 279 F.R.D. 176 (D.D.C. 2012). "Without the threshold evidence of an attorney-client relationship, there can be no privilege." *Id.* (citing *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984)).

Because the Lawmakers cannot even show an attorney-client relationship existed in the context of these communications, the district court did not clearly err in finding their communications must be disclosed. Even if an attorney-client relationship did exist between the Lawmakers and one of these departments, the privilege would still be waived due to the constant presence of third parties on each communication. *See United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976) (noting courts "have refused to apply the privilege" to "communications made in the presence of third parties" (collecting authority)). Just as an example, Elizabeth Alvarez, a private attorney, was included on nearly each communication where Judge Rodriguez found waiver. The Lawmakers nowhere suggest they had an attorney-client relationship with Ms. Alvarez; that she was within the scope of an

attorney-client relationship between them and any state attorney; or that she was their "agent."

Even if an attorney-relationship existed, the Lawmakers also presented no evidence that the communications at issue were made for the purpose of obtaining legal advice from a lawyer. *See United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982). Many of the entries at issue concern communications transmitting facts or data, and the district court appropriately ordered several documents produced on that basis. ROA.10407-36. The Lawmakers quibble with the court's finding that "many" communications concerned facts rather than legal advice, but they do not suggest his finding was clearly erroneous as to those documents he ordered produced on this basis. *See* Br. at 46.

B. The district court did not clearly err in finding the Lawmakers failed to show a common interest.

Recognizing that the documents at issue were shared widely, the Lawmakers try to patch their privilege back together by claiming that the disparate groups and individuals on these communications shared a common legal interest. But that theory suffers from a host of problems. First, the common legal interest doctrine "merely extends a recognized privilege . . . to cover those communications to parties with the common interest" and otherwise "does not create a privilege." *Tivo, Inc. v. AT&T Inc.*, No. 2:09-CV-259 (DF), 2011 WL 13089004, at *2 (E.D. Tex. Dec. 27,

2011). The Lawmakers have not established any valid claim of attorney-client privilege, so there is no privilege to extend to others.

Second, under "circuit precedents," a common legal interest can exist only among actual or potential parties to litigation. *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) (citation omitted). The Lawmakers are not defendants to this suit and—due to their absolute immunity—never could be. Indeed, no one on the communications is a party in this case, save arguably those OAG employees under the aegis of Defendant Paxton. Fifth Circuit precedent is clear that courts do not recognize a common legal interest for communications involving non-parties, never mind communications solely between non-parties. *See, e.g.*, *Windsor v. Olson*, No. 3:16-CV-934-L, 2019 WL 77228, at *9 (N.D. Tex. Jan. 2, 2019); *In re Tinsel Grp., S.A.*, No. MISC. H-13-2836, 2014 WL 243410, at *3 (S.D. Tex. Jan. 22, 2014).

Relatedly, Fifth Circuit precedent requires that "there must be a palpable threat of litigation at the time of the communication, rather than a mere awareness that one's questionable conduct might some day result in litigation." *In re Santa Fe Int'l Corp.*, 272 F.3d at 711. The district court reasonably concluded that, because of the shifting content of the legislation and the uncertainty of its passage, litigation was not "palpable." ROA.10394-95. The Lawmakers disagree, suggesting Texas's regrettable history of election law litigation made a legal challenge inevitable. Br. at 45. But they offer no persuasive reason for finding the district court clearly erred by

noting that the bill's content and prospects remained in flux during the time in question, particularly given that the "potential" for litigation must "be construed narrowly." *In re Santa Fe Int'l Corp.*, 272 F.3d at 710.

Third, the Lawmakers simply fail to introduce any evidence of a common legal interest in this litigation between them and the third parties at issue. They submitted no declarations from Ms. Alvarez, the TLC, or the Lieutenant Governor's office indicating they have a stake in this lawsuit, never mind the same one as the Lawmakers.[12] Even the declaration submitted from the OAG attorney, Mr. White, is silent as to any shared legal interest with the Lawmakers. ROA.9530-31. Counsel acknowledged below that the TLC is "neutral with respect to partisanship," and would not take a position on the merits of any legislation. ROA.10660. There is no reason to believe TLC staffers have the same interest in preserving SB 1 the Lawmakers do.

Finally, the Lawmakers never asserted a "common legal interest" in either their privilege log or in months of correspondence with Plaintiffs. That fails to comply with Rule 26(b)(5), which required the Lawmakers to "expressly make the claim" and to offer a description that "will enable other parties to assess the claim."

[12] The Lawmakers never identify the precise "common legal interest" at issue. To the extent they imply it was a shared interest in passage of the bill, that is not supported by any record evidence and is unrelated to "factiliat[ing] representation in possible subsequent proceedings." *In re Santa Fe Intl'l Corp.*, 272 F.3d at 712 (citation omitted).

Fed. R. Civ. P. 26(b)(5); *see also U.S. ex rel. Reddell v. DynCorp Int'l, LLC*, No. 1:14-CV-86, 2019 WL 12875494, at *2 (E.D. Tex. Sept. 17, 2019) (requiring descriptions of common interest assertions in privilege log). The Lawmakers' failure to disclose this privilege theory prejudiced Plaintiffs' ability to raise it in their motion to compel; the district court would have been within its discretion to find the argument forfeited, as should this Court.

CONCLUSION

For the reasons above, this Court should dismiss the appeal or, alternatively, affirm the district court's May 25, 2022 interlocutory discovery order.

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Respectfully submitted,

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I hereby certify that on July 18, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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