



Civil Rights Division

Appellate Section  
Ben Franklin Station  
P.O. Box 14403  
Washington, D.C. 20044-4403

May 15, 2023

**VIA CM/ECF**

Lyle W. Cayce  
Clerk of the Court  
United States Court of Appeals for the Fifth Circuit  
600 S. Maestri Place, Suite 115  
New Orleans, Louisiana 70130

Re: *LULAC Texas v. Hughes*, No. 22-50435—Plaintiff-Appellee United States’  
Response to Appellants’ Notice of Supplemental Authority Under Federal Rule  
of Appellate Procedure 28(j)

Dear Mr. Cayce:

This letter responds to appellants’ letter regarding *Jackson Municipal Airport Authority v. Harkins*, No. 21-60312 (5th Cir. May 10, 2023).

*First*, appellants wrongly read *Harkins* to decide questions neither raised nor considered there. Unlike in *Harkins*, appellees argued in this appeal that, because the state legislative privilege is qualified, any valid assertion of that privilege here must yield to the important federal interest in enforcing Section 2 of the Voting Rights Act. U.S. Br. 25-32, 37-48; LULAC Br. 23-40. According to appellants, *Harkins* “implicitly rejects” this argument because, when the Court gave examples of a privilege log’s utility in evaluating legislative privilege, it did not specifically cite a need to assess the documents’ relevance to the question of racial bias. Letter 2.

Instead, *Harkins* affirmed the district court’s order requiring a privilege log and simply reversed as “overbroad” the court’s determination that the privilege had been “automatically waived” for any and all documents shared with third parties. Slip Op. 2, 12. Thus, *Harkins* had no occasion to address under what circumstances the legislative privilege, if applicable, would yield. Nor did *Harkins* purport to catalogue an exhaustive list of reasons why a privilege log would be useful to adjudicate assertions of legislative privilege. *Harkins* took as a given the legislators’ assertion that the discovery request at issue sought “only evidence of motive” and found the privilege log necessary nonetheless. Slip Op. 11.

*Second*, with respect to documents LULAC seeks here that were shared with non-legislative third parties, it would be appropriate for the Court to remand the case to the district court to determine in the first instance whether any of those documents (1) were “publicly reveal[ed]”; or (2) were not “a part and parcel of the modern legislative procedures through

which legislators receive information possibly bearing on the legislation they are to consider.” Slip Op. 11-12 (emphasis and citation omitted). The district court should then determine whether the legislative privilege, where applicable to specific documents, must yield with respect to the paramount federal interest.

Sincerely,

Bonnie I. Robin-Vergeer  
Chief

s/ Jonathan L. Backer  
Jonathan L. Backer  
Attorney  
Appellate Section  
Civil Rights Division  
(202) 532-3528  
Jonathan.Backer@usdoj.gov

cc: Counsel of Record (via CM/ECF)

RETRIEVED FROM DEMOCRACYDOCKET.COM