No. 22-50662

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STATE OF TEXAS, ET AL.,
Defendant,

JOAN HUFFMAN, TEXAS SENATE MEMBER, ET AL.,
Appellants.

On Appeal from the United States District Court
for the Western District of Texas, El Paso Division

APPELLANTS' OPPOSED EMERGENCY MOTION FOR STAY PENDING APPEAL AND ADMINISTARATIVE STAY

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No. 22-50662

United States of America,
Plaintiffs-Appellees,

v.

State of Texas, et al.,
Defendants,

Joan Huffman, Texas Senate Member, et al.,
Appellants.

(A) In the district court, the consolidated cases are captioned as *League of United Latin American Citizens, et al. v. Abbott, et al*.

(B) Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 26.1-1 and 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2. As counsel for Appellants, I 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.

1. Texas Lieutenant Governor Dan Patrick – Appellant
2. Texas Senator Joan Huffman – Appellant
3. Texas House Member Todd Hunter – Appellant
4. Texas House Member Tom Craddick – Appellant
5. Texas House Member Ryan Guillen – Appellant
6. Texas House Member Jacey Jetton – Appellant

7. Texas House Member Ken King – Appellant

8. Texas House Member Brooks Landgraf – Appellant

9. Texas House Member Geanie Morrison – Appellant

10. Texas House Member Andrew Murr – Appellant

11. Adam Foltz – Appellant

12. Anna Mackin – Appellant

13. Sean Opperman – Appellant

14. Koy Kunkel – Appellant

15. Adam K. Mortara, Lawfair LLC – Counsel for Appellants, Texas House Members and Staff

16. Patrick N. Strawbridge, Consovoy McCarthy PLLC – Counsel for Appellants, Texas House Members and Staff

17. Taylor A.R. Meehan, Consovoy McCarthy PLLC – Counsel for Appellants, Texas House Members and Staff

18. Frank H. Chang, Consovoy McCarthy PLLC – Counsel for Appellants, Texas House Members and Staff

19. J. Michael Connolly, Consovoy McCarthy PLLC – Counsel for Appellants, Texas House Members and Staff

20. Jeffrey S. Hetzel, Consovoy McCarthy PLLC – Counsel for Appellants, Texas House Members and Staff

21. League of United Latin American Citizens (LULAC) – *LULAC* Plaintiffs

22. Southwest Voter Registration Education Project – *LULAC* Plaintiffs

23. Mi Familia Vota – *LULAC* Plaintiffs

24. American GI Forum of Texas – *LULAC* Plaintiffs

25. La Union Del Pueblo Entero – *LULAC* Plaintiffs

26. Mexican American Bar Association of Texas – *LULAC* Plaintiffs

27. Texas Hispanics Organized for Political Education – *LULAC* Plaintiffs

28. William C. Velasquez Institute – *LULAC* Plaintiffs

29. Fiel Houston, Inc. – *LULAC* Plaintiffs

30. Texas Association of Latino Administrators and Superintendents – *LULAC* Plaintiffs

31. Emelda Menendez – *LULAC* Plaintiffs

32. Gilberto Menendez – *LULAC* Plaintiffs

33. Jose Olivares – *LULAC* Plaintiffs

34. Florinda Chavez – *LULAC* Plaintiffs

35. Joey Cardenas – *LULAC* Plaintiffs

36. Proyecto Azteca – *LULAC* Plaintiffs

37. Reform Immigration for Texas Alliance – *LULAC* Plaintiffs

38. Workers Defense Project – *LULAC* Plaintiffs

39. Paulita Sanchez – *LULAC* Plaintiffs

40. Jo Ann Acevedo – *LULAC* Plaintiffs

41. David Lopez – *LULAC* Plaintiffs

42. Diana Martinez Alexander – *LULAC* Plaintiffs

43. Jeandra Ortiz – *LULAC* Plaintiffs

44. Fatima L. Menendez, Mexican American Legal Defense and Educational Fund (MALDEF) – Counsel for *LULAC* Plaintiffs

45. Denise Hulett, MALDEF – Counsel for *LULAC* Plaintiffs

46. Samantha T. Serna, MALDEF – Counsel for *LULAC Plaintiffs*

47. Kenneth Parreno, MALDEF – Counsel for *LULAC* Plaintiffs

48. Nina Perales, MALDEF – Counsel for *LULAC* Plaintiffs

49. Nikolas Youngsmith, MALDEF – Counsel for *LULAC* Plaintiffs

50. Roy Charles Brooks – *Brooks* Plaintiffs

51. Sandra Puente – *Brooks* Plaintiffs

52. Jose R. Reyes – *Brooks* Plaintiffs

53. Shirley Anna Fleming – *Brooks* Plaintiffs

54. Louie Minor, Jr. – *Brooks* Plaintiffs

55. Norma Cavazos – *Brooks* Plaintiffs

56. Felipe Gutierrez – *Brooks* Plaintiffs

57. Eva Bonilla – *Brooks* Plaintiffs

58. Clara Faulkner – *Brooks* Plaintiffs

59. Deborah Spell – *Brooks* Plaintiffs

60. Phyllis Goines – *Brooks* Plaintiffs

61. Lydia Alcalan – *Brooks* Plaintiffs

62. Martin Saenz – *Brooks* Plaintiffs

63. K. Scott Brazil, Brazil & Dunn – Counsel for *Brooks* Plaintiffs

64. Molly Elizabeth Danahy, Campaign Legal Center – Counsel for *Brooks* Plaintiffs

65. Chad W. Dunn, Brazil & Dunn – Counsel for *Brooks* Plaintiffs

66. Jesse Gaines – Counsel for *Brooks* Plaintiffs

67. Mark P. Gaber, Mark P. Gaber PLLC – Counsel for *Brooks* Plaintiffs

68. Sonni Waknin – Counsel for *Brooks* Plaintiffs

69. Damon James Wilson – Former Plaintiff (Dismissed 2/9/2022)

70. Richard Scott Gladden, Law Office of Richard Gladden – Counsel for Former Plaintiff Wilson (Dismissed 2/9/2022)

71. Rosalinda Ramos Abuabara – *Abuabara* Plaintiffs

72. Akilah Bacy – *Abuabara* Plaintiffs

73. Orlando Flores – *Abuabara* Plaintiffs

74. Marilena Garza – *Abuabara* Plaintiffs

75. Cecilia Gonzales – *Abuabara* Plaintiffs

76. Agustin Loredo – *Abuabara* Plaintiffs

77. Cinia Montoya – *Abuabara* Plaintiffs

78. Ana Ramon – *Abuabara* Plaintiffs

79. Jana Lynne Sanchez – *Abuabara* Plaintiffs

80. Jerry Shafer – *Abuabara* Plaintiffs

81. Debbie Lynn Solis – *Abuabara* Plaintiffs

82. Angel Ulloa – *Abuabara* Plaintiffs

83. Mary Uribe – *Abuabara* Plaintiffs

84. Luz Moreno – *Abuabara* Plaintiffs

85. Maria Montes – *Abuabara* Plaintiffs

86. Abha Khanna, Elias Law Group LLP – Counsel for *Abuabara* Plaintiffs

87. Aria C. Branch, Elias Law Group LLP – Counsel for *Abuabara* Plaintiffs

88. David Fox, Elias Law Group LLP – Counsel for *Abuabara* Plaintiffs

89. Francesa Gibson, Elias Law Group LLP – Counsel for *Abuabara* Plaintiffs

90. Kevin J. Hamilton, Perkins Coie LLP – Counsel for *Abuabara* Plaintiffs

91. Max Renea Hicks, Law Office of Max Renea Hicks – Counsel for *Abuabara* Plaintiffs

92. Richard Alexander Medina, Elias Law Group LLP – Counsel for *Abuabara* Plaintiffs

93. Harleen K. Gambhir, Elias Law Group LLP – Counsel for *Abuabara* Plaintiffs

94. Kathryn E. Yukevich, Elias Law Group LLP - Counsel for *Abuabara* Plaintiffs (Withdrawan on April 5, 2022)

95. Mexican American Legislative Caucus (MALC) – *MALC* Plaintiffs

96. Sergio Mora – *MALC* Plaintiffs

97. Bobbie Garza-Hernandez – *MALC* Plaintiffs

98. George (Tex) Quesada, Sommerman McCaffity Quesada & Geisler LLP – Counsel for *MALC* Plaintiffs

99. Sean J. McCaffity, Sommerman McCaffity Quesada & Geisler LLP – Counsel for *MALC* Plaintiffs

100. Texas State Conference of the NAACP – *NAACP* Plaintiff

101. Brian Raphel, Dechert LLP – Counsel for *NAACP* Plaintiff

102. Ezra D. Rosenberg, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

103. Gary L. Bledsoe, The Bledsoe Law Firm, PLLC – Counsel for *NAACP* Plaintiff and Plaintiff-Intervenors

104. Jon M. Greenbaum, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

105. Lindsey Beth Cohan, Dechert LLP – Counsel for *NAACP* Plaintiff

106. Neil Steiner, Dechert LLP – Counsel for *NAACP* Plaintiff

107. Pooja Chaudhuri, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

108. Robert Stephen Notzon, Law Office of Robert Notzon – Counsel for *NAACP* Plaintiff

109. Sofia Fernandez Gold, Lawyers' Committee for Civil Rights Under Law – Counsel for *NAACP* Plaintiff

110. Fair Maps Texas Action Committee – *Fair Maps* Plaintiffs

111. OCA-Greater Houston – *Fair Maps* Plaintiffs

112. North Texas Chapter of the Asian Pacific Islander American Public Affairs Association – *Fair Maps* Plaintiffs

113. Emgage – *Fair Maps* Plaintiffs

114. Turner Khanay – *Fair Maps* Plaintiffs

115. Angela Rainey – *Fair Maps* Plaintiffs

116. Austin Ruiz – *Fair Maps* Plaintiffs

117. Aya Eneli – *Fair Maps* Plaintiffs

118. Sofia Sheikh – *Fair Maps* Plaintiffs

119. Jennifer Cazares – *Fair Maps* Plaintiffs

120. Niloufar Hafizi – *Fair Maps* Plaintiffs

121. Lakshmi Ramakrishnan – *Fair Maps* Plaintiffs

122. Amatulla Contractor – *Fair Maps* Plaintiffs

123. Deborah Chen – *Fair Maps* Plaintiffs

124. Arthur Resa – *Fair Maps* Plaintiffs

125. Sumita Ghosh – *Fair Maps* Plaintiffs

126. Anand Krishnaswamy – *Fair Maps* Plaintiffs

127. Allison Jean Riggs, Southern Coalition for Social Justice – Counsel for *Fair* Maps Plaintiffs

128. Andre I. Segura, Law Office of Andre Ivan Segura – Counsel for *Fair Maps* Plaintiffs

129. Ashley Alcantara Harris, ACLU Foundation of Texas – Counsel for *Fair Maps* Plaintiffs

130. David A. Donatti, ACLU of Texas – Counsel for *Fair Maps* Plaintiffs

131. Hilary Harris Klein, Southern Coalition for Social Justice – Counsel for *Fair Maps* Plaintiffs

132. Jerry Vattamala, Asian American Legal Defense and Education Fund (AALDEF) – Counsel for *Fair Maps* Plaintiffs

133. Mitchell Brown, Southern Coalition for Social Justice – Counsel for *Fair Maps* Plaintiffs

134. Noor Taj, Southern Coalition for Social Justice – Counsel for *Fair Maps* Plaintiffs

135. Patrick Stegemoeller, AALDEF – Counsel for *Fair Maps* Plaintiffs

136. Susana Lorenzo-Giguere, AALDEF – Counsel for *Fair Maps* Plaintiffs

137. Thomas Paul Buser-Clancy, ACLU Foundation of Texas – Counsel for *Fair Maps* Plaintiffs

138. Yurji Rudensky, Brennan Center for Justice at NYU School of Law – Counsel for *Fair Maps* Plaintiffs

139. Katelin Kaiser, Southern Coalition for Social Justice – Counsel for *Fair Maps* Plaintiffs

140. Paul D. Brachman, Paul Weiss – Counsel for *Fair Maps* Plaintiffs

141. United States of America – Plaintiff

142. Daniel Joshua Freeman, U.S. Department of Justice – Counsel for United States

143. Holly Frances Balsley Berlin, U.S. Department of Justice – Counsel for United States

144. Jacki Lynn Anderson, U.S. Department of Justice – Counsel for United States

145. Jasmin Camille Lott, U.S. Department of Justice – Counsel for United States

146. Jaye Allison Sitton, U.S. Department of Justice – Counsel for United States

147. Michelle Christine Rupp, U.S. Department of Justice – Counsel for United States

148. Thomas Christian Herren, Jr., U.S. Department of Justice – Counsel for United States

149. Timothy F. Mellett, U.S. Department of Justice – Counsel for United States

150. Michael E. Stewart, U.S. Department of Justice – Counsel for United States

151. Trey Martinez Fischer – Plaintiff

152. U.S. Representative Veronica Escobar – Plaintiff (voluntarily dismissed)

153. Martin Anthony Golando, Law Office of Martin Golando, PLLC – Counsel for Plaintiffs Fisher and Escobar

154. Sheila Jackson Lee – Plaintiff-Intervenor

155. Alexander Green – Plaintiff-Intervenor

156. Jasmine Crockett – Plaintiff-Intervenor

157. Eddie Bernice Johnson – Plaintiff-Intervenor

158. State of Texas - Defendant

159. Governor Greg Abbott – Defendant

160. Texas Secretary of State John Scott – Defendant

161. Deputy Secretary of State Jose A. Esparza – Defendant

162. Texas House Speaker Dade Phelan – Former Defendant (dismissed 5/2/2022)

163. Edward L. Marshall, Assistant Attorney General, Texas Office of Attorney General – Counsel for Defendants

164. Jeffrey Michael White, Texas Office of Attorney General – Counsel for Defendants

165. Patrick K. Sweeten, Texas Office of Attorney General – Counsel for Defendants, Third Parties, and Appellants

166. William Thomas Thompson, Texas Office of Attorney General – Counsel for Defendants, Third Parties, and Appellants

167. Christopher D. Hilton, Texas Office of Attorney General – Counsel for Defendants

168. Courtney Brooke Corbello, Texas Office of Attorney General – Counsel for Defendants

169. Jack Buckley DiSorbo, Texas Office of Attorney General – Counsel for Defendants, Third Parties, and Appellants

170. Kathleen Hunker, Texas Office of Attorney General – Counsel for Defendants

171. Ari M. Herbert, Texas Office of Attorney General – Counsel for Defendants

172. Christopher D. Hilton, Texas Office of Attorney General – Counsel for Defendants

173. Ryan G. Kercher, Texas Office of Attorney General – Counsel for Defendants

174. Texas Legislature Counsel – Neutral

175. Alyssa Bixby-Lawson, Texas Office of Attorney General – Counsel for Texas Legislative Counsel

176. Judge David C. Guaderrama – Member of Three-Judge District Court

177. Judge Jerry E. Smith – Member of Three-Judge District Court

178. Judge Jeffrey V. Brown – Member of Three-Judge District Court

/s/ Ryan S. Baasch
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Counsel of Record for Appellants

CONTENTS

Introduction and Nature of Emergency

It is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Absent extraordinary circumstances, legislators cannot be made involuntary targets of discovery in litigation over duly enacted legislation. Breaking with this longstanding principle, and departing from the decisions of three of this Court's sister circuits, the district court has ordered members of the Texas Legislature and staff[1]—each of whom was involuntarily subpoenaed—to disclose their confidential legislative documents bearing on subjective motivations and internal deliberations for the enactment of 2021 redistricting legislation. And it has ordered them to do so by next Monday, August 1.

The order contravenes longstanding principles of legislative privilege, a centuries-old safeguard for an independent legislature. *See Tenney*, 341 U.S. at 373. Indeed, the court below described certain documents as within "the core of legislative privilege, detailing mental impressions on the legislative process, revealing legislative judgments as to alternative maps, and implicating privileged thoughts and opinions." Order 9 (Ex. 1). But the district court ordered them disclosed anyway.

[1] The Texas Legislature members and employees in this appeal are: Lieutenant Governor Dan Patrick, Senator Joan Huffman, Representative Todd Hunter, Representative Tom Craddick, Representative Ken King, Representative Ryan Guillen, Representative Jacey Jetton, Representative Brooks Landgraf, Representative Geanie Morrison, Representative Andrew Murr, Adam Foltz, Koy Kunkel, Anna Mackin, and Sean Opperman ("the Legislators").

Worse, the district court ordered the legislatively privileged documents disclosed one day before *this Court* is going to hear argument in an expedited case *regarding materially identical legislative privilege claims*. *See LULAC Texas, et al. v. Hughes, et al.*, Case No. 22-50435 (5th Cir.) (scheduled for argument August 2, 2022) ("*Hughes*"). To resolve that expedited appeal, this Court will address the same important questions regarding the metes and bounds of legislative privilege as it applies to third-party subpoenas for legislators' documents.

The order should be stayed pending this Court's decision in *Hughes*.[2] Appellants in *Hughes* have asked this Court to clarify that legislative privilege is not to be reduced to a nullity, thereby correcting repeated misapplications of legislative privilege by district courts in this circuit. The balance of the equities overwhelmingly favors a stay pending *Hughes.* The Legislators will experience irreparable harm if the district court's order is not stayed. As far as the Legislators are concerned, once disclosed on Monday, the proverbial "cat is out of the bag." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.).

Because the district court has ordered the Legislators to produce these documents by Monday, **the Legislators respectfully request an emergency stay by Monday, August 1, 2022, at 12:00 p.m. that will operate until this Court issues an opinion in *Hughes*, and/or an administrative stay by that date pending resolution of the motion.** *E.g.*, *BST Holdings, LLC v. OSHA*, No. 21-60845, 2021 WL

[2] The district court rejected the Legislators' request to await *Hughes*. Order 6.

5166656 (5th Cir. Nov. 6, 2021); *Richardson v. Hughs*, No. 20-50774 (5th Cir. Sept. 11, 2020).

Statement of the Case

1. In October 2021, Texas enacted redistricting legislation revising electoral districts for the State's congressional delegation, Senate, House of Representatives, and Board of Education. Plaintiffs sued, alleging the legislation violated §2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. The United States Department of Justice then joined the litigation, challenging congressional and House districts as §2 violations. There are now nine consolidated complaints.

Meanwhile, private plaintiffs joined by the United States Department of Justice sued Texas over other election-related legislation ("SB 1"). *See generally La Union Del Pueblo Entero v. Abbott*, No. 5:21-cv-844-XR (W.D. Tex.). The election-related lawsuits have proceeded on similar tracks. Some of the same private plaintiffs who brought this redistricting litigation subpoenaed Texas legislators and other legislative officials for their privileged documents in the SB 1 litigation. The district court ordered documents produced over legislators' legislative privilege and attorney-client privilege objections (an order now stayed but nonetheless relied upon by the district court below). The SB 1 parties agreed to stay the order pending appellate review. That stayed order is now the subject of the expedited appeal in *Hughes*, *supra*, which will be argued this coming Tuesday.

2. In the underlying redistricting litigation here, fact discovery is now all but closed.[3] During discovery, as relevant here, the United States issued 27 third-party subpoenas *duces tecum* to legislative officials, including legislators and staff, and a legislative agency. Private plaintiffs later issued third-party subpoenas *duces tecum* to legislative officials, overlapping with those issued by the United States.[4]

The subpoena recipients responded to the United States' subpoenas by producing over 8,000 non-privileged responsive documents (nearly 18,000 pages) and raising privilege objections as applicable. Nearly 81% of the responsive documents were produced, while the rest were withheld as legislatively privileged and attorney-client privileged. *See* Legislators' Resp. to Mot. 1-2, ECF 379.

3. Meanwhile, the United States and private plaintiffs deposed or will depose more than twenty legislators and legislative staff, including the Chairman of the House Redistricting Committee, the Chairwoman of the Senate Redistricting Committee, various members of both committees, the House mapdrawer, the Senate mapdrawer, and other legislators and staffers whom the United States and private plaintiffs' deemed relevant to their claims. *See* ECF 466 at 2 tbl.1. Depositions have followed a court-ordered procedure requiring deponents to give legislatively

[3] Fact discovery closed on July 15, 2022, and plaintiffs have asked the district court for an extension only to complete an identified set of fact depositions. Scheduling Order, ECF 96; Mot. to Extend Discovery, ECF 433. All ECF numbers cited herein refer to *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex.).

[4] Private plaintiffs' subpoenas are now the subject of a pending motion to compel raising the same issues implicated here. *See* LULAC Mot. to Compel Documents, ECF 447.

privileged testimony. Even if counsel asks questions about the innerworkings of the legislative process or their internal motivations, the court has ordered the legislative deponents to answer those questions in full, over legislative privilege objections. *See* Order 4-5, ECF 282. Now privy to that privileged testimony, the United States and private plaintiffs may move the court to unseal the privileged testimony to be used as evidence at trial. *Id.* at 5.

4. Months after issuing the subpoenas, and despite having obtained thousands of documents and weeks of deposition testimony, the United States moved to enforce the subpoenas *duces tecum*. *See* U.S. Mot. to Enforce Subpoenas, ECF 351. The United States asked the court to order disclosure of hundreds of documents because, among other reasons, they contained merely "factual information" or because communications were with so-called "outsiders" (such as executive branch officials or congressmembers). U.S. Mot. to Enforce Subpoenas 9-11, ECF 351. The United States also argued that legislative privilege should yield entirely for documents related to congressional redistricting because the importance of the United States' interest in enforcing the Voting Rights Act exceeded the importance of the legislators' privilege. *Id.* at 12-13.

The Legislators opposed the motion on various grounds.[5] They asked the district court to hold the motion in abeyance pending this Court's forthcoming

[5] In response to the motion, the Legislators and other subpoena recipients did produce hundreds of additional pages after further review, including certain calendar entries and other documents reflecting information already in the public record. *See* Resp. to United States Motion to Enforce, ECF 379 at nn.1, 3, 9.

guidance in *Hughes*, poised to resolve the very same questions about the scope of the Legislators' privilege. Legislators' Resp. to United States' Mot. to Enforce 11-12, ECF 379. They explained that awaiting this Court's guidance would "avoid[] the unseemly possibility that legislators turn over documents that the Fifth Circuit then clarifies are privileged." *Id.* at 12. On the merits, among other arguments, they explained that legislative privilege necessarily applied to analyses of draft legislation and that such documents could not be reduced to merely "factual information," *id.* at 14-15. They explained that there was no basis for piercing an otherwise applicable privilege. *Id.* at 12-14. And they explained that legislative privilege necessarily applied to a small number of communications with "outsiders," where those communications were in furtherance of the legislative process. *Id.* at 16-17.

4. The district court declined to stay its order pending this Court's resolution in *Hughes*, suggesting this Court's opinion *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government*, 849 F.3d 615, 624 (5th Cir. 2017) was dispositive. Order 6 (describing "alternative holding" of *Jefferson Community*). In reality, the dispositive (or not dispositive) discussion of legislative privilege in *Jefferson Community* is what this Court will be deciding in *Hughes*. Neither *Jefferson Community* nor any other decision by this Circuit has yet addressed the question squarely implicated by the subpoenas at issue in *Hughes* and here—can legislators be ordered to turn over legislative documents, over their legislative privilege objections?

On the merits, the district court rejected the Legislators' assertions regarding the scope of legislative privilege. *First*, the district court ordered a large subset of documents disclosed that involved analyses of redistricting proposals (*i.e.*, draft

legislation) or otherwise reflected data considered to formulate redistricting legislation, in addition to what the court deemed "administrative documents," draft talking points, and the like. Relying on the district court decision now stayed and on appeal in *Hughes*, the district court ordered those documents disclosed because they merely "contain[ed] 'factually based information'" and thus not entitled to legislative privilege protections. Order 7 (quoting *LUPE*, 2022 WL 1667687, at *2).

Second, the district court ordered documents withheld by the legislators involving legislative communications with third parties, including congressmembers whose districts were being redrawn, in furtherance of the legislative process. As the district court did in *Hughes*, the court below deemed these documents with "outsiders" to waive legislative privilege.

Third, again relying on the now-stayed decision in *Hughes*, the district court ruled that legislative privilege was overcome as to *all documents* related to the United States' claims regarding the 2021 congressional redistricting legislation. The district court acknowledged that these documents were "at the core of legislative privilege, detailing mental impressions on the legislative process, revealing legislative judgments as to alternative maps, and implicating privileged thoughts and opinions." Order 9. Even so, the district court ordered disclosure after balancing factors such as "relevance" and "importance" of such discovery to the United States' claim. That nebulous test was most recently applied by the *Hughes* district court, with its origins in a New York district court decision that has long evaded appellate review. *Id.* at 9-12; *see Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003).

Finally, the district court rejected the legislators' invocation of the attorney-client privilege and work-product protections for documents involving legal counsel retained for the purpose of assessing legal compliance of redistricting proposals. Order 13-22. The district court acknowledged that these materials could contain privileged information, ordered some documents produced with redactions, and ordered others to be produced for *in camera* review. These attorney-client privilege rulings are not at issue for purposes of this stay application. The Legislators intend to submit communications with counsel for *in camera* review and to produce some documents in redacted form, to the extent those documents are not also covered by the legislative privilege arguments raised here. For remaining documents that are both legislatively privileged and attorney-client privileged, those remain subject to this request for a stay pending *Hughes*.

5. The district court's July 25 order requires disclosure of documents within 7 days, on August 1, 2022. The very next day this Court will hear argument in the related appeal in *Hughes*.

The Legislators immediately noticed the appeal and now file this emergency stay motion.

Statement of Jurisdiction

This Court has the power to stay the order compelling third-party subpoena recipients to disclose privileged documents. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 367-69 (5th Cir. 2018) (third-party interlocutory appeal of discovery order); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 879 (5th Cir. 1981); *see also, e.g.*, *In re Hubbard*, 803 F.3d 1292, 1305 (11th Cir. 2015) (immediate appeal for

governmental assertion of privilege). As this Court explained in *Smith*, an order that conclusively resolves a third-party subpoena recipient's privilege objections that makes "the consequence of forced discovery … 'effectively unreviewable' on appeal from the final judgment" is immediately appealable. *Smith*, 896 F.3d at 376-77. In the alternative, if this Court were to depart from *Smith*, this Court would have jurisdiction to first stay and then construe the appeal as a petition for writ of mandamus. *See S. Pac. Transp. Co. v. San Antonio, Tex. By & Through City Pub. Serv. Bd.*, 748 F.2d 266, 270 (5th Cir. 1984).

Even though the order comes from a three-judge district court in a redistricting case, 28 U.S.C. §2284, the nature of the order makes it appealable first to this Court, not the Supreme Court. The Supreme Court has appellate jurisdiction to review only those orders granting or denying interlocutory or permanent injunctions. 28 U.S.C. §1253; *Abbott v. Perez*, 138 S. Ct. 2305, 2319-21 (2018). This Court retains jurisdiction to consider all other orders, including the order requiring the legislators' depositions here. *See, e.g.*, *Watkins v. Fordice*, 7 F.3d 453, 455 & n.2 (5th Cir. 1993) (fee award).

ARGUMENT

The Court ordinarily considers four factors in determining whether to exercise its "inherent" power to stay the effect of an order pending appeal: (1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm in the absence of a stay; (3) whether the opposing party will be substantially injured by a stay; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009). But where the "balance of equities weigh[] *heavily* in favor of granting the

stay" then only a "*serious legal question*" is required. *Tex. Dem. Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020). The Legislators meet either test.

There can be little doubt that the equities overwhelmingly favor a stay until this Court issues its opinion in *Hughes*. The Legislators will experience irreparable harm if a stay is not granted. Once they produce internal legislative documents, the harm is done. Such harm would be uniquely inequitable here if (as is likely) this Court's forthcoming *Hughes* decision requires reconsideration of the district court's sweeping order here. That possibility is readily apparent because the two cases involve materially the same issues—about the scope of the privilege as applied to demands for legislators' documents, the effect of sharing privileged information with third parties, and whether a balancing test can be applied to overcome the privilege. There is no reason for the district court's order to take effect until this Court resolves those same questions already pending before it on an expedited schedule. Proceeding despite the pendency of *Hughes* is contrary to the public interest and the United States, for its part, cannot credibly claim that it will be meaningfully harmed by the short stay necessary for this Court to resolve *Hughes*.

The district court was also wrong on the merits, and this case at a bare minimum presents a serious legal question with "a broad impact on relations between the state and the federal government." *Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 910 n.9 (5th Cir. 2011). This appeal, like *Hughes*, concerns whether and when federal litigation may compel legislators to reveal confidential communications regarding the passage of legislation. As three of this Court's sister circuits have held, a centuries-old common-law privilege ordinarily prohibits such comity-destroying discovery.

I. The Equities Heavily Favor a Stay.

The equitable factors heavily favor a stay. The Legislators will be irreparably harmed absent a stay, the public interest overwhelmingly favors a stay, and the United States will experience no comparable harm from a brief stay pending *Hughes*. *Nken*, 556 U.S. at 426. There is no reason to compel the Legislators to turn over privileged documents now, one day before this Court will hear argument about whether such an order unduly constricts legislative privileges, in a way irreconcilable with other Courts of Appeals.

A. This case presents the same issues as the ones this Court is already addressing in *Hughes*. The cases involve many of the same plaintiffs, and both raise §2 challenges to election-related legislation passed by the 87th Legislature. District courts in both cases have permitted legislators to become targets of third-party discovery, siding with unpublished and largely unreviewed district court decisions and departing from the approaches of other Courts of Appeals. Indeed, a throughline in the decision below is the court's reliance on the now-stayed district court's decision in *Hughes*. This Court will soon be deciding whether that decision was correct and, more broadly, providing much-needed clarification about whether the ground rules for legislative privilege in this Circuit are the same as those in other circuits. The forthcoming clarification in *Hughes* provides every reason to stay the decision below. *See, e.g.*, *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 58 (5th Cir. 2014) (granting stay pending appeal given that Fifth Circuit would be assessing similar claims in related cases in the next month); *see also Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009) ("federal appellate decision that is

likely to have a substantial or controlling effect" is "good" or "excellent" reason for granting stay). Specifically:

(1) The district court concluded that the legislative privilege protects only "integral steps" in the legislative process, and does not protect a host of ostensibly "non-integral" documents such as documents containing "factually based information used in the decision-making process or disseminated to legislators or committees." Order 6-7. Included within that category are "committee reports" "minutes of meetings" and even information that was "available to lawmakers at the time a decision was made." *Id.* at 7. These issues are front-and-center in *Hughes*—indeed, the court below relied on the now-stayed district court decision in *Hughes* for this part of its order. The *Hughes* appellants forcefully argue that the legislative privilege protects not just "integral steps" in the legislative process, but any actions taken by legislators "acting in the sphere of legitimate legislative activity." Appellants' Opening Br. 19, *Hughes* (citing *Tenney*, 341 U.S. at 376). That includes, among other things, "committee reports," *Id.* (citing *Gravel v. United States*, 408 U.S. 606, 617 (1972)), and other documents related to draft legislation that the district court here ordered produced.

(2) The district court believed that this Court's opinion in *Jefferson Community Health Care Centers v. Jefferson Parish Government*, 849 F.3d 615 (5th Cir. 2017), already decided the issues here and in *Hughes*. Order 6. But what to make of *Jefferson Community*'s passing discussion of legislative privilege is directly presented in *Hughes*. Appellants' Opening Br. 31-32, *Hughes* (contending that that case arose in a different context, and that the critical passage from that case amounts to a "cursory,

one-paragraph discussion" which is "dicta" and "could have been deleted" without functionally impacting the case holding).

(3) The district court concluded that the legislative privilege does not shield "documents shared with persons outside the Texas legislature or legislative-staff ambit," including documents shared with "state executive-branch officials." Order 8. *Hughes* again presents exactly this issue, as the Appellants there have argued that no opinion of this Court stands for the proposition that the legislative privilege vanishes once material is shared with third parties (much less third parties including State executive branch officials, who are necessarily intertwined with the legislative process). Appellants' Opening Br. 36, *Hughes*. But as already briefed in *Hughes*, multiple other Circuit courts have held that sharing legislative privilege materials "outside the legislature" such as with "executive officers, partisans, political interest groups, or constituents" does not defeat the privilege. *Id.*; *see, e.g.*, *Hubbard*, 803 F.3d at 1308 (involving legislative privilege arguments raised by governor and former governor).

(4) The district court concluded that legislative documents related to congressional redistricting legislation, even though "at the core of legislative privilege," had to be produced subject to a "balancing of interests." Order 8-12 (relying on *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003)). Again, this question is squarely presented in *Hughes*, where the district court deployed the same "balancing" to pierce legislative privilege. Appellants' Opening Br. at 34, *Hughes* ("The district court was also wrong to depart from [multiple authorities] in favor of a nebulous five-factor test developed by [the *Rodriguez*] court.").

B. There is thus every reason to stay the district court's order, relying largely on the now-vacated district court decision in *Hughes*, pending this Court's review of *Hughes*. Absent a stay, the Legislators must begin producing privileged documents by Monday, August 1. That leaves no time for appellate review of these important privilege issues unless the order is stayed. And once the documents are produced, that bell cannot be unrung. Numerous courts, including this one, have held that "[a]ssuming privilege exists, there is no adequate remedy on appeal for the revelation of this information." *In re E.E.O.C.*, 207 F. App'x 426, 430 (5th Cir. 2006); *Smith*, 896 F.3d at 367-68 ("a new trial order can hardly avail a third-party witness who," having had a claim of privilege rejected during discovery, "cannot benefit directly from such relief"); *see also Dinler v. City of N.Y.*, 607 F.3d 923, 934 (2d Cir. 2010); *In re Profl's Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009).

C. The public interest also heavily favors issuance of a stay here. The harm to the Legislators also harms "the public good" too. *Tenney*, 341 U.S. at 377; *see Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018). Our system of representative democracy depends on letting legislators be legislators, with all the safeguards necessary to let the legislative process run its course—not making legislators discovery targets for their legislative actions. *See, e.g.*, *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). This Court in *Hughes* will soon apply these rules to materially the same legislative privilege arguments as those at issue here. It is bad enough that the Legislators may have to produce documents over well-established privilege objections. But it will be uniquely offensive to this important privilege for the Legislators to turn over documents that will be shown to have been privileged mere weeks or months before

this Court is poised to clarify that they never should have been turned over in the first place.

D. On the other side of the ledger, the United States will not suffer substantial injury if this Court stays the district court's order. The Legislators seek a stay only until this Court resolves *Hughes*, in which argument is days away and which has already been expedited. That expedited schedule is more than adequate to protect the United States' interest. Additionally, the United States has already obtained enormous legislative discovery, as described *supra* at 5-6. The case schedule, moreover, already anticipates that the parties will be supplementing trial evidence at the end of November with additional data from the November 2022 election, Scheduling Order 5, ECF 96. That evidence is far more critical to a §2 redistricting claim than documents purporting to shed light on the individual motivations of individual legislators. If it is sufficient to wait until November to supplement the record with critical election data, it is sufficient to wait until November to supplement the record with legislator documents, of dubious evidentiary value. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349-50 (2021); *United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute "is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for [courts] to eschew guesswork."); *accord Amer. Trucking Ass'n v. Alviti*, 14 F.4th 76, 90 (1st Cir. 2021).

II. The Legislators Are Likely to Prevail in their Appeal, and at Minimum Present a Substantial Case on the Merits.

For all of the reasons already briefed in *Hughes*, the Legislators are likely to succeed—and have certainly presented a "substantial case"—on the merits of this appeal. *Tex. Dem. Party*, 961 F.3d at 397. There is no basis for ordering Legislators to divulge confidential legislative documents to probe the Legislators' subjective motivations regarding redistricting legislation.

A. The legislative privilege safeguards the legislative process, including by limiting discovery into the subjective motivations for legislative acts.

Legislative privilege generally shields from inquiry acts of legislators and their agents undertaken when "acting in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376. It both "protects 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts'" and "precludes any showing of how [a legislator] acted, voted, or decided." *Helstoski*, 442 U.S. at 489 (quoting *United States v. Brewster*, 408 U.S. 501, 525, 527 (1972)). That includes "[c]ommittee reports, resolutions, and the act of voting" and "things generally done" during a Legislature's session "by one of its members in relation to the business before it." *Gravel*, 408 U.S. at 617. In essence, "[t]he privilege protects the legislative process itself, and therefore covers . . . legislators' actions in the proposal, formulation, and passage of legislation." *Hubbard*, 803 F.3d at 1308.

At least three other circuits have held that legislative privilege broadly protects state or local legislators from third-party discovery seeking to probe the legislators' motivations for legislative acts. In *Hubbard*, for example, the Eleventh Circuit held

that a district court abused its discretion in failing to quash third-party subpoenas *duces tecum* served on legislators and executive branch officials in a First Amendment retaliation case. 803 F.3d at 1308. The Eleventh Circuit concluded that "[t]he privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments," *id.* at 1310. Because "[t]he subpoenas' only purpose was to support the lawsuit's inquiry into the motivations" of legislators, the court concluded that it "str[uck] at the heart of the legislative privilege." *Id.* Likewise, the First Circuit refused to allow similar discovery, even if plaintiffs could have established its relevance. *See Alviti*, 14 F.4th at 88-90. And in *Lee*, another redistricting dispute, the Ninth Circuit refused to allow discovery of local legislators, even though evidence of intent was highly relevant to plaintiffs' intentional discrimination claims. *Lee*, 908 F.3d at 1186-88. These decisions, unlike the decision below, are consistent with where the Supreme Court has "drawn the line" for legislative privilege. *United States v. Gillock*, 445 U.S. 360, 373 (1980). Legislative privilege may yield to the federal government's interest in federal criminal prosecutions, but it does not yield in "civil actions" absent extraordinary circumstances. *Id.*; *see Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252. 268 & n.18 (1977).

But here, the order largely quotes from unpublished and unreviewed district court decisions—among them, the stayed district decision in *Hughes*—plus the passing discussion of legislative privilege in *Jefferson Community.* The district court appeared to believe that *Jefferson Community* commanded pressing ahead with the disclosure of hundreds of privileged documents. Order 6. But *Jefferson Community* never addressed the issues here (or in *Hughes*). In passing, *Jefferson Community*

described the legislative privilege as being "qualified," *id.* at 624, just like any other privilege. *See, e.g.*, *U.S. v. Zolin*, 491 U.S. 554, 562-63 (1989) (describing crime-fraud exception for attorney-client privilege); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (qualifying spousal privilege). But *Jefferson Community* never purported to address how the privilege would apply to subpoenas for legislators' documents, nor could it have. There, the issue was whether parish councilmembers could object to the entry of a preliminary injunction based on legislative privilege; they could not, because the privilege did not "bar the adjudication of a claim" against them. 849 F.3d at 624. This appeal, by contrast, is about whether the Legislators must turn over privileged documents.

B. The legislative privilege still applies even when legislative communications occur with third parties.

The district court was also wrong to conclude that the privilege does not apply to documents shared with third parties. Order 8. As the *Hughes* Appellants have already addressed, the legislative privilege necessarily extends to communications with certain "persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents," when those communications are in furtherance of legislators' "discharge of their legislative duty." *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007). Indeed, "[m]eeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures." *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980); *accord In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) (discussing "need to provide sufficient elbow room for advisers to obtain information from all knowledgeable

sources"). Any alternative rule would create the perverse incentive for a legislature to operate in insular fashion, spurning the expertise of those not on the legislature's payroll in the passage of legislation.

C. The legislative privilege cannot be overridden with a five-factor "balancing test."

The district court also wrongly concluded that the legislative privilege could be overcome, even as to "documents . . . at the core of legislative privilege," based on a five-factor "balancing test" that has evaded appellate review. Order 8-12. To Appellants' knowledge, that nebulous balancing test has never been applied by a Circuit court to require legislative discovery, and it is in deep tension with the underlying principles of legislative privilege. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) ("[T]he legislative privilege is 'absolute' where it applies."); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528-29 (9th Cir. 1983) (similar). As the decision below illustrates, the balancing test is a privilege-destroying test, reducing privilege to a nullity. The test considers such factors as "the relevance of the evidence," "the availability of other evidence," and the "'seriousness' of the litigation," Order 9, factors that merely mirror the ordinary rules for ordinary discovery under the Federal Rules of Civil Procedure. A privilege that can be pierced, moreover, whenever the litigation is "serious" and the material "relevant" has "little value," *Lee*, 908 F.3d at 1187-88 (quoting *Tenney*, 341 U.S. at 377). "A privilege that gives way whenever its contents become relevant or even 'highly relevant' to an opposing party's arguments cannot serve [its] purpose." *In re Itron, Inc.*, 883 F.3d 553, 563 (5th Cir. 2018). Information that does not meet that definition

would likely not be admissible, and may not be discoverable, even without a privilege. Again, "[s]uch a defeatable 'privilege' is hardly a privilege at all." *Id.* at 562.

Conclusion

The Court should stay the district court's order compelling the production of legislatively privileged documents pending *Hughes*. In addition, Appellants request an administrative stay by August 1, 2022, pending resolution of this motion.

Respectfully submitted.

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Certificate of Service

I certify that on July 27, 2022, I served this brief via email on all counsel of record in the district court action from which this case has been appealed. I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Ryan S. Baasch
Ryan S. Baasch

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,132 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rules 27(d)(1)(E) and 32(a)(5) and the type style requirements of Rules 27(d)(1)(E) and 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Ryan S. Baasch
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Certificate of Conference

On July 26, 2022, counsel for Appellants conferred with counsel for the the United States, who confirmed that they oppose this motion.

/s/ Ryan S. Baasch
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EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, ***Plaintiffs*,** **EDDIE BERNICE JOHNSON, *et al.*,** ***Plaintiff-Intervenors*,** **v.** **GREG ABBOTT,** *in his official capacity as Governor of the State of Texas*, **et al.**, ***Defendants*.**	§ § § § § § § § § § § § §	**EP-21-CV-00259-DCG-JES-JVB** **[Lead Case]**
UNITED STATES OF AMERICA, ***Plaintiff*,** **v.** **STATE OF TEXAS, *et al*.** ***Defendants*.**	§ § § § § § § § § § §	**Case No. 3:21-CV-00299-DCG-JES-JVB** **[Consolidated Case]**

ORDER

Before the Court is the United States' motion to enforce third-party subpoenas *duces tecum* against Texas legislators, their staff, and a staff member of the Texas Legislative Council seeking

both tangible and electronically stored information.[1,2] Dkts. 351; 351-2 (Ex. 1: Subpoenas). The Court grants the motion.

I. BACKGROUND

The United States filed its Complaint against the State of Texas and Texas Secretary of State John Scott on December 6, 2021. Complaint, *United States v. Texas*, No. 3:21-cv-00299 (W.D. Tex. 2021) (Dkt. 1). The Court later consolidated that action with the above-captioned lead case.

Discovery is ongoing. In February and March, the United States served subpoenas *duces tecum* on the Legislators, seeking documents including redistricting proposals, legislative communications, and data used during the redistricting process. *See* Dkt. 351-2. In response, the Legislators produced roughly 1,000 documents (excluding form letters and similar submissions) and submitted privilege logs. *See* Dkt. 351-3 (Ex. 2: Privilege Logs). On May 10, the United States met and conferred with counsel for the Legislators and, on May 27, counsel for the Legislators submitted updated privilege logs but no additional documents. *See* Dkt. 351-4 (Ex. 3: Updated Privilege Logs). The updated privilege logs contain almost 2,000 entries, including redistricting data, communications with Members of Congress and other outsiders, retainers, invoices, press documents, and other non-privileged items the United States argues are not privileged. *Id.*

[1] The persons served are Representative Steve Allison, Mark Bell, Representative Tom Craddick, Representative Philip Cortez, Darrell Davila, Jay Dyer, Adam Foltz, Colleen Garcia, Representative Ryan Guillen, Senator Joan Huffman, Representative Todd Hunter, Representative Jacey Jetton, Representative Ken King, Koy Kunkel, Representative Brooks Landgraf, Representative J.M. Lozano, Anna Mackin, Representative Geanie Morrison, Representative Andrew Murr, Sean Opperman, Lieutenant Governor Dan Patrick, Speaker Dade Phelan, and Julia Rathgeber. The Court hereinafter refers to the group collectively as "the Legislators."

[2] On July 19, the United States notified the Court it no longer intends to depose House Speaker Dade Phelan. Dkt. 446.

The United States now moves to enforce the subpoenas, arguing the Legislators have withheld hundreds of non-privileged documents in response to the subpoenas, resulting in disclosure of merely one-third[3] of their responsive documents. Dkt. 351 at 1; *see also* Dkt. 351-7 (Ex. 6: Challenged-Document Index).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 45(d)(2)(B)(i) allows a party who has served a subpoena to "move the court . . . for an order compelling production." In turn, Rule 45(e)(2)(A) mandates that "a person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must (i) expressly make the claim; and (ii) describe the nature of the withheld documents . . . in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."

The party withholding documents has the burden to establish they are privileged or protected. *See Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985). To assert attorney-client privilege, a subpoena recipient "must prove: (1) that he made a confidential communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding." *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (emphasis removed and citation omitted). To establish work-product protection, a recipient must show the document was created "in anticipation of litigation" and not the mere possibility of a legal challenge. *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981) (citations omitted).

To assert legislative privilege, a recipient must show that a communication "contains or involves opinions, motives, recommendations or advice about legislative decisions between

[3] The Legislators contest this figure, pointing out in their response brief that they have produced 8,249 of 10,180 responsive documents (81%) and the entire bill file of 3,248 documents (18,874 pages). Dkt. 379 at 2.

legislators or between legislators and their staff." *Jackson Mun. Airport Auth. v. Bryant*, No. 3:16-cv-246, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017) (citations omitted). Legislative privilege is "waived" as to "communications with any outsider." *Perez v. Perry* (*Perez I*), No. 5:11-cv-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge court).

III. DISCUSSION

The United States argues the Legislators have inappropriately (1) asserted attorney-client privilege, work-product protection, and state legislative privilege over factual data; (2) claimed work-product protections over materials not prepared in anticipation of litigation, including documents drafted almost two decades ago; and (3) advanced an overbroad conception of the common-law state legislative privilege, withholding even communications with members of the public. Dkt. 351 at 1. The Court first addresses legislative privilege, and finding it does not shield the entirety of the responsive documents, next turns to attorney-client privilege and work-product protections to determine whether the documents are shielded from discovery.

A. State Legislative Privilege

"Legislative privilege is an evidentiary privilege, 'governed by federal common law, as applied through Rule 501 of the Federal Rules of Evidence.'" *La Union Del Pueblo Entero v. Abbott* (*LUPE*), No. SA-21-CV-00844-XR, 2022 WL 1667687, at *2 (W.D. Tex. May 25, 2022) (quoting *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017)). "While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified." *Jefferson Cmty. Health Care Ctrs.*, 849 F.3d at 624 (quoting *Perez I*, 2014 WL 106927, at *1). "Legislative privilege protects legislators from possible prosecution by an unfriendly executive and conviction by a hostile judiciary, and is one means for ensuring the independence of the legislature . . . . [I]n other words, it serves to preserve the constitutional structure of separate, coequal, and independent

branches of government." *Gilby v. Hughs*, 471 F. Supp. 3d 763, 766–67 (W.D. Tex. 2020) (cleaned up). The privilege applies to "any documents or information that contains or involves opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff." *Jackson Mun. Airport Auth.*, 2017 WL 6520967, at *7 (quoting *Hall v. Louisiana*, No. CIV.A. 12-657-BAJ, 2014 WL 1652791, at *10 (M.D. La. Apr. 23, 2014)).

"The privilege does not apply, though, to 'documents containing factually based information used in the decision-making process or disseminated to legislators or committees, such as committee reports and minutes of meetings,' or 'the materials and information available [to lawmakers] at the time a decision was made.'" *LUPE*, 2022 WL 1667687, at *2 (quoting *Comm. for Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 11, 2011) (internal quotations and citations omitted)). 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." *Perez I*, 2014 WL 106927, at *1 (internal quotation marks omitted).

The Legislators ask this Court to hold the United States' motion in abeyance pending the resolution of a recent district-court decision that concluded that legislative privilege did not shield legislators' documents from discovery. Dkt. 379 at 11 (citing *LUPE*, 2022 WL 1667687). The Legislators contend that the pending appeal will necessarily clarify the ground rules for legislative privilege in the Fifth Circuit, beyond the dicta generally describing the nature of the privilege in *Jefferson Community Health Care Centers*. *See* 849 F.3d at 624. This would be, the Legislators argue, the "most prudent course" so as to "avoid[] the unseemly possibility that legislators turn over documents that the Fifth Circuit clarifies are privileged." Dkt. 379 at 12.

We disagree and decline to stay the motion. The Legislators repeatedly argue that the discussion of state legislative privilege in *Jefferson Community Health Centers* is mere dicta, Dkt. 379 at 11–13, but "[a]lternative holdings are not dicta and are binding in this circuit," *Jaco v. Garland*, 24 F.4th 395, 406 n.5 (5th Cir. 2021). This Court has also already declined to stay this litigation to await outside appeals, *See* Dkt. 246, and the stay in *LUPE* does not suggest a "strong showing" that reversal is likely, *Freedom from Religion Found., Inc. v. Mack*, 4 F.4th 306, 311 (5th Cir. 2021) (internal citation and quotation marks omitted), or that the Fifth Circuit is likely to depart from *Jefferson Community Health Care Centers*. *See also Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997) ("[O]ne panel of this court cannot overrule the decision of another panel; such panel decisions may be overruled only by a subsequent decision of the Supreme Court or by the Fifth Circuit sitting *en banc*.").

Thus, the Court first addresses whether the legislative privilege applies to groups of documents not integral to the legislative process and to those documents shared with legislative outsiders, and then confronts the remaining core legislative-privilege claims under the *Rodriguez* five-factor test.

1. Documents not integral to the legislative process

Legislative privilege only "protects 'integral steps' in the legislative process and does not extend to commentary or analysis following the legislation's enactment." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015); *see also League of Women Voters of Mich. v. Johnson*, No. 17-14148, 2018 WL 2335805, at *6 (E.D. Mich. May 23, 2018). Accordingly, the documents created after enactment of the redistricting legislation that the Legislators seek to shield under the aegis of legislative privilege must be produced. Dkt. 351-7 at 310.

The same can be said for the administrative documents and materials that the Legislators seek to shield. Dkt. 351-7 at 311–14. These documents include schedules, calendar entries, retainer agreements, engagement letters, and employment communications, none of which are sufficiently tied to the substance of legislation to fall within the privilege. *Id.*; *see also generally Favors v. Cuomo* (*Favors I*), No. 11-CV-5632 DLI RR, 2015 WL 7075960, at *8 (E.D.N.Y. Feb. 8, 2015) (compiling a list of "non-legislative" and "legislative" activities); *see, e.g.*, *BBC Baymeadows, LLC v. City of Ridgeland*, No. 3:14-cv-676, 2015 WL 5943250, at *6 (S.D. Miss. Oct. 13, 2015) (holding engagement letter did not fall within legislative privilege); *Kukla v. Vill. of Antioch*, No. 85 C 7946, 1987 WL 9596, at *2 (N.D. Ill. Apr. 15, 1987) (finding village board's employment hearing was not "legislative" but rather held in board's capacity as employer and thus legislative privilege did not apply).

Nor does legislative privilege shield the almost 700 documents listed in the index containing "factually based information used in the decision-making process or disseminated to legislators or committees." *LUPE*, 2022 WL 1667687, at *2 (citation omitted); Dkt. 351-7 at 315–56. Examples of such documents include "committee reports," "minutes of meetings," "materials and information available [to lawmakers] at the time a decision was made," *LUPE*, 2022 WL 1667687, at *2 (citation omitted), and "alternative maps considered during the redistricting process," *LULAC v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2022 WL 1570858, at *2 (W.D. Tex. May 18, 2022). *See also, e.g.*, *League of Women Voters of Mich.*, 2018 WL 2335805, at *7 (ordering the production of "strictly factual materials and information available to lawmakers at the time the legislation was enacted").

2. Third-party documents

The Legislators assert legislative privilege over documents from and communications with third parties. Dkt. 351-7 at 291–301. The United States argues the Legislators must disclose documents exchanged with Members of Congress and congressional staff; counsel for nearly all Republican members of the Texas delegation to the U.S. House of Representatives, who provided the initial draft of the congressional map to Senator Joan Huffman, Chair of the Senate Special Committee on Redistricting; state executive-branch officials; consultants; and members of the public, among others. Dkt. 351 at 10. The Legislators urge the Court to reject arguments that legislative privilege does not extend to documents shared with executive-branch officials or "outsiders"—whom the Legislators argue are not in fact true outsiders to the legislative process. Dkt. 379 at 16.

The Court disagrees that the scope of the privilege is as broad as the Legislators claim. Legislators cannot cloak conversations with executive-branch officials, lobbyists, and other interested outsiders in their privilege. *Perez I*, 2014 WL 106927, at *2. Legislative privilege focuses on "candor in . . . internal exchanges." *United States v. Gillock*, 445 U.S. 360, 373 (1980). And the case law the Legislators lean on—which uniformly addresses immunity, not privilege—is not persuasive. *See, e.g.*, *Baraka v. McGreevey*, 481 F.3d 187, 196–97 (3d Cir. 2007); *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980). Accordingly, legislative privilege will not shield these documents shared with persons outside the Texas legislature or legislative-staff ambit.

3. Balancing of interests

The United States next challenges the Legislators' assertion of privilege over a tranche of documents relating to the 2021 congressional redistricting cycle at issue in this case. Dkt. 351-7 at

357–62. The court finds these documents to be at the core of legislative privilege, detailing mental impressions on the legislative process, revealing legislative judgments as to alternative maps, and implicating privileged thoughts and opinions. *Id.* "Thus, the Court will weigh the *Rodriguez* factors to determine if they should nevertheless be disclosed." *LUPE*, 2022 WL 1667687, at *6.

"[I]n determining whether and to what extent the legislative privilege must be honored, the Court 'must balance the extent to which production of the information sought would chill the [Texas] Legislature's deliberations . . . against any other factors favoring disclosure.'" *Id.* at *2 (quoting *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003)).

> The *Rodriguez* court articulated five factors to consider in making such a determination: "(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."

Id. (citing *Rodriguez,* 280 F. Supp. 2d at 101); *see also Veasey v. Perry*, No. 2:13-CV-193, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014) (applying the *Rodriguez* five-factor analysis); *Perez I*, 2014 WL 106927, at *2 (acknowledging same).

The first factor weighs in favor of disclosure. The United States alleges intentional-discrimination claims on the basis of race, color, or membership in a language-minority group in violation of Section 2 of the Voting Rights Act. Dkt. 318 ¶ 197. The evidence the United States "seek[s] to compel is highly relevant in proving [its] Section 2 claim, as the documents reflect the State Legislators' contemporaneous thoughts and motivations in drafting and enacting [the 2021 Congressional Plan]." *LUPE*, 2022 WL 1667687, at *6; *see also Jefferson Cmty. Health Ctrs.*, 849 F.3d at 624 (holding that the existence of legislative privilege does not bar adjudication of claims to which legislators' "motivations and thought processes" are relevant); *Jones v. City of Coll. Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (finding that where Congress has placed "government intent"

at the heart of a cause of action, the United States "has a compelling interest in discovery of evidence of such intent").

"Here, '[t]he state government's role in the events giving rise to the present litigation is central to [the United States'] claims.'" *Bethune-Hill*, 114 F. Supp. 3d at 339 (quoting *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014)). "Unlike other cases, where . . . the legislative privilege may be employed to 'prevent [the government's] decision-making process from being swept up unnecessarily into the public domain,' this is a case where the decision making process 'is the case.'" *Id.* (quoting *Comm. for Fair & Balanced Map*, 2011 WL 4837508, at *8). "[A]ny documents containing the opinions and subjective beliefs of legislators or their key advisors would be relevant to the broader inquiry into legislative intent and the possibility of racially motivated decisions that were not adequately tailored to a compelling government interest." *Page,* 15 F. Supp. 3d at 666.

The second factor, the availability of other evidence, also weighs in favor of disclosure. Litigants may prove a Section 2 claim by showing discriminatory intent, *LULAC v. Abbott*, No. 3:21-CV-259-DCG-JES-JVB, 2022 WL 1631301, at *12–13 (W.D. Tex. May 23, 2022), which requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"[4] *see Veasey*, 830 F.3d at 230–31 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). "While recognizing that candid discussions among legislators may not be the only evidence that would allow the United States to prove its discriminatory intent claim, . . . the second factor weighs slightly in favor of disclosure given the practical reality that 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.'"

[4] Litigants may also prevail on a Section 2 claim by demonstrating that legislation has a discriminatory effect. *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (en banc).

Veasey v. Perry, No. 2:13-CV-193, 2014 WL 1340077, at *3 (S.D. Tex. Apr. 3, 2014) (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982)).

The third factor, the seriousness of the litigation and the issues involved, strongly favors disclosure. "The federal government's interest in enforcing voting rights statutes is, without question, highly important." *Id.* at *2. "[I]t is indisputable that racial [discrimination] and malapportionment claims in redistricting cases 'raise serious charges about the fairness and impartiality of some of the central institutions of our state government,' and thus counsel in favor of allowing discovery." *Favors v. Cuomo* (*Favors II*), 285 F.R.D. 187, 219 (E.D.N.Y. 2012) (citing *Rodriguez,* 280 F. Supp. 2d at 102).

Factor four, the role of the government in the litigation, also strongly favors disclosure. Here, "the state government's role is direct. The motive and intent of the state legislature when it enacted [the 2021 Congressional Plan] is the crux of this Voting Rights Act case." *Veasey*, 2014 WL 1340077, at *2. "[T]he Legislators' role in the allegedly unlawful conduct is 'direct,' and therefore 'militate[s] in favor of disclosure.'" *Favors I*, 2015 WL 7075960, at *11 (quoting *Comm. for Fair & Balanced Map*, 2011 WL 4837508, at *8.

The fifth factor, the possibility of future timidity by government employees, weighs against disclosure as "the need to encourage frank and honest discussion among lawmakers favors nondisclosure." *Comm. for Fair and Balanced Map*, 2011 WL 4837508, at *8. "[C]ourts have long recognized that the disclosure of confidential documents concerning intimate legislative activities should be avoided." *Veasey*, 2014 WL 1340077, at *3. "Even so, 'where important federal interests are at stake, the principle of comity, which undergirds the protection of legislative independence, yields.'" *LUPE*, 2022 WL 1667687, at *7 (quoting *Benisek v. Lamone*, 263 F. Supp. 3d 551, 555

(D. Md. 2017) (internal quotation marks omitted)).[5] "[T]he Court finds that the need for accurate fact finding outweighs any chill to the legislature's deliberations." *LUPE*, 2022 WL 1667687, at *7.

Accordingly, the Court finds that the overall balance of factors weighs in favor of disclosure. The challenged documents, Dkt. 351-7 at 357–62, must be produced. Additional documents falling into their own category will also be produced: talking points, draft public statements, and media strategy documents, Dkt. 351-7 at 303–309, and the standalone document identified as DOC_0001659, Dkt. 351-7 at 302.[6] Because certain of these documents may potentially be shielded by attorney-client privilege or work-product protections, the Court continues its discussion below.

B. Attorney-client Privilege

The United States argues the Legislators have improperly withheld documents far beyond the scope of attorney-client privilege. Dkt. 351 at 4. The Legislators have asserted attorney-client privilege over nine subsets of documents: (1) documents containing redistricting data and related factual information, Dkt. 351-7 at 1–25; (2) documents passed from client to lawyer, *id.* at 26–47; (3) logistical documents, *id.* at 48; (4) talking points, *id.* at 49–50; (5) retention agreements, *id.* at 51–52; (6) documents not mentioning legal advice, *id.* at 53–71; (7) documents relating to outside counsel Butler Snow LLP, *id.* at 72–85; (8) documents relating to outside mapping consultants, *id.*

[5] The Court notes disclosure of legislative documents in past Voting Rights Act litigation has not rendered Texas officials "timid." *See, e.g.*, *Veasey*, 2014 WL 1340077, at *2; *see generally* U.S. Amended Complaint, Dkt. 318 ¶¶ 19–20, 180 (noting Texas's lengthy history of discrimination in redistricting and voting rights).

[6] The Legislators have also asserted the deliberative-process privilege as grounds to withhold the document, but that privilege only applies to "the internal decision-making process of the executive branch." *Gilby*, 471 F. Supp. 3d at 767.

at 86–91; and (9) documents relating to third parties, *id.* at 92. The Court addresses the groups below.

1. Documents containing redistricting data and related factual information

By way of example, the United States points out that Senator Huffman, her staff, and Adam Foltz[7] asserted privilege over 300 documents—described only as "confidential data" in the privilege log—concerning House and congressional redistricting proposals. Dkts. 351 at 4; 351-7 at 1–25. The United States contends the privilege "does not protect disclosure of the underlying facts," and marshals a litany of cases in support of this proposition. *Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981); *see BDO USA, L.L.P.*, 876 F.3d at 696 (limiting the privilege to materials "generated for the purpose of obtaining or providing legal assistance" (citation omitted)); *Ohio A. Philip Randolph Inst. v. Smith*, No. 1:18-cv-357, 2018 WL 6591622, at *3 (S.D. Ohio Dec. 15, 2018) (three-judge court) (requiring disclosure of "facts, data, and maps").

The Legislators counter that the redistricting documents concerning redistricting proposals are not merely factual, but that they are communications. Dkt. 379 at 3. The Legislators readily agree with the United States that attorney-client privilege does not protect the disclosure of underlying facts, but disagree with the United States' contention that these documents contain only unprivileged factual data. *Id.* The United States' qualified characterization of these documents as "*[c]ontaining* factual information," the Legislators argue, reveals they are more than purely factual. *Id.* (emphasis added). Further, the Legislators argue, "[e]very document, indeed every human communication, will necessarily *contain* factual information." *Id.* In support, the Legislators propose several examples of how a document containing factual information might

[7] Foltz is a Texas Legislative Council employee selected by Representative Hunter, Chair of the House Redistricting Committee, to work on the House map. *See* Dkt. 351-6 at 18–19 (Ex. 5: House Redistricting Comm. Hearing Tr. (Oct. 4, 2021)).

well also contain "data further manipulated for purposes of describing or evaluating a particular proposal, to thereby effectuate a privileged communication between client and attorney." *Id.* at 4. According to the Legislators, revealing the analyses or data also reveals the privileged communication.

The United States' argument hews closer to the mark. Blanket protection for these documents as "communications" absolves a subpoena recipient asserting attorney-client privilege of proving (1) he made a confidential communication, (2) to a lawyer or lawyer's subordinate, (3) for the *primary* purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding. *BDO USA, L.L.P.*, 876 F.3d at 695. To hold otherwise reduces the principle that the privilege does not shield underlying facts to a nullity and flies in the face of considerable authority. *See, e.g.*, *Ohio A. Philip Randolph Inst.*, 2018 WL 6591622, at *3 (requiring production of "facts, data, and maps" sent to counsel); *see also In re Fin. Oversight & Mgmt. Bd.*, 386 F. Supp. 3d 175, 184 (D.P.R. 2019).[8] The documents are not categorically shielded by attorney-client privilege. To the extent any document has annotations or notes implicating bona fide legal advice or containing privileged material, then the Legislators must produce a redacted version. *See, e.g.*, *Ill. Cent. R.R. Co. v. Harried*, No. 5:06-cv-160, 2010 WL 583938, at *2 (S.D. Miss. Feb. 16, 2010).

2. Documents passed from client to lawyer

The second group of documents, labeled as documents passed from client to lawyer, largely corresponds to group one—except the documents in this group appear to have also been sent to counsel. Dkt. 351-7 at 26–47. That these data—admittedly "created, received, and/or gathered" for "the purpose of working on redistricting legislation"—were "[a]lso used by counsel," *id.*, does

[8] The Legislators have not established that the legislative documents at issue were created at the request of counsel or made "to aid in the providing [of] needed legal advice." *Butler v. Am. Heritage Life Ins. Co.*, No. 4:13-cv-199, 2016 WL 367314, at *6 (E.D. Tex. Jan. 29, 2016). Thus, the cases the Legislators cite do not justify withholding the documents. Dk. 379 at 4–5.

not render them privileged. "[D]ocuments do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from client to lawyer." *United States v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997). The documents are not categorically privileged. To the extent any document has annotations or notes implicating bona fide legal advice or containing privileged material, then the Legislators must produce a redacted version.

3. Logistical documents

The next group of documents contains calendar entries and other scheduling materials relating to redistricting. Dkt. 351-7 at 48. The United States argues these are categorically not privileged. Dkt. 351 at 5 (citing *Pic Grp. v. LandCoast Insulation, Inc.*, No. 1:09-cv-662, 2010 WL 1741703, at *2 (S.D. Miss. Apr. 28, 2010)). The Legislators disagree, contending such documents can be privileged when disclosure would "reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided." Dkt. 379 at 5 (quoting *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999)); *see Bernstein v. Mafcote, Inc.*, No. 3:12-cv-311 WWE, 2014 WL 3579522, at *7 (D. Conn. July 21, 2014); *see also, e.g.*, *Bretillot v. Burrow*, No. 14-cv-7633, 2015 WL 5306224, at *25 (S.D.N.Y. June 30, 2015) ("time records . . . contain[ed] privileged material"); *MacEachern v. Quicken Loans, Inc.*, No. 15-CV-12448, 2016 WL 3964814, at *3 (E.D. Mich. July 25, 2016) (similar); *Est. of Robles ex rel. Montiel v. Vanderbilt Univ. Med. Ctr.*, No. 3:11-0399, 2012 WL 3067936, at *3 (M.D. Tenn. July 27, 2012) (similar); *United States v. Heine*, No. 3:15-CR-238-SI, 2017 WL 1393493, at *5 (D. Ore. Apr. 11, 2017) (similar). The Legislators have also alerted the Court of their intention to promptly produce additional calendar entries that, upon further review, "disclose only public meetings information without internal annotations." Dkt. 379 at 6 n.3.

The Court agrees with the United States as to the broad inapplicability of privilege to these documents. The simplest solution is for the Legislators to produce redacted versions if any annotations implicate bona fide legal advice or contain privileged material.

4. Talking points

The next group of documents contains the so-called talking points the Legislators have withheld. Dkt. 351-7 at 49–50. The United States argues such documents are not protected by privilege where the party asserting it cannot show that the primary purpose of the communication was the transmission of legal advice. Dkt. 351 at 5 (citing *Havana Docks Corp. v. Carnival Corp.*, No. 19-CV-21724, 2021 WL 2940244, at *2, *4–5 (S.D. Fla. July 13, 2021)). The Legislators assert these talking points are privileged "where attorneys are involved in '[t]he review and editing of the draft' of talking points, [as] they reveal attorney-client advice no different than a legal memorandum sent from attorney to client." Dkt. 379 at 6 (quoting *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2018 WL 10801570, at *3 (N.D. Ala. Jan. 29, 2018)). Further, the Legislators contend this is even more so when the talking points were intended to be "confidential" and for "internal use-only," thus showing "the desire to maintain the document's confidentiality and privileged nature." *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 660 (D. Nev. 2013).

The court agrees with the United States that these documents are not categorically privileged. To the extent any document has annotations or notes implicating bona fide legal advice or containing privileged material, then the Legislators must produce a redacted version.

5. Retention agreements

The fifth group of documents contains retention agreements and invoices related to legal services provided in connection with redistricting legislation. Dkt. 351-7 at 51–52. The United

States' position is these documents are not privileged as they merely describe "financial transactions between the attorney and client." Dkt. 351 at 5 (quoting *Davis*, 636 F.2d at 1043–44); *see also In re Grand Jury Subpoena*, 913 F.2d 1118, 1123 (5th Cir. 1990)); *Crum & Forster Specialty Ins. Co. v. Great W. Cas. Co.*, No. 3:15-cv-00325, 2016 WL 10459397, at *8 (W.D. Tex. Dec. 28, 2016). The Legislators argue that such documents can also be privileged when the correspondence "reveals the client's motivation for creating the relationship," possible litigation strategy, or "the nature of the services provided, such as researching particular areas of law." Dkt. 379 at 7 (quoting *In re Grand Jury Witness*, 695 F.2d 359, 362 (9th Cir. 1982)). To the Legislators, the particular label or purpose of a document as an engagement agreement or invoice is not dispositive of the privilege inquiry—what matters is whether the documents "reveal communications involved in the strategizing process," or other privileged legal advice. *Id.* (quoting *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 537 (N.D. Ill. 2000)).

Notwithstanding the Legislators' ontological approach to privilege and the possible existence of protected information in these documents, the "identity of the client and the amount of the fee paid" are not protected. *In re Grand Jury Witness*, 695 F.2d 359, 361 (9th Cir. 1982). Such materials must still be produced. To the extent invoices include descriptions that implicate legal advice, redaction is the appropriate solution.

6. Documents not mentioning legal advice

The next group includes approximately 250 documents relating to redistricting proposals for the Texas House, "created, received, and/or gathered at Chairman Hunter's direction" containing some type of "input from attorneys" or "contributions from counsel." Dkt. 351-7 at 53–71.

The United States' position is these documents are not protected, not only because the entries say nothing of legal advice, but also because legislative attorneys frequently play both a legal and policy role. Dkt. 351 at 6; *see South Carolina v. United States*, No. 12-203, 2012 U.S. Dist. LEXIS 188558, at *12 (D.D.C. Aug. 10, 2012) (concluding that "attorney-client privilege does not apply in some instances to [state legislative] staff attorney work") (three-judge court); *see also BDO USA, L.L.P.*, 876 F.3d at 696. The United States qualifies its position, stating that to the extent the Legislators' failure to establish privilege is not alone sufficient to warrant disclosure, it admits *in-camera* review may be necessary to distinguish between documents providing only legal advice versus those that concern policy, political, or technical matters. Dkt. 351 at 6 n.2.

The Legislators respond that these documents fall squarely within the category of redistricting documents protected from disclosure so as to protect the communications between legislators and staff and allow "retained [counsel] to provide legal advice on redistricting."[9] Dkt. 394 at 8 (quoting *Perez v. Perry (Perez II)*, No 11-cv-360, 2014 WL 3359324, at *1–2 (W.D. Tex. July 9, 2014)). The Legislators "retained counsel for legal advice on the innumerable legal compliance issues inherent in redistricting." *Id.* The withheld documents, they represent, are for the purpose of giving or obtaining legal advice or services. *Id.*

While this may well be true, attorney-client privilege does not categorically protect this trove of documents *merely* because they also contain staff attorney or retained counsel "contributions" or "input." Because the staff attorneys and retained counsel serve both legal and policy roles, it is incumbent upon the party seeking the privilege to prove it was for the primary purpose of securing either a legal opinion, legal services, or assistance in some legal proceeding.

[9] The parties have intertwined their arguments for this group and the next group—relating to Butler Snow—but for the sake of clarity the Court has separated the relevant arguments for each batch of documents. This separation is purely for simplification and does not affect the Court's ultimate analysis of privilege for each set of documents.

BDO USA, L.L.P., 876 F.3d at 695. There has been no such showing here. To the extent such documents actually implicate legal advice, redaction is the appropriate solution.

7. Communications with Butler Snow LLP and outside mapping consultants

Next are the documents relating to the Legislators' communication with outside counsel Butler Snow and outside mapping consultants. Dkt. 351-7 at 72–85, 86–91. The United States argues these communications are not necessarily privileged because the firm has a public-policy practice that provides legislative services, like "drafting and reviewing legislation of interest to clients," in addition to other practice areas. Dkt. 351 at 6 (quoting *Government Relations*, BUTLER SNOW, https://www.butlersnow.com/services/practiceareas/government-relations/ (last visited July 21, 2022)). In support, the United States also points to Chairman Hunter's comments that consultants retained by Butler Snow actually drafted portions of the House redistricting plan but that he still withheld 60 documents exchanged with these consultants on the basis of privilege. Dkt. 351 at 6.

The United States' position is that to the extent the Legislators withheld "political" or policy communications from Butler Snow, these documents are not protected. *Id.* (citing *Perez II*, 2014 WL 3359324, at *1–2); *see also, e.g.*, *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998); *South Carolina*, 2012 U.S. Dist. LEXIS 188558, at *5–8. Further, because the outside consultants provided "technical" advice, their communications are not protected from disclosure by attorney-client privilege or work-product doctrine. Dkt. 351 at 6–7 (citing *United States v. El Paso Cnty.*, 682 F.2d 530, 541–42 (5th Cir. 1982)); *see also Chemtech Royalty Assocs., L.P. v. United States*, No. 06-258, 2009 WL 854358, at *3–5 (M.D. La. Mar. 30, 2009); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 303 (D. Md. 1992) (three-judge court)

(indicating that attorney-client privilege does not extend to "active participant[s] in the [redistricting] events").

The Legislators counter that the United States' comparison of outside counsel to legislative staff attorneys, as well as its citation to generic material on Butler Snow's website, is unconvincing. Dkt. 379 at 8. Further, they say the United States' own citation to Chairman Hunter's comments reveals that he had Butler Snow run both the "legal" and "data" analyses on the redistricting proposals. *Id.* Moreover, other remarks made on the House Floor clarify that the Legislators understood Butler Snow's role in advising to be giving *legal* advice on the bill. *Id.* (citing House Journal, October 16, at S213). The Butler Snow attorneys identified in the privilege logs, the Legislators add, further confirm their compliance role as these attorneys hold themselves out as "redistricting and voting rights" and "government litigation" counsel, distinct from purely governmental-relations counsel. *Id.* Further, the Legislators contend, privilege and work-product doctrines protect documents created and work done at the direction of counsel when such communications are kept confidential and in furtherance of the attorney-client relationship. *Id.*; *see also Ferko v. NASCAR*, 218 F.R.D.125, 139–40 (E.D. Tex. 2003) ("assistance by an accounting firm enables attorneys to 'give sound and informed advice'" and is protected (quoting *Upjohn Co.*, 449 U.S. at 30)); *In re Hardwood P-G, Inc.*, 403 B.R. 445, 458 (Bankr. W.D. Tex. 2009) ("communications to third party professionals" hired by attorney are protected).

In reply, the United States argues some communications between the Legislators and Butler Snow attorneys (as well as the consultants) are not protected by privilege because Butler Snow maintained an attorney-client relationship only with Chairman Hunter, his staff, and the House General Counsel. Dkt. 394 at 3 (citing Dkt. 390-2 at 8–9 (Butler Snow Engagement Letter)). Accordingly, the United States argues, the inclusion of additional legislators or staff on

communications meant that the communications were not confidential, and no attorney-client privilege or work-product protections existed. *Id.* So, too, lay unprotected the demographers' non-legal advice and consultation offered directly to the Legislators, unmediated by counsel. *Id.* (citing Dkt. 390-2 at 15–17 (Bryan Engagement Letter)); *see also* Dkt. 379 at 9 (conceding in their response brief that the demographers provided "technical" advice to the Legislators). In any case, the United States' position is that because Butler Snow and the demographers were "active participant[s] in the [redistricting] events"—and not merely consultants on legal compliance—their communications must be disclosed. Dkt. 394 at 3 (quoting *Marylanders for Fair Representation, Inc.*, 144 F.R.D. at 303); *see also Am. Elec. Power Co. v. Affiliated FM Ins. Co.*, No. CV 02-1133-D-M2, 2007 WL 9700756, at *4 (M.D. La. Apr. 9, 2007) (requiring production of "technical" communications); *Ferko*, 218 F.R.D. at 135 ("[A] lawyer may not render communications between the attorney's client and the accountant privileged just by placing an accountant on his or her payroll.").

The Legislators have shown these documents may well be privileged as containing legal advice. That these consultants assisted on "technical" matters does not categorically move their work beyond the scope of the attorney-client privilege. As the Legislators argue, such technical work may well have been necessary in reviewing the legality of the proposed legislation and compliance with the Voting Rights Act. Nevertheless, just because attorneys are involved in the process does not automatically shield the work of such technical experts, nor does it necessarily protect all communications between the parties. The documents must be produced to the Court for *in-camera* inspection.

8. Third-party documents

Finally, the United States argues a handful of communications with legislative outsiders withheld by the Legislators must be produced as "communications made in the presence of third parties" are not protected by privilege. Dkts. 351 at 7 (quoting *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976)); 351-7 at 92. If the Legislators oppose the release of these documents, the Court has found no mention of it in the response brief. Dkt. 379. Nevertheless, because some of the documents appear to potentially be communications between legislators, or their staff, and consultants or their attorneys, they may contain privileged attorney-client communications. Because this cannot easily be determined from the privilege logs, these documents will be treated like the Butler Snow and mapping-consultant documents above and should be produced to the Court for *in camera* inspection.

C. Work-product protection

The United States next argues the Legislators' assertion of work-product protections for various groups of documents lacks merit because they cannot show the documents were created in anticipation of legislation. Dkt. 351 at 7. The specific arguments for each group of documents are discussed below.

1. Documents created during legislative proceedings

The first group the United States argues does not warrant work-product protection encompasses those documents created during legislative proceedings, such as draft redistricting legislation and hearing notes. Dkt. 351-7 at 93–153. The United States contends work-product protections do not cover materials created by attorneys or their agents "in the ordinary course of business, or pursuant to public requirements unrelated to litigation." Dkt. 351 at 7 (quoting *El Paso Cnty.*, 682 F.2d at 542). Further, that courts have declined to extend work-product protection to

documents "pertaining to pending legislation" because "[t]he [l]egislature could *always* have a reasonable belief that any of its enactments would result in litigation." *Bethune-Hill*, 114 F. Supp. 3d at 348 (internal quotation marks omitted).[10] The United States also notes that the Legislators did not initiate a litigation hold at the start of the 87th Legislature, evincing that litigation was not yet reasonably anticipated. Dkt. 394 at 4 (citing *Spanish Peaks Lodge, LLC v. Keybank Nat. Ass'n*, No. 10-cv-453, 2012 WL 895465, at *2 (W.D. Pa. Mar. 15, 2012)).

The Legislators respond that the United States' "categorical rule" that documents created during the legislative process are not protected perverts attorney-client privilege and work-product protections. Dkt. 379 at 10–11. Further, the Legislators contend that case law supports their contention that documents relating to legal compliance of redistricting proposals—or "documents created as part of assessing litigation risk"—are not categorically excluded from the work-product protection. *Id.*; *see also United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981) (asking whether "the primary motivating purpose behind the creation of the document was to aid in possible future litigation"). If the United States were correct, the Legislators argue, then legislators would have second-class status when it comes to obtaining legal advice and the associated protections accommodating the full and frank exchange of such advice for legislation—to the great detriment of the people then subject to the legislation. Dkt. 379 at 10.

The Court agrees with the United States. The "[i]nvolvement of counsel is not a guarantee that work-product protection will apply, although it may show that the pertinent documents were prompted by the prospect of litigation." 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER,

[10] *See also, e.g.*, *Ohio A. Philip Randolph Inst.*, 2018 WL 6591622, at *5 (declining to apply work-product protection to documents prepared because of "clients' statutory duty to draft Ohio's congressional map"); *D.G. ex rel. G. v. Henry*, No. 08-cv-74, 2010 WL 1257583, at *2 (N.D. Okla. Mar. 24, 2010) (declining to apply work-product protection to documents created to "aide [sic] the legislative process," even if "counsel may have [had] litigation in mind while drafting [them]").

FEDERAL PRACTICE & PROCEDURE § 2024 (3d ed. 2010). Instead, the "focus is on whether specific materials were prepared in the ordinary course of business, or were principally prompted by the prospect of litigation." *Id.* "If the document would have been created without regard to whether litigation was expected to ensue, it was made in the ordinary course of business and not in anticipation of litigation." *Mims v. Dallas Cnty.*, 230 F.R.D. 479, 484 (N.D. Tex. 2005). And as "the advisory committee notes to Rule 26(b)(3) make clear, . . . '[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation'" are not protected. *El Paso Cnty.*, 682 F.2d at 542.

"Even assuming that [the Legislators' documents] otherwise qualify for work product protection, we hold the doctrine unavailable here because the [documents] [were] not prepared 'in anticipation of litigation.'" *Id.* The Court "concede[s] that determining whether a document is prepared in anticipation of litigation is a slippery task," but we are guided by circuit precedent requiring that the anticipation of litigation be the *primary* motivating purpose to qualify for work-product protection. *Id.* at 542–43 (citing *Davis*, 636 F.2d at 1040)). The Legislators have not shown that these documents were created outside of the ordinary course of business or that such dual-purpose documents were created for the primary purpose of the anticipation of litigation. Accordingly, these documents are without protection from the work-product doctrine and must be produced.

2. Documents not described as having been created in anticipation of litigation

The Legislators add no additional arguments in support of their assertion of work-product protection for documents not described as having been created in anticipation of litigation. Dkt. 351-7 at 154–215. Because the Court has already reviewed the general arguments and found them wanting, these documents are afforded no work-product protections. They must be produced.

3. Documents relating to outside counsel and map-drawers

The United States argues that documents relating to outside counsel and map-drawers are outside the protections of the work-product doctrine. Dkt. 351-7 at 216–31. As the United States contends, the Legislators' use of outside counsel as an insulating layer between the Legislature and outside map-drawers suggests that "relevant and non-privileged facts remain hidden" and that "production of those facts is essential" to this litigation. Dkt. 351 at 8 (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). Their position is that documents produced by attorneys during the legislative process—and their non-attorney consultants—should be produced. *Id.*

The Legislators rely primarily on their arguments made for documents related to legislative proceedings. *See supra* III.C.1; Dkt. 379 at 10. Having already found this line of reasoning unpersuasive, the Court finds these documents are not categorically shielded by work-product doctrine simply because outside counsel is involved; nor have the Legislators shown these documents were created outside of the ordinary course of business or that their primary purpose was in anticipation of litigation. Nevertheless, these documents are potentially sensitive because they may reveal privileged attorney-client communications; as such, they require individual scrutiny. Accordingly, the documents must be produced to the Court for *in-camera* inspection.

4. Remaining documents

Because the Court has already addressed the rationale for finding attorney-client privilege broadly inapplicable to documents containing factual matter, *see supra* III.B.1., we will not revisit the arguments here as the Legislators add nothing new in support of their work-product-doctrine argument as to this specific group of documents. The documents described as containing factual matter indexed in Docket No. 351-7 at 232–55 are not protected by the work-product doctrine and will be produced.

The same holds true for logistical documents indexed in Docket No. 351-7 at 256. To the extent any such calendar entries or scheduling materials contain annotations that implicate bona fide legal advice or contain privileged material, then the Legislators will produce a redacted version.

So, too, for the talking points documents identified in Docket No. 351-7 at 257–58. The Court has already found attorney-client privilege does not shield these documents from protection. Having reviewed and found wanting the Legislators' general arguments for the application of work-product protection above, these documents will be produced.

The retention agreements and invoices indexed at Dkt. 351-7 at 259 will be produced. To the extent invoices include descriptions that implicate legal advice, redaction is the appropriate solution. The same applies to documents and data created, received, and gathered for redistricting purposes. Dkt. 351-7 at 260–81.

The third-party documents, Dkt. 351-7 at 282–87, however, may contain protected information as they relate to documents sent between legislators, their staff, outside counsel, and outside consultants. Because these documents are potentially sensitive, they require *in-camera* inspection similar to the Butler Snow documents discussed in subsection III.C.3, *supra*.

Finally, the documents drafted years before the Legislators were notified of potential litigation over the 2021 plans, Dkt. 351-7 at 288–90, are not protected by the work-product doctrine in this case. *See Marquette Transp. Co., LLC v. M/V CENTURY DREAM*, No. CV 16-522, 2017 WL 11536184, at *1 (E.D. La. Jan. 4, 2017) (ordering the production of documents, including "documents [] prepared two to three years before the subject incident and [which] cannot possibly be work product"). Nevertheless, the Legislators identify two arguments that militate against production for two subsets of the documents: (1) the first tranche came from the Texas Legislative

Council, with which the Legislators maintain a legislatively privileged and attorney-client privileged relationship; and (2) the second tranche is associated with past redistricting plans, some with legislatively privileged annotations as such documents are revealing of the legislative fact-gathering process for the 2021 legislation and "are thus legislatively privileged." Dkt. 379 at 15 n.9. The first tranche, because it potentially contains privileged communications between attorney and client, will be produced to the Court for *in-camera* inspection. The second tranche, dealing with legislatively privileged documents, will be produced in light of the Court's ruling on disclosure discussed in subsection III.A.3, *supra*.

IV. CONCLUSION

For all the reasons above, the United States' motion to enforce third-party subpoenas *duces tecum*, Dkt. 351, is GRANTED.

The Legislators are hereby ORDERED to produce documents relating to underlying facts concerning the 2021 Texas State House Redistricting Plan and the 2021 Texas Congressional Redistricting Plan, including those set forth on pages 1–25, 232–255, and 315–356 of the Challenged Document Index, Dkt. 351-7.

The Legislators are hereby ORDERED to produce logistical documents, such as calendar entries and other scheduling materials; talking points; and retainer agreements and invoices, including those set forth on pages 48, 49–50, 51–52, 256, 257–58, 259, 303–09, and 311–14 of the Challenged Document Index.

The Legislators are hereby ORDERED to produce documents over which attorney-client privilege is asserted but whose privilege log entries do not specify that legal advice was sought or provided, including those set forth on pages 26–47 and 53–71 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

The Legislators are hereby ORDERED to produce to the Court for *in-camera* inspection documents over which attorney-client privilege or work-product protection is asserted that involve legislative attorneys, Butler Snow attorneys, the map drawing consultants hired by Butler Snow, or other third parties, including those set forth on pages 72–85, 86–91, 92, 216–31, and 282–87 of the Challenged Document Index.

The Legislators are hereby ORDERED to produce documents over which work-product protection is asserted that were created in the ordinary course of legislative business, including those set forth on pages 93–153 and 260–81 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

The Legislators are hereby ORDERED to produce documents over which work-product protection is asserted that were drafted years before litigation in this case was anticipated, including those set forth on pages 288–90 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

The Legislators are hereby ORDERED to produce documents over which work-product protection is asserted but whose privilege log entries do not state that they were created in anticipation of litigation, including those set forth on pages 154–215 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

The Legislators are hereby ORDERED to produce documents over which legislative privilege is asserted that involve communications with non-legislative outsiders, including those set forth on pages 291–301 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

The Legislators are hereby ORDERED to produce documents over which legislative privilege is asserted that are not related to legislation, like draft public statements and media

strategy documents; documents created after the enactment of the 2021 redistricting legislation; and employment communications, including those set forth on pages 303–09, 310, and 311–14 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

The Legislators are hereby ORDERED to produce documents over which legislative privilege is asserted that relate to the 2021 Congressional Redistricting Plan, including those set forth on pages 357–62 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

The Legislators are ORDERED to produce documents over which the deliberative process privilege is asserted, including the document set forth on page 302 of the Challenged Document Index, to the extent no other privilege validly applies under the terms of this Order.

To the extent any document—excluding any ordered produced for *in-camera* inspection—has annotations or notes implicating bona fide legal advice or containing privileged material, then the Legislators will produce a redacted version.

The Legislators are hereby ORDERED to produce these documents within 7 days of this Order.

So ORDERED and SIGNED this 25th day of July 2022.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

And on behalf of:

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeals, Fifth Circuit

-and-

Jeffrey V. Brown
United States District Judge
Southern District of Texas