IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), et al.,

Plaintiffs,

v.

GREG ABBOTT, et al.,

Defendants.

Civil Action No. 3:21-cv-259 (DCG-JES-JVB) (consolidated cases)

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UNITED STATES' SUPPLEMENTAL OPENING BRIEF ON REMAND FROM *LULAC v. PATRICK*: MOTION TO ENFORCE LEGISLATIVE DOCUMENTS SUBPOENAS

INTRODUCTION

Nearly two years after this litigation began, state lawmakers and their staff continue their unprecedented resistance to meaningful discovery concerning fundamental factual questions under Section 2 of the Voting Rights Act: whether a purpose of Texas's latest Congressional redistricting plan is to dilute minority voting strength and whether the policies underlying the Congressional and State House redistricting plans are tenuous. *See* List of Disc. Disputes, ECF No. 708-1. The instant motion concerns the Legislators'[1] responses to subpoenas served early last year to obtain documents necessary to probe public statements. *See* Subpoenas, ECF No. 351-2. The United States moved to enforce the subpoenas against privilege claims, *see* Legis. Docs. Mot., ECF No. 351, and in a careful opinion, the Court ordered the Legislators to produce hundreds of additional documents, *see* Legis. Docs. Order, ECF No. 467. The Fifth Circuit issued a routine administrative stay, *see* Admin. Stay Order, *LULAC v. Patrick*, No. 22-50662 (5th Cir. July 27, 2022), ECF No. 30-2, and later vacated and remanded this Court's order in light of two intervening Fifth Circuit opinions concerning the legislative privilege: *Jackson Municipal Airport Authority v. Harkins*, 67 F.4th 678 (5th Cir. 2023), and *LULAC Texas v. Hughes*, 68 F.4th 228 (5th Cir. 2023). *See* Unpub. Order, *LULAC v. Patrick*, No. 22-50662 (5th Cir. July 18, 2023), ECF No. 107-1. This brief follows. *See* 2d Suppl. Br. Order, ECF No. 719.

Though *Harkins* and *Hughes* narrowed when the legislative privilege is waived and articulated a new standard for when it yields, their effect on this motion is limited. This Court's original decision addressed the attorney-client privilege, work-product doctrine, and deliberative-

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[1] For the purpose of this motion, the Legislators are Rep. Steve Allison, Mark Bell, Rep. Tim Craddick, Rep. Philip Cortez, Darrell Davila, Jay Dyer, Adam Foltz, Colleen Garcia, Rep. Ryan Guillen, Sen. Joan Huffman, Rep. Todd Hunter, Rep. Jacey Jetton, Rep. Ken King, Koy Kunkel, Rep. Brooks Landgraf, Rep. J.M. Lozano, Anna Mackin, Rep. Geanie Morrison, Rep. Andrew Murr, Sean Opperman, Lt. Gov. Dan Patrick, Speaker Dade Phelan, and Julia Rathgeber.

process privilege; *Harkins* and *Hughes* did not touch those doctrines. And most of the Court's prior order regarding the legislative privilege endures. While the Legislators need not now produce all private third-party communications per *Harkins* and *Hughes*, they must still produce factual information and documents untethered to the substance of legislation. They must also produce documents—including communications with outsiders—regarding the Congressional plan, as this is an extraordinary civil case in which the legislative privilege should yield. Accordingly, the United States respectfully requests that the Court substantially grant its motion to enforce the legislative documents subpoenas, as clarified herein.

PROCEDURAL BACKGROUND

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In February and March 2022, the United States served subpoenas on the Legislators, seeking documents like data, analyses, and correspondence related to the redistricting process. *See* Subpoenas. In response, the Legislators produced roughly 1,000 documents—excluding form letters and the like—but withheld nearly 2,000 documents based on the attorney-client privilege, work-product doctrine, deliberative-process privilege, and legislative privilege. *See* Priv. Logs, ECF No. 351-3; Updated Priv. Logs, ECF No. 351-4. The withheld documents include redistricting data, retainers, invoices, media materials, and other nonprivileged documents. *See* Updated Priv. Logs.

After negotiations reached an impasse, the United States moved to enforce the subpoenas in June 2022. *See* Legis. Docs. Mot. This Court granted the motion in July 2022, substantially rejecting the Legislators' overlapping assertions of discovery protections. *See* Legis. Docs Order 4-29. As to the legislative privilege, the Court ruled that the privilege does not apply to documents containing "factually based information used in the decision-making process or disseminated to legislators or committees," including "committee reports," "minutes of

meetings," "materials and information available [to lawmakers] at the time a decision was made," and "alternative maps considered during the redistricting process"; "documents created after enactment of the redistricting legislation" and "administrative documents," including "schedules, calendar entries, retainer agreements, engagement letters, and employment communications"; and "documents shared with persons outside the Texas [L]egislature or legislative-staff ambit." *Id.* at 5-8 (internal quotation marks and citations omitted). The Court also held that the privilege must yield with respect to "documents relating to the 2021 [C]ongressional redistricting cycle" and "talking points, draft public statements, and media strategy documents." *Id.* at 8-12 (internal quotation marks and citations omitted). In so ruling, the Court ordered the Legislators to produce nearly all of the withheld documents sought—some with redactions—and provide others to the Court for *in-camera* review. *See id.* at 27-29. The Legislators appealed and the Fifth Circuit entered an administrative stay. *See* Notice of Appeal, ECF No. 479; Admin. Stay Order.[2]

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In May 2023, while the Legislators' appeal remained pending, the Fifth Circuit issued two other opinions related to the legislative privilege. In a dispute arising from airport governance legislation, *Harkins* affirmed that proponents of the privilege must produce a privilege log, public disclosure waives the privilege, and the privilege reaches only "legitimate legislative activit[ies]." 67 F.4th at 687 (internal quotation marks and citation omitted). And in a dispute arising from election administration legislation, *Hughes* confirmed that the privilege

[2] Upon completion of its *in-camera* review, this Court ruled that only 11 of the 251 inspected documents were privileged in any part and ordered the remainder produced. *See In-Camera* Review Order 1-2, ECF No. 642; Index of Docs. for *In-Camera* Review, ECF No. 492-1. In light of the Fifth Circuit's administrative stay, however, this Court clarified that the Legislators were not required to produce documents over which they asserted the legislative privilege, pending a later order. *See* Clarification Order 2, ECF No. 654.

applies during "the proposal, formulation, and passage of legislation," protects legislators' "subjective thoughts and motives," and does not cover information shared publicly. 68 F.4th at 236-37, 240 (internal quotation marks and citation omitted). For the first time, the Fifth Circuit established in these opinions that the privilege extends to private communications with third parties for legitimate legislative purposes. *See Harkins*, 67 F.4th at 687 (holding that "some communications with third parties, such as private communications with advocacy groups, are protected," insofar as these communications are "part and parcel of the modern legislative procedures through which legislators receive information"); *Hughes*, 68 F.4th at 237 (explaining that communication with third parties brought "*into*" the legislative process does not waive the privilege). And *Hughes* newly articulated that the privilege yields in only criminal or "extraordinary" civil cases. 68 F.4th at 237-38 (citations omitted).

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To apply *Harkins* and *Hughes* to discovery disputes in this litigation, supplemental briefing is underway before this Court. A first round of supplemental briefing concerns motions to compel documents and deposition testimony that remained pending before this Court for the duration of the Fifth Circuit's administrative stay. *See* 1st Suppl. Br. Order, ECF No. 703; *see also* Suppl. Open. Br. 2 n.1, ECF No. 708 (listing motions). This brief commences a second round of supplemental briefing, which concerns only the appropriate resolution of the original legislative documents motion following vacatur and remand to apply *Harkins* and *Hughes* in the first instance. *See* 2d Suppl. Br. Order.

THE LEGISLATIVE PRIVILEGE

A creation of federal common law, the legislative privilege is an evidentiary privilege. *See Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017). The privilege generally protects from disclosure "information that contains or involves

opinions, motives, recommendations or advice about legislative decisions." *E.g.*, *Hall v. Louisiana*, No. 12-cv-657, 2014 WL 1652791, at *10 (M.D. La. Apr. 23, 2014); *see also Hughes*, 68 F.4th at 240 (addressing "subjective thoughts and motives"). But the Fifth Circuit has consistently cautioned that the privilege is "qualified" and "must be strictly construed." *Jefferson Cmty. Health Care*, 849 F.3d at 624; *see also Harkins*, 67 F.4th at 686-87; *Hughes*, 68 F.4th at 236. Accordingly, the privilege yields "where the federal interests at stake outweigh the interests protected by the privilege." *LULAC v. Abbott*, No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022) (noting that the privilege "must not be used as a cudgel" that "prevent[s] the discovery of the truth"); *see also United States v. Gillock*, 445 U.S. 360, 373 (1980) ("[W]here important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields.").

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Harkins and *Hughes* did not—indeed, could not—wipe the jurisprudential slate clean and overrule all past precedent concerning the legislative privilege, including both a Supreme Court opinion and the decision of an earlier Fifth Circuit merits panel. *See United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (explaining the prior-precedent rule). *Gillock* and *Jefferson Community Health Care* thus remain good law. *See id.*; *see also Hughes*, 68 F.4th at 240 (applying *Jefferson Community Health Care*). Numerous district court opinions concerning the legislative privilege are also untouched by the holdings of *Harkins* and *Hughes*.

ARGUMENT

I. *Harkins* and *Hughes* Did Not Impact the Attorney-Client Privilege, Work-Product Protection, or Deliberative-Process Privilege.

Harkins and *Hughes* exclusively concerned the legislative privilege and related jurisdictional issues. *See Harkins*, 67 F.4th at 683; *Hughes*, 68 F.4th at 232, 235-36. These decisions have no impact on this Court's prior reasoning and rulings against the Legislators'

claims of the attorney-client privilege, work-product protection, and deliberative-process privilege. *See* Legis. Docs. Order 12-27; *see also In-Camera* Review Order 1-2. This Court should again reject those claims and order the Legislators to produce nearly all documents over which they have asserted only those protections. *See* Legis. Docs. Order 27-29; *In-Camera* Review Order 2 (ordering some such documents to be produced with specific redactions).[3]

II. *Harkins* and *Hughes* Narrowly Impacted the Legislative Privilege.

Though *Harkins* and *Hughes* articulated new law concerning the legislative privilege, their impact on the legislative documents motion is narrow. For the purposes of this remand, the United States no longer disputes that the privilege extends to the Legislators' private third-party communications. But the privilege still does not apply to factual information or documents insufficiently tied to the substance of legislation, two scope limitations left intact by *Harkins* and *Hughes*. And the privilege must yield as to Congressional documents in this extraordinary litigation.

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A. The Legislative Privilege Applies to Private Third-Party Communications.

Harkins and *Hughes* extended the legislative privilege to encompass private third-party communications for legitimate legislative purposes. *Harkins* held that "some communications with third parties, such as private communications with advocacy groups, are protected by the legislative privilege," so long as these communications are "part and parcel of the modern legislative procedures through which legislators receive information." 67 F.4th at 687 (internal

[3] Of the documents at issue in the underlying motion, 14 concern claims of some combination of only the attorney-client privilege, work-product protection, or deliberative-process privilege. *See* Original Docs. Index 25, 50, 71, 148-50, 153, 210-12, 215, 255 & 258, ECF No. 351-7 [hereinafter Original Index] (DOC_0012507 to DOC_0012517, DOC_0001474, and DOC_0353008 to DOC_0353009). How this Court decides legislative privilege issues has no impact on these 14 documents.

quotation marks committed). And *Hughes* explained that communication with third parties brought "*into*" the legislative privilege does not waive the privilege. 68 F.4th at 237. So the United States acknowledges that the privilege is not waived over the Legislators' communications with outsiders for legitimate legislative purposes under current Fifth Circuit precedent. *Compare* Original Index 291-301 (seeking third-party communications independently) *with* Revised Legis. Priv. Docs. Index (Ex. 1) [hereinafter Revised Index] (not seeking the same).[4] However, to the extent such third-party communications concern the Congressional plan, the privilege should still yield to the extraordinary federal interests in this case. *See* § II.D, *infra*.

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B. The Legislative Privilege Does Not Apply to Factual Information.

Even after *Harkins* and *Hughes*, factual information remains outside the scope of the legislative privilege. Courts in this circuit have consistently said that "facts or information that were made available to lawmakers at the time of their decision . . . are not shielded" by the privilege. *E.g.*, *Hall*, 2014 WL 1652791, at *10; *see also* Legis. Docs. Order 7.[5] *Harkins* and *Hughes* addressed whether the legislative privilege "'was waived' or 'must yield,'" *Hughes*, 68 F.4th at 236; *see also Harkins*, 67 F.4th at 683, so neither decision dictates whether the *scope* of the privilege encompasses factual information. At most, *Hughes* confirmed that the privilege protects "actions" within the regular legislative process. 68 F.4th at 235. But factual information is not an action; it can only be a predicate for action. As a result, the Legislators'

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[4] The United States preserves its arguments on this issue for appeal.

[5] This doctrine runs in parallel with the deliberative-process privilege, under which "factual information generally must be disclosed." *Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992); *see also, e.g.*, *Broward Bulldog, Inc. v. U.S. Dep't of Justice*, 939 F.3d 1164, 1195 (11th Cir. 2019); *Solers, Inc. v. Internal Revenue Serv.*, 827 F.3d 323, 330 (4th Cir. 2016).

claims of the legislative privilege over factual information, such as population and election data and assessments of racial voting patterns, must fail. *See* Legis. Docs. Order 7; Suppl. Open. Br. 5-7; Revised Index 1-53.[6]

C. The Legislative Privilege Does Not Apply to Documents Unrelated to the Substance of Legislation or the Legislative Process.

Harkins and *Hughes* did not address—much less alter—prior decisions that limited the scope of the legislative privilege to matters "sufficiently tied to the substance of legislation." Legis. Docs. Order 7; *see also Harkins*, 67 F.4th at 683; *Hughes*, 68 F.4th at 236. But *Hughes* reaffirmed that the privilege is confined to the period between "the proposal, formulation, and passage of legislation." 68 F.4th at 236 (citation omitted). So documents predating the proposal of redistricting plans—*i.e.*, those before August 12, 2021—or postdating the passage of the same—*i.e.*, those after October 25, 2021—are not privileged. *See* Texas Redistricting: 2020s Timeline, Texas Legislative Council, https://perma.cc/S9PP-KRHE [hereinafter Texas Redistricting Timeline] (noting that the "Census Bureau release[d] the detailed population data by race and ethnicity needed for redistricting" legislation on August 12 and the Governor signed all redistricting plans on October 25). Similarly, the privilege does not shield administrative documents: schedules, calendar entries, retainer agreements, engagement letters, employment communications, invoices, and the like are not sufficiently connected to the substance of

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[6] In providing a rationale for shielding communications involving "persons outside the [L]egislature," *Hughes* mentioned that the legislative privilege "covers all aspects of the legislative process." 68 F.4th at 235-36 (citations omitted). But *Hughes* did not extend the privilege to all nonpublic documents within a legislator's possession, particularly those that do not memorialize opinions, recommendations, or deliberations. *See Hall*, 2014 WL 1652791, at *10. Any broader reading of this language would render it dicta, unrelated to *Hughes*'s holding that the privilege protects communications with lobbyists and executive officials. *See* 68 F.4th at 235-37; *see also, e.g.*, *Gochicoa v. Johnson*, 238 F.3d 278, 287 n.11 (5th Cir. 2000) (defining dicta as statements that "could have been deleted without seriously impairing the analytical foundations of the holding").

legislation or the legislative process to require protection. *See* Legis. Docs. Order 7. So, too, are draft public statements and media strategy documents insufficiently legislative in nature; rather, they inform those outside the legislative process, even broadly defined per *Hughes*. *See Texas v. Holder*, No. 12-cv-128, 2012 WL 13070060, at *3 (D.D.C. June 5, 2012) (three-judge court); *see also Hughes*, 68 F.4th at 237 (describing third parties brought "*into* the process"). Accordingly, the Legislators cannot claim the legislative privilege over pre-redistricting, post-enactment, administrative, or press-related documents. *See* Legis. Docs. Order 6-7; Suppl. Open. Br. 8-9; Revised Index 54-76.[7]

D. The Legislative Privilege Must Yield in This Extraordinary Civil Case.

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Finally, the legislative privilege must still yield with respect to documents concerning the Congressional plan. *Hughes* limited instances in which the privilege must yield, while still recognizing that federal interests must predominate in "criminal as well as 'extraordinary' civil cases." 68 F.4th at 237-38 (citation omitted); *see also id.* at 237 (recognizing that protections created by the Speech or Debate Clause "yield[] to fewer exceptions than the state privilege"). Nonetheless, this Court's prior reasoning as to why the privilege should yield remains intact, even if *Hughes* did not endorse the *Rodriguez* framework often used to assess the weight of the

[7] *Hughes* mentions "potential legislation" as a topic of privileged communications between legislators and outsiders, 68 F.4th at 236, but does not expand the reach of the legislative privilege to all matters that could theoretically be subject to legislation. Rather than reading this language in conflict with *Hughes*'s later description that the privilege covers "legislators' actions in the proposal, formulation, and passage of legislation," *id.*, "potential legislation" is best understood to describe drafts or bills moving through the legislative process, between proposal and passage. *See* Potential, Black's Law Dictionary (11th ed. 2019) (defining "potential" as "[p]ossible if the necessary conditions exist"); Legislation, Black's Law Dictionary (11th ed. 2019) (defining "legislation" as "[t]he law so enacted"). And here, the Legislature has itself conceded that Census data was "needed" to devise any draft redistricting plan. Texas Redistricting Timeline. In any case, documents postdating enactment cannot concern *potential* legislation.

federal interests at stake. *See* Legis. Docs. Order 8-12 (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003)). Ultimately, the federal interests at issue here—an action by the United States against a state for intentional racial discrimination in statewide redistricting, centering on the motives of legislators, targeting recurrent Voting Rights Act violations in a recalcitrant jurisdiction, and safeguarding the legitimacy of electoral maps for federal elected officials—are at their zenith. *See* Suppl. Open. Br. 14-20. "[E]xtraordinary civil cases," *Hughes*, 68 F.4th at 238 (internal quotation marks and citation omitted), cannot be an empty category; if any civil case is extraordinary, it is this one. Thus, any claims of the legislative privilege over documents sought by the United States related to the Congressional plan must yield. *See* Legis. Docs. Order 8-12; Suppl. Open. Br. 14-20; Revised Index 77-83.[8]

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CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court substantially grant the United States' motion to enforce its legislative documents subpoenas: all documents the Court previously ordered produced should again be ordered produced, minus private third-party communications unrelated to the Congressional plan.

[8] Certainly, *Hughes* did not categorically rule that Voting Rights Act enforcement cannot constitute an "important federal interest[]" that may require comity towards state legislators to yield. *Gillock*, 445 U.S. at 373; *see also Hughes*, 68 F.4th at 232 (merely noting that private plaintiffs seeking the documents at issue brought claims under the Constitution and the Voting Rights Act); *id.* at 239 (declining to impose a categorical rule that allegations of racially discriminatory intent require the privilege to yield).

Date: August 10, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on August 10, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and caused to be served by email a copy of this filing to counsel of record.

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