

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)

**UNITED STATES' RESPONSE TO STATE DEFENDANTS' AND
LEGISLATORS' NOTICE OF SUPPLEMENTAL AUTHORITY**

State Defendants and Texas Legislators suggest that this Court follow the Eleventh Circuit's divided opinion in *Pernell v. Florida Board of Governors of the State University*, No. 23-10616, 2023 WL 7125049 (11th Cir. Oct. 30, 2023), *see* Notice of Supp. Auth., ECF No. 737, but they fail to alert the Court that *Pernell* conflicts with binding Fifth Circuit authority.

Within the Fifth Circuit, the legislative privilege may be overcome "in criminal as well as 'extraordinary' civil cases." *La Unión del Pueblo Entero v. Abbott (Hughes)*, 68 F.4th 228, 238 (5th Cir. 2023) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)); *accord In re N.D. Legis. Assembly*, 70 F.4th 460, 464-65 (8th Cir. 2023); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88-89 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018). By contrast, the Eleventh Circuit appears to have rendered the privilege absolute in civil cases "absent the Supreme Court's imprimatur." *Pernell*, 2023 WL 7125049, at *4 (rejecting both categorical and balancing-test approaches to identifying civil matters where the privilege may be overcome). *But see United States v. Gillock*, 445 U.S. 460,

361 (1980) (holding that the privilege must yield “[w]here important federal interests are at stake, *as in* the enforcement of federal criminal statutes” (emphasis added)); *In re Hubbard*, 803 F.3d 1298, 1311-13 (11th Cir. 2015); *Pernell*, 2023 WL 7125049, at *9-16 (J. Pryor, J., dissenting).

Moreover, the Fifth Circuit has limited the scope of the privilege to specific documents, such as those produced or obtained in the period between “the proposal, formulation, and passage of legislation.” *Hughes*, 67 F.4th at 236; *see also, e.g., Hall v. Louisiana*, No. 12-cv-657, 2014 WL 1652791, at *10 (M.D. La. Apr. 23, 2014) (limiting the privilege to “opinions, motives, recommendations[,] or advice about legislative decisions”). The Fifth Circuit has also recognized that the privilege may be waived by public disclosure. *See Hughes*, 68 F.4th at 236-37. By contrast, it appears that the Eleventh Circuit has defined the scope of the privilege based on “the *purpose* of a subpoena, not what the subpoena seeks,” giving the privilege an unbounded temporal scope and eliminating the possibility of waiver. *Pernell*, 2023 WL 7125049, at *3. *But cf. Wolfle v. United States*, 291 U.S. 7, 14-16 (1934) (rooting common law privileges in the nature of underlying communications rather than the purpose for which they are sought).

This Court should not follow the Eleventh Circuit’s aberrant path and—for the reasons articulated in earlier briefing—should grant the pending motions to enforce document subpoenas and motions to unseal deposition testimony.

Date: November 9, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on November 9, 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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