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

| | |
|---|---|
| LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC), et al.,<br><br>Plaintiffs,<br><br>v.<br><br>GREG ABBOTT, et al.,<br><br>Defendants. | Civil Action No. 3:21-cv-259 (DCG-JES-JVB) (consolidated cases) |

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

*LULAC Texas v. Hughes*, 68 F.4th 228 (5th Cir. 2023), changed the law on the legislative privilege in this circuit. But it did not bar discovery of all legislative documents relevant to the United States' Voting Rights Act claims. The discovery disputes at issue here turn on how to read the case. *Hughes* stands for what it holds, not more. *See McClure v. First Nat'l Bank of Lubbock*, 497 F.2d 490, 492 (5th Cir. 1974) (explaining that only "the holding" of an opinion is binding, "not . . . the language of the opinion"). So the United States does not seek legislative documents that reveal the Legislators' "subjective thoughts" or "mental impressions," nor those shared with third parties as part of "legitimate legislative activity," unless privilege claims over those documents have been waived or must yield. *Hughes*, 68 F.4th at 235-36, 240; *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"). Yet the Legislators seize *Hughes*'s dicta and stretch it to the horizon. In their response, they repeat five times a stray mention in *Hughes* that the privilege covers "all aspects of the legislative process." Legis. 2d Suppl. Resp. Br. 2, 7, 8 & 10, ECF No. 731 (citing *Hughes*, 68 F.4th at 235). Anchored in this line, they argue that the privilege extends to factual information, pre-redistricting documents, and post-enactment documents, if not more. *See id.* at 7-8. Putting aside that this language in *Hughes* quotes a now-vacated opinion, *see infra*, Part I, it is mere dictum, *see Gochicoa v. Johnson*, 238 F.3d 278, 286 n.11 (5th Cir. 2000) (defining dicta as statements that "could have been deleted without seriously impairing the analytical foundations of the holding"). But "[d]ictum is not law" and does not bind this Court. *Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019) (citation omitted). This Court should apply *Hughes*'s holdings—not its dicta—and grant the United States' motion to enforce its legislative documents subpoenas per the proposed order. *See* Proposed Order, ECF No. 722-1.

## I. *Harkins*'s En Banc Reconsideration Does Not Counsel Denial or Delay.

The Legislators note that the Fifth Circuit is rehearing *Jackson Municipal Airport Authority v. Harkins* en banc. Legis. 2d Suppl. Resp. Br. 1. Indeed, after the legislators in that case sought rehearing, the *Harkins* panel revised the standing analysis—but not the legislative privilege analysis—in the original opinion late last month. *Compare Jackson Mun. Airport Auth. v. Harkins* ("*Harkins I*"), 67 F.4th 678, 684-86 (5th Cir. 2023), *with Jackson Mun. Airport Auth. v. Harkins* ("*Harkins II*"), No. 21-60312, 2023 WL 5522213, at *3-4 (5th Cir. Aug. 25, 2023). Days later, the Fifth Circuit vacated the revised opinion and ordered en banc proceedings. *See Jackson Mun. Airport Auth. v. Harkins*, No. 21-60312, 2023 WL 5542823 (5th Cir. Aug. 29, 2023). According to the Legislators, "these developments further support denying all pending motions." Legis. 2d Suppl. Resp. Br. 1.

Not so. *Harkins* only concerns whether the Fifth Circuit has appellate jurisdiction, the plaintiffs have standing, legislators must produce a privilege log reflecting documents over which they claim the legislative privilege, and legislators waive the privilege over documents shared with any third parties. *See Harkins I*, 67 F.4th at 683-87; *Harkins II*, 2023 WL 5542823, at *2-5. The jurisdictional issues are irrelevant here. The privilege log issue is moot in this case, as the Legislators have already produced logs. *See, e.g.*, Updated Priv. Logs, ECF No. 351-4. And *Hughes*, which remains binding, reiterates and elaborates on *Harkins*'s waiver holding. *See* 68 F.4th at 236-37. Nothing about these developments supports denying the pending discovery motions. Neither should this Court wait for the Fifth Circuit to reconsider issues that are unlikely to bear on the pending motions.

## II. *Hughes* Did Not Overrule All Prior Precedent on the Legislative Privilege.

The Legislators seem to believe that *Hughes* wiped out all prior case law on the

legislative privilege. *See* Legis. 2d Suppl. Resp. Br. 3 (diminishing the import of *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government*, 849 F.3d 615 (5th Cir. 2017)); *see also* Legis. 1st Suppl. Resp. Br. 5, 8, ECF No. 721 (same). But *Hughes* did not—indeed, could not—overrule earlier Fifth Circuit opinions. *See United States v. Traxler*, 764 F.3d 486, 489 (5th Cir. 2014) (explaining the prior precedent rule). So *Jefferson* remains binding. And where *Hughes* did not hold otherwise, previous opinions on the privilege from district courts in this circuit are still highly persuasive.

In trying to minimize *Jefferson*, the Legislators underscore how untethered their position is from *Hughes*'s text, much more its precise holdings. They claim that the United States "simply ignores" *Hughes*'s remark that *Jefferson* "provides no support for the idea that state legislators can be compelled to produce documents concerning the legislative process *and* a legislator's subjective thoughts and motives." Legis. 2d Suppl. Resp. Br. 3 (quoting *Hughes*, 68 F.4th at 240). But *Hughes*'s use of the conjunctive "and"—which the Legislators emphasize—cuts against their view. That line suggests that the legislative privilege protects only documents that *both* concern the legislative process *and* contain the mental impressions of legislators, not documents that *either* concern process *or* contain impressions. Yet the Legislators elide the conjunction and argue that anything related to the legislative process is privileged. *See id.* at 2, 3, 5, & 7-10. Albeit dicta, *Hughes*'s text belies the breadth of their position.[1]

## III. Factual Information and Documents Unrelated to the Substance of Legislation Are Outside the Scope of the Legislative Privilege.

[1] Notably, the Legislators do not provide any parameters on what documents should be shielded as "concerning the legislative process." *Hughes*, 68 F.4th at 240. Instead, they imply that the inquiry is one of relevance. *See* Legis. 2d Suppl. Resp. Br. 3. But that would wrongly make the protections of the state legislative privilege broader than those of the federal Speech or Debate Clause. *See, e.g., Davis v. Passman*, 544 F.2d 865, 877-81 (5th Cir. 1977) ("Peripheral or tangential activities of a representative must not be confused with the legislative core.").

The United States has explained why the legislative privilege does not apply to factual information or documents unrelated to the substance of legislation. *See* U.S. 1st Suppl. Open. Br. 5-9, ECF No. 708; U.S. 2nd Suppl. Open Br. 7-9, ECF No. 722; U.S. 1st Suppl. Reply Br. 3-5, ECF No. 727. In response, the Legislators primarily rely on dictum in *Hughes* that the privilege "covers all aspects of the legislative process," which they argue means it must extend to factual information and pre-redistricting, post-enactment, press-related, and administrative documents. Legis. 2d Suppl. Resp. Br. 7-8 (quoting *Hughes*, 68 F.4th at 235). But as discussed, such dictum is not binding. *See Morrow*, 917 F.3d at 875.[2] And the Legislators' reliance on this line overlooks that it served only to provide a rationale for shielding communications involving "persons outside the [L]egislature," not a blank check for withholding all legislative documents regardless of character or chronology. *Hughes*, 68 F.4th at 235-36. Notably, the Legislators provide no limiting principle on their view, which would read that passing remark as a basis for shielding all nonpublic documents in a legislator's possession.[3] That cannot be.[4]

---

[2] *Hughes* noted that the "district court properly concluded that the documents at issue 'are subject to legislative privilege'" and instead focused its analysis on whether the privilege "'was waived' or 'must yield.'" 68 F.4th at 236. Thus, the Fifth Circuit did not address the district court's determination that factual information is not subject to the privilege. *See La Unión del Pueblo Entero v. Abbott*, 21-cv-844, 2022 WL 1667687, at *2 (W.D. Tex. May 25, 2022). Per *Hughes*, such materials were not "at issue." 68 F.4th at 236. So the Legislators' attempt to convert dicta into holding using the principle of *ratio decidendi* is unavailing. *See* Legis. 2d Suppl. Resp. Br. 7.

[3] The Legislators also turn a blind eye to other language in *Hughes* that rebuts their position. They claim that "*Hughes* did not draw such an arbitrary cutoff in the legislative timeline." Legis. 2d Suppl. Resp. Br. 8. But it did. *See Hughes*, 67 F.4th at 236 (limiting the legislative privilege to the period between "the proposal, formulation, and passage of legislation").

[4] As to factual information, the Legislators' cited cases are unconvincing. First, they are all decisions of district courts outside this circuit. *See* Legis. 2d Suppl. Resp. Br. 7 (citing cases). Second, the Legislators do not grapple with longstanding in-circuit and other precedent holding otherwise. *See, e.g.*, *Hall*, 2014 WL 1652791, at *10 ("With respect to facts or information that were made available to lawmakers at the time of their decision, the Court concludes that these materials are not shielded."); *see also* U.S. 1st Suppl. Reply Br. 3-4 n.1 (collecting cases). Third,

## IV. The Legislative Privilege Must Yield Over Congressional Documents.

*Hughes* indicated that the legislative privilege should yield in "'extraordinary' civil cases." 68 F.4th at 237-38 (citation omitted). But the Legislators effectively render that an empty category. *See* Legis. 2d Suppl. Resp. Br. 3 (focusing on "federal criminal prosecution"). Though many unique facets of this case render it extraordinary, *see* U.S. 1st Suppl. Open. Br. 14-20; U.S. 2d Suppl. Open. Br. 9-10; U.S. 1st Suppl. Reply Br. 8-10, the Legislators claim it is not. To get there, they individually parse and contest each element that makes this case exceptional. *See* Legis. 2d Suppl. Resp. Br. 3-5 (conflating decennial statewide redistricting litigation with more commonplace election administration litigation, different claims arising under different laws, and cases brought by the United States versus private plaintiffs).[5] In so doing though, they fail to grapple with the *cumulative* federal interests at play here, which should make the legislative privilege yield over documents related to Congressional redistricting. If this case is not extraordinary, no civil case could ever be under the Legislators' logic. But that does not accord with *Hughes*'s text. *See Hughes*, 68 F.4th at 237-38.[6]

The United States requests that the Court grant its legislative documents motion per the proposed order. *See* Proposed Order.

---

some of the Legislators' cited cases do not even mention—much less discuss—factual information. *See, e.g.*, *Common Cause Fla. v. Byrd*, No. 22-cv-109, 2023 WL 3676796, at *2 (N.D. Fla. May 25, 2023).

[5] The Legislators aver that the United States argued in *Hughes* that private suits are on "equal footing" as the Attorney General's enforcement of the Voting Rights Act. *See id.* at 4. Not so. The United States explained there that private enforcement advances the public interest, *see* U.S. Br. 29 n.10, 44-45, *LULAC Texas v. Hughes*, No. 22-50435 (5th Cir. Jul. 18, 2022), ECF No. 47, but only the Attorney General enforces the Voting Rights Act on behalf of the United States.

[6] The Legislators do not dispute that *Hughes* has no impact on the attorney-client privilege, work-product protection, or deliberative-process privilege. *See generally* Legis. 2d Suppl. Resp. Br. So this Court should again reject those claims under its prior reasoning. *See* Legis. Docs. Order 12-29, ECF No. 467; *In-Camera* Review Order 2, ECF No. 642.

Date: September 14, 2023

KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

*/s/ Jaywin Singh Malhi*
T. CHRISTIAN HERREN, JR.
TIMOTHY F. MELLETT
DANIEL J. FREEMAN
MICHELLE RUPP
JACKI L. ANDERSON
HOLLY F.B. BERLIN
JAYWIN SINGH MALHI
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(800) 253-3931
jaywin.malhi@usdoj.gov

**CERTIFICATE OF SERVICE**

I hereby certify that, on September 14, 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.

*/s/ Jaywin Singh Malhi*
Jaywin Singh Malhi
Attorney, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530
(800) 253-3931
jaywin.malhi@usdoj.gov