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.*,

Movants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

APPELLEE UNITED STATES' OPPOSITION TO MOTION FOR A STAY PENDING APPEAL

JOHNATHAN J. SMITH
Acting Principal Deputy Assistant
Attorney General

BONNIE I. ROBIN-VERGEER
KATHERINE E. LAMM
DANIEL J. FREEMAN
MICHAEL STEWART
Attorneys
Department of Justice
Civil Rights Division
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2810

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INTRODUCTION

The Lieutenant Governor and 13 Texas State legislators and staff (collectively, the "Legislators") seek an emergency stay of an order enforcing third-party subpoenas over legislative privilege objections, pending this Court's decision in *LULAC Texas* v. *Hughes*, No. 22-50435 (5th Cir. oral argument scheduled for Aug. 2, 2022). Mot. 1-2.[1] On July 25, a three-judge court declined to hold the United States' enforcement motion in abeyance pending this Court's resolution of *Hughes*, and ordered the Legislators to produce documents within seven days. Doc. 467.

This Court should deny the extraordinary relief the Legislators seek. A stay presents a serious threat to preparation for the August 5 dispositive motion deadline and September 28 trial in this case. Such disruption is unwarranted because the Legislators cannot satisfy the four-factor standard for granting a stay pending appeal. *Nken* v. *Holder*, 556 U.S. 418 (2009). The Legislators are unlikely to succeed on the merits both because this Court lacks jurisdiction over their interlocutory appeal and because the district court correctly analyzed and applied Supreme Court and Circuit precedent on the qualified nature and limited

[1] "Mot. _" refers to the Legislators' Motion To Stay Pending Appeal; "Doc. _, at _" refers to the docket entry number and relevant pages of the filings in *LULAC* v. *Abbott*, No. 3:21-cv-00259 (W.D. Tex.).

scope of legislative privilege. A stay, however, would harm federal interests by blocking key discovery and all but ensuring that nonprivileged documents will not be available for summary judgment briefing and trial. Moreover, this will frustrate the important public interest in enforcement of the Voting Rights Act.

The Legislators insist unpersuasively that the pending appeal in *Hughes* requires a stay here. The mere fact that an appeal is pending in *Hughes* does not mean that case was wrongly decided or call into question authorities on which the three-judge court below relied, including *United States* v. *Gillock*, 445 U.S. 360 (1980), and *Jefferson Community Health Care Centers, Inc.* v. *Jefferson Parish Government*, 849 F.3d 615 (5th Cir. 2017). To the contrary, a motions panel of this Court recently reaffirmed those authorities when it declined to stay that same court's order denying a motion to quash deposition subpoenas to Texas legislators. See *LULAC* v. *Guillen*, No. 22-50407, 2022 WL 2713263 (5th Cir. May 20, 2022).

FACTS AND PROCEDURAL HISTORY

The United States filed a complaint alleging that the State of Texas violated Section 2 of the Voting Rights Act, 52 U.S.C. 10301, based on discriminatory intent and results regarding the 2021 Congressional Redistricting Plan, and based on discriminatory results regarding the 2021 State House Redistricting Plan. See generally U.S. Am. Compl., Doc. 318. The United States' action was consolidated

with other cases brought by private plaintiffs before a three-judge court, *LULAC* v. *Abbott*, No. 3:21-cv-00259 (W.D. Tex.). Doc. 83.

In February and March of this year, the United States served document subpoenas on 23 legislators and legislative staff members, seeking documents including redistricting proposals, communications, and data used during redistricting. Doc. 467, at 2. The Legislators withheld nearly 2000 responsive documents as privileged. Doc. 467, at 2. On June 17, 2022, after failed negotiations, the United States filed a motion to enforce the subpoenas (Doc. 351), and the Legislators opposed or requested in the alternative that the district court hold the motion in abeyance pending resolution of *LULAC Texas* v. *Hughes*, No. 22-50435 (5th Cir.). Doc. 379.

The district court declined to hold the motion in abeyance and granted the motion to enforce. Doc. 467. In refusing to hold the motion in abeyance, the court rejected the Legislators' argument that the legislative privilege questions presented were unsettled and found that the unopposed stay in *Hughes* "does not suggest a 'strong showing' that reversal is likely." Doc. 467, at 6 (citation omitted). On the merits, the court recognized that "[w]hile common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified." Doc. 467, at 4 (quoting *Jefferson Community Health Care Centers, Inc.* v. *Jefferson Parish Government*, 849 F.3d 615, 624 (5th Cir. 2017)).

The court concluded the privilege protects legislative independence and 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," but not "factually based information" such as "committee reports and minutes of meetings, or the materials and information available to lawmakers at the time a decision was made." Doc. 467, at 5 (internal quotation marks omitted) (quoting *Jackson Mun. Airport Auth.* v. *Bryant*, No. 3:16-cv-246, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017) and *La Unión del Pueblo Entero* v. *Abbott (LUPE)*, No. 5:21-cv-844, 2022 WL 1667687, at *2 (W.D. Tex. May 25, 2022), appeal pending *sub nom. LULAC Texas* v. *Hughes*, No. 22-50435 (5th Cir.)).

The district court held that documents created after enactment of redistricting legislation and administrative documents such as schedules, calendar entries, retainer agreements, engagement letters, and employment communications were not related to "integral steps in the legislative process" or "sufficiently tied to the substance of legislation to fall within the privilege." Doc. 467, at 6-7 (citing *Bethune-Hill* v. *Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 243 (E.D. Va. 2015)). The court also found that the privilege did not apply to factual information used in the decision-making process or disseminated to legislators or committees. Doc. 467, at 7. And because the legislative privilege "focuses on candor in internal

exchanges," the court held that the Legislators "cannot cloak conversations with executive-branch officials, lobbyists, and other interested outsiders in their privilege." Doc. 467, at 8 (quoting *United States* v. *Gillock*, 445 U.S. 360, 373 (1980) and citing *Perez* v. *Perry*, No. 5:11-cv-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge court)).

With respect to documents within the scope of the privilege, the district court used the five-factor balancing test from *Rodriguez* v. *Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y.), aff'd, 293 F.Supp.2d 302 (S.D.N.Y. 2003), to determine whether the qualified privilege was overcome, and held that these factors favored disclosure of documents related to the United States' discriminatory intent claim. Doc. 467, at 9-12.

The Legislators appealed and moved this Court for a stay pending this Court's resolution of *Hughes* and alternatively requested an administrative stay. Yesterday, this Court granted a temporary administrative stay.

ARGUMENT

THE COURT SHOULD DENY THE LEGISLATORS' MOTION FOR A STAY PENDING A RULING IN *HUGHES*

This Court should deny the Legislators' motion for a stay. In assessing whether to grant a stay, this Court considers whether the movants have established four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably

injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Freedom from Religion Found., Inc.* v. *Mack*, 4 F.4th 306, 311 (5th Cir. 2021) (quoting *Nken* v. *Holder*, 556 U.S. 418, 426 (2009)). The first two factors "are the most critical." *Nken*, 556 U.S. at 434. The last two factors "merge when the [federal] Government is the opposing party." *Id.* at 435.[2]

A. The Legislators Are Unlikely To Succeed On The Merits

1. This Court Lacks Jurisdiction Over The Legislators' Interlocutory Appeal

As the United States has articulated more fully in *Hughes*, the Court lacks jurisdiction to review the district court's interlocutory order granting the United States' motion to enforce the document subpoenas. Under 28 U.S.C. 1291, this Court has jurisdiction to review "final decisions of the district court[]," including "ones that trigger the entry of judgment" and "a small set of prejudgment orders

[2] Perhaps recognizing that they cannot make a "strong showing" that they are likely to succeed on the merits, the Legislators invoke an alternative standard requiring only a "substantial case on the merits" in cases "[w]here there is a serious legal question involved and the balance of equities heavily favors a stay," *Weingarten Realty Invs.* v. *Miller*, 661 F.3d 904, 910 (5th Cir 2011)). See Mot. 10, 16. A panel of this Court recently declined to apply that standard to legislative privilege objections to legislators' depositions in this action. See *LULAC* v. *Guillen*, No. 22-50407, 2022 WL 2713263, at *1 (5th Cir. May 20, 2022). Moreover, the Legislators have not shown that the *questions* presented regarding the nature and scope of the legislative privilege are serious or unsettled. Nor do the equities "heavily" favor a stay.

that are 'collateral to' the merits of an action and 'too important' to be denied immediate review," *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 103 (2009). The collateral-order doctrine permits review of an order that "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment." *A-Mark Auction Galleries, Inc.* v. *American Numismatic Ass'n*, 233 F.3d 895, 898 (5th Cir. 2000). It is a "well-settled rule" that the collateral-review doctrine generally does not allow for review of "discovery orders." *Id.* at 899; see, *e.g.*, *Texaco Inc.* v. *Louisiana Land & Expl. Co.*, 995 F.2d 43, 44 (5th Cir. 1993).

Mohawk validates this Court's rejection of most immediate appeals of discovery orders. "[T]he decisive consideration" in determining whether a "class of claims" is reviewable under the collateral-order doctrine "is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" 558 U.S. at 107 (quoting *Will* v. *Hallock*, 546 U.S. 345, 352-353 (2006)). Applying that standard, the Supreme Court held that the "limited benefits" of allowing collateral review of adverse rulings on attorney-client privilege "simply cannot justify the likely institutional costs." *Mohawk*, 558 U.S. at 112. Litigants can seek a certified appeal under 28

U.S.C. 1292(b), petition the court of appeals for a writ of mandamus, or incur contempt, which is immediately appealable. *Id.* at 110-111.

Mohawk's reasoning bars collateral review of the district court's rejection of the Legislators' assertions of legislative privilege. See, *e.g.*, *Guillen*, 2022 WL 2713263, at *1 n.1 (noting Judge Willett's concurrence in denying stay of discovery order on legislative privilege "because he is unconvinced that we have jurisdiction under the collateral order doctrine" (citing *Mohawk*, 558 U.S. at 108)). The state legislative privilege is a common law evidentiary privilege. *Jefferson Community Health Care Centers, Inc.* v. *Jefferson Parish Government*, 849 F.3d 615, 624 (5th Cir. 2017). It lacks constitutional footing; as the Supreme Court has recognized, "the separation of powers doctrine[] gives no support to the grant of a privilege to state legislators." *Gillock*, 445 U.S. at 370. The privilege therefore does not vindicate "some particular value of a high order" that would justify collateral-order review. *Mohawk*, 558 U.S. at 107 (quoting *Will*, 546 U.S. at 352). And, importantly, there is little risk to the public interest even if legislators are faced with "a particularly injurious or novel privilege ruling" because they can avail themselves of the options identified in *Mohawk*, 558 U.S. at 110.

Thus, other courts of appeals have held that adverse legislative privilege rulings are not reviewable under the collateral-order doctrine. See *American Trucking Ass'ns, Inc.* v. *Alviti*, 14 F.4th 76, 84 (1st Cir. 2021); *Corporación*

Insular de Seguros v. *Garcia*, 876 F.2d 254, 256-258 (1st Cir. 1989); *Powell* v. *Ridge*, 247 F.3d 520, 526-527 (3d Cir.), cert. denied, 534 U.S. 823 (2001). Decisions holding otherwise (including a line of pre-*Mohawk* cases in this circuit) did not apply *Mohawk*'s reasoning and thus are not persuasive. See, *e.g.*, *In re Hubbard*, 803 F.3d 1298, 1306-1307 (11th Cir. 2015) (declining to apply *Mohawk*); *Branch* v. *Phillips Petrol. Co.*, 638 F.2d 873, 878-879 (5th Cir. 1981).[3]

The Legislators cite this Court's decision in *Whole Woman's Health* v. *Smith*, 896 F.3d 362 (5th Cir. 2018), cert. denied, 139 S. Ct. 1170 (2019) (*WWH*), for the proposition that orders enforcing third-party subpoenas are reviewable under the collateral order doctrine. Mot. 8. But *WWH* involved a "practically *sui generis*" discovery order requiring a religious group to disclose its communications over assertions of a First Amendment privilege. *WWH*, 896 F.3d at 368. *WWH* did not hold that "third-party status alone * * * suffice[s] to invoke the collateral order doctrine." *Vantage Health Plan, Inc.* v. *Willis-Knighton Med. Ctr.*, 913 F.3d 443, 450 n.2 (5th Cir. 2019). In any event, the Legislators are hardly strangers to

[3] In *Alviti*, the court exercised mandamus jurisdiction to review an assertion of legislative privilege. 14 F.4th at 84-85. While the Legislators suggest in passing that this Court may construe this appeal as a petition for writ of mandamus (Mot. 9), they fail to demonstrate that the "drastic and extraordinary" remedy of mandamus relief is warranted here. See *Cheney* v. *United States Dist. Ct. for D.C.*, 542 U.S. 367, 380-381 (2004) (quotation omitted). Among other things, the Legislators cannot establish a "clear abuse[] of discretion that produce[d] patently erroneous results," *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017) (citation omitted). See Part A.2, *infra*.

this litigation whose interests might be overlooked. They are officers of the State of Texas, and they are represented by the Texas Attorney General, who also represents the State and the state officials who are named defendants.

Indeed, this case demonstrates the rationale behind *Mohawk*'s restriction of the collateral-order doctrine and the harms *Mohawk* aims to prevent. Fact discovery in this matter formally closed on July 15. Dispositive motions are due August 5 and trial opens on September 28. This is the second interlocutory appeal in this case regarding legislative privilege, see *LULAC* v. *Guillen*, No. 22-50407 (5th Cir.), and the second motion to stay district court orders requiring discovery from legislators pending appeal, see *Guillen*, 2022 WL 2713263, at *1-2. The instant motion is based primarily on the pendency of an interlocutory appeal of yet another legislative privilege decision adverse to the Legislators, in different litigation on a longer schedule. See Mot. 11-15 (relying on *Hughes*). Several of the Legislators' arguments here rehash those already rejected by this Court when it denied the stay motion in *Guillen*—including arguments that the legislative privilege is absolute and that *Jefferson Community Health Care Centers* is not binding. Mot. 12-13, 16-18. There can be no question that permitting an interlocutory appeal here under the collateral-order doctrine would deviate from the principle of finality and further disrupt litigation that serves the public interest.

2. The District Court Properly Applied the Legislative Privilege

a. This Court Has Made Clear—And Courts Within This Circuit Have Repeatedly Confirmed—That Legislative Privilege Is Qualified

As discussed more fully in the United States' brief in *Hughes*, the Legislators' construction of the legislative privilege as effectively absolute in civil litigation stems from their conflation of that privilege with two "distinct" legal concepts: (1) the legislative privilege available to Members of Congress through the U.S. Constitution's Speech or Debate Clause; and (2) legislative immunity from suit available to both federal and state lawmakers. Mot. 1, 16. Both the Supreme Court and this Court have rejected the Legislators' preferred construction in favor of a narrow, qualified privilege. See *Gillock*, 445 U.S. at 373; *Jefferson*, 849 F.3d at 624; see also *Guillen*, 2022 WL 2713263, at *1. Neither the Speech or Debate Clause nor state legislative immunity is at issue here. Rather, the district court is enforcing third-party document subpoenas that implicate only *Gillock*'s qualified privilege, which must yield "where important federal interests are at stake." 445 U.S. at 373.

As *Gillock* explains, the state legislative privilege does not guard against "intrusion by the Executive or Judiciary into the affairs of a coequal branch," a concern that is grounded "solely on the separation of powers doctrine." 445 U.S. at 369-370. Moreover, "principles of comity" do not "require the extension of a

speech or debate type privilege to state legislators" because "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." *Id.* at 370, 373; *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976).

This Court likewise has recognized that state legislative privilege provides only a qualified protection from disclosure in civil litigation. In *Jefferson*, this Court held that "[w]hile the common-law legislative *immunity* for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified." 849 F.3d at 624 (emphasis added) (citation omitted); accord *Guillen*, 2022 WL 2713263, at *1. Moreover, this Court emphasized that the 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." *Jefferson*, 849 F.3d at 624 (quoting *Perez*, 2014 WL 106927, at *1).[4]

The Legislators also unpersuasively argue that three out-of-circuit cases have recognized an absolute state legislative privilege from civil discovery on par

[4] The Legislators characterize the relevant language in *Jefferson* as "dicta." Mot. 12-13. It is not. As the district court correctly recognized, "[a]lternative holdings are not dicta and are binding in this circuit." Doc. 467, at 6 (quoting *Jaco* v. *Garland*, 24 F.4th 395, 406 n.5 (5th Cir. 2021).

with the Speech or Debate Clause's testimonial privilege. Mot. 16-17. But in each case, the court acknowledged that the privilege must yield in some cases. *See Alviti*, 14 F.4th at 90; *In re Hubbard*, 803 F.3d at 1311; *Lee* v. *City of L.A.*, 908 F.3d 1175, 1187 (9th Cir. 2018), cert. denied, 139 S. Ct. 2669 (2019).[5]

In sum, the Legislators' far-reaching claim that the legislative privilege is absolute in private civil litigation contravenes all precedent.

b. The District Court Properly Applied The Limited Scope Of The Legislative Privilege

The district court rightly held that the state legislative privilege is far narrower than the Legislators claim. Specifically, the court correctly construed the privilege's scope to exclude (1) documents not "integral to the legislative process," such as those created after the enactment of redistricting legislation, administrative documents, and "factually based information used in the decision-making process or disseminated to legislators or committees"; and (2) legislators' communications with "third parties." Doc. 467, at 6-8 (citation omitted). That construction flows from *Gillock*, which recognized that the statelegislative privilege—which lacks the

[5] *Lee* affirmed a summary judgment grant in a redistricting case where the summary-judgment record demonstrated that although race predominantly motivated one lawmaker, other lawmakers did not share his motivation, rendering further probing of legislative intent unnecessary. 908 F.3d at 1183-1186. *Lee* is inapposite to a challenge to pretrial discovery.

separation-of-powers grounding underlying the Speech or Debate Clause—protects "candor in the internal exchanges" of the legislature. 445 U.S. at 373.

As an initial matter, the district court correctly determined that the state legislative privilege does not apply to documents created after enactment of the challenged redistricting legislation or to factual information. Doc. 467, at 7. Discovery of factual information or information that post-dates enactment of the legislation generally does not jeopardize "candor" in legislative deliberations. *Gillock*, 445 U.S. at 373. That is because "the prospect of disclosure is less likely to make an advisor [or legislator] omit or fudge raw facts, while it is quite likely to have just such an effect on 'materials reflecting deliberative or policy-making processes.'" *Quarles* v. *Department of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting *EPA* v. *Mink*, 410 U.S. 73, 89 (1973)). For that reason, the qualified privilege typically does not extend to factually based information, such as committee reports and minutes of meetings, used in the decision-making process or disseminated to legislators or committees. *E.g.*, *Committee for a Fair & Balanced Map* v. *Illinois State Bd. of Elections*, No. 11-cv-5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011). "This approach strikes the proper balance between the need for public accountability and the desire to avoid future timidity of lawmakers." *Id.* at *10.

The district court faithfully applied these principles when it found that the state legislative privilege did not permit withholding documents created after the enactment of Texas's redistricting legislation, administrative documents not "sufficiently tied to the substance of legislation," and documents described as containing "factually based information" used by or disseminated to legislators. Doc. 467, at 6-7 (citation omitted).

The district court also correctly determined that the Legislators' communications with non-legislative third parties are outside the scope of the state legislative privilege in this case. Doc. 467, at 8. That is because such communications generally do not qualify as the legislature's "internal exchanges." *Gillock*, 445 U.S. at 373. The legislative privilege gives legislators a qualified entitlement "not to divulge their reasons for supporting or opposing legislation, and not to discuss such matters with outsiders." *Almonte* v. *City of Long Beach*, No. cv 04-4192, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005). But the privilege does not allow legislators "to discuss those matters with some outsiders but then later invoke the privilege as to others." *Ibid.* Numerous courts in this Circuit (and elsewhere) have explained that the state legislative privilege does not apply to communications with outsiders such as "party representatives, non-legislators, or non-legislative staff." *E.g.*, *Perez*, 2014 WL 106927, at *2; *accord Bethune-Hill* v. *Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015); *Texas* v.

Holder, No. 12-128, 2012 WL 13070060, at *2 (D.D.C. June 5, 2012) (three-judge court); *Bryant*, 2017 WL 6520967, at *7. Thus, this district court, like other courts in this Circuit, limited the privilege to exclude external communications. Doc. 467, at 8.

The Legislators suggest disclosure of communications with third parties would chill external communications and create an incentive to "operate in an insular fashion." Mot. 19. But, the legislative privilege, unlike the attorney-client privilege "protects a *process*," not confidentiality for its own sake. *Favors* v. *Cuomo*, 285 F.R.D. 187, 210 (E.D.N.Y. 2012). Because legislative outsiders are "always free to disclose every aspect of the[ir] encounter[s] * * * it is hard to contend that there is any reasonable expectation of secrecy * * * or serious threat of timidity for fear that the conversation be discovered." *North Carolina State Conf. of the NAACP* v. *McCrory*, Nos. 1:13-cv-658, 2015 WL 12683665, at *8 (M.D.N.C. Feb. 4, 2015).

Accordingly, the district court's rulings on the state legislative privilege's scope were correct.

3. The District Court Properly Found That Legislative Privilege Must Yield

The district court correctly concluded that otherwise-valid assertions of legislative privilege must yield with respect to documents concerning the Congressional plan. Doc. 467, at 8-12. The court faithfully applied the well-

established five-factor balancing test adopted in *Rodriguez* v. *Pataki*, 280 F. Supp. 2d 89, 100-101 (S.D.N.Y. 2003), to determine when the legislative privilege is overcome, and concluded that "the overall balance of factors weighs in favor of disclosure." Doc. 467, at 9-12. The *Rodriguez* factors weigh: (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.[6] The district court found that the first four weighed in favor of disclosure, the third and fourth factors "strongly" so. Doc. 467, at 9-12. The court was well within its discretion to conclude this showing "outweighs any chill to the legislature's deliberations." Doc. 467, at 12 (citation omitted).

The Legislators do not challenge the district court's weighing of these factors or suggest that the court should have selected a different test. Mot. 19-20. Instead, they renew their argument that legislative privilege is essentially

[6] The *Rodriguez* factors are widely used by courts in this Circuit and elsewhere. See, *e.g.*, *Angelicare, LLC* v. *Saint Bernard Par.*, No. 17-7360, 2018 WL 1172947, at *8 (E.D. La. Mar. 6, 2018); *Bryant*, 2017 WL 6520967, at *6; *Harding* v. *County of Dall.*, No. 3:15-cv-0131, 2016 WL 7426127, at *12 (N.D. Tex. Dec. 23, 2016); *Hall* v. *Louisiana*, No. 12-657, 2014 WL 1652791, at *9 (M.D. La. Apr. 23, 2014); *Veasey* v. *Perry*, No. 2:13-cv-193, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014); *Perez*, 2014 WL 106927, at *2 (three-judge court).

unqualified, suggesting the balancing test "reduc[es] privilege to a nullity." Mot. 19. This complaint is unfounded. As discussed in the United States' brief in *Hughes*, the *Rodriguez* factors properly provide qualified protection to legislative deliberations above and beyond the general discovery limitations provided by the Federal Rules of Civil Procedure. For the reasons stated in Part I.A.1, *supra*, the qualified nature of the legislative privilege is not in doubt, and on this front the Legislators cannot show a likelihood of success—or even a substantial question—on the merits.

B. The Legislators Will Not Be Irreparably Injured Absent A Stay

The Legislators also fail to meet *Nken*'s second prong. They argue that the production of the documents will injure them because once that happens, "the cat is out of the bag." Mot. 2, 14 (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.)). But the thrust of the Legislators' motion is not complete relief from disclosure pending appeal but instead disclosure during the pendency of *Hughes*. *See* Mot. 2, 14-15. They fail to show why disclosure during the "weeks or months" *Hughes* is pending would constitute irreparable harm. Further, nothing about the fact that subpoena recipients took an appeal in *Hughes* calls into question this Court's holding in *Jefferson* that "the legislative privilege for state lawmakers is, at best, one which is qualified," 849 F.3d at 624, or makes their success on appeal more likely. Although *Hughes*

presents legal issues that overlap with those in this case, it is because the district courts in both cases correctly assessed similar issues. A stay in such circumstances is unwarranted, especially where the balance of equities favors the United States and civil rights enforcement.

C. The Legislators Do Not Meet Their Burden On The Final Two Stay Factors Because Delaying Production Will Harm The United States And The Public Interest

Because the Legislators cannot make a strong showing under the first two factors, the Court should deny the stay. *Nken*, 556 U.S. at 434. But if the Court considers the remaining factors, it will find that here, too, the Legislators fall short. This is especially so because here, as discussed below, the United States is party to this litigation and opposes the stay; thus, the public interest merges with the interest of the *federal* government. See *id.* at 435.

"[I]t would be inherently unfair to require [the United States] to continue to litigate this matter forward toward motion practice with an uncertainty surrounding whether [they] would ultimately have access to these records." *Tyree* v. *County of Summit*, No. 5:12cv2627, 2013 WL 1285887, at *2 (N.D. Ohio Mar. 26, 2013). Fundamentally, staying document production would "substantially injure" the United States' ability to obtain "timely resolution of [its] claims." *New York* v. *U.S. Dep't of Commerce*, 339 F. Supp. 3d 144, 150 (S.D.N.Y. 2018). Any delay in the challenged document production threatens the United States' ability to gather

the information necessary to meet the August 5 dispositive motion deadline and to prepare its case for a September 28 trial. A stay pending full resolution of *Hughes* could effectively deny any opportunity for the United States to review and use this important document discovery. "[T]he privilege must not be used as a cudgel to prevent the discovery of non-privileged information or to prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege." *Guillen*, 2022 WL 2713263, at *2.

For similar reasons, the Legislators' suggestion that the post-trial record could be supplemented with legislative document productions is unavailing. See Mot. 15. That the case schedule contemplates judicial notice of data from the November 2022 election, which necessarily post-dates a September trial, hardly supports their argument here. Such materials will not serve as the basis for motion practice and trial examinations. And the Legislators' argument ignores that the United States and other plaintiffs have brought discriminatory purpose claims for which the legislative documents are important evidence. Therefore, the United States and private plaintiffs would be significantly harmed by a stay.

Moreover, the United States seeks to enforce the Voting Rights Act's prohibition on racial discrimination in elections; thus, the federal government's interests merge with those of the public. The Fourteenth and Fifteenth Amendments guarantee citizens the right to vote free of discrimination on the basis

of race, a right "preservative of all rights." *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (citation omitted). "[C]ompliance with the Voting Rights Act so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy." *Rivera Madera* v. *Lee*, No. 1:18-cv-152, 2019 WL 2077037, at *2 (N.D. Fla. May 10, 2019) (citation omitted).

The Legislators ignore the public interest in Voting Rights Act enforcement and focus only on vague principles protected by the doctrine of legislative *immunity*, such as not making legislators "targets for their legislative actions." Mot. 14-15. But that doctrine is inapposite here. The Legislators are not defendants or "being targeted" in this action, and their desire to avoid scrutiny cannot outweigh the United States' compelling interest in enforcing the Voting Rights Act's prohibition on racial discrimination in voting.

Finally, delaying the currently scheduled trial would compromise the public interest in timely Voting Rights Act adjudication. Under the principle in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006)—that courts ordinarily should not enjoin a state's election laws close to an election—the 2022 elections will occur under Texas's current plans before their legality can be resolved. The district court expedited the schedule here both to afford the Texas Legislature an opportunity to enact a remedy for any violation found and to lessen the chance that this case (including

appellate review) will extend into candidate qualifying in late 2023, which would potentially risk a delay in any relief for the 2024 election cycle. The public interest here strongly favors timely adjudication of this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Legislators' motion.

Respectfully submitted,

JOHNATHAN J. SMITH
Acting Principal Deputy Assistant
Attorney General

s/ Katherine E. Lamm
BONNIE I. ROBIN-VERGEER
KATHERINE E. LAMM
DANIEL J. FREEMAN
MICHAEL STEWART
Attorneys
Department of Justice
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2810

CERTIFICATE OF SERVICE

I certify that on July 28, 2022, I electronically filed the foregoing APPELLEE UNITED STATES' OPPOSITION TO MOTION FOR A STAY PENDING APPEAL with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLEE UNITED STATES' OPPOSITION TO MOTION FOR A STAY PENDING APPEAL (1) does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5069 words; and (2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

Date: July 28, 2022