

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

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, *et al.*,

Plaintiffs,

v.

GREG ABBOTT, *et al.*,

Defendants.

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Case No. 3:21-cv-00259
[Lead Case]

RESPONSE TO THE UNITED STATES’ AND LULAC PLAINTIFFS’ MOTIONS TO COMPEL

Defendants Greg Abbott, in his official capacity as Governor of Texas, Jane Nelson in her official capacity as Secretary of State of Texas, Jose A. Esparza, in his official capacity as Deputy Secretary of State, and the State of Texas (collectively, “State Defendants”), the Senate Legislators, and the House Legislators (collectively, “Legislators”) file this Response to The United States’ Fifth Motion to Compel Legislative Deposition Testimony [ECF 742] and LULAC Plaintiffs’ Opposed Motion to Compel Portions of the National Republican Redistricting Trust and Adam Kincaid’s Depositions that are Subject to Legislative Privilege Objections[ECF 743].

On November 2, 2023, Plaintiffs deposed Adam Kincaid both individually and as the corporate representative of the National Republican Redistricting Trust. At that deposition Mr. Kincaid was represented by counsel; counsel for certain members of the Texas Senate and counsel for certain members of the Texas House of Representatives also appeared to represent the interests of their clients. During that deposition counsel for the Legislators lodged certain objections raising legislative privilege but permitted Mr. Kincaid to answer. [See ECF 282]. The United States and

LULAC Plaintiffs have now filed these motions to compel asking the Court to overrule the assertions of legislative privilege and release certain portions of the deposition transcript.

I. LEGAL STANDARD

Legislative privilege is a common-law evidentiary privilege. *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 235 (5th Cir. 2023) (“*Hughes*”). “[T]he privilege covers the material a legislator may refuse to turn over or disclose.” ECF 746 at 2. “It protects the many actions and documents legislators take, review, or produce within the legislative process itself.” ECF 746 at 2–3 (cleaned up).

II. ARGUMENTS & AUTHORITIES

A. **The Testimony Sought is Within the Scope of the Legislative Privilege**

The scope of the legislative privilege “is properly and necessarily broad.” ECF 746 at 2. The privilege is not limited to the casting of a vote but covers actions that occur within “the sphere of legitimate legislative activity: including “all aspects of the legislative process.” *La Union Del Pueblo Entero*, 68 F.4th at 235 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376, (1951); *Jackson Mun. Airport Auth. v. Harkins*, 67 F.4th 678, 686-87 (5th Cir. 2023)). It covers material prepared for a legislator’s understanding of legislation, lobbying conversations encouraging a vote on pending legislation, and even materials the legislator possesses related to pending legislation.” ECF 746 at 3. “The privilege also extends to material provided by or to third parties involved in the legislative process.” *Id.* It “applies with full force against requests for information about the motives for legislative votes and legislative enactments.” ECF 746 at 3 (quoting *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015)).

B. Third-party communications are protected by the privilege

“As part of that [legislative] process, lawmakers routinely ‘[m]eet[] with persons outside the legislature—such as executive officers, partisans, political interest groups, or constituents—to discuss issues that bear on potential legislation.’” *Hughes*, 68 F.4th at 235 (quoting *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007)). Accordingly, “some communications with third parties, such as private communications with advocacy groups, are protected by legislative privilege” *Id.* at 236 (quoting *Jackson Mun. Airport Auth.*, 67 F.4th at 686). This court has previously analogized the legislative privilege to the privilege protecting expert reports as work-product. ECF 746 at 6. The same holds here.

Plaintiffs contend that “the legislative privilege does not extend to every communication with every lobbyist, political party, or other member of the public”, ECF 743 at 7, but they ignore that the legislative privilege does extend to “all aspects of the legislative process.” *Hughes*, 68 F.4th at 235. As the Fifth Circuit has recognized, “[a]n exception for communications ‘outside the legislature’ would swallow the rule almost whole, because ‘meeting with interest groups is a part and parcel of the modern legislative procedure that which legislators receive information possibly bearing on legislation they are to consider.’” *Id.* at 236 (quoting *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)) (cleaned up).

The proper question is not whether the communication involved legislative insiders or outsiders but what the purpose of the communication was. The court must ask if the third party “obtained or prepared the information to present it to the legislators in the legislative process” if so then the third party “acted as an aide or consultant to the legislator and properly asserted the privilege.” ECF 746 at 6 (citing *Hughes*, 68 F.4th at 236–37). As the purpose of Mr. Kincaid and

NRRT was to present this information to the Legislators as part of the legislative process, it properly falls within the privilege and the Court should reject Plaintiffs' attempts to compel that information.

C. Legislative privilege protects derivative factual information

While legislative privilege does not protect purely factual information, it does protect “the possession, preparation, or review of factual information when disclosure would ‘inevitably reveal the legislator’s deliberations.’” ECF 746 at 4 (quoting *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997)). In fact, “[t]he legislative privilege extends further than either [deliberative process or attorney–client] privilege when it comes to bare facts.” *Id.* “[T]estimony or documentation that may indicate the legislator’s relative focus on same facts is privileged.” *Id.* Plaintiffs contend that certain factual information is not protected by legislative privilege. ECF 742 at 5–6; ECF 743 at 8. However, it is not merely factual information that the Legislators seek to protect but the reliance on those facts by the Legislators which reveals the legislative process. For example, whether the NRRT created “change reports” (ECF 743 at 8) necessarily implicates what information the Legislators relied on when deliberating on the maps at issue.

The United States’ assertion that legislative privilege does not protect “the factual materials considered before taking [legislative] actions” (ECF 742 at 5-6) is foreclosed by this Court’s recent order. *See* ECF 746 at 4 (“disclosing *that* the legislator relied on or considered some facts, and not others, would inevitably indicate that legislator’s deliberations.”) Accordingly, the Legislators’ assertion of legislative privilege should be sustained and Plaintiffs’ motions to compel should be denied.

D. Legislative Privilege Does Not Yield in Statewide Redistricting Challenges

Plaintiffs continue to argue that legislative privilege should yield due to the “extraordinary” circumstances of this litigation. ECF 742 at 7–8; ECF 743 at 9–10. As the Fifth Circuit recently held in a Voting Rights Act case and this Court recently confirmed in this litigation, legislative privilege does not yield to either private plaintiffs or the United States. ECF 746 at 9–14. While “[r]edistricting litigation . . . is not ordinary litigation,” ECF 743 at 9 (quoting *In re Landry*, 83 F.4th 300, 307 (5th Cir. 2023)), this redistricting litigation is not *extraordinary*. ECF 746 at 12.

III. CONCLUSION

Mr. Kincaid and NRRT prepared and provided information to the Legislators to aid in the redistricting process. This is inherently part of the legislative process and thus is protected by the legislative privilege. Therefore, the Court should deny Plaintiffs’ motions and sustain the assertions of Legislative privilege.

Date: December 28, 2023

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on December 28, 2023 and that all counsel of record were served by CM/ECF.

/s/ William D. Wassdorf

WILLIAM D. WASSDORF