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

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

Plaintiffs,

v.

GREG ABBOTT, in his official capacity as Governor of the State of Texas, *et al.*,

Defendants.

CIVIL ACTION NO. 3:21-cv-00259-DCG-JES-JVB [Consolidated Action: Lead Case]

PRIVATE PLAINTIFFS' REPLY IN SUPPORT OF THEIR SECOND SUPPLEMENTAL BRIEF REGARDING THE LEGISLATIVE PRIVILEGE (*LULAC v. PATRICK* REMAND) (DKT. 725)

I. The Supreme Court Rejected the Legislators' View of the Legislative Privilege.

The U.S. Supreme Court long ago rejected the notion that the legislative privilege encompasses "all things in any way related to the legislative process." *United States v. Brewster*, 408 U.S. 501, 516 (1972); *see also* Dkts. 725 at 2-4 and 726-2 at 2-3.[1] Far from endorsing that the legislative privilege is "all-encompassing," *Gravel v. United States*, 408 U.S. 606, 625 (1972), Supreme Court precedent has long focused on protecting only "inquir[y] into the *motives* of legislators," *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (emphasis added) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)).

The Legislators skip right past all that, failing to acknowledge—much less grapple with—this precedent anywhere in their opposition brief. *See* Dkt. 731. Instead, the Legislators distort the language and reasoning of *LULAC Texas v. Hughes* to support their overly expansive view of the privilege.[2] 68 F.4th 228 (5th Cir. 2023). But *Hughes* did not—and could not—disturb Supreme Court precedent or the Fifth Circuit's statements that the privilege is qualified and must be strictly construed. *See* Dkt. 725 at 3-4.

Nevertheless, the Legislators focus on statements in *Hughes* that the privilege is "necessarily broad" and that the privilege "covers all aspects of the legislative process." Dkt. 731 at 3 (quoting *Hughes*, 68 F.4th at 235, 236). But as the Supreme Court long ago emphasized, and to which the Legislators also fail to respond, the Speech or Debate Clause should not be read to "protect all things in any way related to the legislative process" even though the clause "must be read broadly." *Brewster*, 408 U.S. at 516. Thus, against *Brewster* and its progeny, and prior

[1] Private Plaintiffs incorporate by reference and re-urge the arguments in their prior supplemental briefing regarding the legislative privilege. *See* Dkts. 725 (Second Supplemental Opening Brief), 709 (First Supplemental Opening Brief), and 726-2 (Reply in Support of First Supplemental Opening Brief).

[2] Private Plaintiffs incorporate by reference and re-urge here the United States' argument that the *en banc* consideration of *Jackson Municipal Airport Authority v. Harkins*, No. 21-60312 (5th Cir.) does not support denying the motions to compel at issue. Dkt. 734 at 3.

Fifth Circuit precedent, *Hughes* means only one thing: the privilege continues to protect only opinions, motives, recommendations, or advice about legislative decisions. Dkt. 725 at 2-4.

II. The Legislative Privilege Does Not Protect Fact-based Information.

Hughes addressed two narrow issues: when the privilege is waived and when it yields. Dkt. 725 at 4. Despite the Legislators' suggestion otherwise, the *Hughes* court had no reason to address whether the privilege covers fact-based information. *See id.*

In any event, nothing in *Hughes* changes that fact-based information falls outside the scope of the privilege because such information is not an integral part of the deliberative and communicative process and does not in and of itself reflect a legislator's opinions or motives. *See supra*, Section I; *see also* 725 at 4-5; Dkt. 709 at 8-13. The Legislators offer the conclusory assertion that disclosure of factual information will necessarily reveal legislators' thoughts, motives, or opinions. Dkt. 731 at 8. But as Private Plaintiffs have previously noted, courts routinely distinguish between factual information and thoughts, motives, and opinions in the context of the attorney-client and deliberative process privileges. *See* Dkt. 725 at 4-5; Dkt. 709 at 10-13. The Legislators thus fail to distinguish the legislative privilege on this ground.

The Legislators' attempt to distinguish the legislative privilege as "broader" than these other privileges also falls flat. Dkt. 731 at 8. Conceding that all three privileges promote the ability to deliberate and communicate freely, the Legislators assert that the legislative privilege is different because it protects "the legislative *process* as a whole and the legislators' ability to focus on their jobs[.]" *Id.* But the deliberative process privilege is indistinguishable: it protects a process—"agency decisionmaking," *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021)—and "the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

Accordingly, the legislative privilege does not shield fact-based information, and the documents in Exhibit B (Dkt. 725-2) must be disclosed. *See* Dkt. 725 at 4-5; *see also* Dkt. 709 at 8-13.

III. The Texas Constitution Limits the Lieutenant Governor's Legislative Power.

In asserting that the Lieutenant Governor can invoke the legislative privilege over the documents at issue here, the Legislators argue that Private Plaintiffs "seek to minimize the Lieutenant Governor's legislative functions to debating and voting only when the Senate sits as the Committee of the Whole and casting the tie-breaking vote." Dkt. 731 at 10. But as Private Plaintiffs have repeatedly pointed out, it is the Texas Constitution—not Private Plaintiffs—that imposes that limitation on the Lieutenant Governor's *legislative* authority. *See, e.g.*, Dkt. 725 at 5-8. Except as "expressly permitted," the Lieutenant Governor—a member of the executive branch—shall not "exercise any power properly attached" to the legislative branch. *See* Tex. Const., art. II, § 1; Tex. Const., art. IV, § 1. And the Texas Constitution expressly permits two—and only two—such instances: (1) "debat[ing] and vot[ing] on all questions" only when the Senate is "in Committee of the Whole" and (2) "giv[ing] the casting vote" only "when the Senate is equally divided." Tex. Const., art. IV, § 16(b). Those circumstances did not happen. Whatever disagreement the Legislators have with this distribution of legislative power, the text of the Texas Constitution controls. *See* Dkt. 526 at 2-3; *see also In re Abbott*, 628 S.W.3d 288, 293 (Tex. 2021) ("Our goal when interpreting the Texas Constitution is to give effect to the plain meaning of the text as it was understood to those who ratified it").

The Legislators' extratextual argument does not change that outcome. According to the Legislators, the Texas Constitution affords the Lieutenant Governor legislative power over his actions antecedent to these two enumerated instances. The Legislators point to out-of-circuit cases to support their assertion, but Supreme Court precedent—not cases outside of this

Circuit—control here. And that precedent is instructive: although the President performs a legislative function in signing or vetoing a bill, *see Bogan*, 523 U.S. at 55, the President does not perform a legislative function for any deliberations in Congress prior to a bill's passage. Similarly, although the Lieutenant Governor performs a legislative function in certain instances under the Texas Constitution, he does not perform a legislative function for actions preceding those instances. Accordingly, and for the reasons expressed in Private Plaintiffs' prior briefs, the Lieutenant Governor may not invoke the legislative privilege here. *See* Dkts. 725 at 5-8. The documents in Exhibit C (Dkt. 725-3) must therefore be disclosed. *See* Dkt. 725 at 5-8.

IV. The Legislative Privilege Does Not Protect Information Outside the Period of Enactment of the Challenged Legislation.

The Legislators sidestep the repeated emphasis by the U.S. Supreme Court that the legislative privilege covers only integral steps in the legislative process. *See Bogan*, 523 U.S. at 55; *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *Gravel*, 408 U.S. at 625. And the Legislators avoid acknowledging the Supreme Court's observation that, to determine whether activities "fall within the legitimate legislative sphere," courts "look to see whether the activities took place in a session of the House by one of its members in relation to the business before it." *Eastland*, 421 U.S. at 503. Read in that context—and by its plain language—*Hughes*'s statement "that the privilege covers legislators' actions in the proposal, formulation, and passage of legislation" cannot mean that documents created *after* the passage of a bill are privileged. 68 F.4th at 236. After all, a legislator's thoughts or actions would have no effect on any legislation after it was sent to the Governor. Thus, post-enactment documents are not privileged. And because a redistricting bill could not have been proposed or considered prior to the release of the Census, documents pre-dating the Census are likewise not privileged. Accordingly, the documents in Exhibit D (Dkt. 725-4) must be produced. Dkt. 725 at 8-10.

V. The Legislators Have Waived the Privilege Over Information Shared Outside the Legislative Process.

Hughes did not hold that the legislative privilege covers every communication between a legislator and third party. Rather, *Hughes* indicates that, where a legislator does not solicit from a third party the specific evidence, that evidence has not been "brought . . . *into* the [legislative] process." *See* 68 F.4th at 237; *see also* Dkts. 709 at 17-18 and 725 at 10. And in those circumstances, the privilege has been waived. The Legislators fail to refute this requirement of solicitation, and fail to show that the documents in Exhibit E (Dkt. 725-5) were brought *into* the legislative process. Accordingly, those documents must be produced. *See* Dkt. 725 at 10.

VI. The Privilege—Where Applicable—Must Yield.

To the Legislators, *Hughes* stands for the proposition that the privilege cannot yield in any case alleging violations of the Voting Rights Act and the U.S. Constitution. Dkt. 731 at 4-5. But *Hughes* did not reach so broad a holding. Rather, *Hughes* requires the Court to analyze whether a particular case constitutes an "extraordinary civil case" in which the privilege should yield. *See* 68 F.4th at 238 (cleaned up). For the reasons expressed in Private Plaintiffs' Second Supplemental Brief, and which the Legislators fail once again to acknowledge, statewide redistricting is a *sui generis* process with little check otherwise against legislative self-entrenchment. Dkt. 725 at 11-12. As such, and in light of the allegations of racially discriminatory intent and effect, the privilege must yield where applicable.[3] Ex. A (Dkt. 725-1).

VII. Conclusion

For the foregoing reasons, and the reasons expressed in Private Plaintiffs' prior motions to compel, Private Plaintiffs respectfully request that the Court compel the disclosure of the evidence in Exhibits A to E to Private Plaintiffs' Second Supplemental Brief. Dkt. 725.

[3] Contrary to the Legislators' assertion otherwise, Private Plaintiffs have not effectively abandoned the five-factor test used by courts in this Circuit to determine whether the privilege yields. *See* Dkt. 725 at 12 n.9.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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