No. 21-60312

In the United States Court of Appeals for the Fifth Circuit

JACKSON MUNICIPAL AIRPORT AUTHORITY; BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY, EACH IN HIS OR HER OFFICIAL CAPACITY AS A COMMISSIONER ON THE BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY; DOCTOR ROSIE L. T. PRIDGEN, IN HER OFFICIAL CAPACITY AS A COMMISSIONER ON THE BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY; REVEREND JAMES L. HENLEY, JR., IN HIS OFFICIAL CAPACITY AS A COMMISSIONER ON THE BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY; LAWANDA D. HARRIS, IN HER OFFICIAL CAPACITY AS A COMMISSIONER ON THE BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY; VERNON W. HARTLEY, SR., IN HIS OFFICIAL CAPACITY AS A COMMISSIONER ON THE BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY; EVELYN O. REED, IN HER OFFICIAL CAPACITY AS A COMMISSIONER ON THE BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY; DOCTOR ROSIE L. T. PRIDGEN, INDIVIDUALLY AS CITIZENS OF THE CITY OF JACKSON, MISSISSIPPI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; LAWANDA D. HARRIS, INDIVIDUALLY AS CITIZENS OF THE CITY OF JACKSON, MISSISSIPPI, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED; VERNON W. HARTLEY, SR., INDIVIDUALLY AS CITIZENS OF THE CITY OF JACKSON, MISSISSIPPI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; EVELYN O. REED, INDIVIDUALLY AS CITIZENS OF THE CITY OF JACKSON, MISSISSIPPI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; JAMES L. HENLEY, JR., INDIVIDUALLY AS CITIZENS OF THE CITY OF JACKSON, MISSISSIPPI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Intervenors-Appellees,

v.

JOSH HARKINS; DEAN KIRBY; PHILLIP MORAN; CHRIS CAUGHMAN; NICKEY BROWNING; JOHN A. POLK; MARK BAKER; ALEX MONSOUR,

Respondents-Appellants.

On Appeal from the United States District Court for the Southern District of Mississippi

BRIEF FOR THE STATES OF TEXAS, ALABAMA, IDAHO, INDIANA, IOWA, LOUISIANA, MONTANA, NEBRASKA, SOUTH CAROLINA AND UTAH AS AMICI CURIAE

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Certificate of Interested Persons

No. 21-60312

Jackson Municipal Airport Authority, et al.,

Intervenors-Appellees,

v.

Josh Harkins, et al.,

Respondents-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Identity and Interest of Amici Curiae

Amici States depend on the proper interpretation and application of the legislative privilege, which has protected the process by which the People's representatives decide what laws will govern for at least five centuries. Plaintiffs who challenge the constitutionality of state laws routinely request access to documents or testimony that the privilege protects. Even when the States ultimately prevail in such litigation, victory comes at a steep price. Statewide elected officeholders and legislators have no choice but to expend countless hours mired in litigation, preparing for and responding to discovery requests, producing detailed privilege logs, sitting for depositions, and attending trial. This takes precious time away from officials' work on behalf of the people who elected them.

Accordingly, Amici have two substantial interests in this litigation: (1) in ensuring that the federal courts do not exceed the scope of jurisdiction provided to them by Article III such that the States are "dragged . . . into federal court" unnecessarily, especially in "political dispute[s] between state and local governments," *Jackson Mun. Airport Auth. v. Harkins*, No. 21-60312, 2023 WL 5522213, at *12 (5th Cir. Aug. 25, 2023) (Duncan, J., concurring in part and dissenting in part); and (2) in protecting state legislators from "the distraction of incessant litigation" by preserving the full scope of the legislative privilege. *In re N.D. Legis. Assembly*, 70 F.4th 460, 463 (8th Cir. 2023) (orig. proceeding).

Summary of the Argument

I. Intervenor Plaintiffs should never have reached discovery—let alone prolonged litigation over the scope of legislative privilege—because their claims stumble on Article III's injury-in-fact requirement. In their initial complaint in intervention, a city mayor, city council, two local entities, and the commissioners of one of those entities challenged a Mississippi statute ("Senate Bill 2162") limiting their power, if not eliminating it entirely. *Harkins*, 2023 WL 5522213, at *1. Rather than sue on their own behalf, however, they purported to represent local voters. *Id.* When this Court rejected their standing to do so, they shifted course, instead attempting to create standing based on the alleged loss of their employment and related benefits.

The Court should again reject Plaintiffs' case for lack of standing. *First*, Senate Bill 2162 explicitly states that Commissioners are appointed, not employed, meaning they have no cognizable interest in their employment. *Second*, Plaintiffs' per diem and travel reimbursement benefits are neither particular nor personal to them—those benefits run with their seats and are paid to whomever currently holds a commissioner appointment. *Third*, no matter how they dress it up, Plaintiffs' complaint continues to assert an interest that belongs to third-party voters without meeting the narrow exceptions to the general prohibition on third-party standing.

Moreover, the Court should be hesitant to find that a public official has standing simply because a state law eliminates certain appointed positions. Endorsing the panel's standing theory would undermine this Court's standing jurisprudence and lodge in this Court's docket years-long political disputes that have no business in federal court.

II. Although the Court should never reach the issue, it should also hold that state legislators are not required to expend the massive resources required to create a document-by-document log justifying claims of legislative privilege. In *La Union del Pueblo Entero v. Abbott*, the Court held that when legislators bring "third parties *into* the [legislative] process" they have *not* waived the legislative privilege. 68 F.4th 228, 237 (5th Cir. 2023). Although *Pueblo Entero* cited the original, withdrawn panel decision in this case in reaching its conclusion, no party has asked the Court to revisit that ruling, and for good reason: even apart from its citation to the panel's decision here, the Court's decision was firmly rooted in the privilege's long history, and it is consonant with precedent from other circuits that the privilege covers "legislators' actions in the proposal, formulation, and passage of legislation." *Id.* at 236 (quoting *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015)). Indeed, any other rule would undermine the privilege's "necessarily broad" scope. *Id. Pueblo Entero* was correctly decided, and the Court should reject any belated effort to cabin or undermine it.

But now that the Court has established the scope of the legislative privilege in this Circuit, the Court should revisit whether state legislators must submit document-by-document privilege logs to invoke it. In that regard, the panel's holding was error. After *Pueblo Entero*, requiring such a privilege log would only encourage improper discovery requests to legislators and demand the massive expenditure of resources by legislators to no useful purpose. Although publicly disclosed documents are not subject to the privilege, they do not require distracting legislators with third-party discovery requests because they are, by definition, *publicly available*. By contrast, as the Court explained in *Pueblo Entero*, the "very fact" that a plaintiff needs

discovery to access these documents "shows that they have not been shared publicly" and are thus privileged. *Id.* at 237. In the rare instance that a third-party subpoena seeks information that is neither public nor privileged, the Court can (and should) presume that legislators will act in good faith to turn over responsive, non-privileged documents. At most, the Court should require a categorical description of materials being withheld.

ARGUMENT

I. Plaintiffs Lack Standing.

The complaint in intervention has no business in federal court. Plaintiffs are local political officials or entities who are undoubtedly displeased that their state Legislature has opted to redistribute governmental authority to other persons or entities. But they have asserted no injury cognizable under Article III. The panel's contrary conclusion invites disappointed factions to entangle federal courts in potentially innumerable disputes over the distribution of state-law powers between States and local, municipal entities. Because such disputes are both inherently political and inherently local, this Court should decline the invitation.

A. The operative complaint fails to allege an Article III injury.

The Mississippi Legislature passed Senate Bill 2162 to end total municipal control over the Jackson-Medgar Wiley Evers International Airport, a major transportation hub serving the entire State. *Harkins*, 2023 WL 5522213, at *1. Before Senate Bill 2162, the city government—represented by Plaintiffs here—chose all five commissioners of the Jackson Municipal Airport Authority who ran the airport. *Id.* After

Senate Bill 2162, the city government could choose only two of a nine-member board regional authority that operated the airport. *Id.* City leaders generally and commissioners specifically are (perhaps understandably) displeased by this shift in power. But the merits of that decision are not and should not be before the Court.

It is well established that to demonstrate Article III standing, a plaintiff "must have suffered an injury in fact—an invasion of a legally protected interest—that is concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Stallworth v. Bryant*, 936 F.3d 224, 229-30 (5th Cir. 2019) (internal citations omitted); *see also Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "It is not enough simply to argue that there has been some violation" of a law or policy; rather, a plaintiff "must allege a personal violation of rights." *Barber*, 860 F.3d at 353 (citing *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir. 2009)). Therefore, the challenged statute—here, Senate Bill 2162—"must have some concrete applicability to [Plaintiffs]" as individuals to confer standing. *Id.* (citing *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 294 n.31 (5th Cir. 2001)). "Plaintiffs always have the burden to establish standing," *id.* at 352, and "generally must assert [their] *own* legal rights and interests, not those of third parties." *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988) (emphasis added).

Because Plaintiffs have not "clearly shown an injury-in-fact" that satisfies Article III's requirements, they have failed to meet that burden. *Barber*, 860 F.3d at 352. After this Court refused to allow them to assert political injuries on behalf of voters, Plaintiffs switched gears and alleged they suffered a pocketbook injury because

certain Plaintiffs—namely, the former Commissioners of the now defunct Authority—will no longer receive per diem and travel-expense reimbursements for carrying out their roles as Commissioners. *Harkins*, 2023 WL 5522213, at *3. The panel agreed, equating the loss of Plaintiffs' per diems to "the loss of personal, economic benefits received from employment" that can form the basis of a "traditional Article III injury." *Id.* But "[n]o precedent supports that unheard-of theory of standing," by which the loss of per-diem payments to political appointees constitutes an invasion of a legally protected interest. *Id.*, at *9 (Duncan, J., dissenting). This "lack of historical precedent" represents a "telling indication of the severe constitutional problem' with [plaintiffs'] assertion of standing to bring this lawsuit." *Harrison v. Jefferson Par. Sch. Bd.*, 78 F.4th 765, 769 (5th Cir. 2023). Plaintiffs' attempts to manufacture standing on this basis fails for three reasons.

First, despite the panel majority's holding otherwise, Plaintiffs do not "stand to lose their job[s]" should the Jackson Municipal Airport Authority (JMAA) be modified. *Harkins,* 2023 WL 5522213, at *3. Under local law, JMAA Commissioners are appointed—not employed. *See* Miss. Code § 61-3-5 (establishing general rules for airport authorities); *id.* § 61-3-6 (codifying Senate Bill 2162). And the positions are part time, *id.* § 61-3-13(1), as the primary role managing the JMAA is performed by an employed Executive Director, *Id.* § 61-3-13(3). Commissioners can receive per diem and travel reimbursements for costs related to their roles as Commissioners, but they take no salaries. *Id.* § 61-3-13 (limiting the per diem expenses to 120 days per year). As this Court has already explained, Plaintiffs' appointments were

restructured, but their jobs were not lost because they never had jobs in the traditional sense. *See Stallworth*, 936 F.3d at 226.

Because this case involves the restructuring of a group of political appointees, this is not a typical employment case in which the loss of a job may constitute a concrete and particularized harm, *cf., Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011); *Nall v. BNSF Ry. Co.*, 917 F.3d 335 (5th Cir. 2019), and the panel's reliance on such employment termination cases was misguided, *see, e.g., Harkins*, 2023 WL 5522213, at *3; *accord Houchens v. Beshear*, 850 F. App'x 340, 344 (6th Cir. 2021) (holding at the merits stage that a political appointee had no protected interest in continued appointment) (citing *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339 (6th Cir. 1992)).

Second, Plaintiffs' per diem and travel reimbursements are not "tangible, economic benefits" that, if lost, confer Article III standing on Plaintiffs. *Harkins*, 2023 WL 5522213, at *3. To substantiate its holding, the panel cited three cases discussing the deprivation of private employment benefits due to racial discrimination or sexual harassment. *See id.* at *10 (Duncan, J., dissenting). Again, this fails to account for the nature of Plaintiffs' roles. Unlike public employees, political appointees can typically be fired at will for any reason—including purely political reasons. *See, e.g.*, *Haddock v. Tarrant Cnty.*, 852 F. App'x 826, 830 (5th Cir. 2021) (summarizing the *Elrod/Branti* doctrine). In such a circumstance, the former appointee would undoubtedly be entitled to the salary that accrued during his tenure. But as Judge Duncan explained in his dissent, Plaintiffs' "[p]er diems are perks tethered to public office,

not private rights," such as a salary, "whose loss personally injures the office-holder." *Harkins*, 2023 WL 5522213, at *9 (Duncan, J., dissenting).

Because Plaintiffs had no right to continue as Commissioners, Plaintiffs cannot maintain a "private right" to benefits that exist "solely because [the Commissioners] are Members of [the JMAA]." *Raines v. Byrd*, 521 U.S. 811, 821 (1997). As the Supreme Court has held, this type of benefit "runs with the [Commissioner's] seat, a seat which the [Commissioner] hold[s] as trustee for his constituents, not as a prerogative of personal power." *Id.* (parentheticals omitted). In other words, Plaintiffs "enjoy these perks only because they are public servants, not because they have a private right to expense the City of Jackson for a New York Strip or a trip to Vegas." *Harkins*, 2023 WL 5522213, at *10 (Duncan, J., dissenting). The loss of such perks does not deprive Plaintiffs of "something to which they *personally* are entitled." *Raines*, 521 U.S. at 821 (emphasis in original).

Notably, no Plaintiff alleges he has been "singled out" from other Commissioners to receive "specially unfavorable treatment." *Id.* (citing *Powell v. McCormack*, 395 U.S. 486, 512-14 (1969)). Instead, Plaintiffs assert only an "institutional injury... which necessarily damages all [Commissioners] equally." *Id.* And Plaintiffs "may not support standing by alleging only an institutional injury." *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016); *see also Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953-54 (2019) (individual members "lack standing to assert the institutional interest[]" of a governing body). Once again, Plaintiffs have failed to demonstrate that they are personally harmed by the elimination of the JMAA or incidental benefits that "run[] . . . with the seat." *Raines*, 521 U.S. at 821. Yet the

panel's decision would allow Plaintiffs to sue in their individual capacities based on personal interests that do not exist.

Third, Plaintiffs fail to establish standing because the gravamen of their complaint remains "that SB 2162 violates the Equal Protection rights *of the citizens of Jackson*," *Harkins*, 2023 WL 5522213, at *1 (emphasis added), rather than "a legally protected interest" *of their own*, *Barber*, 860 F.3d at 352. This Court in *Stallworth* already explained there is "no precedent" "supporting [Plaintiffs' original] theory that Jackson voters have a right to elect officials with the exclusive authority to select municipal airport commissioners." *Stallworth*, 936 F.3d at 231. Although Plaintiffs have purported to refashion their theory of injury to assert one on behalf of themselves, they have maintained that the *interest* underlying their claims belongs to "residents and taxpayers of Jackson" and "Jackson voters" who they claim "have a right to elect officials" who select the JMAA Commissioners. *Id.* at 231. Thus, at its core, Plaintiffs' grievance remains the alleged infringement of the voting rights of Jackson citizens, not a violation of their own private rights. Tellingly, no one has asked this Court to reconsider *Stallworth*'s holding. For good reason: doing so would dramatically expand the scope of third-party standing to cover circumstances where voters can, and routinely do, bring such claims independently. *See McCormick*, 845 F.2d at 1341; *e.g.*, *Vote.org v. Callanen*, 39 F.4th 297, 304 (5th Cir. 2022) (noting that the text of section 1983 "seemingly precludes an action premised on the deprivation of another's rights.").

In sum, because Plaintiffs fail to allege a cognizable injury-in-fact, they lack standing to pursue their claims. The Court can decide this case on that basis alone.

B. The panel's decision countenances federal intervention in quintessentially local disputes.

The panel's holding is doubly problematic because it threatens to ensnare the federal courts in localized political disputes between state and local governments that have no proper place in a federal forum. In dissent, Judge Duncan rightly warned that the panel's decision "lets a federal court continue to stick its nose into a political spat." *Harkins*, 2023 WL 5522213, at *11 (Duncan, J., dissenting). This Court has elsewhere rejected a State's "attempt[] to invoke federal jurisdiction to enforce mostly state law against a subordinate" as inconsistent with precedent as well as our federal structure. *Harrison*, 78 F.4th at 771. Yet the panel's holding *invites* subordinate entities like the municipal entities and officials here to engage in creative litigation strategies to shoehorn state-law claims into federal fora.

State legislatures often adjust the allocation of power between the State and its subdivisions and among the State's different political subdivisions. *See, e.g.*, *State of Texas v. Harris County*, No. 23-0656 (Tex. 2023) (pending suit over Senate Bill 1750, which had the effect of abolishing the position of the Harris County Elections Administrator); *State of Texas v. Harris County*, No. 03-23-00531-cv (Tex. App.—Austin, 2023) (pending suit over House Bill 2127, which preempted contrary local regulation in certain identified subject matters); *Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, 660 S.W.3d 108 (Tex. 2023) (challenge to the Texas Education Agency Commissioner's authority to appoint a board of managers for the Houston Independent School District); *Abbott v. Harris County*, 672 S.W. 3d 1 (Tex. 2023) (resolving three

related disputes concerning localities efforts to nullify Texas Governor's Executive Orders).

The panel was wrong to invite political subdivisions who are disappointed in their state political processes to ask *federal courts* to referee their squabbles. "Federal courts," after all, "are courts of limited jurisdiction," that "possess only that power authorized by [the] Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). And abstention doctrines further restrain this limited grant of federal jurisdiction by requiring federal courts exercising the "judicial power of the United States," U.S. Const. art. III, § 1, to pause and pay special heed to "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Daves v. Dallas County*, 64 F.4th 616, 625 (5th Cir. 2023) (en banc) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)); *see also* William J. Rich, 3 Modern Constitutional Law § 39:18 (3rd ed.) (explaining that "federal courts should respect principles of federalism which include deference to state decision makers").

The panel's pronouncement that local officials' loss of a state-conferred power—and with it a state-conferred per diem—confers an Article III injury that is cognizable in federal court abjures these careful limits on federal-court jurisdiction. As a consequence, its decision risks burdening the States and the federal courts with cases that have no business being here in the first instance.

II. If the Court Reaches the Question, It Should Reaffirm the Legislative Privilege's Broad Protections.

Because it lacks jurisdiction over Plaintiffs' claims, the Court need not even consider the questions whether the district court accurately concluded that the Legislators had waived their claim that certain documents were shielded from disclosure by the legislative privilege or whether the district court properly compelled the Legislators to produce a privilege log. But if it does reach the question, the Court should reverse the district court's ruling on both scores. As to the former, this Court has already correctly concluded in *Pueblo Entero* that the legislative privilege applies to protect from disclosure documents that legislators may share with third parties who are brought into the legislative process. Although *Pueblo Entero* cited the panel's original decision in this case (which was identical in relevant part to the superseding, now-vacated panel opinion), Plaintiffs' en banc briefing has offered no valid reason to use this Court's consideration of the standing and privilege-log issues as a vehicle to disturb that thorough, separate decision. And as to the latter, after *Pueblo Entero* the production of a privilege log would serve no utility: publicly disclosed documents are not subject to the privilege, but Plaintiffs can (by definition) obtain them without serving a burdensome subpoena on the Legislators. The Court can and should presume that the Legislators will act in good faith to turn over documents that are otherwise not privileged.

A. *Pueblo Entero* correctly held that documents shared with third parties during the legislative process are shielded from disclosure.

1. For centuries, the legislative privilege has "protect[ed] 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation

for those acts'" and "preclude[d] any showing of how [a legislator] acted, voted, or decided." *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (third alteration in original) (citation omitted). The common-law roots of the legislative privilege run deep, stretching back to the English "Parliamentary struggles of the Sixteenth and Seventeenth Centuries," *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), in particular the "conflict between the [House of] Commons and the Tudor and Stuart monarchs," *United States v. Johnson*, 383 U.S. 169, 178 (1966). But "[s]ince the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *Id.* Indeed, at the Founding, "[f]reedom of speech and action in the legislature was taken as a matter of course," and the Framers deemed it "so essential . . . that it was written into the Articles of Confederation and later into the Constitution." *Tenney*, 341 U.S. at 372.

In the federal Constitution, the legislative privilege is reflected in the Speech or Debate Clause, which provides in relevant part that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6. That federal provision was preceded by similarly robust protections in some of the earliest state constitutions. *See Tenney*, 341 U.S. at 375-77. And today, similar language appears in most state Constitutions, including Texas's. *See id.* at 375 & n.5.

Although the "Federal Speech or Debate Clause . . . by its terms is confined to federal legislators," *United States v. Gillock*, 445 U.S. 360, 374 (1980), the legislative privilege also shields state legislators in federal court via "federal common law, as

applied through Rule 501 of the Federal Rules of Evidence," *Pueblo Entero*, 68 F.4th at 235 (quoting *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017). "[P]rinciples of comity" undergird the application of the legislative privilege to state legislators who are haled before federal courts. *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021) (quoting *Gillock*, 445 U.S. at 373). So do "the interests in legislative independence," which "remain relevant in the common-law context." *Id.*

2. Just five months ago, this Court joined three of its sister circuits in applying the legislative privilege to shield state legislators from intrusive third-party discovery in private, civil litigation that sought to probe legislators' motivations for legislative acts. *See Pueblo Entero*, 68 F.4th at 235-40; *see also Alviti*, 14 F.4th at 87; *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186-88 (9th Cir. 2018); *Hubbard*, 803 F.3d at 1311-12; *see also N.D. Legis. Assembly*, 70 F.4th at 463-65.

The Court deployed a three-pronged analysis to assess the privilege's applicability. *First*, the Court endeavored to "defin[e] the privilege's scope—that is, the many actions and documents that are within 'the legislative process itself' and that the common-law privilege therefore traditionally protects.'" *Pueblo Entero*, 68 F.4th at 235. *Second*, responding to the plaintiffs' argument that the participation of non-legislators in the legislative process waived the privilege, the Court explained that the privilege preserves the "law-making process" itself, and that legislators "did not *waive* the privilege by communicating with individuals who are outside the Legislature." *Id.* at 235, 236-37. *Third*, the Court explained that, under Supreme Court

precedent, "the privilege does not *yield*" merely because the plaintiffs asserted a federal constitutional claim. *Id.* at 235, 237-40.

Based on this three-part analysis, the Court concluded that the legislative privilege "preclude[d] the compelled discovery of documents pertaining to the state legislative process" that the plaintiffs sought. *Id.* at 240. In other words, "[s]tate lawmakers can invoke legislative privilege to protect actions that occurred within 'the sphere of legitimate legislative activity' or within 'the regular course of the legislative process.'" *Id.* at 235 (quoting *Tenney*, 341 U.S. at 376, and *Helstoski*, 442 U.S. at 489). It "is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process," including even "communications with third parties, such as private communications with advocacy groups." *Id.* at 235-36. And the privilege holds "even when constitutional rights are at stake." *Id.* at 238.

3. The panel's original panel decision in this case (which is identical in relevant part to the now-vacated, superseded opinion) predated and is cited in the Court's analysis in *Pueblo Entero*. As a result, it understandably traces the analysis in *Pueblo Entero* about the scope of the legislative privilege in several respects. For example, the panel correctly explained that "[l]egislative privilege applies to communications where the legislator or his agent was acting within 'the sphere of legislative activity,'" *Harkins*, 2023 WL 5522213, at *5 (quoting *Tenney*, 341 U.S. at 376), and that "the privilege is 'not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process,'" *id.* (quoting *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007)). Applying that principle, the panel rightly concluded that "communications with third parties outside [of] the legislature might still be

within the sphere of 'legitimate legislative activity' if the communication bears on potential legislation." *Id.* (quoting *Hubbard*, 803 F.3d at 1308). And the panel was right again when it aligned itself with two sister circuits by holding that "some communications with third parties, such as private communications with advocacy groups, are protected by legislative privilege when they are 'a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider.'" *Id.* (quoting *Almonte*, 478 F.3d at 107 and *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)).

The Court should not disturb any of these sound holdings, which were independently affirmed and expanded by the panel in *Pueblo Entero*. No party sought en banc or Supreme Court review of that decision, and *Pueblo Entero* has already engendered important reliance interests for state legislators, *see, e.g.*, Appellants' Br. 39-43, *La Union del Pueblo Entero v. Bettencourt*, No. 23-50201 (5th Cir. June 20, 2023), ECF No. 68. More importantly, in their briefing to-date, Plaintiffs have offered no reason that the Court should unsettle *Pueblo Entero* through this *en banc* proceeding. The Court should, however, reject the panel's requirement of a burdensome, document-by-document privilege log in the light of the principles announced in *Pueblo Entero*.

B. The burdens of producing a privilege log vitiate the privilege's protections.

Although the panel rightly rejected "the district court's broad pronouncement that the Legislators waived their legislative privilege for any documents or information that had been shared with third parties," the panel nonetheless required the

Mississippi Legislators to produce a privilege log. *Harkins*, 2023 WL 5522213, at *5. The panel concluded that "a privilege log would not be useless because evidence of legislative motive is not necessarily privileged." *Id.* To illustrate that point, the panel noted that "legislative privilege as to certain documents is waived when the Legislator *publicly* reveals those documents." *Id.* And the panel explained that "statements that have no connection whatsoever with 'legitimate legislative activity' are not protected by legislative privilege." *Id.* For those reasons, the Court found that "a privilege log is necessary to determine which of the requested documents and communications are protected by legislative privilege." *Id.*

The panel made three threshold errors in reaching that conclusion. *First*, the panel's explanation of the utility of a privilege log does not hold up on closer scrutiny. As *Pueblo Entero* recognized, if a document has been publicly disclosed, there is no need for a subpoena, let alone a privilege log—Plaintiffs can simply obtain the information through public means. 68 F.4th at 237. Although in theory, a legislator might be subpoenaed for documents that are neither public nor privileged because they are unconnected to a "legitimate legislative activity," *Harkins*, 2023 WL 5522213, at *5, the panel did not explain how such documents could be "relevant to any party's claim or defense and proportional to the needs of the case," Fed. R. Civ. P. 26(b)(1). Moreover, the Court can apply a "presumption of good faith" that state legislators will follow this Court's pronouncements and produce documents that they have already made public or otherwise not privileged. *Cf. Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Yarls v. Bunton*, 905 F.3d 905, 910-11 (5th Cir. 2018).

Second, the panel ignored that the burdensome requirement to create a privilege log itself impinges upon the legislative privilege, which "reinforces representative democracy by fostering an environment where public servants can undertake their duties without the threat of personal liability or the distraction of incessant litigation." *N.D. Legis. Assembly*, 70 F.4th at 463. Or as the Court put it in *Pueblo Entero*, the privilege "serves the 'public good' by allowing lawmakers to focus on their jobs rather than on motions practice in lawsuits." 68 F.4th at 237.

A "litigant does not have to name members or their staffs as parties to a suit in order to distract them from their legislative work. Discovery procedures can prove just as intrusive." *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988). That has been Texas's experience. Carefully culling potentially responsive documents, reviewing them one-by-one to make a privilege determination, coordinating with counsel to decide whether to assert the privilege as to each document, and finally drafting a privilege log that would be deemed sufficient under the panel's analysis is a time-consuming endeavor. Worse still, a privilege log is rarely the end of the road. What follows is often a slog of meet-and-confer letters followed by motion practice. *E.g.*, Mot. to Compel; App. to Mot. to Compel , *Tex. Democratic Party et al. v. Hughs,* No. 1:19-cv-1063 (W.D. Tex. Mar. 2, 2020), ECF Nos. 41, 42. All of this distracts state legislators from the day-to-day work of legislating—the job for which they were elected. *Cf. In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995) (noting the "settled rule in this circuit" that "exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted.").

Third, the panel did not address the interplay between the legislative privilege and the Rules of Civil Procedure. Rule 45 requires parties to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" and, in turn, shields third-party subpoena recipients from compliance with a subpoena that imposes an undue burden. Fed. R. Civ. P. 45(d)(1), (d)(3)(A)(iv). For the reasons explained above, a requirement to submit a privilege log imposes an undue burden on legislators. *Supra* pp. 16-18.

Plaintiffs have insisted that *Pueblo Entero* endorsed a privilege log requirement. Not so. True, the Texas legislators in that case did draft and submit privilege logs, and the Court found that helpful in delineating the documents subject to the privilege. 68 F.4th at 237. But the legislators compiled those logs only because before *Pueblo Entero*, the law in this Circuit was unsettled as to whether communications with third parties were protected. *Id.* at 237-38. *Pueblo Entero* instructs that they are. *Id.* at 237. Now that the issue has been resolved, there is no need for legislators to painstakingly list, document-by-document, what this Court has already held is precluded from disclosure.

C. At minimum, the Court should minimize the burden on legislators by requiring a categorical privilege log.

Alternatively, the Court should at least ease the burden on legislators who have until now been compiling document-by-document logs in these situations. Rule 45 also generally requires parties to "describe the nature of the withheld documents." Fed. R. Civ. P. 45(e)(2)(A)(ii). But courts always retain the discretion to limit the burden on subpoena recipients (and parties to litigation generally). That discretion

can take various forms, including quashing the subpoena altogether if it imposes an undue burden. *See* Fed. R. Civ. P. 45(d)(1), (d)(3)(A)(iv).

As one district court has explained, "[a]ppropriate circumstances for exercising the court's discretion" in discovery disputes "include 'if (a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well grounded.'" *Benson v. Rosenthal*, No. 15-782, 2016 WL 1046126, at *10 (E.D. La. Mar. 16, 2016). Thus, even if the Court concludes that a privilege log is warranted when legislators assert the privilege (which it should not), the Court should make clear that district courts have wide latitude to bless "the submission of 'categorical' privilege logs" to alleviate the burden that a third-party subpoena otherwise imposes. *Id.* at *11.

Conclusion

The district court's order should be reversed.

Respectfully submitted.

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Certificate of Service

On October 17, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,394 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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