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 others 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

EN BANC BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING INTERVENORS-APPELLEES AND URGING AFFIRMANCE ON THE ISSUE ADDRESSED HEREIN

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES:

INTEREST OF THE UNITED STATES

The United States has a strong interest in this appeal, which concerns the state legislative privilege. The Department of Justice has authority to enforce several federal civil rights protections against state and local governments. *See, e.g.*, 42 U.S.C. 2000c-6 (authorizing Attorney General to initiate school desegregation actions); 42 U.S.C. 2000h-2 (permitting Attorney General to intervene in certain actions under the Fourteenth Amendment's Equal Protection Clause); 42 U.S.C. 3614 (allowing Attorney General to commence actions under the Fair Housing Act); 52 U.S.C. 10308(d) (allowing Attorney General to seek preventive relief under the Voting Rights Act). The Department regularly faces assertions of legislative privilege as a shield to discovery in these cases, in which evidence of legislative intent and materials within legislators' possession may be relevant.

STATEMENT OF THE ISSUE

The United States addresses the following question:

Whether the district court abused its discretion by ordering state legislators to submit a privilege log to substantiate their assertion of legislative privilege as a basis for withholding documents responsive to third-party subpoenas.

STATEMENT OF THE CASE

A. Factual Background

This appeal arises from a challenge to a 2016 Mississippi law, Senate Bill 2162 (S.B.2162). *See* ROA.4564-4618.[1] S.B.2162 replaced the Jackson Municipal Airport Authority (JMAA), which operates Mississippi's major airport (Jackson-Medgar Wiley Evers International Airport), with a regional authority. ROA.4567-4568, 4570. Whereas the JMAA is comprised of five commissioners chosen by Jackson city officials, the new nine-member regional body has two commissioners selected by city officials, two selected by neighboring counties' officials, and five selected by state officials. ROA.4567-4568, 4587-4588. Jackson's population is approximately 79% Black, while the population of Mississippi is approximately 37% Black. ROA.4602. All five commissioners at the time of the operative complaint identified as Black. ROA.4604-4605.

B. Relevant Procedural Background

1. District Court Proceedings

A Jackson citizen brought this action seeking to enjoin enforcement of S.B.2162. ROA.91-97. The city's mayor and council, as well as the JMAA, its

[1] "ROA.___" refers to the electronic record on appeal. "Op.__" refers to the panel's August 25, 2023, revised decision in this appeal, which this Court subsequently vacated. "Leg.Br.__" refers to the legislators' supplemental en banc brief. "Comm'r.Br.__" refers to the commissioners' supplemental en banc brief.

board of commissioners, and the individual commissioners, intervened. ROA.554-557. In relevant part, the commissioners claim in their individual capacities that S.B.2162 violates the Equal Protection Clause because it was enacted with a racially discriminatory purpose. ROA.4601-4610.

The intervenors served third-party subpoenas on eight current or former Mississippi legislators who were involved in S.B.2162's passage. ROA.1748. The legislators produced "reports and other factual data" related to the law. Leg.Br.8. The subpoenas' Request #3 also sought documents "exchanged by . . . you and any person, including members of the Mississippi legislature and any governmental agency, body, or its representative(s) regarding Senate Bill 2162 and/or the Jackson-Medgar Evers International Airport." ROA.1748 (quoting ROA.1540). The legislators objected on relevance and legislative-privilege grounds and refused to respond or provide a privilege log, prompting the intervenors to seek enforcement. ROA.1748-1749.

A magistrate judge partially granted and partially denied the subpoena enforcement motion. ROA.1747-1761. As relevant here, the magistrate judge first held that Request #3 sought evidence of legislative intent relevant to plaintiffs' equal protection claim. ROA.1750-1751. The magistrate judge then considered the legislators' assertion of the state legislative privilege, which the judge construed as a "qualified" shield to discovery that may yield after balancing

relevant interests or be waived through third-party disclosure. ROA.1753-1759. The magistrate judge also declined the legislators' request to treat the privilege as absolute and excuse them from providing a privilege log. ROA.1760-1761. The magistrate judge ordered the legislators to produce "the nonprivileged documents responsive to Request #3" and "a privilege log identifying the responsive documents withheld from production under a claim of privilege." ROA.1761.

The district court affirmed. ROA.3608-3611. The court held that the magistrate judge properly construed this Court's precedent when it required the legislators to "create the customary privilege log" to enable adjudication of the privilege's application, and the court "indicated" that documents shared with "non-legislative third parties" likely will have to be produced. ROA.3608-3611.

2. First Appeal And Remand

The legislators took their first appeal, which this Court resolved by concluding that the commissioners lacked standing as "residents and taxpayers of Jackson" to assert the equal protection claim on which they sought discovery. *See Stallworth v. Bryant*, 936 F.3d 224, 231-232 (5th Cir. 2019). The court vacated the discovery order and remanded with instructions to dismiss without prejudice. *Id.* at 232.

On remand, the commissioners amended their complaint, which now asserts a theory of injury tied to their positions as commissioners. ROA.4609-4610. The

commissioners sought and the district court granted reinstatement of the discovery order. ROA.4719-4721, 4823.

3. Second Appeal

The legislators again appealed, this time generating a fractured decision with shifting majorities. The Court held that appellate jurisdiction was proper and that the commissioners had Article III standing before it turned to the subpoenas. Relevant here, the panel majority upheld the district court's requirement that the legislators provide a privilege log. Op.11-12. The majority rejected the legislators' claim that no privilege log should be required because Request #3 seeks material that is either "privileged or irrelevant"—*i.e.*, evidence of legislative motive, which is privileged, or otherwise materials not pertaining to motive, which are irrelevant to the intent-based equal protection claim. Op.11-12. The majority instead held that a privilege log was necessary because legislative privilege can be waived when, for example, a legislator "*publicly* reveals" documents. Op.11. Further, it held that "statements that have no connection whatsoever with 'legitimate legislative activity' are not protected by legislative privilege." Op.11-12 (citation omitted). Thus, the majority "agree[d] with the district court that a privilege log is necessary to determine which of the requested documents and communications are protected by legislative privilege." Op.12.

The majority "disagree[d]," however, with the district court's "overbroad" conclusion that sharing documents with third parties waives the privilege. Op.12-13. Rather, the majority held, communications with outsiders—such as "private communications with advocacy groups"—"might still be within the sphere of 'legitimate legislative activity'" if part of the "modern legislative procedures through which legislators receive information" bearing on "potential legislation." Op.12 (citations omitted).

4. Petition For Rehearing En Banc

The legislators petitioned for rehearing en banc, asserting that the appeal raises questions of exceptional importance about standing and legislative privilege. While the petition was pending, the panel issued an amended opinion containing additional standing analysis. *See* Op.7-11. Soon thereafter, this Court granted rehearing en banc and vacated the panel opinion. Order 2 (Aug. 29, 2023).

SUMMARY OF ARGUMENT

The legislators ask this Court to treat the state legislative privilege as a bar to normal discovery process, relying on overbroad constructions of Supreme Court precedent, inapplicable decisions of other circuits, and a strained reading of this Court's decision in *La Unión del Pueblo Entero v. Abbott*, 68 F.4th 228 (5th Cir. 2023) (*LUPE*). Leg.Br.14, 25-48. Although the privilege protects from disclosure certain materials that may be in legislators' possession, *LUPE* correctly

acknowledged that the privilege has a bounded scope, may be waived, and "must yield" in "extraordinary instances" where "important federal interests are at stake." 68 F.4th at 237 (internal quotation marks and citations omitted). The legislators' request for an exemption from civil discovery lacks case-law support and, if granted, would seriously undermine enforcement of constitutional and statutory guarantees in many cases where proof of discriminatory legislative intent or a tenuous public policy is important.

A privilege log is, as the district court put it, the "customary" means of substantiating and then testing a privilege assertion. ROA.3609. The mere incantation of legislative privilege, as is true for other common-law privileges, does not exempt state officials from the obligation to produce a privilege log. Courts need not take on faith legislators' assertions that withheld documents are indeed privileged or that no exception applies. None of the other circuit decisions the legislators invoke supports their claim that the district court abused its discretion or provides reason for this Court to overturn its own precedent and upend established practice.

ARGUMENT

The district court did not abuse its discretion when it required the legislators to provide a privilege log.

Because the state legislative privilege is bounded in scope, waivable, and may yield in some circumstances, the district court properly ordered the legislators

to provide a privilege log to substantiate and enable testing of their privilege assertions.

A. The qualified state legislative privilege is bounded in scope, waivable, and may yield.

1. The state legislative privilege is distinct from protections afforded to federal lawmakers and does not bar civil discovery.

As this Court has recognized, the state legislative privilege "is an evidentiary privilege governed by federal common law, as applied through Rule 501 of the Federal Rules of Evidence." *LUPE*, 68 F.4th at 235 (alteration omitted) (quoting *Jefferson Cmty. Health Care Ctrs., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017)). Although this privilege—which derives from the comity afforded state legislators—bears some resemblance to the broad and firm immunity that the Speech or Debate Clause of the U.S. Constitution confers on members of Congress, it is a distinct and qualified protection. *See generally United States v. Gillock*, 445 U.S. 360 (1980); *LUPE*, 68 F.4th at 237.

a. The Speech or Debate Clause provides that "for any speech or debate in either House" of Congress, Senators and Representatives "shall not be questioned in any other [p]lace." U.S. Const. Art. I, § 6, Cl. 1. The Clause's aims are "insuring the independence of individual legislators" and "reinforcing the separation of powers." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (quoting *United States v. Brewster*, 408 U.S. 501, 507 (1972) and

United States v. Johnson, 383 U.S. 169, 178 (1966)). To that end, the Clause protects federal legislators "acting within the sphere of legitimate legislative activity" from the "'consequences'" and "'burden of defending themselves'" in litigation. *Id.* at 503 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)).

Even where members of Congress are not sued, the Speech or Debate Clause provides an evidentiary or testimonial privilege that prevents inquiry into "the regular course of the legislative process and into the motivation for those acts." *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (citation omitted). Where the Speech or Debate privilege applies, it is absolute. *See, e.g.*, *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 862 (D.C. Cir. 1988).

State legislators receive no such express constitutional (or federal statutory) protections. Instead, the Supreme Court has inferred from tradition that "state legislators enjoy common-law immunity from liability for their legislative acts . . . that is similar in origin and rationale to that accorded Congressmen." *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951)). Although courts generally consider the *immunity* available to federal and state legislators to be equivalent, the absolute evidentiary *privilege* for federal legislators is "broader" than the privilege for state legislators. *Id.* at 733 (citing *Gillock*, *supra*); see *LUPE*, 68 F.4th at 237

(acknowledging that "the federal privilege yields to fewer exceptions than the state privilege").

This is so because the separation-of-powers doctrine, which undergirds the privilege for members of Congress, falls away where state legislators are concerned, and "principles of comity" alone do not justify a coextensive privilege. *Gillock*, 445 U.S. at 370; *see also Consumers Union*, 446 U.S. at 733. Indeed, "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." *Gillock*, 445 U.S. at 370. Accordingly, the legislative privilege yields where "important federal interests are at stake, as in the enforcement of federal criminal statutes." *Id.* at 373; *cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (recognizing that, while legislative privilege "frequently" bars legislators' testimony, in "extraordinary instances" legislators "might be called to the stand at trial to testify concerning the purpose of [an] official action").

b. While the legislators insist that legislative privilege functions as a bar to "compulsory evidentiary process" (Leg.Br.26),[2] their bold claim does not comport

[2] The legislators cite *EEOC v. Washington Suburban Sanitary Commission*, 631 F.3d 174, 181 (4th Cir. 2011), for this proposition, but that decision did not treat legislative privilege as a complete bar to discovery. Instead, it required the

with precedent in civil rights cases that involve proof of discriminatory legislative intent or tenuous public policy—including evidence obtained from state legislators. The Supreme Court's seminal *Arlington Heights* decision laid out a multifactored analysis for assessing discriminatory purpose that incorporates legislative history, "especially" lawmakers' contemporary statements. 429 U.S. at 266-268. Although the Court deemed "extraordinary" the cases in which legislators must testify at trial about the purpose of legislative acts, it is significant that in *Arlington Heights* itself, the plaintiffs questioned local board members about information underlying a challenged zoning decision—both during discovery and trial—to support their equal protection and Fair Housing Act claims. *Id.* at 270 n.20. Similarly, the Court has directed an inquiry under Section 2 of the Voting Rights Act (VRA) into whether "the policy underlying . . . the contested practice or structure is tenuous." *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986). There, too, the three-judge trial court had relied on the testimony of a "legislator-witness." *Gingles v. Edmisten*, 590 F. Supp. 345, 374 (E.D.N.C. 1984).

The Supreme Court has left little question that individual legislators' conduct may be relevant to assessing legislative intent, referencing legislators' statements, deeds, and even testimony as evidence of discriminatory purpose. *See,*

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regional body claiming the privilege to comply with an investigative subpoena that only sought information pertinent to an age-discrimination claim. *Id.* at 181-184.

e.g., *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (holding that a facially neutral voting restriction violated the Equal Protection Clause based in part on a legislator's statement that the law's purpose was "to establish white supremacy"); *see also, e.g.*, *Cooper v. Harris*, 581 U.S. 285, 298-300 (2017); *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 265-266, 273-274 (2015); *cf. Department of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1915 (2020) ("contemporary statements" are "possible evidence" of executive-branch animus (citation omitted)). Indeed, the United States and private plaintiffs regularly elicit discovery of individual legislators' deeds and statements that demonstrates the purpose of challenged enactments, and courts often consider such evidence as compelling proof of civil rights violations. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 236-237 (5th Cir. 2016) (en banc) (citing as evidence of discriminatory purpose state legislators' deposition testimony about tabling amendments to challenged voter ID law); *North Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016) (emphasizing evidence of legislators' and staff's requests for and use of race data in crafting restrictive voting law); *see also, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 950 (W.D. Tex. 2017) (three-judge

court); *Busbee v. Smith*, 549 F. Supp. 494, 500, 518 (D.D.C. 1982) (three-judge court).[3]

Allowing state legislators to assert the privilege free from the scrutiny enabled by a privilege log would transform what is now a limited and qualified common-law privilege into a complete bar to discovery, thwarting proof of many meritorious federal claims.

2. This Court and others have acknowledged limits, exceptions, and qualifications to the state legislative privilege.

In keeping with precedent and tradition, this Court has construed the state legislative privilege as bounded in scope, waivable, and qualified. *LUPE*, 68 F.4th at 236-238; *Jefferson Cmty. Health Care Ctrs.*, 849 F.3d at 624. Several other circuits have acknowledged the same. *See, e.g.*, *In re North Dakota Legis. Assemb.*, 70 F.4th 460, 464-465 (8th Cir. 2023); *American Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 86-88 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d

[3] The legislators highlight Judge Jones's *Veasey* concurrence and dissent—which critiqued the significant discovery taken from legislators—in arguing that Congress could not have foreseen the "burdens of modern discovery" in enacting Section 1983. Leg.Br.29-30 & n.20. But she described the "internal correspondence" obtained only as "potentially privileged," and wrote that her concern was "not to say that circumstantial evidence of intent may be not used in proving intentional discrimination." *Veasey*, 830 F.3d at 287-288 & n.14. Notably, the *Veasey* majority remanded for further analysis after concluding the evidence could support a finding of discriminatory intent. *Id.* at 230-243.

1175, 1187-1188 (9th Cir. 2018). The privilege's limitations compel the conclusion that a district court must have discretion to require a log to support privilege assertions.

Most recently, this Court in *LUPE* held that the state legislative privilege, "like other privileges," is "'qualified'" and subject to "exceptions that serve 'the normally predominant principle of utilizing all rational means for ascertaining the truth.'" 68 F.4th at 236 (quoting *Jefferson Cmty. Health Care Ctrs.*, 849 F.3d at 624). The Court reached this view by considering core Supreme Court precedents, like *Tenney*, and contemporary appellate decisions, like *In re Hubbard*, 803 F.3d 1298, 1311-1312 (11th Cir. 2015), that the legislators claim demonstrate the impropriety of subjecting them to normal discovery protocols like providing a privilege log. *See LUPE*, 68 F.4th at 235-239. *LUPE*, which arose from non-party state legislators' resistance to document subpoenas issued by private plaintiffs in VRA litigation, did not exhaustively analyze the privilege's applications but nevertheless reaffirmed key principles governing the privilege. *Id.* at 231, 235-240.

First, *LUPE* defined the privilege's scope as encompassing "actions that occurred within 'the sphere of legitimate legislative activity' or within 'the regular course of the legislative process.'" 68 F.4th at 235 (quoting *Tenney*, 341 U.S. at 376, and *Helstoski*, 442 U.S. at 489). *LUPE* stated that the privilege reaches "all

aspects of the legislative process," including meetings with non-legislators "to discuss issues that bear on potential legislation." *Id.* at 235-236 (quoting, *inter alia*, Op.11-12). Because the Court understood the parties to agree that the withheld documents fell within the privilege's scope, it went no further in this regard. *Id.* at 236.

Second, *LUPE* held that legislators may waive the privilege when they reveal documents "publicly," as when shared with "third parties *outside* the legislative process," but not when legislators bring "third parties *into* the process." 68 F.4th at 237 (quoting Op.11). The Court offered examples from the legislators' privilege log of documents for which the privilege was not waived—a legislator's hand-written notes on materials from a third party, correspondence and advice solicited from constituents and officials—but offered no categorical delineation of insider and outsider scenarios. *Ibid.*

Third, *LUPE* affirmed that the "legislative privilege gives way 'where important federal interests are at stake,'" in "criminal as well as 'extraordinary' civil cases." 68 F.4th at 237-238 (quoting *Gillock*, 445 U.S. at 373, and *Arlington Heights*, 429 U.S. at 268). The Court noted, however, that these "qualifications do not subsume the rule." *Id.* at 238. *LUPE* identified a "continuum of legislative immunity and privilege," *id.* at 239, ranging from the Section 1983 suits in *Tenney* and *Bogan v. Scott-Harris*, 523 U.S. 44 (1998)—both damages suits against

legislators, in which the immunity did not yield—"to the criminal prosecution under federal law at issue in *Gillock*," where the privilege did yield. 68 F.4th at 239. The Court held that the case before it was more akin to the former than the latter, *ibid.*, and did not purport to answer how the question might be resolved in other cases.

Thus, *LUPE* confirms—consistent with the panel majority in this case and this Court's *Jefferson Community Health Care Centers* decision—that, far from absolute, the qualified state legislative privilege is bounded in scope, waivable, and must yield in extraordinary civil cases.

B. A district court may require a privilege log to assess whether the state legislative privilege shields documents from discovery.

There is no merit to the legislators' suggestion that invoking legislative privilege effectively exempts them from normal federal court discovery protocols, such as substantiating privilege assertions with a log. *See* Leg.Br.26-42. This Court has not held that the privilege functions as a complete bar to discovery. *See LUPE*, 68 F.4th at 233-240. Rather, *LUPE* acknowledged the privilege's goals but explained that "[r]ecords are not protected from production just because they are within the privilege's scope." *Id.* at 236. It affirmed that legislative privilege, "like other privileges," may face exceptions or qualification in service of "'the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Ibid.* (quoting *Jefferson Cmty. Health Care Ctrs.*, 849 F.3d at 624).

Moreover, *LUPE* relied on normal methods for assessing the privilege's application. *Id.* at 237 (referencing privilege log entries). The full Court should confirm the vitality of these principles and practical tools in discovery.

1. A privilege log is the usual tool by which parties substantiate and courts assess whether a privilege applies, is waived, or must yield in keeping with the aim of "ascertaining the truth." *LUPE*, 68 F.4th at 236 (citation omitted). "A party asserting a privilege exemption from discovery bears the burden of demonstrating its applicability." *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001); *see also NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011). Indeed, the federal rules require that justification. When withholding documents responsive to a subpoena, a person must expressly claim the privilege and "describe the nature" of the documents "in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." Fed. R. Civ. P. 45(e)(2)(A); *accord* Fed. R. Civ. P. 26(b)(5)(A) (comparable requirement for parties resisting discovery requests).

Providing a privilege log to satisfy Rules 26 or 45 is so "customary," as the district court put it (ROA.3609), that this Court appears to have said little about it. As the First Circuit has explained, Rule 45's "operative language is mandatory" and "courts consistently have held that the rule requires a party resisting disclosure to produce a document index or privilege log." *In re Grand Jury Subpoena*, 274

F.3d 563, 575-576 (1st Cir. 2001); *see also In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 751 (D.C. Cir. 2006).

This Court has clarified that parties must offer document-specific designations—not blanket assertions—to satisfy these requirements: A "privilege log's description of each document and its contents must provide sufficient information to permit courts and other parties to 'test the merits of' the privilege claim." *EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 697 (5th Cir. 2017) (alteration omitted) (quoting *United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982), and citing *Interbake Foods*, 637 F.3d at 502)). This requirement applies to a range of common-law privileges. *See, e.g.*, *ibid.* (attorney-client privilege); *Interbake Foods*, 637 F.3d at 502 (attorney-client and work-product privileges); *Veracities PBC v. Strand*, 602 F. Supp. 3d 1354, 1359 (D. Or. 2022) (marital-communications privilege); see also *In re Subpoena Duces Tecum*, 439 F.3d at 750-751 (requiring privilege log before considering existence of common-law settlement privilege). The unexcused failure to substantiate privilege assertions may result in waiver. *BDO USA*, 876 F.3d at 697; *accord In re Grand Jury Subpoena*, 274 F.3d at 576.

Indeed, as with other common-law privileges, courts routinely rely on privilege logs to assess claims of legislative privilege. One example, of course, is *LUPE*, where this Court referenced entries in the legislators' privilege log in analyzing the waiver question. 68 F.4th at 236. Although the legislators there

voluntarily produced a log, courts often order parties resisting discovery on legislative privilege grounds to do so to enable evaluation of their claims.[4] Even members of Congress, who receive the Speech or Debate Clause's more robust protections, sometimes must provide privilege logs (or similar tools) to support privilege assertions. *See, e.g.*, *Securities & Exch. Comm'n v. Committee on Ways & Means of the U.S. House of Reps.*, 161 F. Supp. 3d 199, 248-249, 252 (S.D.N.Y. 2015); *Jewish War Veterans of the U.S., Inc. v. Gates*, 506 F. Supp. 2d 30, 61-62 (D.D.C. 2007).

2. a. To the extent the legislators argue that they should be relieved categorically from the obligation of providing a privilege log, such an absolute construction of the privilege deviates from this Court's precedent and lacks support in other circuit court decisions. As explained in Section C below, a log is essential for considering legislative privilege assertions.

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[4] *See, e.g.*, *Georgia State Conf. of the NAACP v. Georgia*, No. 1:21-cv-05338, 2022 WL 18780944, at *3 (N.D. Ga. Nov. 1, 2022); *Glowgower v. Bybee-Fields*, No. 3:21-cv-00012, 2022 WL 4042412, at *8 (E.D. Ky. Sept. 2, 2022); *Brandt v. Rutledge*, No. 4:21CV00450, 2022 WL 3108795, at *1 (E.D. Ark. Aug. 4, 2022); *NAACP v. East Ramapo Cent. Sch. Dist.*, No. 17 Civ. 8943, 2018 WL 11260468, at *7 (S.D.N.Y Apr. 27, 2018); *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 5:15-CV-156, 2015 WL 7854590, at *3 (E.D.N.C. Dec. 3, 2015); *Committee for a Fair & Balanced Map v. Illinois State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *11 (N.D. Ill. Oct. 12, 2011).

This Court has acknowledged that courts must arbitrate state government officials' claims of privilege rather than abdicate control of the evidence to officials' "caprice," particularly given the "potential for misuse of government privilege." *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 388 (5th Cir. 1970) (quoting *Overby v. United States Fidelity & Guar. Co.*, 224 F.2d 158, 163 (5th Cir. 1955) (federal executive privilege) (quoting *United States v. Reynolds*, 345 U.S. 1, 7 (1953) (state secrets)). Although *Carr* involved a state agency's invocation of governmental privilege, not a legislator's, the *LUPE* court deemed these two privileges sufficiently analogous to rely on *Carr* in analyzing appellate jurisdiction. *LUPE*, 68 F.4th at 234.

The legislators' claim that *LUPE* calls into question the propriety of requiring a privilege log (Leg.Br.14, 25-26)—and thus the principle of *Carr*—lacks support. *LUPE* gave great weight to the purposes and protections of legislative privilege that the legislators advance here and yet never suggested that such privilege assertions may evade judicial evaluation. 68 F.4th at 237. Quite the contrary, this Court analyzed legislators' privilege claims by considering information in their privilege log. *Ibid.*

b. The other circuit decisions on which the legislators rely (Leg.Br.32-35, 38-42) do not support abandoning this Court's principles and practices to satisfy the legislators' entreaty to take their word for it when it comes to legislative

privilege simply because "motive" is in play. Decisions like the Eleventh Circuit's in *Hubbard* and the Eighth Circuit's in *North Dakota* represent practical outcomes driven by the substantive allegations and procedural histories of each case; they do not support the legislators' categorical opposition to a privilege log here.

The Eleventh Circuit in *Hubbard*, *supra*, quashed document subpoenas relating to a non-cognizable First Amendment retaliation claim, but it did not purport to eliminate legislators' obligation to satisfy the requirements of Rule 45. *Hubbard* held first that the district court erred in deeming the privilege forfeited through officials' failure to meet four purported requirements for invoking a government privilege, because circuit precedent demanded compliance only with Rule 45's requirement that a party asserting privilege describe the withheld documents sufficiently to enable assessment of the claim. 803 F.3d at 1310. The court then found that the subpoenas exclusively sought evidence of officials' motivations in passing the challenged law, such that the "factual heart" of the claim was "one and the same" with the "scope of the legislative privilege." *Id.* at 1311. "Given the circumstances," the court held that the officials adequately asserted the privilege through their motions to quash and that the district court's "unnecessary detail and procedures" undermined the privilege's purpose of preventing distraction. *Ibid.* The court also held that the privilege did not yield because the plaintiffs' free-speech challenge to an otherwise-valid statute premised

on purportedly retaliatory motive was not cognizable; thus, the subpoenas did not "serve an important federal interest." *Id.* at 1312 (citation omitted).

Hubbard contained important caveats that bear repeating here, where legislators invoke the decision to try to escape normal discovery protocols. The court noted that it was not deciding "whether a document-by-document invocation of the legislative privilege would be required in a different case," where evidence was not sought solely to support an impermissible claim based on legislators' subjective motives. 803 F.3d at 1311. The court also warned that its decision "should not be read as deciding whether, and to what extent, the legislative privilege would apply to a subpoena in a private civil action based on a different kind of constitutional claim." *Id.* at 1312 n.13. Thus, by its own terms, *Hubbard* does not cast doubt on the usual practice of requiring a privilege log to support invocations of legislative privilege or on the possibility that the privilege may yield to support certain viable federal-law claims. *But see Pernell v. Florida Bd. of Governors of the State Univ.*, 84 F.4th 1339, 1343-1344 (11th Cir. 2023) (holding that legislative privilege barred a subpoena seeking evidence of legislators' motivations).[5]

[5] The *Pernell* majority premised its holding on Supreme Court and Eleventh Circuit authority regarding legislative *immunity* and a strained reading of *Hubbard* that ignored its cautionary caveats. 84 F.4th at 1343-1344. *Pernell* is inconsistent with this Court's precedent, which acknowledges the privilege's protections for

The Eighth Circuit's decision in *North Dakota* is similarly limited. There the court reversed a district court's denials of state legislators' motions to quash subpoenas seeking "evidence of alleged illicit motive" in a suit challenging state house redistricting plans under Section 2 of the VRA. 70 F.4th at 462 (internal quotation marks omitted). The court understood there to be no dispute that the information sought was "within the sphere of legitimate legislative activity" and thus was "privileged" absent "waiver." *Id.* at 463-464. The court then held that the district court conceived of waiver too broadly, as communications with certain third parties "are a legitimate aspect of legislative activity." *Id.* at 464. Finally, the court declined to find that "this case" was an "extraordinary instance[]" in which the privilege yields, opining that individual motive cannot establish legislative intent and that the plaintiffs' VRA claim, in its view, did not depend on intent in any event. *Id.* at 464-465.

Although the legislators here claim that *North Dakota* shows that they need not produce a log to substantiate privilege claims (Leg.Br.14, 40), the majority did not address the issue—only the dissent did so. 70 F.4th at 466 (Kelly, J., concurring and dissenting in part). Moreover, as in *Hubbard*, the court's decision was guided by its understanding of the discovery dispute and claim before it, *i.e.*,

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legislators' subjective motivations but does not treat the privilege as absolute and presumes document-by-document review. *See* Section A.2, *supra*.

that the privilege's application to the materials sought was uncontested and they were unnecessary to establishing liability. Thus, *North Dakota* does not undercut the proposition that legislators' privilege assertions may be tested through a privilege log, as they were in *LUPE*.

The legislators cite other appellate decisions holding that evidence of legislators' motives may be privileged, but they shed no light on the antecedent requirement that legislators substantiate their privilege assertions. In *American Trucking Associations*, a Commerce Clause challenge to a bridge toll, it was undisputed that plaintiffs sought only evidence of officials' acts and motives that fell within the privilege's scope, and the First Circuit held that the privilege did not yield because the claim hinged on discriminatory effect, not purpose. 14 F.4th at 88-89. The court said nothing about requiring a privilege log to test whether responsive materials fell within the privilege's scope, and it reserved the possibility that the privilege might yield in some other "private civil case" that depends "heavily on subjective motive or purpose." *Id.* at 88. Similarly, the Ninth Circuit's decision in *Lee*, where the court addressed whether the district court erred in barring depositions of city council officials in a gerrymandering case, says nothing about the discovery issue here. 908 F.3d at 1186-1188. Having agreed that summary judgment in the City's favor was proper, *Lee* found the "factual

record" before it insufficient to support requiring the privilege to yield. *Id.* at 1183-1186, 1188.

The legislators' reliance (Leg.Br.33) on *Schlitz v. Virginia*, 854 F.2d 43 (4th Cir. 1988), too, is misplaced. There, the Fourth Circuit held that legislative immunity barred a state judge's suit against the Commonwealth for its General Assembly's failure to reelect him to a judgeship based on age because the suit would require the legislators to testify about their motives in performing an indisputably legislative act. *Id.* at 45-46. But *Schlitz* says nothing about the privilege's application to a claim *not* barred by legislative immunity.

In another unavailing case the legislators invoke (Leg.Br.35), *State Employees Bargaining Agent Coalition v. Rowland*, 494 F.3d 71 (2d Cir. 2007), the Second Circuit considered whether the governor's assertion of legislative immunity barred a claim for unlawful termination of public employees. Although the court precluded probing the governor's motives to determine whether his acts were legislative, it did so because motivation had no bearing on this functional inquiry. *Id.* at 90 (citing *Bogan*, 523 U.S. at 55). The court held that further discovery was necessary on whether the immunity applied, *id.* at 91-92—quite the opposite of allowing such assertions to go unsubstantiated.

C. The district court properly required the legislators to provide a privilege log.

As the panel majority held, the district court was within its discretion to order the legislators to provide the "customary" privilege log so that the parties and court could assess their legislative privilege assertions. Op.11-12; ROA.3609 (affirming ROA.1753-1755, 1760-1761); ROA.4823. *LUPE* confirms the propriety and value of a privilege log to ensure that withheld documents are in fact within the privilege's scope and that the privilege has not been waived. A log also may assist in assessing whether the privilege must yield.

First, as the panel majority concluded, a privilege log is "necessary to determine which of the requested documents and communications are protected by legislative privilege." Op.12. As *LUPE* reaffirmed, the privilege protects materials concerning actions "within the sphere of legitimate legislative activity or within the regular course of the legislative process," including certain third-party interactions that "bear on potential legislation." 68 F.4th at 235-236 (internal quotation marks and citations omitted). Request #3 seeks documents the legislators exchanged with anyone "regarding Senate Bill 2162 and/or the Jackson-Medgar Evers International Airport." ROA.1748 (citation omitted). The legislators contend that all information sought in Request #3 pertains to legislation and falls within the privilege's scope. Leg.Br.40-41. But the commissioners disagree, explaining that, for example, the request reaches information the

legislators might possess about the airport (rather than about the legislation) that could undermine proffered race-neutral justifications for S.B.2162. Comm'r.Br.39.

It is not obvious that all communications responsive to Request #3 would arise from "the regular course of the legislative process" or "bear on potential legislation." *LUPE*, 68 F.4th at 235-236 (citations omitted). Nor was the district court required to take the legislators' word for it. *See Carr*, 431 F.2d at 388. Indeed, the panel majority rightly observed that a privilege log would help to ascertain whether withheld materials are unconnected with legislative activity (or in service of legislators' "private indulgence" rather than the "public good") and thus non-privileged. Op.11-12 (citing *Hubbard*, 803 F.3d at 1308, and *Tenney*, 341 U.S. at 376-377).

Significantly, the legislators acknowledge they produced certain materials responsive to the subpoenas—namely, "reports provided for the benefit of the legislators" and "other factual data connected with S.B.2162." Leg.Br.8, 42. That the legislators possess but did assert privilege over some responsive materials further underscores the need for a log so that the commissioners may test (and the court may consider) privilege assertions over other responsive documents. Thus, the legislators can draw no support for their argument that a log is unnecessary from cases like *Hubbard* or *North Dakota*, in which the courts found that all

documents sought were within the privilege's scope. *See Hubbard*, 803 F.3d at 1311; *North Dakota*, 70 F.4th at 463-464.

Second, it also was proper for the district court to require a privilege log to evaluate whether the legislators had waived the privilege. *See* Op.11-12; ROA.1757-1761, 3609. *LUPE* construed waiver more narrowly than the district court here, but it confirmed that legislative privilege is not "non-waivable." 68 F.4th at 236. Indeed, *LUPE* holds that legislators may waive the privilege where they share materials with those "outside the legislative process" or "publicly." *Id.* at 237 (emphasis omitted).

The legislators make too much of this Court's remark in *LUPE* that "[t]he very fact that Plaintiffs need discovery to access" the withheld documents "shows that they have not been shared publicly," 68 F.4th at 237, suggesting that the subpoena itself is an admission of non-disclosure. *See* Leg.Br.40. But it is easy to envision instances where documents that a legislator shared publicly or with third parties outside the legislative process might remain unknown or inaccessible to plaintiffs. Notably, *LUPE* made its observation with a privilege log before it—which it cited in finding no waiver—and did not suggest that probing the waiver claim improperly burdens the legislators. 68 F.4th at 236-237. Moreover, because *LUPE* did not fully delineate what constitutes communications inside versus outside the legislative process, a privilege log may be important for the district

court to assess whether waiver occurred rather than leaving that determination to the party asserting privilege.

Lastly, a privilege log may be an appropriate tool for assessing whether a case presents an "extraordinary instance[]" in which the state legislative privilege must "yield" in service of "important federal interests." *LUPE*, 68 F.4th at 237-238 (citations omitted); *accord American Trucking Ass'ns*, 14 F.4th at 87; *Hubbard*, 803 F.3d at 1311.[6] Courts assessing whether the privilege yields have considered a range of factors (such as those the magistrate judge identified (ROA.1756)) on which a privilege log might shed light, including the relevance and availability of evidence and the possibility that disclosure will prompt future timidity in legislative employees.

In sum, a privilege log is an essential mechanism that courts use to ensure access to needed discovery without improperly revealing privileged material. A ruling here that effectively grants state legislators an absolute privilege against civil process by withdrawing this crucial tool will impede access to relevant

[6] In tension with *Hubbard*, the *Pernell* majority held that, absent the Supreme Court's imprimatur, the legislative privilege is unqualified in a private plaintiff's Section 1983 action. 84 F.4th at 1344-1345. No other appellate court has so held. The dissent explains convincingly why Supreme Court precedent, the history of Section 1983, and longstanding federal practice do not support this conclusion. *Id.* at 1349 (J. Pryor, J., dissenting).

evidence of legislative intent and thus impair efforts to enforce federal statutory and constitutional limits on state action.

CONCLUSION

For these reasons, this Court should affirm the district court's order requiring production of a privilege log.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 16, 2023, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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Date: November 16, 2023