No. _____

IN THE

Supreme Court of the United States

BARBERS HILL INDEPENDENT SCHOOL DISTRICT, ET AL..
Applicants,

v.

EVERETTE DE'ANDRE ARNOLD, ET AL.

On Application for a Stay from the United States Court of Appeals for the Fifth Circuit

APPLICATION FOR A STAY PENDING A PETITION FOR A WRIT OF CERTIORARI AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (who were the defendants-appellants below) are Barbers Hill Independent School District (the District), Barbers Hill Independent School District Board of Trustees (the Board), Greg Poole, and Fred Skinner (collectively, the District Parties).

Respondents (who were the plaintiffs-appellees below) are Everette De'Andre Arnold, Kaden Bradford, and Sandy Arnold.

RELATED PROCEEDINGS

United States District Court:

George v. Abbott, 2025 WL 1685239 (S.D. Tex. June 16, 2025)

George v. Abbott, 2025 WL 2083338 (S.D. Tex. July 24, 2025)

United States Court of Appeals:

George v. Barbers Hill Indep. Sch. Dist., No. 25-40544 (5th Cir. 2025)

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

1. Pursuant to Supreme Court Rule 23, 28 U.S.C. § 2101(f), and 28 U.S.C. § 1651, the District Parties ask the Court stay the judgment issued by the United States Court of Appeals for the Fifth Circuit and further proceedings in the United States District Court for the Southern

District of Texas pending a ruling on an intended petition for a writ of certiorari. The District Parties also request an immediate administrative stay to prevent irreparable injury.

2. This appeal concerns the legislative privilege. Federal, state, and local legislators may not, according to the privilege, be compelled to testify "concerning the purpose of official action" except "[i]n some extraordinary instances." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). "Extraordinary instances" only exist in criminal prosecutions. *See United States v. Gillock*, 445 U.S. 360, 373 (1980). This Court and the circuits agree that a run-of-the-mill civil rights case, such as this one, does not fit the bill. *Id.*[1]

[1] The cases barring plaintiffs a license to interrogate legislators via depositions or subpoenas run the gamut of federal claims. *Bogan*, 523 U.S. at 47, 53 (employment); *Vill. of Arlington Heights*, 429 U.S. at 254, 268 & n.18 (housing); *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310, 323 (5th Cir. 2024) (*Bettencourt*) (election laws); *La Union del Pueblo Entero v. Abbott*, 68 F.4th 228, 231–32, 237 (5th Cir. 2023) (*Hughes*) (same); *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1344 (11th Cir. 2023) (education); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021) (toll assessments); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1189, 1188 (9th Cir. 2018) (redistricting). If the Fifth Circuit had reached the appeal's merits, the case would not be a close call.

3. Here, a district court ordered local legislators (a volunteer school board president and a superintendent) to sit for depositions and disclose the rationale and underlying motivations for a school board policy. The district court forced disclosure of information subject to the privilege—in the presence of opposing counsel—without considering the privilege's contours or application and under threat of sanctions. Because this is precisely the type of disclosure the privilege bars, the District Parties appealed.

4. Acting *sua sponte*, the Fifth Circuit declined to exercise jurisdiction. First, the panel cited "prudential" reasons not to resolve the appeal, such as the District Parties' purported inability to satisfy the Fifth Circuit's non-party standing framework. *Arnold v. Barbers Hill Indep. Sch. Dist.*, 157 F.4th 749, 753–54 (5th Cir. 2025). Second, the panel held the government cannot assert the privilege on behalf of non-party legislators. *Id.* at 755.

5. This Court has already addressed the first issue. A decade ago, this Court directed courts not to abdicate their "virtually unflagging" duty to "hear and decide cases" in their jurisdiction merely because "prudence" dictates. *Lexmark Int'l Inc. v. Static Control Components,*

Inc., 572 U.S. 118, 125–26 (2014). The panel did not address *Lexmark*, which other circuits have held fatal to prudential standing doctrines. And although this Court has not considered the second issue, the link between the privilege's purpose and government action underscores why the Fifth Circuit's decision is wrong.

6. As constructed, the district court's "assert-disclose-review" procedure forces legislators to either (1) unwillingly disclose information protected by the legislative privilege or (2) face sanctions. *Arnold*, 157 F.4th at 752. By declining to exercise appellate jurisdiction, the panel has tacitly forced the same choice without a meaningful avenue for appellate review. But once information is released, there is no way to get it back; the "cat is out of the bag," so to speak. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.).

7. The District Parties intend to prepare a petition for a writ of certiorari. Because the District Parties face irreparable harm unless this Court intervenes, the District Parties respectfully request a stay to allow the preparation and filing of the petition.

STATEMENT

8. This case stems from a school board policy on dress and grooming standards. Like other school districts nationwide, public and private employers, and the military, the District has a hair-length rule for male students. The reasons for the rule—i.e., community expectations, student success and discipline, and career readiness—are public and well-documented. *George v. Abbott*, 2025 WL 1685239, at *2 (S.D. Tex. June 16, 2025). Indicting the hair-length rule as unlawful discrimination, two students and a parent sued the District. *Arnold*, 157 F.4th at 752.

9. During discovery, the respondents sought to depose former-Board President Fred Skinner and Superintendent Greg Poole "about the Board members' 'subjective intentions, motivations, thought processes, and any other information not available to the public concerning the adoption of [the District's] male hair length policy.'" *Id.* at 752. The District Parties agreed to depositions but maintained that any questions falling within the legislative privilege's ambit were improper. *Id.*

10. Disagreeing, the district court established an "assert-disclose-review" approach, wherein:

> Deponents would appear for their depositions and testify. If they chose to assert the legislative privilege for a particular question, they still were required to answer the question in full [in the presence of opposing counsel]. The parties would then mark those portions of the deposition transcripts as "confidential." If a party wished to use one of those portions later, it could move to compel and file a sealed copy of the transcript excerpt for *in camera* review.

Id. at 752.

11. But the proposed "assert-disclose-review" approach vitiates the privilege, which is intended to ensure that "elective office remains an invitation to draft legislation, not defend" litigation. *Hughes*, 68 F.4th at 233. Indeed, "[t]he privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions" of compelled testimony on the basis of speculation. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). So the District Parties appealed.

12. The case was at the Fifth Circuit for over two years. One panel heard oral argument, but a judge developed a conflict. Following a second oral argument over a year later, a different panel dismissed the appeal due to "prudential standing considerations." *Arnold*, 157 F.4th at 753. The panel refused to determine if the "assert-disclose-review" approach "merely toes the legislative-privilege line or crosses it." *Id.* at 752 n.1.

13. With the Office of the Governor of Texas as an amicus, the District Parties requested rehearing. The panel's refusal to act on the appeal, the District Parties observed, functionally compelled the release of privileged information without appellate review. The District Parties cited this Court's admonition against using prudential standing to avoid hearing cases, along with several circuits exploring the doctrine's limits post-*Lexmark*. But the Fifth Circuit denied rehearing and did not stay the mandate, which was issued on December 11, 2025.

14. The District Parties are now subject to an order compelling Skinner's and Poole's testimony under threat of sanctions. *Arnold*, 157 F.4th at 753.

ARGUMENT

15. This application is made pursuant to 28 U.S.C. §§ 2101(f) and 1651. Under either provision, a Justice may stay the judgment of a court of appeals "pending action by this Court on [an] intended petition for certiorari." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J.) (considering application under § 2101(f)); *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins.* Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J.) (same, noting application could be filed under § 1651).

16. This Court's "settled practice [is] to grant a stay" pending a petition for a writ of certiorari "when three conditions are met." *Scott*, 561 U.S. at 1302. "First, there must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted)." *Id.* "Second, there must be a significant possibility that the judgment below will be reversed." *Id.* "And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed." *Id.*[2] A stay is not a matter of right; rather, principles of "sound equitable discretion" guide the analysis. *Id.* at 1305.

17. Here, all three elements are satisfied, and "sound equitable discretion" counsels in favor of granting a stay. Therefore, the Court should grant a stay so that the District Parties may file a petition for a writ of certiorari.

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[2] Although the cases applying § 2101(f) do not cite the traditional stay factors, the District Parties note that the factors mirror each other. The traditional stay factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). The District Parties will address these factors through the lens of § 2101(f) and the *Scott* framework.

A. There is a reasonable probability the Court will grant certiorari to resolve the circuit splits.

18. The first element considers the likelihood that the Court will grant review. *Scott*, 561 U.S. at 1302. This Court grants certiorari to resolve circuit splits, decide "important question[s] of federal law," and bring conflicting authority into line with this Court's decisions. Supreme Ct. R. 10(a), (c). In this case, the Court is likely to grant review on at least two important federal questions:

- May a federal court of appeals decline to exercise jurisdiction for "prudential" reasons in a legislative privilege case?
- May a governmental entity assert legislative privilege by filing a motion for protection for a non-party legislator?

Both questions involve splits in authority, and one involves a departure from this Court's express directives.

1. The Court will probably grant certiorari to correct the Fifth Circuit's erroneous reliance on prudential standing doctrines.

19. "[P]rudential doctrines implicate judicial discretion to avoid cases over which [a court] ha[s] jurisdiction." *Matter of Salubrio, L.L.C.*, 2023 WL 3143686, at *4 (5th Cir. Apr. 28, 2023) (Oldham, J., dubitante). Courts use the doctrine to dismiss an appeal when they would "rather not touch [it]." *Id.* But over ten years ago, this Court explained that courts

have a "virtually unflagging" duty to exercise jurisdiction. *Lexmark*, 572 U.S. at 126. And "prudence" is not a sufficient basis for a court of appeals to abdicate that duty. *Id.*

20. Still, the Fifth Circuit has retained prudential standing doctrines—albeit with hesitation among its judges. *Compare Matter of Highland Capital Mgmt., L.P.*, 74 F.4th 361, 368–69 & n.32 (5th Cir. 2023) (holding *Lexmark* insufficiently "unequivocal" to overrule doctrines), *with Matter of Salubrio*, 2023 WL 3143686, at *4–5 (Oldham, J., dubitante) ("And the Supreme Court has suggested that prudential standing could be on its last leg. . . . After *Lexmark*, I harbor doubt as to the validity of prudential standing doctrines . . . .").

21. And Judge Oldham's reservations aren't outliers. *See, e.g.*, *Matter of Salubrio*, 2023 WL 3143686, at *4–5 (Oldham, J., dubitante) (collecting cases). In the years following *Lexmark*, the circuits have split over its effect. Some circuits describe prudential standing doctrines as "greatly narrowed." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). Others characterize them as "likely doom[ed]." *In re Schubert*, 2023 WL 2663257, at *2 (6th Cir. Mar. 28, 2023); *In re Capital Contracting Co.*, 924 F.3d 890, 896–97 (6th Cir. 2019). And others still have acknowledged

the circuit split and created carve-outs. *See Trantham v. Tate*, 112 F.4th 223, 233–34 (4th Cir. 2024).

22. In large swaths of the country—but not others—a court of appeals can decline jurisdiction because it would "rather not touch the case." *Matter of Salubrio*, 2023 WL 3143686, at *4 (Oldham, J., dubitante). Such is the problem here. The Fifth Circuit had jurisdiction over the appeal under the collateral order doctrine but declined to exercise it. This Court is likely to grant review to correct the Fifth Circuit's failure to abide by *Lexmark* and resolve the circuit confusion.

2. The Court will probably grant certiorari to confirm that a non-party legislator need not intervene in every lawsuit the government participates in to invoke the privilege.

23. At its core, the legislative privilege protects governmental decision-making; it "covers all aspects of the legislative process." *Hughes*, 68 F.4th at 235. And although the legislative privilege is personal to a legislator, this Court has allowed others—such as aides and assistants—to invoke it for a legislator. *Gravel v. United States*, 408 U.S. 606, 616 (1972).

24. Following that analysis, courts have allowed the government to invoke the privilege for non-party legislators. *See, e.g.*, *DoorDash, Inc.*

v. City of New York, 780 F. Supp. 3d 434, 443 n.2 (S.D.N.Y. 2025) (finding no issue with the city invoking the privilege); *Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, 2021 WL 5882653, at *2 (M.D. Tenn. Dec. 13, 2021) (same for county); *Lee*, 908 F.3d at 1181 (same for city); *La. Cleaning Sys., Inc. v. City of Shreveport*, 2018 WL 3039739, at *2 (W.D. La. June 19, 2018) (same); *Cunningham v. Chapel Hill Indep. Sch. Dist.*, 438 F. Supp. 2d 718, 719–20 (E.D. Tex. 2006) (same for school district). While some courts reached the opposite conclusion, *Arnold*, 157 F.4th at 753 (collecting cases), they are poorly reasoned. *Infra* Section B(2).

25. The lower courts disagree on who may assert the privilege on a legislator's behalf. Given the importance of this federal question, the Court is likely to grant review to resolve the split among the lower courts.

B. There is a significant possibility that the judgment below will be reversed.

26. Much like the first *Nken* factor, the second element for a stay turns on the likelihood of reversal. *Scott*, 561 U.S. at 1302. Recall the two questions warranting this Court's review:

(1) May a federal court of appeals decline to exercise jurisdiction for "prudential" reasons in a legislative privilege case?

(2) May a governmental entity assert legislative privilege by filing a motion for protection for a non-party legislator?

The Fifth Circuit did not address the propriety of prudential standing, and it answered the second question in the negative. Because the answer to the first question is "no" and the second is "yes," this Court will likely reverse if it grants the petition.

1. Prudential standing is not a sufficient basis to dismiss an appeal when the legislative privilege is at issue.

27. Again, the analysis begins with prudential standing. While the Fifth Circuit had jurisdiction under the collateral order doctrine, the panel declined to exercise it. *Arnold*, 157 F.4th at 755–56. Citing "prudential standing concerns," the panel concluded the appeal didn't satisfy its prudential standing framework for non-parties. *Id.* at 755–58.

28. But the doctrine is deeply flawed. To start, it "finds little support in the language of Article III and early American legal history." S. T. Brown, *The Story of Prudential Standing*, 42 Hastings Const. L.Q. 95, 97 (2014) (collecting sources); *see also Matter of Salubrio*, 2023 WL 3143686, at *4 ("'the standing doctrine, at least as presently conceived,' does not 'run deep in our history'") (citations omitted).

29. The historical shortfalls are only the beginning. Indeed, the doctrine's "tortured constitutional discourse" has been characterized, among other things, as:

- "permeated with doctrinal confusion";
- "hopelessly incoherent and subject to manipulation";
- "a pointless constraint on the courts"; and
- "driven by substantive or normative assessments" that merely "masquerad[e] as threshold jurisdictional inquiries."

Brown*, supra*, at 97 (collecting sources) (citations omitted) (cleaned up).

30. And Justices on this Court have leveled criticisms, as well. Prudential standing has been described as a "word game played by secret rules," *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting), a "cover" for poor analysis, *Allen v. Wright*, 468 U.S. 737, 767 (1984) (Brennan, J., dissenting), and an "inapt," confusing descriptor, *cf. June Med. Servs., L.L.C. v. Russo*, 591 U.S. 299, 362–63 (2020) (Thomas, J., dissenting) (citation omitted).

31. For these reasons, some commenters have called to eliminate the doctrine. *See, e.g.*, Kylie Chiseul Kim, *The Case Against Prudential Standing*, 85 Tenn. Law. Rev. 303 (2017) ("The only solution to the problems caused by prudential standing is to eliminate the concept.

Although many have suggested other solutions—including removing the 'jurisdictional implication' of prudential standing . . .—none have proved successful in ridding these problems.") (citations omitted). Following this Court's direction in *Lexmark*, some courts have answered the call. *Supra* Section A(1) (collecting cases).

32. Whether or not the Court does away with prudential standing entirely, its application should be limited. In *Lexmark*, a party argued that, despite the existence of Article III jurisdiction, the courts should have declined to adjudicate a party's "claim[s] on grounds that are 'prudential,' rather than constitutional." *Lexmark*, 572 U.S. at 125–26. A lower court agreed. *Id.* This Court found the request to be in "tension with . . . the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* (cleaned up). When a "class" has grounds to appeal, the Court warned, courts may not avoid jurisdiction "merely because 'prudence' dictates." *Id.* at 128.

33. The doctrine's purpose offers a viable limiting principle. Prudential standing derives—at least in part—from separation-of-powers principles. *Lexmark*, 572 U.S. at 127. The privilege, which is vital for "the public good," belongs to the legislative branch and its state and

local corollaries. *Cf. Tenney*, 341 U.S. at 377. The public interest is served when the judiciary vindicates—not vitiates—disrupted legislative rights. *Vill. of Arlington Heights*, 429 U.S. at 268 & n.18 ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches"). So the Court could reasonably limit the doctrine to cases where separation-of-powers issues are at play.

34. Other limiting principles are consistent with existing caselaw. For example, the doctrine's application is questionable where important constitutional rights are at stake. In those instances, courts hesitate to dismiss appeals based on prudential grounds. *E.g.*, *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886 (9th Cir. 2007) (electing to "suspend the prudential standing doctrine because of the special nature of the risk to" a constitutional right); *Doe I v. Landry*, 909 F.3d 99, 108 (5th Cir. 2018) (recognizing same principle).

35. And under either principle, prudential standing poses no impediment to deciding the legislative privilege issues here. Important interests arise in legislative privilege cases. Indeed, courts have appellate jurisdiction under the collateral order doctrine if "delaying review would harm 'a substantial public interest' or 'some particular value of a high

order.'" *Hughes*, 68 F.4th at 233 (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009)). And delaying review for non-party legislators asserting the privilege "would imperil both of those interests":

> The public has a substantial interest in ensuring that elective office remains an invitation to draft legislation, not defend privilege logs. Freedom from constant distraction is a high-order value. That is especially so for this class, which consists solely of claims from non-parties who "lack appellate remedies available to the contenders in litigation."

Id. (citations omitted). "The privilege is designed to allow 'lawmakers to focus on their jobs rather than on motions practice in lawsuits.'" *Bettencourt*, 93 F.4th at 317. But far from accomplishing those goals, the Fifth Circuit's decision "would make [local] legislators full-time motions practitioners." *Id.*

36. Whether prudential doctrines are eliminated, limited to the separation-of-power context, or prohibited when important constitutional rights are at stake, the result is the same: the Fifth Circuit should have heard the appeal. Because it did not, the panel abandoned its "virtually unflagging" duty to hear a case in its jurisdiction. Reversal is likely.

2. The Fifth Circuit vitiated the privilege by not allowing the District to assert it for its legislators.

37. Next, the Court is likely to reverse the Fifth Circuit on the question of who may invoke the privilege. The panel held the government may not invoke the privilege for non-party legislators. *Arnold*, 157 F.4th at 756. In so doing, it deepened a split without much analysis. *Compare id.* (collecting cases), *with supra* Section A(2) (collecting cases).

38. The better rule is to allow the government to assert the privilege. After all, the ability of a third party "to invoke the privilege comes not from their positions as 'aides' or 'assistants.'" *Bettencourt*, 93 F.4th at 321 (citing *Gravel*, 408 U.S. at 622). "Instead, it depends on whether the act for which they invoke privilege was done at the direction of, instruction of, or for a legislator." *Id.* "Accordingly, there is no reasoned basis" why a governmental body, acting on behalf of and at the direction of a non-party legislator, cannot invoke the privilege. *See Bettencourt*, 93 F.4th at 321.

39. This "approach makes sense because it is the work of the legislative body that gives rise to the privilege in the first place." *Doe*, 2021 WL 5882653, at *2. "This inextricable link between the legislative

body and the legislative privilege" is sufficient for the government to invoke the privilege. *Id.*

40. The opposing position focuses narrowly on this Court's framing of the privilege as "personal." *Arnold*, 157 F.4th at 756 ("Because the privilege is personal in nature, . . . an entity like [the District] cannot assert the privilege on behalf of individual legislators.") (collecting cases). But that reasoning cannot be squared with *Gravel*, which rejected such a cramped reading by allowing third parties to assert the privilege on behalf of legislators. 408 U.S. at 616.

41. And in addition to undermining *Gravel*, the panel's position vitiates the privilege's purpose. The privilege safeguards legislative deliberation and is designed to protect legislators from distraction. *Tenney*, 341 U.S. at 377; *Bettencourt*, 93 F.4th at 317 (the privilege allows lawmakers to work on legislation—not being "full-time motions practitioners" in lawsuits). It should not create procedural hoops for legislators to jump through.

42. The panel's refusal to allow the District to raise privilege issues for its legislators was error. Elective office should be "an invitation to draft legislation, not [to] defend" litigation. *Hughes*, 68 F.4th at 233.

Yet, under the panel's construction, legislators may only assert the privilege if they directly intervene in a lawsuit. That result renders the privilege "of little value" since it subjects legislators "to the cost and inconvenience and distractions" of lawsuits immediately. *Tenney*, 341 U.S. at 377. If the Court grants review, it is likely to correct this error.

C. The legislative privilege will be stripped from local legislators if the judgment is not stayed.

43. Mirroring the second *Nken* factor, the third element considers the risk of irreparable injury to the applicant. *Scott*, 561 U.S. at 1302. Irreparable harm is manifest when a court orders a party to disclose privileged information to an adversary—or even a court—in litigation. *See, e.g.*, *United States v. Philip Morris Inc.*, 314 F.3d 612, 621–22 (D.C. Cir. 2003) ("the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party is clear enough" evidence of irreparable harm to justify a stay); *see also Jewish War Veterans of U.S., Inc. v. Gates*, 522 F. Supp. 2d 73, 81 (D.D.C. 2007) ("the Members feel that the possibility of *in camera* review of privileged documents by this Court

itself constitutes harm for purposes of this analysis . . . on this view, there would be no way to remedy the harm once incurred.").

44. Once privileged information is produced, further assertions of the privilege are meaningless; the privilege would be "irretrievably breached and beyond the protection of an appellate court.'" *Bettencourt*, 93 F.4th at 316 (citation omitted); *see also McHugh v. St. Tammany Par.*, 2024 WL 3757195, at *2 (E.D. La. Aug. 12, 2024) (same). The "harm is plainly irreparable" because the "review of those privileged materials cannot be undone." *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 175 (4th Cir. 2019).

45. With the mandate issued, the District Parties are subject to an order compelling Poole and Skinner to sit for depositions and disclose privileged information to their adversaries and the district court. *Arnold*, 157 F.4th at 753. The district court has already authorized respondents to seek sanctions. *Arnold*, 157 F.4th at 753. And future sanctions could involve monetary fines, contempt citations, and imprisonment.

46. Absent intervention, the District Parties lack an avenue to obtain appellate review of the district court's order unless Skinner and Poole first defy it. Perhaps Skinner and Poole will have the "uncommon

courage" needed to stand up for their rights. *Tenney*, 341 U.S. at 377. Perhaps not. But either way, the legislative privilege is designed to prevent public officials from being subjected to intrusive inquiries into their motives in the first place. *Vill. of Arlington Heights*, 429 U.S. at 254, 268 & n.18. Since the Fifth Circuit's decision tacitly requires legislators to sit for depositions, it turned the privilege on its head. *Tenney*, 341 U.S. at 377 (noting the privilege's intent to free legislators from "distractions" caused by lawsuits).

47. Forcing public servants—including an unpaid volunteer—to choose between surrendering the legislative privilege forever or risking contempt, fines, and incarceration is not consistent with the dignity of the legislative process. A stay is therefore needed to prevent the Fifth Circuit's mandate and the district court's order from irreparably harming the District Parties while denying them any meaningful path to appellate review.

D. Sound equitable discretion counsels in favor of a stay.

48. "A stay will not issue simply because the necessary conditions are satisfied." *Scott*, 561 U.S. at 1305. "Rather, sound equitable discretion will deny the stay when a decided balance of convenience weighs against

it." *Id.* (cleaned up) (citations omitted). Under this portion of the stay analysis, the Court considers the potential harm to the respondents. *Id.* This analysis thus mirrors the third and fourth *Nken* factors.

49. The orders here threaten to vitiate (or, more accurately, to obviate) the protections the legislative privilege promises. *Supra* Section C. Compelling public officials to testify about their legislative motives before opposing counsel eradicates the privilege for the reasons already outlined above. *Supra* Section C. The Fifth Circuit's decision thus puts at risk a structural safeguard that protects representative government itself.

50. A stay will not harm the respondents. The respondents may argue that their case should not be delayed any further and that they should receive the information compelled by the district court. But neither argument holds water. For starters, while "some prejudice [ ] is inherent in any delay, [ ] delay alone is insufficient to prevent a stay." *Short v. City of Rochester*, 747 F. Supp. 3d 594, 602 (W.D.N.Y. 2024) (collecting cases). At this point, the two student respondents have already graduated from high school—and one has even graduated from college. A few additional months are not harmful.

51. Next, the respondents might claim they should be allowed to take depositions now to prove their case. But that argument would be difficult to square with reality; after all, the respondents have ample evidence about the rationale for the challenged policy, including:

- public statements;
- op-eds;
- declarations;
- board minutes;
- recordings of open meetings;
- community feedback and public comments;
- internal reports; and
- thousands of emails.

See, e.g., *Gates*, 522 F. Supp. at 82 (equities cut against plaintiffs when they had ample evidence to support their claims). In fact, the reasons for the policy have already been judicially established. *George*, 2025 WL 1685239, at *2–3 (citing rationales and collecting evidence).

52. Lastly, in evaluating the equities, the Court should consider the public interest. *Nken*, 556 U.S. at 435. When the government appeals, "its interest and harm merge with that of the public." *Veasey v. Paxton*,

870 F.3d 387, 391 (5th Cir. 2017) (citing *Nken*, 556 U.S. at 435). So, for the same reasons described above through the lens of irreparable harm, the equities favor a stay. *Supra* Section B.

53. And further, the legislative privilege implicates "a substantial public interest." *Hughes*, 68 F.4th at 233. "[T]he public has a substantial interest in ensuring that elective office remains an invitation to draft legislation," not defend lawsuits or participate in depositions. *Id.* Indeed, as the *Arlington Heights* Court explained, "judicial inquiries into legislative . . . motivation represent a substantial intrusion into the workings of other branches." 429 U.S. at 268 & n.18. Denying a stay would harm that interest and effectuate the very harm the privilege protects against.

54. A short stay preserves the status quo, prevents irreversible harm to the legislative privilege, and furthers the public interest while this Court determines if review is appropriate.

E. The Court should grant an administrative stay while it considers this application.

55. An administrative stay is appropriate to prevent irreparable harm and preserve the Court's jurisdiction while it considers a stay

application. *United States v. Texas*, 144 S. Ct. 797, 798 (2024) (Barrett, J., concurring) ("point" of administrative stay "is to minimize harm while an appellate court deliberates"); *Nken*, 556 U.S. at 427 (administrative stay "allows an appellate court to act responsibly").

56. Recall that Poole and Skinner remain subject to an order compelling them to testify about privileged legislative matters or face sanctions. *Arnold*, 157 F.4th at 753. Absent immediate protection, this Court will likely lose jurisdiction, and the District Parties will be irreparably harmed. The "relative consequences of staying the lower court's judgment versus allowing it to go into effect" favors immediate relief. *See Texas*, 144 S. Ct. at 798 (Barrett, J., concurring).

57. An administrative stay will maintain the status quo for the short period the Court needs to evaluate this application. It will not prejudice respondents and will ensure that privileged materials are not forcibly disclosed to opposing counsel—the very harm the privilege exists to prevent—before this Court can act.

CONCLUSION

58. The Fifth Circuit's reliance on "prudence" to avoid hearing an appeal yields an untenable result: unless legislators enter the litigation,

the legislative privilege cannot be raised. Local legislators are thus forced to expend resources to personally enter the litigation before appealing the same issue again, all while facing the threat of contempt, fines, and incarceration. That cannot be how the legislative privilege functions, and the Court should intervene to allow the District Parties to brief this issue more thoroughly.

59. Prudential standing is, as Judge Oldham explained in *Matter of Salubrio*, "on its last leg." 2023 WL 3143686, at *4–5 (Oldham, J., dubitante). The Fifth Circuit relied on this invalid (or at least very limited) doctrine to avoid hearing the appeal. But following this Court's lead in *Lexmark*, many circuits have questioned, sharply narrowed, or eliminated the doctrine. The Court should intervene to ensure uniformity of federal practice.

60. This case presents an excellent vehicle for this Court to address two important, recurring, and unsettled federal questions. The District Parties request an opportunity to seek this Court's review. To that end, the District Parties ask the Court:

- to stay the Fifth Circuit's judgment and the district court proceedings so the District Parties can prepare a petition for a writ of certiorari; and

- to grant an immediate administrative stay pending the Court's consideration of this application.

Otherwise, these important issues risk evading review, and a privilege of constitutional dimensions will be irreparably damaged.

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Respectfully submitted,

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