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

APPENDIX

TAB A

CASE NO. 23-20256

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Everett De'Andre Arnold; Kaden Bradford; Sandy Arnold,

Plaintiffs - Appellees

v.

Barbers Hill Independent School District; Barbers Hill Independent School District's Board of Trustees; Fred Skinner; Greg Poole,

Defendants - Appellants

On Appeal from the United States District Court,
for the Southern District of Texas, Houston Division, No. 4:20-cv-1802

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CERTIFICATE OF INTERESTED PERSONS

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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STATEMENT REGARDING ORAL ARGUMENT

This Court should hear oral argument. This case involves the correct application of the legislative privilege to deposition testimony in a civil rights case. The district court entered an order requiring the appellants to testify in the presence of opposing counsel about matters the appellants contend are exempt from discovery because they are subject to the legislative privilege, effectively vitiating the testimonial privilege. Because the district court's order is contrary to the purpose underlying legislative privilege and this Court's recent precedent, the district court abused its discretion. This Court has recently grappled with the application of legislative privilege in two cases involving document discovery, one of which will be heard by the en banc Court in the near future. *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228 (5th Cir. 2023); *Jackson Mun. Airport Auth. v. Harkins*, 67 F.4th 678 (5th Cir. 2023), *withdrawn and superseded by* 2023 WL 5522213 (5th Cir. Aug. 25, 2023), *vacated by* 2023 WL 5542823 (5th Cir. Aug. 29, 2023) (granting en banc rehearing). This Court has not yet addressed the application of legislative privilege to deposition testimony, but its sister circuits have. Given the importance of the legislative privilege, this Court's recent case law, and the open question regarding the scope of legislative privilege as it applies to deposition testimony, appellants believe oral argument would significantly aid the Court's decisional process.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 and the collateral order doctrine. Because a district court decision that requires the disclosure of information shielded by legislative privilege conclusively determines the issue, it is a final order for purposes of appellate jurisdiction. *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 232-35 (5th Cir. 2023).

STATEMENT OF THE ISSUES

- The district court abused its discretion when it issued an order requiring appellants to testify and reveal information protected by legislative privilege.
- The district court abused its discretion when it denied the request in appellants' motion for protection to bar appellees from asking deposition questions calculated to invade the legislative privilege.
- The district court abused its discretion when it issued an order seeking to enforce its ruling on the motion for protection after appellants took this interlocutory appeal, which divested the district court of jurisdiction over the question of legislative privilege.

STATEMENT OF THE CASE

Appellees filed this case in 2020, challenging Barbers Hill Independent School District's (the District) grooming policy that restricts the length at which male students may wear their hair. ROA.51-114; ROA.3105-3225. Appellees also

sued numerous District employees and Board members in their individual capacities. ROA.51-114. Specifically, Kaden Bradford and De'Andre Arnold, both of whom are Black and former students of the District, allege that the District's policy discriminated against them on the basis of their race and gender in violation of the Fourteenth Amendment's Equal Protection clause. ROA.3105-3225. Bradford and Arnold, joined by Arnold's mother, also assert claims under the First Amendment, Title IX, Title VI, the Fourteenth Amendment's due process clause, and state law. ROA.3105-3225. The district court held a temporary injunction hearing and entered an order barring the District from enforcing its grooming policy against Bradford (Arnold was no longer enrolled at the District and had graduated from a neighboring school district). *See Arnold v. Barbers Hill Indep. Sch. Dist.*, 479 F. Supp. 3d 511 (S.D. Tex. 2020).

The District filed an interlocutory appeal of the temporary injunction, but dismissed the appeal when the individual defendants were dismissed from the case. ROA.2915-16; ROA.3095-97.

The District moved to dismiss the majority of appellees' claims, and the district court denied the motion without analysis. ROA.3241-68; ROA.4058. The parties conducted substantial discovery. Neither party has moved for summary judgment at this time.

During the course of discovery, a dispute arose as to the scope of the appellees' ability to depose the District's Superintendent, Dr. Greg Poole, and the President of its Board of Trustees, Fred Skinner. ROA.4186-4198; RE at Tab 4. Specifically, while the District agreed that both could be deposed, the District, Dr. Poole, and Mr. Skinner maintain that they are entitled to assert legislative privilege in response to some of appellees' anticipated inquiries about the enactment of grooming policy. ROA.4188. The District filed a motion for protection seeking to limit the scope of the testimony that may be elicited at deposition on the basis of legislative privilege. ROA.4186-4198; RE at Tab 4. Specifically, the motion sought to prevent questioning about:

- The subjective intent, thought process, support or non-support, and rationale of any current or former Board members regarding the adoption of the current or past versions of the District's dress and grooming code;

- The subjective intent, thought process, support or non-support, and rationale of any current or former Board members for changing or revising the District's dress and grooming code;

- The motives of any current or former Board members for adopting the District's current or past dress and grooming codes;

- The subjective intent, thought process, support or non-support, and rationale of any current or former Board members regarding the adoption of past or current Board policies;

- Details pertaining to why Mr. Skinner or any former or current Board members voted to adopt or maintain a dress and grooming code for the District; and

- Any other information that would invade the Board's legislative immunity.

ROA.4187.

The district court took accelerated briefing on the issue and then entered an order granting the motion, in part, and denying the motion, in part. ROA.4446-48; RE at Tab 3. Instead of restricting the scope of questioning, the district court entered an order that established a procedure for the depositions. ROA.4447; RE at Tab 3. In relevant part, the district court's order provided that:

> (1) Parties should proceed with depositions and the deponents must appear and testify even if it appears likely that legislative privilege may be invoked in response to certain questions.
>
> (2) Deponents may invoke legislative privilege in response to particular questions, but the deponent invoking the privilege must then answer the question in full. The response will be subject to the privilege.
>
> (3) The portions of deposition transcripts containing questions and answers subject to the privilege shall be deemed CONFIDENTIAL as defined in Parties previously filed "Amended Protective Order" (*See* Dkt. No. 159-1).
>
> (4) If a party wishes to use any portion of deposition testimony that is subject to legislative privilege, that party must seal those portions and submit them to the Court for in camera review, along with a motion to compel.
>
> (5) Any such motion to compel shall be filed within 14 days of the deposition. The response will be due within 7 days after the motion is filed. Any reply will be due 7 days after the response is filed.

ROA.4447; RE at Tab 3.

Upon the district court's issuance of its order, the District, Dr. Poole, and Mr. Skinner filed a notice of interlocutory appeal under the collateral order doctrine. ROA.4454-56; RE at Tab 2. The parties agreed to postpone the depositions until after this Court ruled on the appeal. *See* Motion to Stay (on file in this Court). At a status conference, the district court denied the District's motion to stay proceedings. ROA.4480-81. The district court further advised that it intended to keep the September 2023, trial setting in place regardless of the pendency of this appeal. ROA.4481. In light of the pendency of this appeal, the District declined to present Dr. Poole and Mr. Skinner for deposition. *See* Motion to Stay (on file in this Court). The District filed a motion to stay proceedings in this Court which the appellees opposed. *See* Motion to Stay (on file in this Court). Appellees then sought an order from the district court compelling the depositions of Dr. Poole and Mr. Skinner. ROA.4493-97. The district court entered an order compelling Dr. Poole and Mr. Skinner to appear for deposition and authorizing appellees to seek sanctions. ROA.4500; RE at Tab 5. Appellants filed an emergency supplement to its motion to stay in this Court and requested a temporary administrative stay. *See* Motion to Stay (on file in this Court).

This Court entered a temporary administrative stay of proceedings and, subsequently, entered an order carrying appellants' motion to stay with the case. ROA.4502. As a result, all proceedings in the district court were stayed. ROA.4502.

SUMMARY OF THE ARGUMENT

The doctrine of legislative privilege protects legislative actors from being called to testify about legislative activities that are not known to the public. And the law is clear that legislative privilege extends to school board members. Consequently, Mr. Skinner, Dr. Poole, and any other District witness having non-public knowledge about the Board's legislative activities, have the right to invoke the testimonial privilege in response to questions that could elicit testimony on the following topics:

- The subjective intent, thought process, support or non-support, and rationale of any current or former Board members regarding the adoption of the current or past versions of the District's dress and grooming code;

- The subjective intent, thought process, support or non-support, and rationale of any current or former Board members for changing or revising the District's dress and grooming code;

- The motives of any current or former Board members for adopting the District's current or past dress and grooming codes;

- The subjective intent, thought process, support or non-support, and rationale of any current or former Board members regarding the adoption of past or current Board policies;

- Details pertaining to why Mr. Skinner or any former or current Board members voted to adopt or maintain a dress and grooming code for the District; and

- Any other information that would invade the Board's legislative immunity.

Appellees sought to ask deposition questions that invade a privilege designed to protect the discussions necessary to the legislative process. The District moved for protection. In ruling on the District's Motion for Protection, the district court entered an order that required the witnesses to sit for deposition, invoke the privilege, and then answer deposition questions despite the invocation of the privilege. In other words, by its very terms, the district court's order required the disclosure of privileged information. By ordering disclosure of privileged information, the district court abused its discretion. This Court should correct the district court's clear abuse of discretion.

ARGUMENT AND AUTHORITIES

A. Standard of Review.

This Court reviews a trial court's discovery orders for abuse of discretion. *La Union Del Pueblo Entero*, 68 F.4th at 235. "The district court's legal conclusions should be reviewed de novo, and its factual findings should not be disturbed unless they are clearly erroneous." *Id.* (quoting *Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 491 (5th Cir. 2013)).

B. Legislative Privilege.

Under the doctrine of legislative immunity, federal, state, and regional legislators are entitled to invoke a testimonial privilege, called legislative privilege. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48–50 (1998); *see also Hernandez v. City*

of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981). This privilege stems from Article I, Section 6 of the U.S. Constitution, which states:

> The Senators and Representatives . . . shall, in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same . . . .

U.S. Const., Art. I, § 6. That same clause encompasses the testimonial privilege where it states, "and for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." *Id.* The United States Supreme Court has stated this testimonial privilege was "designed to aid in the effective functioning of government." *Gravel v. U.S.*, 408 U.S. 606, 617 (1972). It does this by barring plaintiffs from deposing local legislators as to certain legislative acts. *See id. at* 616 (holding that a senator could not be required to testify about legislative acts that occurred in a subcommittee meeting); *see also Cunningham v. Chapel Hill, ISD*, 438 F. Supp. 2d 718, 722 (E.D. Tex. 2006) ("The Supreme Court and several circuit courts have clearly recognized that the doctrine of legislative immunity protects legislative actors from being called to testify about their legislative activities.").

The doctrine of legislative privilege's protection extends to any individual "performing legislative acts, regardless of the title of their positions, and regardless of whether they were elected or appointed." *Bannum, Inc. v. City of Beaumont, Tex.*,

236 F. Supp. 2d 633, 635 (E.D. Tex. 2002) (citing *Calhoun v. St. Bernard Parish*, 937 F.2d 172, 174 (5th Cir.1991)); *see also Marrero v. City of Hialeah,* 625 F.2d 499, 508 (5th Cir.1980) ("[I]t is the official function that determines the degree of immunity required, not the status of the acting officer."); *Bryan v. City of Madison, Miss*., 213 F.3d 267, 272 (5th Cir. 2000) ("Legislative immunity protects officials fulfilling legislative functions even if they are not 'legislators.'"). Thus, the inquiry in this case turns on whether the actions by any current or former Board members to adopt or revise the District's dress and grooming code consisted of legislative activity, *i.e.,* whether they were legislative in nature. *See Oscar Renda Contracting, Inc. v. City of Lubbock, Tex*., No. 5:05-CV-029-C, 2007 WL 9718491, at *2 (N.D. Tex. Sept. 17, 2007) ("[A] court must determine if the act for which the privilege is being asserted was a legislative act.").

"[A]ctions are 'legislative' if they have 'the purpose and effect of altering the legal rights, duties, and relations of persons ... outside the legislative branch.'" *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 461 (5th Cir. 2022) (quoting *INS v. Chadha*, 462 U.S. 919, 952 (1983)). The enactment of a general policy is a legislative act as a matter of law. *Bryan*, 213 F.3d at 273 ("If the action involves establishment of a general policy, it is legislative."). As such, the enactment of the Board's policies are legislative acts as a matter of law, because they apply to the entire school district and are not "specifically focused" on any one individual or group. *See Oscar Renda*

Contracting, Inc., 2007 WL 9718491, at *2. And so are all other activities inherent in the enactment of policies, such as voting on the policy and the subjective intentions and thoughts regarding the policy's enactment. *See, e.g., Bogan*, 523 U.S. at 55 (holding that a legislator's "acts of voting for an ordinance were, in form, quintessentially legislative"); *see also Harding v. Cnty. of Dallas, Tex.*, No. 3:15-CV-0131-D, 2016 WL 7426127, at *3–5 (N.D. Tex. Dec. 23, 2016) (noting that information about the subjective intent of a county official in making a policy decision would qualify as a legislative act); *Cunningham*, 438 F. Supp. 2d at 720 (holding that a school board member could not be made to testify about his voting decision to deny a Level III grievance and ratify the dissolution of a department due to legislative immunity); *Oscar Renda Contracting, Inc*., 2007 WL 9718491, at *2 (finding that "any attempts to look beyond the actual decision to the underlying motivation of council members is an inappropriate type of inquiry as determined by the Supreme Court.") (citing *Bogan*, 523 U.S. at 54).

The policy at issue in this case is the portion of the District's dress and grooming code that governs the length of male students' hair. ROA.3118-22. The District's Board voted to adopt and approve the dress and grooming code that is in effect for the entire District. Accordingly, any acts or rationale possessed by Mr. Skinner, Dr. Poole, or any other current or former Board member relating to the adoption of the District's dress and grooming code are core legislative activities that

are protected by the testimonial privilege afforded by legislative immunity. The scope of information protected by legislative immunity and shielded by the testimonial privilege encompasses, but is not limited to, the subjective intentions, motivations, and thoughts on the District's dress and grooming code; the reasoning for voting for or against the dress and grooming code; and any information or discussions from closed or executive sessions. Thus, Dr. Poole, Mr. Skinner, and any current or former Board members are protected from testifying and revealing information related to these legislative acts.

C. The district court abused its discretion when it adopted a procedure that would force appellants to disclose information shielded by legislative privilege.

Federal Rule of Civil Procedure 26(c) grants district courts the authority to, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." This includes "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters." Fed. R. Civ. P. 26(c)(1)(D). Thus, a party may move under Rule 26(c) for a protective order barring discovery that would invade legislative privilege. That is exactly what the appellants did here. ROA.4186-4198; RE at Tab 4. The district court granted the motion for protection, in part, and denied it in part, entering an order that contained the following operative language:

> (1) Parties should proceed with depositions and the deponents must appear and testify even if it appears likely that legislative privilege may be invoked in response to certain questions.
>
> (2) Deponents may invoke legislative privilege in response to particular questions, but the deponent invoking the privilege must then answer the question in full. The response will be subject to the privilege.
>
> (3) The portions of deposition transcripts containing questions and answers subject to the privilege shall be deemed CONFIDENTIAL as defined in Parties previously filed "Amended Protective Order" (*See* Dkt. No. 159-1).
>
> (4) If a party wishes to use any portion of deposition testimony that is subject to legislative privilege, that party must seal those portions and submit them to the Court for in camera review, along with a motion to compel.
>
> (5) Any such motion to compel shall be filed within 14 days of the deposition. The response will be due within 7 days after the motion is filed. Any reply will be due 7 days after the response is filed.

ROA.4447; RE at Tab 3. And, while the district court's order states that "Nothing in this order shall be construed as deciding any issue of legislative privilege[,]" the process adopted by the district court conclusively decides the issue – by forcing disclosure. ROA.4448 (alteration to punctation added); RE at Tab 3.

The district court drew the procedure it used in its order from an order issued by the Western District of Texas in a redistricting case. ROA.4405. The Western District's order was subsequently found by a motions panel of this Court to be narrowly tailored to protect the legislative privilege and, as a result, the motions

panel declined the deponents' request to stay the depositions pending interlocutory appeal. *LULAC v. Abbott*, 2022 WL 2713263 (5th Cir. May 20, 2022). The Supreme Court then declined to issue a stay. *Guillen v. LULUC*, 142 S. Ct. 2773 (2022). Importantly, the motion panel focused on the qualified nature of legislative privilege and concluded that a balancing of interests was appropriate. *LULAC*, 2022 WL 2713263. Relying on the motion panel's decision, the district court determined that its procedure would properly balance the parties interests. ROA.5905.

In making this determination, however, the district court did not account for this Court's published decision in *La Union Del Pueblo Entero*, which was issued a year after the motion panel's non-precedential order, and held that the legislative privilege barred litigants' efforts to obtain documents that were shielded by legislative privilege. 68 F.4th 228 (5th Cir. 2023); ROA.4412 (appellants directing district court to recently issued decision in *La Union Del Pueblo Entero*). The import of *La Union Del Pueblo* is that discovery processes cannot be used to vitiate the legislative privilege and it effectively overruled the motion panel's conclusion that a balancing of interests was appropriate. *See id.*

This makes sense. That is because even though the district court, following the court in *LULAC*, appears to have tried to carefully craft a procedure and protect privileged testimony from disclosure after the deposition (including, marking any testimony as confidential, requiring an *in camera* review prior to any use of such

testimony, and warning the parties that disclosure of such testimony will result in sanctions), this is insufficient. Requiring a deponent to answer a question, even after the privilege is invoked, is tantamount to forcing the deponent to waive their individual legislative privilege. It is of no consequence if the testimony is immediately deemed confidential and all people present in the room are sworn to secrecy by the threat of sanctions – the testimony is still heard. And even if the Court requires a motion to compel to be filed and an *in camera* review conducted prior to the disclosure or use of any confidential testimony, this does not prohibit opposing counsel from strategically using the information in other respects, or other people present from disclosing the testimony intentionally or by mistake. And that is the very thing the privilege is designed to guard against.

What is clear from the law delineating the purpose of legislative privilege – that legislators cannot be forced to testify as to matters shielded by the privilege – is that an order like the district court's order that forces the testimony, violates the privilege. *La Union Del Pueblo Entero*, 68 F.4th at 237-240 (explaining that the privilege, when applicable, bars compelled discovery). Thus, because the district court's order requires disclosure of matters shielded by the legislative privilege, it constitutes an abuse of discretion and must be vacated.

D. The district court abused its discretion when it denied, in part, the District's motion for protective order and declined to limit the scope of deposition testimony.

Even in moving for protection, the District acknowledged that Mr. Skinner and Dr. Poole possessed discoverable information that was not shielded by the legislative privilege by agreeing to present them for deposition. ROA.4188; RE at Tab 4; ROA.4273; ROA.4280; ROA.4288. However, because the appellees made clear their intention to question both witnesses on matters that are shielded by legislative privilege, the District requested that the district court restrict the scope of the anticipated question. ROA.5892-98 (discussion of assertion of legislative privilege during depositions). Specifically, the District sought to bar questioning on topics that would invade the legislative privilege. *See* Statement of the Case and Summary of the Argument, *supra*; *see also* ROA.4187; RE at Tab 4.

The district court concluded that the issue of privilege was not ripe for its consideration because it did not have specific questions and answers before it. ROA.4446-48; RE at Tab 3. In reaching this conclusion, the district court erred because the legislative privilege protects categories of information; it does not just apply to specific questions. *See La Union Del Pueblo Entero*, 68 F.4th at 235-36. Specifically, legislative privilege bars inquiring into all activities that are "… part and parcel of the modern legislative procedures…" *Id.* at 236. Thus, a district court should not need to look at specific questions – it can, and should, bar whole

categories of questions. This is because, at its root, the legislative privilege implicates "… the core question whether a lawmaker may 'be made to answer – either in terms of questions *or* in terms of defending … from prosecution.'" *Id.* at 237 (quoting *Gravel v. United States*, 408 U.S. 606, 616 (1972) (quotations, emphasis and omission in original)). And this case squarely presents the question of whether legislative privilege bars certain deposition questions in a civil rights case.

While this Court has not directly considered the extent to which legislative privilege bars depositions that seek to invade the legislative privilege, the Ninth Circuit has. In *Lee v. City of Los Angeles*, the plaintiffs in an equal protection lawsuit challenging the city's drawing of district boundaries, sought to depose city officials involved in the redistricting process. 908 F.3d 1175, 1181, 1186 (9th Cir. 2018). The city officials moved for protection from being deposed and the district court barred the depositions on the grounds that the depositions would invade the legislative privilege. *Id*. at 1181. The Ninth Circuit affirmed. *Id*. at 1187-88. In reaching its conclusion, the Ninth Circuit traced the history of legislative privilege back to its deep roots in the Sixteenth and Seventeenth Centuries and highlighted its importance. *Id*. And, the Ninth Circuit expressly rejected the contention that, just because a plaintiff brings a constitutional claim, the plaintiff is entitled to invade legislative privilege. *Id*. at 1188 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) for the proposition ". . . that 'judicial inquiries into

legislative or executive motivation represent a substantial intrusion' such that calling a decision maker as a witness 'is therefore usually 'usually to be avoided'").

This Court cited *Lee* in *La Union Del Pueblo Entero*, as support for its conclusion that legislative privilege barred the production of documents. 68 F.4th at 239. It stands to reason that, if legislative privilege bars the production of documents, it must bar the even more intrusive discovery that a deposition entails. *See* 68 F.4th at 239-40; *Lee*, 908 F.3d at 1186-88. This Court should adopt *Lee*'s analysis and hold that legislative privilege bars a plaintiff from seeking to ask questions in a deposition that invade the legislative privilege. And, building on *Lee*, this Court should hold that the district court abused its discretion when it denied the District's motion for protection seeking to limit the scope of appellees' deposition examination of Dr. Poole and Mr. Skinner.

E. Appellees cannot establish in this appeal that legislative immunity does not apply.

As established above, Mr. Skinner, Dr. Poole, and other District witnesses are entitled to assert the testimonial privilege to protect legislative immunity in response to questions that would seek to invade the privilege. And, as explained below, appellees cannot establish any exception to the application of legislative immunity.

1. The very limited "extraordinary instances" exception to the applicability of legislative immunity does not apply as a matter of law.

The Supreme Court in *Arlington Heights* held that "[i]n some extraordinary instances[,] the members [of the relevant governmental entity] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Vill. of Arlington Heights*, 429 U.S. at 268. While the Supreme Court did not define "extraordinary instances," lower court decisions shed light on the issue.

The Ninth Circuit observed that *Arlington Heights* "itself was an equal protection claim alleging racial discrimination – putting the government's intent directly at issue – but [the Supreme Court] nonetheless suggested that such a claim was not, in and of itself, within the subset of 'extraordinary instances' that might justify an exception to the privilege." *Lee*, 908 F.3d at 1188. Likewise, the First Circuit, in 2021, mirrored this analysis, explaining that "were we to find the mere assertion of a federal claim sufficient, even one that addresses a central concern of the Framers, the privilege would be pretty much unavailable largely whenever it is needed." *American Trucking Associations, Inc. v. Alviti,* 14 F.4th 76, 88 (1st Cir. 2021).

Additionally, while this Court has never found extraordinary circumstances to exist, it has acknowledged the exception and made clear the heavy burden necessary to show that extraordinary circumstances defeat the privilege. *See Veasey v. Abbott*,

830 F.3d 216, 233 (5th Cir. 2016); *see also League of United Latin Am. Citizens Abbott v. United States*, No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022). In *Veasey,* this Court held that the lower court "mistakenly relied in part on speculation" about a legislator's motives behind voting a certain way on Texas Senate Bill 14. *Id.* In making this finding, this Court cited the "extraordinary instances" language from *Arlington Heights* to support its assertion that "[d]iscerning the intent of a decisionmaking body is ***difficult and problematic***." *Id.* (emphasis added). Relying on Supreme Court authority, this Court continued, stating that "[i]nquiries into congressional motives or purposes are a ***hazardous matter***." *Id.* (emphasis added) (quoting *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968)). And, most recently, this Court reiterated these sentiments, explaining that the "extraordinary" civil case exception cannot subsume the rule. *La Union Del Pueblo Entero*, 68 F.4th at 238. This case, which involves nothing more than a challenge to a school district's grooming policy, simply cannot be the hypothetical "extraordinary" civil case that defeats legislative privilege. *See Karr v. Schmidt,* 460 F.2d 609 (5th Cir. 1972) (en banc) (establishing per se rule that challenges to school district grooming policies are not actionable).

Further, in analyzing the contours of legislative immunity and the testimonial privilege, the Texas Supreme Court has concluded that, at a minimum, "all other available evidentiary sources must first be exhausted before

extraordinary circumstances will be considered." *In re Perry*, 60 S.W.3d 857, 860–62 (Tex. 2001); *see also Austin Lifecare, Inc. v. City of Austin*, No. A-11-CA-875-LY, 2012 WL 12850268, at *2 (W.D. Tex. Mar. 20, 2012) ("Additionally, the court finds Plaintiffs have alternative methods for discovering the information they seek, as they may obtain direct evidence from other sources").

Against this backdrop of legal authority, appellees are left to argue they are entitled to inquire into "each board member's mindset, intent, and reasoning for his or her decision" to adopt a race-neutral dress and grooming code, merely because they bring a race discrimination claim. *See* ROA.3501-02. However, alleging racial discrimination is not, in and of itself, an "extraordinary instance" warranting an intrusion into the legislative process. *See, e.g., Lee,* 908 F.3d at 1187–88. This makes sense. Otherwise, legislative immunity would not be available in a large category of cases. And there is nothing in caselaw or the history and tradition that supports the doctrine of legislative immunity that would support such a result. To the extent appellees attempt to rely on their gender claim to establish extraordinary circumstances, the Court should reach the same result for the same reasons.

2. Appellants have not waived their legislative privilege.

To the extent appellees attempt to argue appellants' legislative privilege has been waived (as they did in their district court filings), *La Union Del Pueblo Entero* narrowly constrains the waiver doctrine as it applies to legislative privilege.

Specifically, it is only when items of information – documents, conversations, or thoughts – have been publicly disclosed outside the legislative process, that waiver of the privilege will apply. 68 F.4th at 236. And the very nature of the topics that Dr. Poole and Mr. Skinner contend are shielded by legislative privilege – *i.e.*, those things unknown to the public – cannot be found to be the subject of a waiver of the privilege.

F. The district court abused its discretion by issuing an order to enforce the deposition procedure after this interlocutory appeal was perfected.

When a notice of appeal is filed in a case, the trial court is divested of jurisdiction over the issues subject to the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *United States v. Green*, 882 F.2d 999, 1001 (5th Cir. 1989) ("The filing of a timely and sufficient notice of appeal does transfer jurisdiction over matters involved in the appeal from the district court to the court of appeals, thus divesting the district court of jurisdiction to take any action with regard to the matter except in aid of the appeal."). Due to the transfer of jurisdiction from a district court to the court of appeals upon filing of a notice of appeal, orders issued by a district court in the absence of jurisdiction are null and void. *United States v. Willis,* --- F.4th ---, 2023 WL 5013686, at *4 (5th Cir. Aug. 7, 2023) (citing 16A WRIGHT & MILLER

§ 3949.1); *United States v. Lucero*, 755 F. App'x 384, 385-86 (5th Cir. 2018) (same); *Collin Cty. v. Siemens Bus. Servs., Inc.*, 560 F. Supp. 2d 525, 527 (E.D. Tex. 2006) (same); *Judd v. Furgeson*, 239 F. Supp. 2d 442, 446-447 (D.N.J. 2002) (district court recognizing its order was void when entered during this pendency of an interlocutory appeal under the collateral order doctrine).

And, yet, despite this well-established rule, the district court issued an order after this appeal was filed enforcing the very ruling that was appealed by compelling the appellants to sit for deposition and testify to matters subject to the legislative privilege. ROA.4500. This Court should hold that the district court's enforcement order was null and void because it was issued in the absence of jurisdiction. *See Willis*, 2023 WL 5013686, at *4.

G. This Court should clarify that the filing of an interlocutory appeal automatically stays all district court proceedings related to the appeal.

In this case, the district court took the view that it could enforce its order despite the transfer of jurisdiction because the case was not stayed. ROA.5956-59 (status conference discussion regarding absence of stay); ROA.4500 (order compelling deposition in accordance with order setting deposition procedures); *see also LULAC*, 2022 WL 2713263 (motions panel of this Court denying stay request because deposition order was "vigilant and narrow" in effort to protect legislative privilege). The lack of an automatic stay upon the filing of a notice of interlocutory appeal creates a lack of clarity as to the scope of a trial court's authority to act during

the pendency of an appeal. This Court should clarify that – regardless of whether a stay is imposed – a trial court's order that is issued to enforce an order that is the subject of a pending appeal, is void. *Willis,* 2023 WL 5013686, at *4.

CONCLUSION AND PRAYER

Legislative privilege protects District witnesses from answering questions regarding legislative activities, including the mindset, intent, and reasoning behind any current or former Board members' decision to adopt the District's dress and grooming code. The district court's order effectively stripped the witnesses of their legislative privilege. As such, this Court should reverse and vacate the district court's orders establishing a deposition protocol that requires them to answer deposition questions despite invoking legislative privilege and enforcing compliance with the protocol. Further, this Court should hold that the district court abused its discretion when it denied, in part, the District's motion for protection, and declined to limit the scope of permissible deposition testimony. This Court should also vacate the district court's order compelling the depositions as null and void and, in doing so, clarify that an interlocutory appeal automatically stays all district court proceedings related to the appeal. Finally, this Court should award appellants their taxable costs of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

I further certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I further certify that I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B) and Local Rule 32.3, the undersigned certifies:

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/s/ Jonathan Griffin Brush

_____

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Attorney for Defendants-Appellants

TAB B

No. 23-20256
IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EVERETT DE'ANDRE ARNOLD, KADEN BRADFORD, and SANDY ARNOLD
Plaintiffs - Appellees

v.

BARBERS HILL INDEPENDENT SCHOOL DISTRICT, BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES, FRED SKINNER, and GREG POOLE
Defendants - Appellants

On Appeal from the U.S. District Court,
Southern District of Texas, No. 4:20-CV-1802

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CERTIFICATE OF INTERESTED PERSONS

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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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees submit that oral argument is unnecessary because the issues raised by this appeal are clearly resolved under controlling precedent. The law is clear that an appellate court should not entertain an interlocutory appeal where there was no final decision below; that a testimonial privilege may not be invoked to shield discovery of information a litigant has affirmatively advanced as a sword to defend itself; and that a legislator may not continue to invoke legislative privilege after having waived the privilege by repeatedly sharing the allegedly privileged information publicly. Additionally, while Barbers Hill Independent School District ("BHISD") calls the district court's order an abuse of discretion, this Court has already said that an identical order was "carefully crafted," "admirably prudent, cautious, vigilant, and narrow."

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JURISDICTIONAL STATEMENT

For the reasons given *infra* at 8-14 of the Argument section, this Court does not have jurisdiction over this appeal or the related stay motion, which has been carried with the case, *see* ROA.4502.

STATEMENT OF THE ISSUES

1. Should this Court entertain an interlocutory appeal when there was no final decision below?

2. Did the district court abuse its discretion when it entered an order identical to one the Fifth Circuit called "carefully crafted," "admirably prudent, cautious, vigilant, and narrow"?

3. Can a state legislator continue to assert legislative privilege even after having waived it by repeatedly sharing allegedly privileged information with the public?

4. Should a litigant be permitted to use legislative privilege as both a sword and a shield in litigation?

STATEMENT OF THE CASE

In this lawsuit, Plaintiffs-Appellees seek relief from BHISD's policy regulating male students' hair (the "Hair Policy") on the grounds that the Hair Policy's construction and enforcement is unconstitutional race and sex discrimination and violates students' right to freedom of expression. *See generally*

ROA.3105-3225. A core question before the district court is whether race played a role in the decision of BHISD's Board of Trustees (the "Board") to adopt and revise the Hair Policy. *See* ROA.4063 (district court order recognizing that the information sought by Plaintiffs is "crucial because it bears on [BHISD's] motives for the . . . policy change").

The Board is responsible for enacting and revising certain policies, including the Hair Policy. ROA.2976. The Hair Policy was revised at a public Board meeting on December 16, 2019. ROA.2976. As the district court has explained, "[BHISD] has stated that it made the December 2019 policy change 'because of' recommendations made by [the United States Department of Justice], 'and not in order to target students of a particular race.'" ROA.4063. Indeed, each member of BHISD's Board and Superintendent Greg Poole submitted declarations to the district court discussing their motivations and rationales for the Hair Policy and stating that the December 2019 revisions to the Hair Policy were made based on recommendations from the U.S. Department of Justice. *See* ROA.1568 at ¶ 16; ROA.1649 at ¶ 8; ROA.1653 at ¶ 7; ROA.1656 at ¶ 5; ROA.1658 at ¶ 6; ROA.1664-1665 at ¶ 4; ROA.1667-1669 at ¶¶ 4, 9; & ROA.1671 at ¶ 4. In addition, Superintendent Poole published an op-ed in a newspaper and made several public statements on Twitter concerning the rationale behind the revisions to the Hair Policy. *See* ROA.3018-3020 & ROA.3152-3154.

Moreover, on July 23-24, 2020, Superintendent Greg Poole testified in court regarding BHISD's motivation for revising the Hair Policy. *See* ROA.5179-5181, ROA.5205-5206, & ROA.5584. Superintendent Poole testified that BHISD's revisions to its Hair Policy were "initiated, timed with, [and] coordinated with the DOJ," ROA.5205-5206, and "the primary impetus [for the change] was the DOJ," ROA.5584. Further, Superintendent Poole testified that BHISD let the U.S. Department of Justice "bless those changes that [BHISD] made." ROA.5181.

The U.S. Department of Justice, however, has contested those representations. In a July 28, 2020 letter, an attorney from the U.S. Department of Justice stated that their office did not recommend the December 2019 revisions to the Hair Policy. *See* ROA.4063 (district court order recounting the letter).

Accordingly, Plaintiffs-Appellees sought discovery that would allow them to evaluate the Board's and Superintendent Poole's representations about their motives for adopting the Hair Policy—and the inconsistency between those representations and the statements of the U.S. Department of Justice. Towards that end, Plaintiffs-Appellees sought to depose Superintendent Poole (both as a fact witness and as BHISD's 30(b)(6) designee) and Board members, including Mr. Fred Skinner. Mr. Skinner is a long-serving Board Trustee and former Board President, who attended all Board meetings, and is currently the Board's Vice President. *See, e.g.*, ROA.4229 ¶ 1; ROA.4242 ¶ 1; ROA.4264 ¶ 1.

On May 25, 2022, at a discovery hearing, the district court instructed Plaintiffs-Appellees to move forward with Trustee Skinner's deposition and authorized Plaintiffs-Appellees to "ask him questions about any communications . . . between the other board members, [including] their motives." ROA.5721.

BHISD moved for a protective order that would bar Plaintiffs-Appellees from asking deposition questions that may elicit testimony that BHISD believes is covered by "legislative immunity." *See* ROA.4186-4198. In response, Plaintiffs-Appellees noted*, inter alia*, that BHISD was attempting to use testimonial privileges as both a sword and a shield—claiming that their revisions to the challenged policy were motivated by the U.S. Department of Justice, not by racial discrimination, while at the same time attempting to bar Plaintiffs-Appellees from testing that rationale by inquiring into the Board's motives. ROA.4200-4266.

The district court resolved BHISD's motion on June 1, 2023, holding that the issue of legislative privilege was not ripe for decision and setting forth a procedure to govern outstanding depositions. ROA.4446-4448 ("[T]he Court concludes that issues of state legislative privilege are not yet ripe for decision . . . the Court will be better positioned to make decisions on the application of the privilege when 'presented with specific questions and specific invocations of [] legislative privilege' . . . . Nothing in this order shall be construed as deciding any issue of legislative privilege.").

BHISD appealed that order. ROA.4454-4456. BHISD has since declined to present either Superintendent Poole or Trustee Skinner for deposition. BHISD's Br. at 5. On June 30, 2023, the district court entered an order compelling the depositions of Superintendent Poole, BHISD's Rule 30(b)(6) witness (BHISD has designated Superintendent Poole as its 30(b)(6) deponent), and Trustee Skinner. ROA.4500. On July 5, 2023, this Court granted a temporary administrative stay, declaring, "All proceedings before the district court are hereby stayed pending further order of this court." Doc. 43-1.

SUMMARY OF THE ARGUMENT

In the face of significant evidence that BHISD's Hair Policy was motivated by discrimination against Black male students who wore their hair in locs in homage to their heritage, BHISD scrambled to advance a pretextual, alternative reason for their actions. BHISD insisted that the changes to the Hair Policy that resulted in the Plaintiffs' exclusions from school were made to further their pursuit of excellence and at the request of the U.S. Department of Justice. The superintendent and every single school board member publicly filed sworn declarations in court saying as much. The superintendent said as much in his sworn testimony in court. The superintendent also fired off tweets and wrote an op-ed advancing this narrative.

But now, when faced with depositions where a school board member and the superintendent (both as a fact witness and as BHISD's 30(b)(6) designee) would be

placed under oath and asked about this subject by Plaintiffs' counsel, BHISD insists they should not have to answer. BHISD seeks to use a testimonial privilege to avoid having its superintendent and a school board member sit for a deposition where they may be asked about the pretext they advanced in publicly-filed declarations, in sworn testimony uttered in a public court hearing, on Twitter, in a newspaper, and elsewhere.

Even if this Court had jurisdiction over this appeal (and, as discussed *infra* at 8-14, it does not), it is well-established that a litigant may not use allegedly privileged information as a sword to defend itself while at the same time invoking privilege as a shield to prevent their adversary from asking questions to test the veracity of their defense.

Moreover, this appeal is not properly before this Court, given that the district court never issued a final decision as to whether legislative privilege applied. Rather, the district court concluded that the issue was not ripe because BHISD sought a privilege determination about questions that had yet to be asked and answers that had yet to be given.

The district court's reasoned order setting forth a procedure for navigating depositions involving testimony that BHISD claims is covered by legislative privilege is consistent with binding precedent. Indeed, that order is almost identical to an order that the Fifth Circuit called "carefully crafted," "admirably prudent,

cautious, vigilant, and narrow." *League of United Latin Am. Citizens v. Abbott* ("*LULAC II*"), No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022) (discussing an order entered by a three-judge court in *League of United Latin Am. Citizens v. Abbott* ("*LULAC*"), No. EP-21-CV-259-DCG-JES-JVB, 2022 WL 1570858 (W.D. Tex. May 18, 2022)).

Furthermore, legislative privilege simply does not apply where: (a) neither Superintendent Poole nor Trustee Skinner has individually asserted legislative privilege, (b) Superintendent Poole is not a legislator and does not have standing to invoke legislative privilege, (c) even assuming arguendo that Superintendent Poole could invoke legislative privilege, he waived it by repeatedly sharing allegedly privileged information with the public via publicly-filed court documents, his testimony in court, on Twitter, and via an op-ed he submitted to a newspaper, and (d) Trustee Skinner likewise waived legislative privilege by volunteering allegedly privileged information in a publicly-filed declaration in court.

Finally, even assuming arguendo that (a) this Court had jurisdiction, (b) the privilege was applicable, (c) the privilege had not been waived, and (d) BHISD was not attempting to undermine the judicial process by wielding legislative privilege as both a sword and a shield, legislative privilege should still yield here in favor of the important federal interest in vindicating anti-discrimination laws.

In sum, this Court should dismiss this appeal for lack of jurisdiction and dissolve the stay pending appeal. Alternatively, this Court should affirm the orders of the district court, allowing depositions to proceed as governed by the lower court's June 1, 2023 order.

STANDARD OF REVIEW

The Fifth Circuit "review[s] discovery orders 'for abuse of discretion.'" *La Union Del Pueblo Entero v. Abbott* (*"LUPE II"*), 68 F.4th 228, 235 (5th Cir. 2023) (quoting *Whole Woman's Health v. Smith*, 896 F.3d 362, 369 (5th Cir. 2018)). This Court "applies a highly deferential standard of review to discovery matters." *United States v. Corp. Mgmt., Inc*., 78 F.4th 727, 750 (5th Cir. 2023). Indeed, "a district court has broad discretion in all discovery matters," and "such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse." *Malik v. U.S. Dep't of Homeland Sec.*, 78 F.4th 191, 196 (5th Cir. 2023).

ARGUMENT

I. This Court Lacks Jurisdiction Because The Challenged Order Is Not Reviewable Under The Collateral Order Doctrine

As a threshold matter, this Court lacks jurisdiction because the district court's June 1, 2023 order is not reviewable under the collateral order doctrine. Appellate jurisdiction is generally limited to "final decisions of the district courts." *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr*., 913 F.3d 443, 448 (5th Cir. 2019). "Pretrial discovery orders are generally not considered final decisions; even an order

to disclose potentially privileged material is likewise insufficient by itself to provide jurisdiction." *Id*. at 449. *See also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) ("[W]e have generally denied review of pretrial discovery orders.").

The Supreme Court has articulated a narrow set of circumstances—known as the *Cohen*[1] exception—in which collateral orders may be appealable, requiring that they "'[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Will v. Hallock*, 546 U.S. 345, 349-50 (2006) (citation omitted) (noting that, "The conditions are 'stringent," noting the exception's "modest scope," and deeming the exception narrow since, to broaden the exception would undermine the interest in judicial efficiency and the "sensible policy of avoiding the obstruction of just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." (cleaned up; citations omitted)).[2]

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[1] *See Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 546, (1949) (holding a collateral order appealable where it "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.").

[2] *See also Van Cauwenberghe v. Biard*, 486 U.S. 517, 527–28 (1988) ("Allowing appeals from interlocutory orders that involve considerations enmeshed in the merits of the dispute would waste judicial resources by requiring repetitive appellate review of substantive questions in the case.")

This Circuit has stressed that "the collateral order doctrine must be deployed narrowly and 'with skepticism,'" *La. Real Est. Appraisers Bd. v. U.S. Fed. Trade Comm'n*, 976 F.3d 597, 604 (5th Cir. 2020), and has historically disfavored applying the *Cohen* exception to discovery orders. *A-Mark Auction Galleries, Inc. v. Am. Numismatic Ass'n*, 233 F.3d 895, 899 (5th Cir. 2000) (It is a "well-settled rule . . . that discovery orders may not be appealed under the *Cohen* exception.") (collecting cases).[3]

BHISD's bare statement of jurisdiction, which contains no analysis of how this case fares under *Cohen*, fails. The *Cohen* test is not satisfied in this case, so this Court has no jurisdiction over this interlocutory appeal. The first *Cohen* factor, which requires a "conclusive[] determination" of the disputed issue, is unmet. *Will*, 546 U.S. at 349. The district court has yet to decide whether the legislative privilege applies, and if so, the scope of such privilege. The order explicitly states: "Nothing in this order shall be construed as deciding any issue of legislative privilege."

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[3] Both *Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018), and *LUPE II*, 68 F.4th 228, exceptions to the rule that pre-trial discovery orders are not appealable, are distinguishable. *See, e.g.*, *Leonard v. Martin*, 38 F.4th 481, 487 (5th Cir. 2022) (distinguishing *Whole Woman's Health v. Smith* on the basis that it involved "discovery against a nonparty with substantial First Amendment implications"); *LULAC II*, 2022 WL 2713263, at *1 ("Judge Willett believes that *Whole Woman's Health v. Smith* is distinguishable because it concerned a very different type of privilege, one resting on the First Amendment."); *LUPE II*, 68 F.4th 228 (appeal from an order that actually determined whether or not a document was protected by legislative privilege). Pre-trial discovery orders are generally unreviewable in part because non-parties subject to discovery orders "have alternative avenues for appellate review," as they have the option to resist the order and appeal the contempt citation. *Leonard*, 38 F.4th at 487.

ROA.4448. *See Banca Pueyo SA v. Lone Star Fund IX (US), L.P.*, 978 F.3d 968, 973 (5th Cir. 2020) (finding the first *Cohen* condition not satisfied where the appealed order did "not conclusively determine whether, and to what extent, discovery might be required.").

Neither is second *Cohen* factor satisfied, as the discovery issue is not "completely separate from the merits of the action." *Will*, 546 U.S. at 349. "[W]here the issues raised in an interlocutory appeal 'involve[ ] considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action,' the order is often found not to be separate." *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 174 (5th Cir. 2009) (citation omitted). Here, the issues raised in this interlocutory appeal—including whether BHISD has waived legislative privilege or is using legislative privilege as both as sword and a shield—require the Court to consider the public statements BHISD has advanced regarding its intent. Indeed, BHISD has taken pains to advance a pretext concerning its intent precisely because Plaintiffs-Appellees allege that BHISD has construed and enforced its Hair Policy to intentionally discriminate against Black and male students. The challenged order, which implicates whether Plaintiffs-Appellees can investigate that intent, is inextricably tied to the merits of this case. *See In re Search of Elec. Commc'ns*, 802 F.3d 516, 525 (3d Cir. 2015) (a prejudgment order denying a motion to quash a search warrant was not completely separate from the merits of the case (and thus not

immediately appealable) where the fruits of the warrant would "become part of the evidentiary chain of proof," and thus "may substantially affect the merits of a case."). Indeed, the challenged order resolved a motion wherein BHISD sought to use a testimonial privilege to prevent Plaintiffs-Appellees from posing deposition questions to BHISD officials that could yield answers about BHISD's intent; the fruits of that deposition questioning would add to the factual record and substantially affect the merits of the case.

Finally, Appellants have failed to meet the third *Cohen* factor, which asks "whether a right is 'adequately vindicable' or 'effectively reviewable.'" *Mohawk Indus., Inc.*, 558 U.S. at 107 (citation omitted). As to this factor, the Supreme Court instructs that "the decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of high order.'" *Id*. In *Mohawk*, the Supreme Court held that denying interlocutory jurisdiction of an order which pierced attorney-client privilege did not render the movants' rights effectively unreviewable, and relatedly, would not "imperil" the public interest. *Id. Mohawk* reasoned that "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings…." *Id.* at 109.

Mohawk's reasoning applies equally here. The district court—having implemented a cautious, step-by-step *in camera* procedure—should be afforded deference to rule on "the routine application of settled legal principles," which are "unlikely to be reversed on appeal, particularly when they rest on factual determinations for which appellate deference is the norm." *See Id.* at 110 (collecting cases); *see also id.* at 112 ("[T]he limited benefits of applying 'the blunt, categorical instrument of § 1291 collateral order appeal' to privilege-related disclosure orders simply cannot justify the likely institutional costs") (citation omitted).

Appellants summarily assert that this Court has jurisdiction under the collateral order doctrine, citing *LUPE II*. To be sure, *LUPE II* departed from this Circuit's precedent by applying the *Cohen* exception to a discovery order. Nevertheless, *LUPE II* is inapposite. *LUPE II* involved an order that actually made a conclusive determination of the disputed issue since the district court actually determined whether or not legislative privilege applied. The challenged order in *LUPE II* required the production of privileged documents, while the district court here has made no decision on whether or not legislative privilege applies and, if so, the scope of the privilege. The *LUPE II* district court, of course, was ruling on documents that were already in existence, whereas—as the district court here noted—the issue of legislative privilege here is not ripe since it involves questions

that have yet to be asked and answers that have yet to be given. Thus, unlike *LUPE II*, in this case, the first prong of the *Cohen* exception has not been met.

While there was a concern in *LUPE II* that the privileged information of nonparties would be improperly "shared into the public domain," here, the allegedly privileged testimony would be subject to a strict protective order with those protections only removed if the district court determined, after *in camera* review, that legislative privilege did not apply. Moreover, unlike the non-party legislators in *LUPE II*, whose recourse following an erroneous evidentiary ruling may have been limited, Superintendent Poole and Trustee Skinner are represented by defense counsel (who filed this appeal on their behalf as if they are parties). *See LUPE II*, 68 F.4th at 233. Finally, and critically, the legislators in *LUPE II* had not used the allegedly privileged information as both a sword and shield—conduct which is impermissible and waives the privilege. *See infra* at 31-35.

The *Cohen* exception does not apply and the order is not ripe for review. This Court should deny BHISD's appeal for lack of jurisdiction.

II. The District Court Did Not Abuse Its Discretion by Issuing an Order Materially Identical to an Order Viewed Favorably by the Fifth Circuit.

A. The Fifth Circuit Has Described the Procedure Adopted by the District Court As "Carefully Crafted," "Admirably Prudent, Cautious, Vigilant, and Narrow."

The district court did not abuse its discretion by entering a discovery order setting forth a procedure to govern outstanding depositions. ROA.4446-4448. In

fact, the procedure set forth by the district court to govern these depositions is nearly identical to an order governing potentially privileged discovery that was viewed favorably by this Court, which called the procedure "carefully crafted," "admirably prudent, cautious, vigilant, and narrow." *LULAC II*, 2022 WL 2713263, at *2 (discussing an order entered by a three-judge court in *LULAC*, 2022 WL 1570858).

In *LULAC*, the United States and private plaintiffs subpoenaed three non-party state representatives to testify at depositions, including questions that may concern the representatives' motive or intent. 2022 WL 1570858 at *1-2. In response to those subpoenas, the representatives filed motions to quash the subpoenas or issue a protective order that would limit the subject matter that the plaintiffs could inquire about on the basis of legislative privilege.[4] *Id.* The district court determined that it would be premature to rule on what information may or may not be subject to legislative privilege. *Id.* The depositions at issue had not occurred and "[w]hether state legislative privilege attaches is [a] fact-and context-specific [inquiry] . . . [that] 'depends on the question being posed.'" *Id*. (quoting *Perez v. Perry,* No. 5:11-CV-360-OLG-JES (W.D. Tex. Aug. 1, 2011), ECF No. 102 at 5).

[4] Contrary to BHISD's argument, *see* BHISD's Br. at 8, "Assertions of legislative immunity and privilege by state lawmakers . . . are governed by federal common law rather than the Speech or Debate Clause, which by its terms applies only to federal legislators." *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021). "And the common-law legislative immunity and privilege are less protective than their constitutional counterparts." *Id.*

The district court proceeded with "great caution," developing a procedure to govern the upcoming depositions that protected potentially privileged information, but allowed the plaintiffs to inquire about non-privileged information. *Id.* at *2. Accordingly, the *LULAC* court outlined the following procedure to govern the representatives' depositions:

> (1) Parties should proceed with depositions and the deponents must appear and testify even if it appears likely that legislative privilege may be invoked in response to certain questions.
>
> (2) Deponents may invoke legislative privilege in response to particular questions, *but the deponent invoking the privilege must then answer the question in full. The response will be subject to the privilege.*
>
> (3) The portions of deposition transcripts containing questions and answers subject to the privilege shall be deemed to contain confidential information and shall therefore be subject to the "Consent Confidentiality and Protective Order" (Dkt. 202) previously entered in this case.
>
> (4) If a party wishes to use any portion of deposition testimony that is subject to legislative privilege, that party must seal those portions and submit them to the Court for in camera review, along with a motion to compel.
>
> (5) Any such motion to compel shall be filed by August 1, 2022. Though the Court sets this deadline, it encourages the parties to file earlier, if at all possible.

LULAC, 2022 WL 1570858, at *2-3. *Cf.* ROA.4447 (the June 1, 2023 order from the district court). The court warned the parties of the seriousness of maintaining

confidentiality and also explained that nothing in the order should be construed as deciding any issue of legislative privilege. *LULAC*, 2022 WL 1570858, at *3. The district court thus recognized that it would be better positioned to make decisions on the scope of the privilege when the court was presented with specific questions and specific invocations of the privilege.

The Fifth Circuit denied the representatives' request to stay the depositions pending appeal. *LULAC II*, 2022 WL 2713263, at *1. In doing so, this Court recognized that the district court did not deny that legislative privilege might apply; rather, it concluded that the issue was "'not yet ripe for decision,' since 'no questions have been asked, and no answer given.'" *LULAC II*, 2022 WL 2713263, at *1 (quoting *LULAC,* 2022 WL 1570858 at *1). The Court noted that, "the [state legislative] privilege is not so broad as to compel [a district court] to quash the deposition subpoenas, modify them, or enter a protective order prohibiting questions about [certain topics] . . ." *Id.* (citing *Jefferson Cmty. Health Care Ctrs, Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (determining that "legislative privilege for state lawmakers is, at best, one which is qualified" and that "this evidentiary privilege cannot bar the adjudication of a claim") and *United States v. Gillock*, 445 U.S. 360, 361 (1980) (recognizing that legislative privilege must yield where important federal interests are at stake). According to this Court, the district court's "vigilant and narrow" order was an "an admirably deliberate and

cautious approach to the legislative privilege issue" that went "to great lengths to protect [m]ovants." *LULAC II*, 2022 WL 2713263, at *1-2.

Here, the challenged order governing depositions is materially identical to the *LULAC* order.[5] *See* ROA.4446-4448. As in *LULAC*, the lower court recognized it was "not [well-]positioned to rule on what information may be the subject of legislative privilege, as determining whether the privilege applies is a fact and content specific inquiry" and depends on the deposition questions being posed. ROA.4446-4447. Thus, it adopted a procedure that allowed the parties to develop the requisite record, while ensuring the interests of the parties remained protected. ROA.4446-4448. Similar to *LULAC*, the challenged order was "carefully crafted," "admirably prudent, cautious, vigilant, and narrow." *See LULAC II*, 2022 WL 2713263, at *2.

The lower court's procedure is prudent because it is understandably difficult for a district court to rule on legislative privilege before the deposition questions are asked and the deponent responds. As this Court has previously declared, "[legislative] privilege must not be used as a cudgel to prevent the discovery of non-privileged information." *LULAC II*, 2022 WL 2713263, at *2 (citing *Jefferson Cmty.*

[5] The lower court's order sets forth the *LULAC* instructions verbatim, only diverging from the *LULAC* language in order to clarify the governing protective order and the deadline to submit motions to compel.

Health, 849 F.3d at 624; *Gillock*, 445 U.S. at 361). Likewise, "[legislative] privilege must not be used . . . to prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege." *LULAC II*, 2022 WL 2713263, at *2 (citing *Jefferson Cmty. Health*, 849 F.3d at 624; *Gillock*, 445 U.S. at 361). Here, given that the issue of legislative privilege is not ripe, Plaintiffs-Appellees' claims seek to vindicate an important federal interest, and the depositions will cover information that is not privileged as well as information that BHISD claims is privileged, the Court should affirm the district court's order which sets forth an "admirably prudent" way to proceed.

B. Courts in This and Other Circuits Have Used the Procedure Set Forth by the Lower Court.

Moreover, other cases in this Circuit in similar procedural postures have also followed this procedure. *See, e.g.*, *Veasey v. Perry*, No. 2:13-CV-193 (S.D. Tex. June 18, 2014), ECF No. 341 (denying motions to quash deposition subpoenas filed by legislators on the basis of privilege and ordering legislators and legislative aides to appear for depositions, invoke legislative privilege in response to particular questions, answer subject to the privilege, and seal portions of the deposition transcript concerning allegedly privileged testimony); *League of United Latin Am. Citizens v. Abbott*, ("*LULAC III*") No. 21-CV-00259, 2022 WL 2866673, at *5 (W.D. Tex. July 6, 2022) (recognizing that the district court was poorly positioned to assess the parties' respective legislative privilege arguments because legislative

privilege is a fact and context specific inquiry which depends on the deposition questions posed and outlining a deposition procedure materially identical to *LULAC*); *Perez v. Perry*, No. 5:11-CV-360 (W.D. Tex. Aug. 1, 2011), ECF. No. 102 at 5-6 (ordering parties proceed with depositions and ordering the deponents to appear and testify even if it appears likely that the privilege may be invoked in response to certain questions). Courts in other circuits have also adopted this process. *See e.g.*, *Texas v. Holder*, No. 1:12-CV-128 (D.D.C. Apr. 20, 2012), ECF No. 84 at 2-3 (refusing to grant blanket protective order); *Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015) (ordering depositions to proceed, at which the legislators may raise legislative privilege, as warranted, but must answer the questions posed).

C. None of the cases BHISD Cites Overrules *LULAC II*, Which Called the Challenged Order "Carefully Crafted," "Admirably Prudent, Cautious, Vigilant, and Narrow."

Neither *Jackson Municipal Airport Authority v. Harkins*, 67 F.4th 678 (5th Cir. 2023), *withdrawn and superseded* by 2023 WL 5522213 (5th Cir. Aug. 25, 2023), *vacated* by 2023 WL 5542823 (5th Cir. Aug. 29, 2023) (granting en banc rehearing), nor *LUPE II*, 68 F.4th 228 (5th Cir. May 17, 2023), overrules *LULAC II*. Unlike *LULAC II*, neither case involved a dispute regarding deposition testimony. 2022 WL 2713263, at *1. Instead, the discovery disputes in *Jackson Municipal*

Airport Authority[6] and *LUPE II* pertained to documents withheld by non-party legislators based on claims of legislative privilege. 2023 WL 5522213, at *1; 68 F.4th at 231-32. Unlike *LULAC II*, where the issues relating to legislative privilege were not yet ripe, 2022 WL 2713263, at *1, the privilege was assessed by the district court in *LUPE II*, 68 F.4th at 232 (observing that the district court rejected most of the legislative privilege claims after non-party legislators produced a privilege log and subsequently ordered production of the documents) and *Jackson Municipal Airport Authority*, 67 F.4th at 684 (noting that the magistrate judge determined that legislative privilege had been waived as to certain documents and ordered the production of those documents).

Unlike *LUPE II* and *Jackson Municipal Airport Authority*, the district court here did not assess BHISD's legislative privilege claim; nor could it do so because BHISD asserted legislative privilege before the depositions of Superintendent Poole (as a fact witness and as BHISD's 30(b)(6) designee) and Trustee Skinner occurred. The district court's reasoned process requires the deponent to answer when legislative privilege is invoked, but it does not permit public disclosure of that information. ROA.4447. Indeed, the district court's order dictates that, where a party

[6] BHISD acknowledges that *Jackson Municipal Airport Authority*, like *LUPE II*, is inapposite because it does not address legislative privilege claims in the context of deposition testimony. BHISD's Br. at v. The Fifth Circuit's decision to rehear *Jackson Municipal Airport Authority en banc* will have no bearing on the issues before the Court in this case.

invokes legislative privilege, those questions and answers "shall be deemed CONFIDENTIAL" as defined in the Amended Protective Order. ROA.4447. The Amended Protective Order provides penalties for unauthorized disclosure. Further, the district court's order requires that for any information designated as subject to legislative privilege, the party seeking to use that information must file a motion to compel, seal those portions of the transcript, and submit the transcript to the district court for *in camera* review. ROA.4447. Thus, the district court can assess the privilege claim and if the claim is proper, whether it should yield in the circumstances of this case. *See Gillock*, 445 U.S. at 373 (recognizing that the evidentiary privilege for a state legislator should yield in a federal criminal prosecution because "important federal interests are at stake"). Therefore, *Jackson Municipal Airport Authority* and *LUPE II* are distinguishable.

Lacking any decision in this Circuit casting doubt on the "carefully crafted," "admirably prudent, cautious, vigilant, and narrow" order of the district court, *see LULAC II*, 2022 WL 2713263, at *2, BHISD looks to the Ninth Circuit's decision in *Lee v. City of Los Angele*s, 908 F.3d 1175 (9th Cir. 2018). *Lee* is not controlling in this Court. But, in any event, *Lee* is readily distinguishable.

BHISD highlights that, in *Lee*, the district court granted a protective order prohibiting the plaintiffs in that case from questioning City officials on "any legislative acts, motivations, or deliberations pertaining to the 2012 redistricting

ordinance" and the court subsequently granted summary judgment to the City and plaintiffs appealed both decisions of the district court. 908 F.3d at 1181. But, although the Ninth Circuit affirmed the district court's protective order, it did so in conjunction with its affirmance of the district court's order granting summary judgment. And, in upholding the district court's summary judgment order, the Ninth Circuit concluded that the plaintiffs in *Lee* failed to raise a genuine issue of material fact that the City was motivated predominately by race in its redistricting process (which was the issue in that case). *See Id*. at 1178. The Court further explained that "the factual record in this case falls short of justifying" inquiry by Plaintiffs into the City officials' motives. *Id.* at 1188.

Here, however, the record is quite different—there is no ruling below concluding that the Plaintiffs have failed to raise a genuine issue of material fact that BHISD was motivated, at least in part, by race when it revised its Hair Policy. To the contrary, the district court, citing "evidence in the record of selective enforcement, procedural irregularities, and increasingly restrictive amendments [to the Hair Policy], coupled with the lack of a persuasive justification for the hair-length policy," held that Plaintiff Kaden Bradford had established a substantial likelihood of success on his gender discrimination, race discrimination, and First Amendment claims. *Arnold v. Barbers Hill Indep. Sch. Dist*., 479 F. Supp. 3d 511, 528 (S.D. Tex. 2020). Moreover, Superintendent Poole and Trustee Skinner have

already submitted sworn testimony regarding BHISD's motivations, as have several other BHISD officials. Thus, *Lee* is inapplicable to the facts of this case. Plaintiffs-Appellees should be permitted to inquire into whether the narrative BHISD has advanced is mere pretext.

III. Legislative Privilege Does Not Apply Here.

A. Superintendent Poole Does Not Have Standing to Invoke Legislative Privilege.

Superintendent Poole does not have standing to invoke legislative privilege because he is an executive officer, not a legislator. Legislative privilege may only be asserted by state and local officials acting in a legislative capacity. *Cunningham v. Chapel Hill, ISD,* 438 F. Supp. 2d 718, 722 (E.D. Tex. 2006). Courts have extended legislative privilege to school board members because an act by a school board bears the "hallmarks of traditional legislation . . . reflect[ing] a discretionary, policymaking decision." *Id*. at 723 (quoting *Bogan v. Scott-Harris*, 523 U.S. 44 (2000)). However, executive officers, like a superintendent, do not have standing to invoke legislative privilege. *See Gilby v. Hughs*, 471 F. Supp. 3d 763, 767 (W.D. Tex. 2020).

Superintendent Poole is the chief executive officer of BHISD, not a board member. Tex. Ed. C. 11.201(a) ("A superintendent is the educational leader and chief executive officer of a district."). His duties generally do not require him to primarily work in a legislative capacity. In contrast, the Board's duties are primarily

legislative in nature, including (1) adopting comprehensive goals for the district and the superintendent; (2) adopting a policy to establish district- and campus-level planning and decision-making processes; and (3) adopting rules that require students to adhere to a dress code. *See* Tex. Ed. C. 11.1511(b); FNCA(LOCAL)-A. Indeed, BHISD confirmed that the "District's Board [not Superintendent Poole] voted to adopt and approve the dress and grooming code that is in effect for the entire District." *See* ROA.4192; *see also* ROA.5168 (where Superintendent Poole states that it is the *school board's* exclusive right to set the policy, not his, because they are elected officials (emphasis added)).

Because Superintendent Poole's duties are not contemplated to bear the hallmarks of a traditional legislator, he cannot invoke the privilege. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) ("Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity."); *Gilby*, 471 F. Supp. 3d at 768 (determining that communications from legislators to the executive branch seeking guidance on formulating legislation "are not meaningfully different" from communications between legislators and constituents, lobbyists, or think-tanks); *Cunningham*, 438 F. Supp. 2d at 719 (where

the defendant school district did not invoke legislative privilege on behalf of the superintendent).

B. Superintendent Poole and the Board Have Waived Legislative Privilege.

1. Superintendent Poole and the Board Waived Legislative Privilege Through Prior Public Statements.

Moreover, even if Superintendent Poole has standing to invoke legislative privilege, he and the Board members waived the privilege after making several public statements on allegedly privileged matters, outside of the legislative process.[7] Legislative privilege "is a personal one and may be waived or asserted by each individual legislator." *Gilby*, 471 F. Supp. 3d at 767. Crucially, waiver "need not be explicit and unequivocal, and may occur either in the course of the litigation when a party testifies as to otherwise privileged matters, or when purportedly privileged communications are shared with outsiders." *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012) (internal quotations citations omitted). Here, Superintendent Poole, Trustee Skinner, and the other Board members unequivocally waived legislative privilege.

[7] In addition, neither Superintendent Poole nor the individual Board of Trustees have properly asserted legislative privilege. *See Perez v. Perry,* No. 5:11-CV-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (explaining that counsel "may not invoke the legislative privilege; each [individual] must assert or waive the privilege individually.").

Legislators waive the privilege when they speak on the public record regarding matters otherwise subject to the privilege, *see Alexander v. Holden*, 66 F.3d 62, 68 (4th Cir. 1995) (finding legislative privilege was "clearly waived" when commissioners "testified extensively as to their motives in depositions with their attorney present, without objection"), and when they share information otherwise protected by the privilege with outside third parties. *Perez v. Perry*, No. 5:11-CV-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) ("To the extent ... that any legislator, legislative aide, or staff member had conversations or communications with any outsider (e.g., party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications.").

Superintendent Poole waived legislative privilege when, at the lower court's July 2020 preliminary injunction hearing, he testified extensively, without intervention from counsel, on the subjective intent, thought processes, and motives underlying the Hair Policy. Superintendent Poole testified that language in the Hair Policy referring to locs and cornrows was removed, at least in part, due to inquiries from the U.S. Department of Justice that made BHISD realize the "racial nature" of those hairstyles. ROA.5166. He also indicated that the Hair Policy reflected BHISD's "high expectations," the policy set BHISD apart and unlike "other school districts" nearby, did not reflect "lax eroding standards." ROA.5170. Superintendent

Poole went so far as to testify that the Board shared with him their goals with respect to the Hair Policy and that the policy "has always been about high expectations, [not] race or discrimination." ROA.5170-5171.

In addition, Superintendent Poole and each Board member submitted public declarations to the court that described their intent in enacting the Hair Policy. For example, Superintendent Poole characterized the intent and basis for crafting the Hair Policy as being related to input from local employers and colleges. *See* ROA.1566. Similarly, Trustee Skinner affirmed that: "When I voted to adopt small modifications to the language of the hair length regulation, I only intended to clarify the regulation and dress code exemption procedures, not to change them." ROA.1658 at ¶ 4. Superintendent Poole and board members also asserted in their declarations that the December 2019 revisions to the Hair Policy were made based on recommendations from the U.S. Department of Justice. *See, e.g.*, ROA.1568 at ¶ 16; ROA.1658 at ¶ 6.

Superintendent Poole also waived the privilege by publicly sharing information with the press. Specifically, Superintendent Poole published an op-ed in the Baytown Sun, the local newspaper, claiming that the purpose of the Hair Policy was to maintain BHISD's "high standard[s]" and "African American culture is not given the same exemption from the dress code [as other cultures or religion]." ROA.1345-1346. Superintendent Poole also disseminated information on the

subjective intent, thought processes, and motive underlying the Hair Policy through public social media posts. In December of 2020, Superintendent Poole claimed, via Twitter, that the Hair Policy was informed by "statistically significant correlations" between academic success, safer schools, and schools with stricter dress codes. *See* ROA.3225; *see also* ROA.3215-3221.

This Court's recent decision in *LUPE II* does not undermine a finding of waiver here. 68 F.4th 228. In *LUPE II*, legislators communicated with third parties, such as party leaders and lobbyists, that were part of the legislative process. There, the Fifth Circuit determined that the legislators *did not* waive their privilege because "the legislators did not send privileged documents to third parties *outside* the legislative process; instead, they brought third parties *into* the process." *Id.* at 237. Here, however, the exact opposite occurred—Superintendent Poole and the Board made public statements about privileged matters to third parties outside of the legislative process, well after the disputed policy was crafted, reviewed, enacted, and revised when they testified about the Hair Policy in open court, when Superintendent Poole tweeted and wrote an op-ed addressing the purpose behind the Hair Policy and when individual board members publicly filed declarations about the basis for revisions to the Hair Policy.

Moreover, unlike *LUPE II*, Appellants waived legislative privilege when they produced documents related to internal deliberations about revisions to the Hair

Policy. *See Favors*, 285 F.R.D. at 212 ("The law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations.") and *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir. 1999) ("[The] disclosure of any significant portion of a confidential communication waives the privilege as to the whole.") (quoting *United States v. Davis*, 636 F.2d 1028, 1043 n. 18 (5th Cir. 1981)). For example, in discovery, BHISD turned over an email exchange between Superintendent Poole and Trustee Skinner that discussed potential responses to the media regarding revisions to the Hair Policy. The email included a draft response to a reporter's question about whether the Board would rethink its Hair Policy. The drafted response to this question that Trustee Skinner sent to Superintendent Poole was the following: "We are working hard to prepare our students for the workforce. One of our highest priorities is that 100% of seniors graduate and we've done that 6 of 8 years… What would you consider most useful to students of all backgrounds, cultures and religions? Something that makes them happy in the present, or a foundation that will equip them for a future of change and constants demands. I know, you want yours now!"

Even more telling, BHISD itself at one point argued that Plaintiffs-Appellees should depose Superintendent Poole to determine the Board's motive in revising the Hair Policy. In a motion to quash the deposition of Sara Leon, counsel for BHISD, Appellants asserted attorney-client privilege and then argued that: "Plaintiffs can

acquire relevant, non-privileged information on matters related to the December 2019 hair policy revisions from the District's Rule 30(b)(6) designee." ROA.3840. Appellants later confirmed that Superintendent Poole was the 30(b)(6) designee. During this discovery dispute, legislative privilege was never raised as a reason not to question the 30(b)(6) designee or individual board members.

Superintendent Poole, Trustee Skinner, and the Board waived legislative privilege multiple times over by providing prior testimony and public statements on allegedly privileged subjects.

2. Superintendent Poole and the Board Waived Legislative Privilege by Attempting to Use Legislative Privilege as a Sword and Shield.

BHISD seeks to use legislative privilege as both a sword and shield in this case to gain an unfair advantage over Plaintiffs-Appellees. However, rules of evidence and equity prohibit allowing a party to profit from such a tactic. *See United States v. Woodall*, 438 F.2d 1317, 1324 (5th Cir. 1970) ("privilege…is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.") (citation omitted). On the one hand, BHISD has presented self-serving statements about the School Board's purported race- and gender-neutral motives for enacting the Hair Policy in order to attack the credibility of the allegations in Plaintiffs-Appellees' complaint. On the other hand, BHISD attempts to shield from discovery all factual inquiry into the

Board's motives in enacting and revising the Hair Policy. However, Fifth Circuit case law is clear that "a party may not use privileged information both offensively and defensively at the same time." *Willy v. Admin. Rev. Bd*., 423 F.3d 483, 497 (5th Cir. 2005).

The sword and shield doctrine prohibits "the manifest unfairness … that results when a party invokes privileged communications while denying its adversary access to the same." *In re Itron, Inc.*, 883 F.3d 553, 564-65 (5th Cir. 2018) (cleaned up). Yet, BHISD has created just this kind of "manifest unfairness" by invoking purportedly privileged evidence of race- and gender-neutral motives for the Hair Policy, while seeking to deny Plaintiffs-Appellees the opportunity to depose Superintendent Poole and Trustee Skinner regarding the same. Under the sword and shield doctrine, if a party affirmatively relies on privileged information to support an element of its defense, the privilege is deemed waived. *See id.* at 558; *In re Schlumberger Tech. Corp*., 818 F. App'x 304, 307 (5th Cir. 2020); *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989). The scope of the waiver will extend to all subject matter related to the privileged information introduced into the litigation. *Itron* at 558; *Doe v. Baylor Univ.*, 335 F.R.D. 476, 498–99 (W.D. Tex. 2020) ("The scope of…waiver extends also to the material on that subject matter necessary to litigate the issue fairly.").

Cunningham v. Chapel Hill Indep. Sch. Dist., which BHISD cites approvingly in their brief, BHISD's Br. at 10, recognizes that this doctrine applies to legislative privilege in just such a circumstance as is presented by this case. 438 F. Supp. 2d 718 (finding that school board trustees will be deemed to have waived legislative privilege if they testify as to the school board's motivations for a decision adverse to the plaintiff and, as a result of that waiver, would be subject to depositions on that issue).

The facts of this case are also materially indistinguishable from the facts which this Court in *Conkling* found established waiver of privilege under the sword and shield doctrine. 883 F.2d at 435. In *Conkling*, the plaintiff introduced into evidence assertions about select privileged communications with his attorney in order to establish that he did not have notice of relevant facts until a date which fell within the statute of limitations. *Id*. at 432-33. In order to investigate the credibility of these assertions, defendants sought discovery, including depositions of the plaintiff's current and former attorneys, regarding information tending to show when the plaintiff first knew or should have known of the relevant facts underlying his claim. *Id*. at 434. The Court found, pursuant to the sword and shield doctrine, that the plaintiff had waived his attorney-client privilege by injecting privileged information into the litigation and thus deposition questions of his attorneys related to the information which he had introduced would be permitted. *Id.* at 434-35. As in

Conkling, BHISD has affirmatively introduced privileged information to attack Plaintiffs-Appellees' legal claims and has thus forfeited its right to shield related inquiry into BHISD's motives from discovery.

It is difficult to imagine a more egregious example of relying on legislative privilege as both a sword and shield to gain manifestly unfair advantage over an opposing party than that presented by this case. As discussed, *supra* at 2-3, BHISD has expressly and affirmatively relied on declarations from every single member of the relevant legislative body (the Board), as well as testimony and a declaration from the superintendent in support of its defense. In offering these statements, BHISD voluntarily introduced into evidence information regarding the entire Board's motives in enacting the Hair Policy, exactly the kind of motive evidence which BHISD now claims is shielded from discovery by legislative privilege.

The statements introduced by BHISD consist of assertions providing specific non-discriminatory rationales for the enactment of the Hair Policy and are intended to present a credible attack on the allegations of discriminatory motive at the heart of Plaintiffs-Appellees' legal claims. At the same time, BHISD attempts to eliminate any ability Plaintiffs-Appellees have to contest BHISD's assertions through discovery of contradictory evidence by claiming a privilege that extends to all non-public evidence of BHISD's motives. *See* BHISD's Br. at 6 (claiming that legislative privilege precludes Plaintiffs-Appellees from posing any questions to

Superintendent Poole, Trustee Skinner, "*and any other District witness*" that "*could elicit* testimony" about these matters, regardless of whether such inquiries would actually elicit indisputably non-privileged information (emphasis added)). If prohibited from inquiring into the actual motives of the Board in enacting the policy, Plaintiffs-Appellees would be put at manifestly unfair disadvantage in responding to this attack on their legal claims, contrary to relevant Fifth Circuit case law. *Itron*, 883 F.3d at 564-65; *Conkling*, at 434. In these circumstances, the law makes clear that the privilege must be deemed waived and discovery into information related to the motive evidence that BHISD has introduced into this litigation must be allowed. *See Itron, 883* F.3d at 558 ("[T]o prevent selective or misleading disclosures, fairness dictates that the waiver extend to related subject matter").

IV. Even If Legislative Privilege Applies and Was Not Waived, It Should Yield as This Case Presents Important Federal Interests.

The legislative privilege is qualified and may be overcome by important federal interests. *Gillock*, 445 U.S. at 373. Indeed, legislative privilege "must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Jefferson Cmty. Health Care Ctrs. Inc*., 849 F.3d at 624 (quoting *Perez,* 2014 WL 106927, at *1; *LULAC v. Guillen*, 2022 WL 2713263, No. 22-50407, 2022 WL 2713263 (5th Cir. May 20, 2022) at *2 ("The state legislative privilege . . . must not

be used as a cudgel to . . . prevent the discovery of the truth in cases where the federal interests at stake outweigh the interests protected by the privilege").

As the Supreme Court recognized, a private litigant who challenges racial discrimination under the Civil Rights Act of 1964 is "vindicating *a policy that Congress considered of the highest priority*." *Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 401–02 (1968) (emphasis added). Plaintiffs-Appellees allege race and sex discrimination, as well as violations of freedom of expression, in school. These federal interests are of particular import as they involve harms suffered by children who are consequently deprived of receiving an education. In *Allen v. Wright*, the Supreme Court held that such injury, that is, "children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, as shown by cases from *Brown v. Board of Education*, 347 U.S. 483 (1954), to *Bob Jones University v. United States*, 461 U.S. 574 (1983), one of the most serious injuries recognized in our legal system." 468 U.S. 737, 756, (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc*., 572 U.S. 118 (2014); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

Plaintiffs-Appellees thus seek to enforce some of the most crucial rights conferred by the Constitution, within a vital American institution. And they do so to vindicate the rights of children. There is a confluence of important federal interests at stake here. *See Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 765–66 (S.D. Tex. 2011) (recognizing that there is a very strong interest in the enforcement of civil rights statutes that provide remedies for violations of the Constitution).

Moreover, unlike some cases where the courts have declined to hold that legislative privilege must yield to important federal interests, here, Plaintiffs-Appellees must prove discriminatory intent. *Compare Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88–89 (1st Cir. 2021) ("We need not reject altogether the possibility that there might be a private civil case in which state legislative immunity must be set to one side because the case turns so heavily on subjective motive or purpose. This is not such a case, however, because proof of the subjective intent of state lawmakers is unlikely to be significant enough in this case to warrant setting aside the privilege."), *and In re N. Dakota Legislative Assembly*, 70 F.4th 460, 465 (8th Cir. 2023) (declining to hold that the legislative privilege yielded where the underlying claim did not turn on discriminatory intent), *with United States v. Bd. of Educ. of the City of Chi*., 610 F. Supp. 695, 700 (N.D. Ill. 1985)) (Where a case involved allegations of intentional discrimination, "the decisionmaking process ... *is* the case.").

BHISD has not pointed to the availability of other sources of information to obtain the information that Plaintiffs seek. And "given the practical reality that officials seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority," *Veasey v. Perry*, No. 2:13-CV-193, 2014 WL 1340077, at *3 (S.D. Tex. June 18, 2014), there is no alternative source for evidence of the contemporaneous and candid discussions of the Board's subjective intentions, thought processes, support or non-support, rationales, and motives for the Hair Policy. *See Angelicare, LLC v. St. Bernard Par.*, No. 17-7360, 2018 WL 1172947, at *9 (E.D. La. Mar. 6, 2018) (finding that legislative privilege did not apply to councilmembers' intent testimony because evidence could not be obtained through other means as there were not robust meeting notes; in-depth circumstantial evidence of intent; or meeting minutes with council members' statements of reasoning for the decisions made); *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) (recognizing that "the highly relevant and potentially unique nature of the evidence" weighed in favor of disclosure).

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal for lack of jurisdiction and dissolve the stay pending appeal. Alternatively, this Court should

affirm the orders of the district court, allowing depositions to proceed as governed by the lower court's June 1, 2023 order.

Dated: October 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that:

This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 9,112 words.

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above was filed electronically with the Clerk of the Court using the CM/ECF system this October 2, 2023. Notice of this filing will be sent to ALL counsel by operation of the court's electronic filing system.

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TAB C

CASE NO. 23-20256

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Everett De'Andre Arnold; Kaden Bradford; Sandy Arnold,

Plaintiffs - Appellees

v.

Barbers Hill Independent School District; Barbers Hill Independent School District's Board of Trustees; Fred Skinner; Greg Poole,

Defendants - Appellants

On Appeal from the United States District Court,
for the Southern District of Texas, Houston Division, No. 4:20-cv-1802

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SUMMARY OF THE ARGUMENT

Legislative privilege stems from the U.S. Constitution. It ensures federal, state, regional, and local legislators can focus on their policymaking duties rather than litigation. While the privilege may be pierced in narrow "extraordinary instances," cases alleging discrimination in election laws and housing do not meet the requisite standard. Accordingly, Plaintiffs-Appellees' case – which challenges matters historically left to local control – cannot meet the threshold.

In their brief, Plaintiffs-Appellees do not articulate why their claims are more important than voting, housing, or any number of other federally protected interests. Instead, their brief focuses on the case's merits, attacks jurisdiction, and asserts legislative privilege was waived. All three foci betray inherent weaknesses in their appellate arguments. *First*, this appeal is not about the merits. It is about the district court's decision to compel local legislators to sit for depositions and reveal their subjective thoughts and motives for policymaking decisions. *Second*, in *La Union Del Pueblo Entero v. Abbott* ("*LUPE II*"), 68 F.4th 228, 232 (5th Cir. 2023), this Court held that "orders denying non-party state-legislators' assertions of legislative privilege" are immediately appealable. Every policy rationale articulated in *LUPE II* supports its application here. *Third*, Plaintiffs-Appellees' waiver arguments are not properly before the Court. The district court did not find a waiver, and Plaintiffs-Appellees did not cross-appeal. Moreover, Plaintiffs-Appellees advocate for an

exception to the legislative privilege that would, as this Court explained months ago, "swallow the rule."

ARGUMENT AND AUTHORITIES

A. The Court has appellate jurisdiction.

The Court may review the district court's decision effectively stripping Superintendent Poole's and Trustee Skinner's legislative privilege. While 28 U.S.C. § 1291 limits appellate jurisdiction to final decisions, "courts have long given this restriction a practical rather than technical construction." *LUPE II*, 68 F.4th at 232 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 451, 456 (1949)). Under *Cohen*, the Court has jurisdiction to review orders that "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal." *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 448 (5th Cir. 2019). "[T]he decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (citation omitted).

1. This appeal falls within the collateral order doctrine.

All three *Cohen* conditions are met, and the Court has appellate jurisdiction under the collateral order doctrine. This Court has already concluded that the class

at issue in this appeal, "orders denying non-party state-legislators' assertions of legislative privilege," are immediately appealable. *LUPE II*, 68 F.4th at 232.

The first *Cohen* condition is satisfied if, among other things, (1) a district court compels the disclosure of information shielded by legislative privilege; or (2) failure to comply with the complained-of order may result in sanctions. *LUPE II*, 68 F.4th at 232–35. *First*, once a deposition occurs and privileged information is revealed, the information cannot be returned. In those circumstances, the constitutional mandate that legislators "shall not be questioned in any other [p]lace" is already breached. U.S. Const., Art I, § 6; *Gravel v. United States*, 408 U.S. 606, 617 (1972). Here, the district court ordered Superintendent Poole and Trustee Skinner to appear for depositions and answer questions, even if legislative privilege applies. Compliance would undermine the purpose of the legislative privilege – to prevent external interference with legislators' policymaking duties. *LUPE II*, 68 F.4th at 233. *Second*, "conclusiveness is apparent" when "failure to comply with [the district court's order] may result in sanctions." *Id.* (quoting *Whole Woman's Health v. Smith*, 896 F.3d 362, 367 (5th Cir. 2018)). In this case, the district court authorized Plaintiffs-Appellees to seek sanctions against Appellants for failing to present Superintendent Poole and Trustee Skinner to answer privileged questions. ROA.4500. Accordingly, the first *Cohen* condition is met.

The second *Cohen* condition is met because this appeal considers an "important question[] separate from the merits" of the underlying case. *Smith*, 896 F.3d at 367. This appeal concerns the contours of legislative privilege, not the District's ultimate liability. *See United States v. Jefferson*, 546 F.3d 300, 309 (4th Cir. 2008). "Exposing potentially confidential information is an important issue wholly separate from the merits of the underlying litigation." *Vantage Health Plan*, 913 F.3d at 448; *see also Smith*, 896 F.3d at 367.

The third *Cohen* condition is met because, absent an interlocutory appeal, Plaintiffs-Appellees will elicit privileged deposition testimony before final judgment. The district court did not merely order Superintendent Poole and Trustee Skinner to submit for depositions. Instead, it ordered Superintendent Poole and Trustee Skinner to answer all Plaintiffs-Appellees' questions, irrespective of privilege objections. "[O]nce confidential information is released, there is no going back." *Vantage Health Plan*, 913 F.3d at 448; *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Justice Kavanaugh wrote, "appeal after final judgment will often come too late because the privileged materials will already have been released. In other words, 'the cat is out of the bag.'").

Exercising appellate jurisdiction here "also satisfies *Mohawk*'s formulation, which allows interlocutory jurisdiction when delaying review would harm a substantial public interest or some particular value of a high order":

> Delaying review for this class of claims 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 [depositions]. Freedom from constant distraction is a high-order value.

LUPE II, 68 F.4th at 233 (citing *Mohawk*, 558 U.S. at 109); *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty . . . for the public good."). It is inconsistent with separation of powers principles "for a court to inquire into the motives of legislators," including local legislators like the District's trustees. *Tenney*, 341 U.S. at 377; *Bogan v. Scott-Harris*, 523 U.S. 44, 48–50 (1998).

Plaintiffs-Appellees sought and received extensive document discovery. The District, its employees, and its trustees made exhaustive efforts to accommodate Plaintiffs-Appellees' thorough discovery requests. Notably, trustees serve as unpaid volunteers. Tex. Educ. Code § 11.061(d). They have full-time jobs outside the District. *See id.* Plaintiffs-Appellees' actions, if upheld, risk deterring future citizens from serving their communities simply because someone aligned differently on the political spectrum disagrees with a policy decision. *Cunningham v. Chapel Hill ISD*, 438 F. Supp. 2d 718, 723 (E.D. Tex. 2006) (expressing these concerns). "Constant distraction" is an understatement. *Cf. LUPE II*, 68 F.4th at 233.

Because all three *Cohen* conditions are met, the Court has jurisdiction to hear this appeal under the collateral order doctrine.

2. Plaintiffs-Appellees' contrary arguments lack merit.

Plaintiffs-Appellees contend this Court lacks jurisdiction under the collateral order doctrine. App'ee Br. at 9. Except for a few generalities about appellate jurisdiction, Plaintiffs-Appellees misunderstand the *Cohen* exception. *See* App'ee Br. at 8–14.

First, Plaintiffs-Appellees contend the district court decision didn't make an ultimate determination on how they might use the privileged material they elicit during depositions. App'ee Br. at 10. How a district court or litigant stylizes an order doesn't determine its "proper characterization." *See Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426 (5th Cir. 1981). The district court's order compels Superintendent Poole and Trustee Skinner to sit and testify about information shielded by the legislative privilege. That is "conclusive" in every practical sense. *See In re Kellogg*, 756 F.3d at 761.

Second, Plaintiffs-Appellees assert that the waiver issue "require[s] the Court to consider the public statements BHISD has advanced regarding its intent." App'ee Br. at 11. They are mistaken, again. This Court has consistently maintained that privilege issues are "wholly separate from the merits of the underlying litigation." *Vantage Health Plan*, 913 F.3d at 448; *Smith*, 896 F.3d at 367.

Third, Plaintiffs-Appellees hang their argument regarding the third *Cohen* condition on the U.S. Supreme Court's holding in *Mohawk*. However, the *Mohawk*

Court "express[ed] no view on" how the collateral order doctrine applies to "governmental privileges." *Mohawk*, 558 U.S. at 113 n.4. This Court likewise held that "[n]othing in *Mohawk* forbids jurisdiction" in legislative privilege cases. *LUPE II*, 68 F.4th at 234. In fact, this Court has concluded the opposite. In *LUPE II*, the Court expressly rejected Plaintiffs-Appellees' arguments, observing that *Mohawk* considered "governmental (not private) non-parties (not litigants) asserting legislative privilege (not attorney-client privilege)." *Id.* Unlike the individuals in *Mohawk*, Superintendent Poole and Trustee Skinner are governmental non-parties asserting legislative privilege. ROA.3090–91, 3105 (dismissing individual defendants from lawsuit).

Defendant-Appellants have already established the applicability of the collateral order doctrine. Plaintiffs-Appellees' paper-thin arguments to the contrary, which ignore applicable in-circuit precedent, are easily dismissed.

3. *LUPE II* is on point.

Plaintiffs-Appellees concede the *LUPE II* court "appl[ied] the *Cohen* exception to a discovery order." App'ee Br. at 13. Yet they still argue this Court lacks jurisdiction and *LUPE II* doesn't apply. Even though (1) this Court rebuffed the improper invasion of information protected by the legislative privilege mere months ago; and (2) an exploratory, fishing expedition-like deposition into the subjective thoughts and motives of policymakers, like that sought by Plaintiffs-

Appellees, is markedly more invasive than the document discovery at issue in *LUPE II*.

This Court should reject Plaintiffs-Appellees' unpersuasive attempt to cabin *LUPE II*'s holding. *First*, Plaintiffs-Appellees assert that "critically, the legislators in *LUPE II* had not . . . waive[d] the privilege." App'ee Br. at 14. Despite labeling this statement "critical," it is immaterial to the jurisdictional question; it "confuses two separate inquiries: (1) the merits . . . ; and (2) jurisdiction." *See Payne v. Progressive Finc. Servs., Inc.*, 748 F.3d 605, 608 (5th Cir. 2014). Additionally, in *LUPE II*, the plaintiffs-appellees also argued that the government had waived legislative privilege. 68 F.4th at 236. This Court disagreed, explaining that the waiver argument could not "swallow the rule." *Id.*; *see also infra* Section B(4) (addressing waiver).

Second, Plaintiffs-Appellees argue Superintendent Poole and Board President Skinner "are represented by defense counsel," unlike the legislators in *LUPE II*. App'ee Br. at 14. This is inaccurate. The Texas Attorney General represented both the non-party legislators and state defendants in *LUPE II*. Moreover, all three distinctions relied upon by the *LUPE II* Court are present here: Superintendent Poole and Trustee Skinner are "governmental (not private) non-parties (not litigants) asserting legislative privilege (not attorney-client privilege)." 68 F.4th at 234; ROA.3090–91, 3105.

Third, Plaintiffs-Appellees suggest the *LUPE II* Court was only concerned that "privileged information . . . would be improperly shared into the public domain." Again, this is inaccurate and only addresses one aspect of the Court's reasoning. *LUPE II*, 68 F.4th at 233 ("For *all those reasons*, we have interlocutory jurisdiction . . . ."") (emphasis added). The Court first explained that "litigation itself distracts lawmakers from the job that voters sent them to do," and "they cannot get that time back." *Id.* That concern rings true here. Moreover, Plaintiffs-Appellees seek to implement a dramatically more invasive process than the document discovery at issue in *LUPE II*: a fishing expedition-like deposition into the subjective thoughts and motives of policymakers.

LUPE II is on point. All three of its distinctions from *Mohawk* are implicated here. And this case also implicates the paramount concern about interference with legislators' policymaking duties. Consistent with precedent from the U.S. Supreme Court and this circuit, the Court has appellate jurisdiction to review the district court's order vitiating the legislative privilege. *See In re Bonvillian Marine Serv., Inc.,* 19 F.4th 787, 792 (5th Cir. 2021) (discussing the rule of orderliness).

4. In the alternative, the Court may construe the appeal as a request for a writ of mandamus.

"Although mandamus is not a substitute for a jurisdictionally proper appeal, it can be an appropriate vehicle for obtaining immediate judicial review of nonfinal orders that would otherwise escape timely scrutiny." *Am. Trucking Ass'ns, Inc. v.*

Alviti, 14 F.4th 76, 84 (1st Cir. 2021); *Smith*, 896 F.3d at 367–69; 28 U.S.C. § 1651.

In similar cases, the courts granted mandamus:

- The state officials "raise[d] unsettled legal questions about the scope of the legislative privilege as applied to state lawmakers." *Id.*

- "[T]he degree to which state officials may be subjected to discovery in civil cases alleging violations of the federal constitution raises important questions about the appropriate balance of power between the states and the federal government." *Id.* at 85.

- "[T]he questions presented are likely to reoccur." *Id.* (collecting cases). Indeed, in this circuit alone, these questions have been raised multiple times in the past few years.

- "[T]he ordinary course of perfecting an appeal by incurring a contempt order is sometimes less readily available to state actors than to private parties." *Id.* An "appeal after final judgment will . . . come too late because the privileged materials will already have been released." *In re Kellogg*, 756 F.3d at 761.

See also Smith, 896 F.3d at 367–69; *In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015); *In re Perry*, 60 S.W.3d 857, 861–62 (Tex. 2001). Therefore, the Court may exercise mandamus jurisdiction under 28 U.S.C. § 1651.

B. The Court should reverse and vacate the district court's order regarding legislative privilege.

The legislative privilege protects the legislative process by shielding legislators' motives from discovery. The doctrine stems from the U.S. Constitution, and the U.S. Supreme Court has even explained that "[t]he rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators." *Bogan*, 523 U.S. at 52; *Cunningham*, 438 F. Supp. 2d at 723

("The testimonial privilege is an inherent aspect of the legislative immunity that applies to local legislators under the Speech and Debate Clause of the United States Constitution."). There is one narrow exception recognized by the U.S. Supreme Court: the "extraordinary instances" exception, which may arise in a criminal case. This is not a criminal case, and Plaintiffs-Appellees cannot distinguish their case from those not constituting "extraordinary instances." Plaintiffs-Appellees' reliance on dicta and unpublished motions panels' orders is misplaced.

1. Plaintiffs-Appellees cannot distinguish their case from the scores of discrimination cases that failed to establish "extraordinary instances."

"In some extraordinary instances," policymakers "might be called . . . to testify concerning the purpose of . . . official action." *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 (1977). However, the U.S. Supreme Court has never held any civil case contained the requisite "extraordinary instances." *Cf. United States v. Gillock*, 445 U.S. 360, 373 (1980) (criminal case). Nor has this Court. *See LUPE II*, 68 F.4th at 237–38. Nor has the Texas Supreme Court. *See In re Perry*, 60 S.W.3d at 861–62. Judicially sanctioned intrusions into legislative immunity are exceedingly rare. *Id.* at 862 n.2.The cases denying plaintiffs a license for a forced interrogation span the spectrum of federal claims.

In *Village of Arlington Heights*, the plaintiffs alleged a municipality denied a rezoning request that would allow a development company "to build . . . townhouse

units for low- and moderate-income tenants" for racially discriminatory reasons. 429 U.S. at 254. These were not "extraordinary instances." *Id.* at 268 & n.18 ("judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government").

The U.S. Supreme Court revisited the issue in *Bogan v. Scott-Harris*. There, a city employee sued city officials and alleged "racial animus" and First Amendment retaliation in the elimination of her position. *Bogan*, 523 U.S. at 47. The Court held that city officials maintained "absolute legislative immunity." *Id.* at 53. Again, there were no "extraordinary instances."

The Ninth Circuit recently addressed legislative privilege in *Lee v. City of Los Angeles*. In *Lee*, the plaintiffs argued a municipality's redistricting decisions were racially motivated. 908 F.3d 1175, 1178 (9th Cir. 2018). The Ninth Circuit "recogniz[d] that claims of racial gerrymandering involve[d] serious allegations." *Id.* at 1188. However, it rejected "a categorical exception whenever a constitutional claim directly implicates the government's intent" *Id.* Such an exception "would render the privilege of little value" and be inconsistent with *Village of Arlington Heights*. *Id.*

In *American Trucking Associations v. Alviti*, the plaintiffs asserted that collecting tolls under a state toll assessment law was discriminatory. 14 F.4th at 88. The First Circuit rejected the plaintiffs' arguments. *Id.* "Were [the court] to find the

mere assertion of a federal claim sufficient, even one that addresses a central concern of the Framers," it explained, "the privilege would be pretty much unavailable largely whenever it is needed." *Id.*

This Court recently considered the scope of legislative privilege considering the above caselaw. In *LUPE II*, the plaintiffs argued the Texas Legislature "acted with racially discriminatory intent" in amending the Election Code "as it relates to voter registration, voting by mail, poll watchers, and other aspects of election integrity and security." 68 F.4th at 231–32. This Court explained it was not "one of those extraordinary instances in which the legislative privilege must yield." *Id.* at 237.

Plaintiffs-Appellees' claims are not "extraordinary instances" as a matter of law. Here, Plaintiffs-Appellees allege race and sex discrimination regarding a school's hair-length regulation. Other courts in this circuit have already concluded that some, if not all, of their claims might be nonviable as a matter of law. *See* Order Granting Partial Summary Judgment, *M.T. v. Tatum Indep. Sch. Dist.*, No. 2:21-CV-00364-RWS, at 16–18 (E.D. Tex. Oct. 13, 2023) (acknowledging that the school district's hair-length policy justifications survived intermediate scrutiny as a matter of law). The only on-point response from the U.S. Supreme Court comes from Justice Black. *Karr v. Schmidt*, 401 U.S. 1201, 1202–03 (1971) (orig. proceeding).

He summarily dismissed the premise of a cognizable claim based on a school's hair-length regulation:

> The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear.

Id. Plaintiffs-Appellees' claims do not implicate federal interests more important than *any* of the cases cited above. Therefore, "extraordinary instances" do not exist, and Plaintiffs-Appellees are barred from asking Superintendent Poole and Trustee Skinner about their "subjective thoughts or motives" on the Hair Policy. *LUPE II*, 68 F.4th at 240.

2. Plaintiffs-Appellees' contrary arguments lack merit.

While they argue this case presents "important federal interests," Plaintiffs-Appellees do not meaningfully attempt to distinguish any of the above cases, save one. App'ee Br. at 35–38. Plaintiffs-Appellees cite several U.S. Supreme Court cases for the undisputed proposition that civil rights laws are important. App'ee Br. at 36. But tellingly, Plaintiffs-Appellees do not cite even one controlling case demonstrating their case meets the "extraordinary instances" test and bypasses legislative immunity. *See* App'ee Br. at 35–38. Therein lies the rub.

Plaintiffs-Appellees assert they need to depose policymakers because they "must prove discriminatory intent" to prevail. App'ee Br. at 37. Plaintiffs-Appellees distinguish *Alviti* on this ground. App'ee Br. at 37. This argument has already been

rejected. *LUPE II*, 68 F.4th at 238; *Lee*, 908 F.3d at 1188. Plaintiffs-Appellees' argument "would render the privilege of little value" and contradicts *Village of Arlington Heights*, which itself "involved an equal protection claim alleging racial discrimination" and "putting the government's intent directly at issue." *Lee*, 908 F.3d at 1188.

Curiously, Plaintiffs-Appellees portray the existence of racial animus in the Hair Policy as fact, yet they insist that they cannot prove their case without depositions. *See* App'ee Br. at 38. Setting aside this inconsistency, neither Superintendent Poole nor Trustee Skinner speak for the entire board. In *Lee*, the court noted that the relevant inquiry concerns "the *legislature's* decision," not an individual legislator. 908 F.3d at 1184. "[I]nquiries into legislative motives are a hazardous matter," because "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 (2022) (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)). Discriminatory intent does not exist here, but if it did, it could be established with circumstantial evidence. *See Village of Arlington Heights*, 429 U.S. at 265.

Plaintiffs-Appellees' argument that "there is no alternative source for evidence" is peculiar considering they cite ample alternative sources in their brief. *Compare* App'ee Br. at 2 (citing public statements, op-eds, declarations, and other

documents explaining the Hair Policy's rationale), *with id.* at 38. In addition to Plaintiffs-Appellees' lengthy list, Defendant-Appellants also observe that the District produced board minutes, recordings of open meetings, community feedback and public comments, internal reports, and many thousands of emails regarding the Hair Policy. *See In re Perry*, 60 S.W.3d at 862 (holding depositions were inappropriate where the government had produced "a wide array of documentary information . . . to the plaintiffs").

Equally curious is Plaintiffs-Appellees' reliance on dicta from *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government*. App'ee Br. at 17–19, 35. As recently explained by this Court, *Jefferson Community* "provides no support for the idea that state legislators can be compelled to produce" information "concerning the legislative process and a legislator's subjective thoughts or motives." *LUPE II*, 68 F.4th at 240. In *Jefferson Community*, the city council members asserted that legislative immunity prohibited the district court "from even *deciding* whether to issue injunctive relief." *Id.* (emphasis in original). The Court "held only that a claim for injunctive relief could proceed." *Id.* "That holding says nothing about cases like this one." *Id.* Plaintiffs-Appellees have not explained how an invasive, exploratory probing into policymakers' "subjective thoughts or motives" is acceptable when mere document production is not. *Cf. id.* In

any event, the *LUPE II* Court's analysis is controlling here. *Cf. In re Bonvillian*, 19 F.4th at 792.

Plaintiffs-Appellees apparently mischaracterize a two-page, unpublished motions panel order in *LULAC II* as "controlling precedent." *Compare* App'ee Br. at v, 20–21, *with* 5th Cir. R. 47.5.4. The plaintiffs in *LUPE II* also tried to rely on *LULAC II*. *LULAC II*'s limited reasoning pulls from *Jefferson Community*, which this Court has already explained does not apply in these circumstances. *LUPE II*, 68 F.4th at 240. Defendant-Appellants agree with the legislators in *LUPE II* that "[s]tatements in *Jefferson* [*Community*] and *LULAC* that the legislative privilege is 'qualified' are . . . unhelpful. Neither case explores the nature of that qualification or supplies any guidance about how the legislative privilege applies in a case like this one." Appellants' Reply Brief, *LUPE II*, 2022 WL 3043239, at *11 (July 27, 2022). This Court agreed. *See generally LUPE II*, 68 F.4th at 240–41 (declining to address plaintiffs-appellees' *LULAC II* arguments).

Lastly, Plaintiffs-Appellees attempt to distinguish the Ninth Circuit's decision in *Lee*. App'ee Br. at 23–24. In so doing, they focus on the different procedural posture. App'ee Br. at 23 (highlighting that the district court in *Lee* granted summary judgment whereas the district court below did not). This distinction misses the mark, as the *LUPE II* Court considered *Lee*'s relevance in a similar procedural posture to the present case but did not find it noteworthy. *Compare LUPE II*, 68 F.4th at 231–

32 (considering the legislator's interlocutory appeal following a granted motion to compel), and *La Union Del Pueblo Entero v. Abbott* ("*LUPE I*"), No. SA-21-CV-00844-XR, 2022 WL 1667687, at *1 (W.D. Tex. May 25, 2022) (granting motion to compel), *with Lee*, 908 F.3d at 1181–82. Plaintiffs-Appellees' proffered distinction is irrelevant.

Plaintiffs-Appellees also cite the district court's finding on a limited preliminary injunction record that the District did not have "a persuasive justification for the hair-length policy" as another distinction from *Lee*. App'ee Br. at 23 (citation omitted). On October 13, 2023, another Texas district court acknowledged the same policy justifications advanced by the District here were sufficient to survive intermediate scrutiny as a matter of law. *See* Order Granting Partial Summary Judgment, *M.T. v. Tatum Indep. Sch. Dist.*, No. 2:21-CV-00364-RWS, at 16–18 (E.D. Tex. Oct. 13, 2023) (the policy justifications were (1) community expectations, (2) student success, and (3) career readiness). The district court's disagreement with the policy justifications does not invalidate them, nor is it sufficient to distinguish *Lee* from this case. *Cf. Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (noting the U.S. Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools") (citations omitted).

This Court, like its sister circuits, has concluded that legislative privilege bars invasion of legislators' subjective thoughts or motives in these circumstances. Plaintiffs-Appellees rely on unpersuasive arguments that have already been rejected or proffer factual distinctions without substantive analysis. Because Plaintiffs-Appellees cannot establish the requisite "extraordinary circumstances," they cannot pierce legislative privilege for "the public good." *Cf. Tenney*, 341 U.S. at 377.

3. A legislator's employee, such as Superintendent Poole, can assert the privilege.

Plaintiffs-Appellees concede that Trustee Skinner and his fellow board members are protected by legislative privilege. App'ee Br. at 24. Superintendent Poole, they suggest, does not enjoy the same privilege. In doing so, Plaintiffs-Appellees draw a false analogy to the federal separation of powers scheme, where independent, co-equal branches of government are not beholden to each other. *Compare* U.S. Const. Arts I, II, *and* Tex. Const. Art II, § 1, *with* App'ee Br. at 24–25.

Their analogy cannot hold; the Texas public education system is structured differently from the federal government. Under the Education Code, a board of trustees may employ a superintendent. Tex. Educ. Code § 11.201(b). The superintendent's duties include "preparing recommendations for policies to be adopted by the board of trustees." *Id.* § 11.201(d)(7). "The board of trustees and the

superintendent *shall* work together to: . . . establish district-wide policies." *Id.* § 11.1512(b)(4) (emphasis added).

It is well-established that employees of legislators can assert legislative privilege. *See Doe v. McMillan*, 412 U.S. 306, 312 (1973) (citation omitted); *Gilby v. Hughs*, 471 F. Supp. 3d 763, 767 (W.D. Tex. 2020). Superintendent Poole is the only employee directly selected and hired by the Board. Tex. Educ. Code § 11.201(b). He is statutorily required to "prepare recommendations for policies." *Id.* §§ 11.201(d)(7), 11.1512(b)(4). Therefore, he can assert legislative immunity and the testimonial privilege as the Board's employee. *See La. Cleaning Sys., Inc. v. City of Shreveport*, No. 16-CV-0014, 2018 WL 3039739, at *2 (W.D. La. June 19, 2018) (holding the legislative privilege applied to the mayor and city attorney for their recommendations in executive session). The District informed Plaintiffs-Appellees of these cases and statutes. ROA.4276. But instead of addressing them, Plaintiffs-Appellees chose to maintain their strawman comparison to the federal separation of powers system. App'ee Br. at 24–25.

Any other result would be anomalous. While responsible for the District's ultimate policy-making functions, trustees rely on their superintendent. Plaintiffs-Appellees apparently concede that they can't inquire into trustees' "subjective thoughts and motives" directly but suggest they can acquire the same information from Superintendent Poole. If such a probing, invasive inquiry into the legislative

process is permissible, the privilege exists in name only. And if courts punished trustees' reliance on their superintendents by piercing the privilege, it would "dissuade some citizens from volunteering for [school boards] and would surely hinder the free flow of discussion that is such an integral part of the democratic legislative process." *Cunningham*, 438 F. Supp. 2d at 723; *City of Shreveport*, 2018 WL 3039739, at *2 (expressing same concerns).

4. Plaintiffs-Appellees' illogical, unpersuasive waiver arguments are not properly before the Court.

Legislative privilege bars "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Helstoski*, 442 U.S. 477, 489 (1979). It protects ancillary matters inherent in the enactment of policies, including the subjective thoughts and motives behind a policy's enactment. *Bogan*, 523 U.S. at 55 (describing a legislator's act in voting for an ordinance as "quintessentially legislative"); App'nt Br. at 10 (collecting cases).

Of course, legislative privilege may be waived. *E.g.*, *Cunningham*, 438 F. Supp. 2d at 723–24; *City of Shreveport*, 2018 WL 3039739, at *2. When a legislator shares privileged information publicly, the privilege is waived as to that information. *LUPE II*, 68 F.4th at 236–37 ("legislative privilege as to certain documents is waived when the Legislator *publicly* reveal[s] those documents") (emphasis in original). However, waivers are construed narrowly. *See id.*; *Perez v. Perry*, No. SA-11-CV-

360-OLG, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014); *City of Shreveport*, 2018 WL 3039739, at *2.

Plaintiffs-Appellees assert Defendant-Appellants "raised . . . whether BHISD has waived legislative privilege or is using legislative privilege as both a sword and a shield" on appeal. App'ee Br. at 11. This is incorrect. *First*, the District cannot waive legislative privilege. "Legislative privilege is a personal one and may be waived or asserted by each individual legislator" or their employees.[1] *Gilby*, 471 F. Supp. 3d at 767. Plaintiffs-Appellees' repeated efforts to suggest that the District asserted or waived privilege miss the mark. *Second*, it appears Plaintiffs-Appellees are dissatisfied with the district court's decision to not find a waiver of immunity at this juncture. If so, they should have cross-appealed. Fed. R. App. P. 28.1; *Domain Protection, L.L.C. v. Sea Wasp, L.L.C.*, 23 F.4th 529, 540 (5th Cir. 2022) (noting a cross-appeal is necessary when the litigant "seek[s] something the judgment did not include"). The district court did not make a finding on waiver but nonetheless forced Superintendent Poole and Trustee Skinner to disclose privileged information; therefore, the waiver issue is not properly before the Court.

It is true that Superintendent Poole and Trustee Skinner made public statements about the Hair Policy. Defendants-Appellants acknowledge privilege is

[1] To be clear, Superintendent Poole and Trustee Skinner have repeatedly made their intention to assert legislative privilege clear. ROA.4273. The district court effectively prohibited them from doing so, necessitating this appeal.

waived "as to the contents of . . . specific communications" revealed to the public. *Perez*, 2014 WL 106927, at *2; *LUPE II*, 68 F4th at 236–37. As a result, the District has never sought to withhold information regarding Superintendent Poole's or the Board of Trustees' public statements. Those topics are seemingly insufficient for Plaintiffs-Appellees; otherwise, this litigation would not be necessary.

In any event, public statements about policymaking functions and litigation are not universal waivers. The *City of Shreveport* court rejected Plaintiffs-Appellees' argument, explaining, "the public statements referenced by Plaintiff were made pursuant to the council members' legislative function." 2018 WL 3039739, at *2. Likewise, the city attorney's "explanation of the reasons for the amendment, which was clearly done for the benefit of the members of the community, did not reveal confidential information to third parties and thereby waive the privilege." *Id.* When the Board of Trustees issued statements about the Hair Policy, they engaged in a "legislative function." *See id.* When Superintendent Poole wrote an op-ed, he did so "for the benefit of the members of the community." *See id.*

By comparison, one cannot interrogate a legislator on their subjective thoughts and motives in voting for or against a bill simply because (1) a bill analysis or statement of intent exists; or (2) the legislator made a public comment before or after the vote. If the rule differed, the exception "would swallow the rule almost whole." *Cf. LUPE II*, 68 F.4th at 236.

Here, the District offered to present its employees and trustees for depositions to answer questions about any information that has been shared publicly. Plaintiffs-Appellees were dissatisfied with this offer and wanted to inquire into "the subjective intent, thought process, support or non-support, and rationale" regarding the Hair Policy *beyond* the public information. ROA.4186–289, 4397–401. Defendants-Appellants are not using the privilege as a sword and a shield, and Plaintiffs-Appellees refusal to accept the District's offer and conduct depositions regarding already-public information is telling. They ask this Court to find a waiver of *all* information subject to the legislative privilege, not just the "specific communications" revealed to the public. *Perez*, 2014 WL 106927, at *2. But those communications do not act as a general and all-encompassing waiver. This Court should reject their efforts to vitiate the privilege.

5. Plaintiffs-Appellees tacitly concede the district court's order is void.

Plaintiffs-Appellees did not advance any arguments about the enforceability of the district court's order compelling the depositions and authorizing Plaintiffs-Appellees to seek sanctions. ROA.4500. That order was issued without jurisdiction and is void. App'nt Br. at 21–22 (collecting cases). Defendants-Appellants respectfully request that this Court (1) hold that the district court's order is void; and (2) clarify that the filing of an interlocutory appeal deprives district courts of jurisdiction to enforce the appealed order. App'nt Br. at 22–23.

CONCLUSION AND PRAYER

For the foregoing reasons, this Court should (1) reverse and vacate the district court's orders establishing a deposition protocol that requires Superintendent Poole and Trustee Skinner to reveal information protected by the legislative privilege; (2) vacate the district court's null and void order compelling the depositions because it was issued without jurisdiction; and (3) award the Defendant-Appellants their taxable costs of appeal.

Respectfully submitted,

ROGERS, MORRIS & GROVER, L.L.P.

/s/ Jonathan Griffin Brush

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

I further certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I further certify that I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Jonathan Griffin Brush

Jonathan Griffin Brush
Attorney for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B) and Local Rule 32.3, the undersigned certifies:

1. This Brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B)(ii) because:

X this brief contains **5,524** words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f), *or*

this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

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/s/ Jonathan Griffin Brush

_____

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TAB D

December 12, 2023

Lyle W. Cayce
Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Arnold v. Barbers Hill Independent School District*,
Docket No. 23-20256

Dear Mr. Cayce:

Pursuant to Rule 28(j), Plaintiffs-Appellees respectfully submit *Ben Toma v. United States District Court for the District of Arizona*, No. 23A452 (Nov. 27, 2023) in support of affirmance.

Therein, the Supreme Court denied legislators' application for a stay of depositions on the grounds of legislative privilege where the legislators waived the privilege when they "specifically put their own motives for passing the Voting Laws at issue when denying Plaintiffs' allegations that the Arizona Legislature enacted the Voting Laws with discriminatory intent." *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8183557, at *2 (D. Ariz. Sept. 14, 2023). *Accord In re: Ben Toma*, No. 23-70179, 2023 WL 8167206, at *1 (9th Cir. Nov. 24, 2023) ("The district court did not clearly err in determining that Petitioners waived their legislative privilege by voluntarily intervening and putting their intent at issue by denying Plaintiffs' allegations."). The Supreme Court's denial of the stay had the effect of requiring the legislators to sit for depositions concerning the legislature's intent.

While the individuals claiming legislative privilege here did not intervene in the lawsuit, they did "specifically put their own motives" at issue and waive the privilege by voluntarily wielding evidence concerning their purported motives as a sword to defend against Plaintiffs-Appellees' claims. Intervention, of course, is not a prerequisite to a finding of waiver. *See, e.g.*, *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 236–37 (5th Cir. 2023) (noting that non-party legislators (who had not intervened in the lawsuit) would have waived legislative privilege if they had publicly revealed certain documents). Indeed, undersigned counsel are unaware of any case wherein the Supreme Court stayed the deposition of legislators who waived legislative privilege by seeking

to use allegedly privileged information as both a sword and a shield. *Cf. Guillen v. LULAC*, 142 S. Ct. 2773 (2022) (Mem.) (declining to stay depositions of legislators despite their concerns about legislative privilege).

Respectfully submitted,

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BOARD CERTIFIED
Texas Board of Legal Specialization
CIVIL APPELLATE LAW

December 14, 2023

Via CM/ECF
Lyle W. Cayce, Clerk
United States Court of Appeals, Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: No. 23-20256; *Arnold v. Barbers Hill Indep. Sch. Dist.*

Dear Mr. Cayce:

In their Rule 28(j) advisory, Plaintiffs-Appellees referred the Court to *Toma v. United States District Court for the District of Arizona*, No. 23A452, 2023 WL 8178439 (Nov. 27, 2023), a summary denial of a stay application. But, upon review, it's clear this "supplemental briefing" is inappropriate and should be disregarded.

First, Plaintiffs-Appellees didn't comply with Rule 28(j), as they didn't refer to the page of the brief they intended to supplement with citations. As such, their "supplemental briefing" is "not an appropriate use of a Rule 28(j) letter." *Johnson v. Tyson Foods, Inc.*, 22-10171, 2023 WL 2645553, at *4 n.7 (5th Cir. Mar. 27, 2023).

Second, Plaintiffs-Appellees' reliance on a summary stay denial (totaling 17 words) is misplaced. "[D]ecisions by either a single Justice or the full Court to *deny* a stay application cannot have any precedential or persuasive effect." Trevor N. McFadden, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 Harv. J. of L. & P.P. 827, 849 (2021). A decision lacking "any precedential or persuasive effect" is not "pertinent and significant" under Rule 28(j).

Third, the case underlying *Toma*'s stay denial doesn't address any pending issues. *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2023 WL 8183557 (D. Ariz. Sept. 14, 2023). *Fontes* focuses on waiver. Here, the district court didn't find waiver, so a case exploring its contours is not germane. If Plaintiffs-Appellees wanted to brief waiver, they should have cross-appealed. If they wanted to cite *Fontes*, they could have done so in their response brief. They did neither.

Fourth, the *Fontes*' holding doesn't apply. *Fontes* hinges on state legislators "voluntarily intervening" in a lawsuit. *Id.* at *2–3. The district court's analysis focused on the scope and legal effect of intervention. *Id.* But, as Plaintiffs-Appellees concede, there was no intervention here. Unlike the state legislators in *Fontes*, Trustee Skinner and Superintendent Poole sought "immunity from this suit" and do not seek "to actively participate in this litigation." *Id.* at *2. Plaintiffs-Appellees cherry-pick verbiage to try and shoehorn their case into *Fontes*' holding, but it provides no support.

Very truly yours,

Rogers, Morris & Grover, L.L.P.

Jonathan G. Brush

cc: Counsel of Record *(Via CM/ECF)*

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BOARD CERTIFIED
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April 9, 2024

Via CM/ECF
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600 S. Maestri Place
New Orleans, LA 70130-3408

Re: No. 23-20256; *Arnold v. Barbers Hill Indep. Sch. Dist.*

Dear Mr. Cayce:

Pursuant to Rule 28(j), Defendants-Appellants respectfully submit *In re Fort Worth Chamber of Commerce, et al.*, ___ F.4th ___, No. 24-10266 (5th Cir. Apr. 5, 2024), in support of vacating the district court's enforcement order. Defendants-Appellants intend this decision to supplement pages 21–23 of their opening brief and page 24 of their reply brief.

In *In re Fort Worth*, the district court implicitly denied a preliminary injunction and, while the appeal of that denial was pending, granted a motion to transfer the case to an out-of-circuit district court. Slip op. at 1–2. The aggrieved party sought relief from the district court's order, and this Court explained that "[o]nce a party properly appeals something a district court has done . . . the district court has zero jurisdiction to do anything that alters the case's status." *Id.* at 2, 9–10.

Similarly, the district court here sought to enforce the very order Defendants-Appellants appealed and compel Defendants-Appellants to sit for depositions and testify to matters protected by the legislative privilege. Had this Court not intervened, the district court's enforcement order would have decided the issues raised on appeal, effectively forcing Defendants-Appellants to waive the legislative privilege. *See id.* at 11 (noting that the district court's order "would essentially nullify the appeal and render us unable to grant relief"). But, as this Court noted, "[a] notice of appeal from an appealable order divests the district court of jurisdiction over aspects of the case on appeal." *Id.* at 10.

In re Fort Worth reiterates a simple principle that the court below did not follow and Plaintiffs-Appellants tacitly concede on appeal given their lack of briefing on the issue. Therefore, Defendants-Appellants request that the Court consider *In re Fort Worth* and vacate the district court's void enforcement order, which was issued without jurisdiction.

Very truly yours,

Rogers, Morris & Grover, L.L.P.

Jonathan G. Brush

cc: Counsel of Record *(Via CM/ECF)*

TAB G

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 3, 2025
Lyle W. Cayce
Clerk

No. 23-20256

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,

Plaintiffs—Appellees,

versus

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1802

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

Barbers Hill Independent School District ("BHISD") instituted a "Hair Policy" in 2019 restricting the length of male students' hair. Plaintiffs, former students and parents in BHISD, allege the Hair Policy and its enforcement amount to race and sex discrimination and infringe students' freedom of expression. As discovery unfolded, plaintiffs sought to depose Superintendent Greg Poole ("Poole") and former Trustee Board President

Fred Skinner ("Skinner"). BHISD, Poole, Skinner, and the Board of Trustees now present an interlocutory appeal concerning legislative privilege.

I.

We draw the following allegations from plaintiffs' Second Amended Complaint. BHISD maintains a Student Code of Conduct, setting standards for behavior and discipline within the district. Hair-length restrictions have long existed in the Student Code of Conduct, limiting the ways male students could wear their hair. Halfway through the 2019–2020 school year, the Board of Trustees amended the hair policy. The new policy provided:

> Male students' hair will not extend, at any time, below the eyebrows, or below the ear lobes. Male students' hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down.

Notably, plaintiffs allege that the administrators restricted hair length when worn down—regardless of whether the student wears his hair up while at school—and removed express language that previously permitted cornrows or locs that complied with the rest of the policy. Plaintiffs sued BHISD, alleging the Hair Policy violates the Fourteenth Amendment's Due Process and Equal Protection guarantees, the First Amendment's speech and expression protections, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Texas Civil Practice and Remedies Code § 106.001.

Procedural history illuminates the issues on appeal. Poole, Skinner, and BHISD's Board of Trustees are designated appellants. But Poole, Skinner, and the Board of Trustees are not parties under the operative complaint. During discovery, plaintiffs sought to depose Poole and Skinner. While BHISD initially consented to the depositions, it maintained that both

deponents were entitled to legislative privilege over certain inquiries. To that end, BHISD moved for a protective order restricting plaintiffs from asking Poole and Skinner about the Board members' "subjective intentions, motivations, thought processes, and any other information not available to the public concerning the adoption of [BHISD's] male hair length policy."

Appellants appeal just the district court's partial denial of BHISD's motion for protection and the discovery policy it outlined. On the denial front, the district court refrained from deciding any privilege issues. It concluded that it would "be better positioned" to decide whether the privilege applied once presented with specific questions and invocations of the privilege at the depositions. In short, the fact-intensive legislative privilege issues were not yet ripe. But the district court partially granted the motion by establishing a procedure for resolving those privilege-application questions. It adopted an "assert-disclose-review" approach: 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. 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. The district court credited *League of United Latin American Citizens v. Abbott* (*LULAC I*), No. EP-21-CV-00259, 2022 WL 1570858 (W.D. Tex. May 18, 2022), for the privilege procedure.[1]

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[1] A motions panel of this court commended the *LULAC I* district court's procedure as "carefully crafted." *League of United Latin Am. Citizens v. Abbott* (*LULAC II*), No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022) (denying motion to stay pending appeal). The parties discuss *LULAC II* at length, but *LULAC II* is an unpublished motions-panel decision. *See Dick v. Colo. Hous. Enters., L.L.C.*, 872 F.3d 709, 711–12 (5th Cir. 2017) (explaining unpublished opinions are not controlling precedent). To preview, we dismiss this appeal on jurisdictional grounds. So, we cannot decide—at this

Shortly thereafter, BHISD, the Board of Trustees, Poole, and Skinner appealed. Appellants contend the district court abused its discretion by compelling disclosure of privileged material, eviscerating the privilege. Back in the district court, BHISD moved to stay the depositions pending appeal, which the district court denied. BHISD later refused to produce Poole and Skinner for their depositions. And appellants then moved this court to stay the district court proceedings. Meanwhile, the district court compelled BHISD to produce Poole and Skinner for their depositions and authorized plaintiffs to seek sanctions. BHISD then moved this court for an emergency administrative stay of the district court proceedings, which the court granted as a temporary administrative stay. But the court carried with the case the motion to stay pending appeal.

Appellants ask the court to decide whether the district court abused its discretion by partially denying the motion for protection and ordering legislators to respond by answering questions such that the testimony might possibly invade the legislative privilege. Legislative privilege is held by the legislator. *La Union del Pueblo Entero v. Abbott* (*LUPE*), 93 F.4th 310, 321 (5th Cir. 2024). Here, the privilege holders have not yet invoked the privilege or otherwise participated in the proceedings. As explained below, prudential standing considerations deprive the court of jurisdiction over this appeal.

II.

Plaintiffs-Appellees challenged appellate jurisdiction, invoking the collateral order doctrine and (albeit briefly) Poole's and Skinner's failure to individually assert the legislative privilege. Although plaintiffs' argument on the latter point is brief, it generates prudential standing concerns that the

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juncture—whether the district court's compulsive "assert-disclose-review" approach merely toes the legislative-privilege line or crosses it.

court addresses *sua sponte*. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt.*, 389 F.3d 491, 498 (5th Cir. 2004) ("Although defendants have not explicitly raised the issue of [constitutional or prudential] standing, we may consider it *sua sponte*."). Even if the district court's order fits within a category of orders that are immediately appealable as collateral orders, we lack jurisdiction anyway: BHISD, the non-party legislators Poole and Skinner, and the non-party Board of Trustees do not have appellate standing.

A.

"The legislative privilege is personal to the legislator." *LUPE*, 93 F.4th at 321 (citing *Gravel v. United States*, 408 U.S. 606, 616 (1972)); *see id.* at 321–22 (recognizing legislators, aides, assistants, and third parties performing legislative acts can invoke the privilege). Multiple district courts have concluded, following that rationale, that the government entity or legislative body itself cannot invoke the legislative privilege on an individual legislator's behalf. *See, e.g.*, *Perez*, 2014 WL 106927, at *1; *A Helping Hand, LLC v. Baltimore Cnty.*, 295 F. Supp. 2d 585, 590 (D. Md. 2003); *ACORN (N.Y. Ass'n of Cmty. Orgs. For Reform Now) v. Cnty. of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007). Our court has not directly answered whether a government entity can invoke the legislative privilege on behalf of individual legislators. It likewise has not addressed who has standing to appeal an order relating to the privilege in such a case. But our circuit's appellate standing precedents, alongside the Eleventh Circuit's recent approach in nearly identical circumstances, provide apt guidance.

Start with a primer on appellate standing. "It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it." *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) (quoting *Ward v. Santa Fe Indep.*

Sch. Dist., 393 F.3d 599, 603 (5th Cir. 2004)). Relevant here, "a party generally may not appeal a district court's order to champion the rights of another." *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994); *Odneal v. Pierce*, 324 F. App'x 297, 302 (5th Cir. 2009) ("An indirect stake in the claims of another party is not sufficient to create standing on appeal."); *In re Deepwater Horizon*, 857 F.3d 246, 252–53 (5th Cir. 2017) (recognizing that prudential standing allows appellant to protect only its own interests, unless appellant's and third party's interests coincide and a genuine obstacle prevents third party from protecting his own interests). This third-party standing rule derives from prudential limitations to our jurisdiction, not constitutional ones. *See In re Deepwater Horizon*, 857 F.3d at 252. Applying a similar third-party standing concept, the Eleventh Circuit has held that a government entity has no standing to appeal an order denying an individual immunity, even if the government entity moved to protect that immunity. *See Kimberly Regenesis, LLC v. Lee Cnty.*, 64 F.4th 1253, 1260 (11th Cir. 2023).

Next, consider our circuit's non-party standing framework—also implicating prudential, not constitutional, standing limits. *Castillo v. Cameron Cnty.*, 238 F.3d 339, 349 n.16 (5th Cir. 2001). Ordinarily, "only parties to a lawsuit, or those that properly become parties," may appeal. *Lewis v. Crochet*, 105 F.4th 272, 281 (5th Cir. 2024) (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam)). But a non-party "may be allowed to appeal" an order that "affects his interests." *Castillo*, 238 F.3d at 349. To determine whether a non-party fits that bill, our circuit assesses "(1) 'whether the nonpart[y] actually participated in the proceedings below,' (2) whether 'the equities weigh in favor of hearing the appeal,' and (3) whether 'the nonpart[y] ha[s] a personal stake in the outcome.'" *LUPE*, 93 F.4th at 315 (quoting *Castillo*, 238 F.3d at 349); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 249 (5th Cir. 2009) (explaining non-parties "are generally not

permitted to appeal a ruling in which they did not participate").[2] When review is sought "after a party is dismissed from the underlying suit, that party is often allowed to appeal," but only if the order "affects its interests" under the three-part test. *Lewis*, 105 F.4th at 281 (quotation cleaned up).

In *LUPE*, both party and non-party appellants sought review of a district court's order concluding several documents were not protected by legislative privilege. 93 F.4th at 314; *see also id.* at 315 (describing ruling ordering non-legislators to submit to depositions and produce non-privileged documents). The court assessed three jurisdictional issues: (1) whether the state legislators had standing to appeal as non-parties; (2) whether the discovery order was subject to interlocutory review; and (3) whether the issue was moot. *Id.* at 315–20. Only *LUPE*'s non-party standing analysis informs the current case. The *LUPE* opinion explained all three *Castillo* elements favored non-party standing. The legislators had "participated adequately" at the district court because they had asserted their legislative privileges in response to third-party subpoenas seeking the same documents at issue in the appeal, and filed briefs and attended hearings about the legislative privilege. *Id.* at 315–16; *see also United States v. Fluitt*, 99 F.4th 753, 762 (5th Cir. 2024) (concluding third parties "participated in the discovery dispute" by asserting privilege, opposing motion to compel, and appealing magistrate judge's order

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[2] Our circuit has never squarely decided whether the non-party standing test identifies required elements or weighted factors. Some of our cases describe the test in the conjunctive—often concluding the appellant has satisfied all three elements. *See, e.g.*, *Castillo*, 238 F.3d at 349–50. Elsewhere, our circuit has described—albeit in dicta—non-party standing's "vague balancing test." *In re Lease Oil Antitrust Litig.*, 570 F.3d at 249. We now clarify that the non-party standing test requires appellant to satisfy all three elements. As implied in *In re Lease Oil*, a balancing test would invite heightened subjectivity, and uncertainty, to non-party prudential standing. *See id.* (suggesting moving to intervene is a "much more certain way of proceeding" than relying on the non-party standing balancing test). Such an approach could lead to inconsistent outcomes and conflicts with precedent describing the test in the conjunctive.

to district judge). The equities weighed in favor of non-party standing because the district court had ordered production of potentially privileged documents and the legislators had "no other mechanism to vindicate their potentially meritorious claims of legislative privilege." *LUPE*, 93 F.4th at 316. And the public interest in preserving the privilege was a "high-order value." *Id.* at 317. What's more, the legislators had a personal stake in the outcome—they created or reviewed the documents while performing their legislative activities. *Id.* at 318. So, the non-party legislators had standing to appeal the denial of the privilege.

The Eleventh Circuit recently combined these two standing concepts, dismissing a legislative-privilege-based appeal for lack of jurisdiction. In the unpublished *Pen American Center, Inc. v. Escambia County School District*, the Eleventh Circuit rejected a school board's attempt to assert legislative privilege on behalf of its members. No. 24-13896, 2025 WL 1937264, at *1 (11th Cir. July 15, 2025) (per curiam). There, plaintiffs sought to depose individual board members, seeking information about their motives in removing certain books from schools. *Id.* at *2. The school board moved for a protective order, asserting legislative privilege. *Id.* The Eleventh Circuit dismissed the appeal. *Id.* at *1. The school board (a party) "lack[ed] standing to assert the legislative privilege of its members, who each individually possess[ed] the privilege." *Id.* at *4. And the appealing school board members (non-parties) also lacked standing to challenge the denial of the protective order. *Id.* While the board had attached declarations by the board members expressing their intentions to invoke the privilege, the board members had not moved, appeared, or "participate[d] in any other way in the proceedings." *Id.* So, the Eleventh Circuit dismissed the appeal for lack of jurisdiction. *Id.* at *5.

B.

Turning to the appeal at issue, BHISD, Poole, Skinner, and the Board of Trustees all appealed. Recall that BHISD filed the motion for protection asserting the legislative privilege. Applying our circuit's third-party and non-party standing limitations, we conclude none of the appellants has standing to challenge the district court's order on appeal. The dispositive circumstance here: no appellant with authority to invoke the privilege has invoked it yet and the non-party legislators have not otherwise participated adequately to confer standing.

1.

Start with BHISD. Although BHISD is a party in the district court, and its motion is the subject of this appeal, BHISD itself does not hold the "personal" legislative privilege. *See LUPE*, 93 F.4th at 321. Because the privilege is personal in nature, many courts have concluded an entity like BHISD cannot assert that privilege on behalf of individual legislators. *Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *4 ("[T]he [asserting entity] lacks standing to assert the legislative privilege of its members, who each individually possess the privilege insofar as they are entitled to it."); *Perez*, 2014 WL 106927, at *1 ("[T]he State of Texas [does not have] standing to assert the legislative privilege on behalf of any legislator . . . that may be deposed. Since no person entitled to assert any privilege has done so, the pending motion [for protective order] is denied as premature."); *Gilby v. Hughs*, 471 F. Supp. 3d 763, 767 (W.D. Tex. 2020) (concluding the secretary of state lacked standing to invoke legislative privilege on behalf of legislators); *A Helping Hand, LLC*, 295 F. Supp. 2d at 590 ("[T]he County Council's motion [for protective order] must be denied because the Council may not assert the privilege on its members' behalf."); *ACORN*, 2007 WL 2815810, at *4 (explaining "it is not up to the Board to assert or waive the privilege; the Board members must do so for themselves," but assuming the privilege was asserted individually (quotation cleaned up)).

The underlying right allegedly infringed by the district court's order belongs to the individual legislators, not BHISD. While BHISD did not receive the relief it sought from its motion, BHISD had no standing to seek that relief on behalf of the legislators in the first place. As a result, we conclude BHISD is not aggrieved by the district court's order and, accordingly, lacks third-party standing to appeal the order for allegedly vitiating the legislative privilege. *See Rohm & Hass Tex., Inc.*, 32 F.3d at 208 ("[A] party generally may not appeal a district court's order to champion the rights of another[.]"); *Kimberly Regenesis, LLC*, 64 F.4th at 1260 (concluding quasi-judicial immunity did not belong to appellant county, so "county was not aggrieved by" and "ha[d] no standing to appeal" order denying county's motion for protection on immunity grounds).

2.

Consider, next, non-party legislators Poole[3] and Skinner. Recall the three non-party standing elements: (1) participation in the district court; (2) equitable considerations favoring appeal; and (3) personal stake in the outcome. *LUPE*, 93 F.4th at 315; *Castillo*, 238 F.3d at 349 (describing the three-part test). Following *LUPE*'s analysis outlined above, assume the equitable-considerations and personal-stake elements support standing. Even if those prongs favor standing, Poole and Skinner have not "participated adequately" at the district court to appeal this particular order. *See LUPE*, 93 F.4th at 316.

To be sure, Poole and Skinner were involved—once upon a time—in the district court proceedings. They were original parties to the action. But,

[3] The parties questioned whether Superintendent Poole is entitled to legislative privilege as an executive officer. We need not resolve that question because even if Poole could invoke the privilege here, he lacks standing to appeal the district court's order.

as best the court can tell, they were involved in no way after their dismissal, including in the proceedings on the motion for protective order. *But see LUPE*, 93 F.4th at 315–16 (rejecting argument that the participation inquiry turns on just the "exact proceedings giving rise to the order on appeal"). Critically, Poole and Skinner have not yet asserted the privilege for themselves or otherwise objected in the district court. Because they have not yet actually asserted the privilege (or otherwise participated in the two years between their dismissal and BHISD's motion), we conclude Poole and Skinner were not involved adequately enough to have appellate standing on this issue.[4] *See Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *4 (concluding non-party board members themselves lacked standing for failure to participate in district court proceedings beyond affidavits affirming intention to invoke the privilege); *Kimberly Regenesis, LLC*, 64 F.4th at 1262 (dismissing individual commissioner's appeal for failure to participate at district court by moving for protective order, attending hearings on motion, filing briefs, or objecting in any manner to rejection of quasi-judicial immunity); *cf. LUPE*, 93 F.4th at 315–16 (concluding non-party legislators had participated sufficiently for standing by asserting legislative privilege themselves and filing briefs on application of privilege in district court); *Overby*, 224 F.2d at 162 (allowing non-party to appeal order denying claim of privilege and demanding document production where appellant had asserted privilege and claimed a property right in the documents).

3.

Lastly, the Board of Trustees lacks standing under either of the two rationales above. Even if the Board had tried to assert the legislative

[4] In finding there is no standing, we also decline to address the other antecedent issue of waiver. The parties have raised this issue extensively, however it has not been decided by the district court and is unnecessary to reach for the purposes of this decision.

privilege, it (like BHISD) is unable to assert the legislative privilege on behalf of the individual legislators. *Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *5 ("[T]he legislative privilege asserted belongs to the Board members not the Board . . . ."). And the non-party Board has not participated adequately in the proceedings below to confer standing, even if the privilege were properly invoked. The Board did not file an amicus brief about these issues—or its interest in preserving the privilege—in the district court. It did not appear at any of the hearings surrounding the legislative privilege. And it was dismissed as a party when plaintiffs filed their Second Amended Complaint. Any way we slice it, the non-party Board of Trustees lacks standing to appeal.

III.

This case's cart precedes its horse. Appellants seek to challenge the district court's order on a legislative privilege issue before any legislator has asserted the privilege. BHISD is not aggrieved by the discovery order, so it lacks third-party standing. The individual legislators have not participated adequately in the district court to confer non-party standing under *Castillo*'s three-part test. And the Board of Trustees—under either theory—also lacks standing to appeal. Absent an appellant with standing, the court lacks jurisdiction and DISMISSES this appeal.[5] The pending motion to stay pending appeal is DISMISSED as moot.

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[5] We decline to reach the legislative privilege issues through appellants' alternative mandamus argument under 28 U.S.C. § 1651. The writ is a "drastic and extraordinary remedy" for "really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). Appellants give the issue short shrift, declining to even address whether the mandamus elements are satisfied such that this is an extraordinary cause. *In re Westcott*, 135 F.4th 243, 245 (5th Cir. 2025) (outlining Supreme Court's "three conditions that must be satisfied before a writ of mandamus may issue"); *Cheney*, 542 U.S. at 380–81 (explaining "three conditions must be satisfied before [writ] may issue" and placing burden on petitioner).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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Suite 115
NEW ORLEANS, LA 70130

November 03, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 23-20256 Arnold v. Barbers Hill Indep Sch Dist
USDC No. 4:20-CV-1802

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 39, 40, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

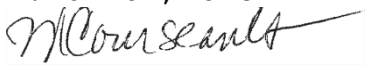
Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that each party bear its own costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Melissa B. Courseault, Deputy Clerk

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TAB H

No. 23-20256

IN THE

United States Court of Appeals for the Fifth Circuit

EVERETT DE'ANDRE ARNOLD, ET AL.,
Plaintiffs-Appellees,

v.

BARBERS HILL INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellants.

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

Petition for Rehearing *En Banc*

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CERTIFICATE OF INTERESTED PERSONS

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.

Defendants-Appellants

Barbers Hill Independent School District
(the District);
Barbers Hill Independent School District Board of Trustees
(the Board);
Fred Skinner; and
Greg Poole
(collectively, the District Parties)

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RULE 40 STATEMENT

The panel's decision conflicts with decisions from the Supreme Court (*Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)), this Court (*La Union del Pueblo Entero v. Abbott* (*Bettencourt*), 93 F.4th 310 (5th Cir. 2024), *Sanchez v. R.G.L.*, 761 F.3d 495 (5th Cir. 2014); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244 (5th Cir. 2009); and *Maiz v. Virani*, 311 F.3d 334, 339 (5th Cir. 2002)), and other circuit courts of appeals (*Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020), *In re Schubert*, 2023 WL 2663257, at *2 (6th Cir. Mar. 28, 2023), and *In re Capital Contracting Co.*, 924 F.3d 890, 896–97 (6th Cir. 2019)). *See also* Summary of the Argument *infra*.

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STATEMENT OF THE ISSUES

The panel erred in:

1. Dismissing the appeal for "prudential" reasons when it had jurisdiction under the collateral order doctrine;
2. Converting the three-*factor* non-party standing test into a three-*element* test (but, under either framework, the District Parties still had standing);
3. Holding governmental entities can't invoke the legislative privilege on behalf of non-party legislators; and
4. Not reaching the merits and concluding a routine civil rights lawsuit isn't one of the narrow circumstances in which the legislative privilege must yield.

STATEMENT OF THE CASE

This is a civil rights case about the District's hair-length rule for male students. ROA.51–114, 3105–3225. During discovery, the parties disputed the scope of depositions for some District officials. ROA.4186–4198. The District Parties agreed to depositions but maintained that legislators could assert legislative privilege when applicable. ROA.4188. The District moved to prevent questioning on "motives," "subjective

intent, thought processes, support or non-support, and rationales" regarding various policy decisions. ROA.4186-4198.

The district court granted-in-part and denied-in-part the motion. ROA.4446–48. Instead of restricting the questioning, the district court established a deposition procedure. ROA.4447. The procedure, which the panel calls an "assert-disclose-review" procedure, required deponents to "appear and testify even if it appear[ed] likely that legislative privilege may be invoked." ROA.4447. Deponents "must … answer the question[s] in full" before opposing counsel. ROA.4447. If a party wished to use the testimony later, it would need to submit it to the district court for an *in camera* review. ROA.4447.

The District Parties appealed under the collateral order doctrine. ROA.4454–56. The district court declined to stay its decision and entered an enforcement order compelling depositions and authorizing sanctions. ROA.4480–81, 4493–97, 4500. This Court stayed the proceedings. Op. at 4. After briefing concluded, the parties argued the case in February 2024. Thereafter, one of the panel members developed a conflict, and the case was reargued in September 2025. The panel then dismissed the appeal.

SUMMARY OF THE ARGUMENT

Although the Court has jurisdiction under the collateral order doctrine, the panel declined to exercise jurisdiction for "prudential" reasons. The panel decision, which runs counter to controlling Supreme Court and in-circuit precedent, renders orders compelling legislators to reveal information protected by the legislative privilege functionally unreviewable in many contexts. The Court should grant *en banc* review for four reasons:

- **Prudential Standing.** Prudential standing shouldn't apply outside the separation-of-powers context. Courts can't abandon their "virtually unflagging" duty to exercise jurisdiction for "prudential" reasons. *Lexmark*, 572 U.S. at 126. Here, appellate jurisdiction exists under the collateral order doctrine, yet the panel declined to exercise jurisdiction for "prudential" reasons.

- **The Non-Party Standing Framework.** This Circuit's non-party standing test considers three factors. The panel held the three-*factor* test from *Castillo v. Cameron County*, 238 F.3d 339 (5th Cir. 2001) is, in fact, a three-*element* test. But that holding contradicts circuit precedent. And regardless, the panel's finding that the non-parties didn't adequately participate in the lawsuit to confer standing can't be squared with the record, which confirms their extensive participation.

- **Who Can Assert the Legislative Privilege.** The panel held a governmental entity can't assert legislative privilege for its members and declined to address whether a superintendent could. However, last year in *Bettencourt*, this Court allowed third parties to assert the legislative privilege for legislators.

Governmental entities or executive officers acting at legislators' behest are closely situated to the policymaking process and fall within the *Bettencourt* rule.

- **The Merits.** The panel declined to reach the merits on the district court's "assert-disclose-review" order. Op. at 3. But according to the Supreme Court (and every circuit to have considered the issue, including this one), a civil rights case can't pierce the privilege. Only criminal law cases can. Therefore, the district court's orders compelling depositions are invalid.

For these reasons, the Court should grant *en banc* rehearing and reverse the trial court's order compelling non-party legislators to testify about matters protected by the legislative privilege.

ARGUMENT & AUTHORITIES

A. The panel decision conflicts with Supreme Court precedent because it dismissed the appeal for "prudential" reasons when appellate jurisdiction existed.

Under the collateral order doctrine, "orders denying non-party state-legislators' assertions of legislative privilege" are immediately appealable. *La Union del Pueblo Entero v. Abbott*, 68 F.4th 228, 232 (5th Cir. 2023) (*Hughes*). Such an order exists here, where the district court ordered non-party legislators to sit for depositions and testify (before opposing counsel) about information shielded by the legislative privilege. ROA.4447. Yet the panel declined to exercise jurisdiction. Op. at 5.

Raising "prudential standing concerns" *sua sponte*, the panel concluded the appeal didn't satisfy this Circuit's prudential standing framework for non-parties. Op. at 9–12.

Outside the separation-of-powers context, prudential standing is flawed. In 2014, the Supreme Court decided *Lexmark*. There, a party argued that, despite the existence of Article III jurisdiction, the courts should've 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.* The Supreme Court, however, 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 of plaintiffs" has grounds to appeal, the Supreme Court warned, courts may not avoid jurisdiction "merely because 'prudence' dictates." *Id.* at 128.

In the years following *Lexmark*, the circuits have split over its effect on prudential standing's vitality. Some circuits describe the doctrine as "greatly narrowed." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). Others say it's "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). Others acknowledge the circuit split and created carve-outs. *See Trantham v. Tate*, 112 F.4th 223, 233–34 (4th Cir. 2024).

A panel of this Court held prudential standing survived *Lexmark* in "bankruptcy appeals." *Matter of Highland Capital Mgmt., L.P.*, 74 F.4th 361, 368–69 & n.32 (5th Cir. 2023). The panel reasoned that, absent an "unequivocal" decision ending the practice in all contexts, it could still be used in bankruptcy cases. *Id.* The District Parties perceive an inconsistency between *Lexmark*'s directive and the panel decision (as well as *Highland Capital*) and ask the *en banc* Court to hold an appeal can't be dismissed under the prudential standing doctrine outside of the separation-of-powers context.

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 v. Brandhove*, 341 U.S. 367, 377 (1951). The public interest is served when the judiciary vindicates—not vitiates—disrupted legislative rights. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 268 & n.18 (1977) ("judicial inquiries into

legislative or executive motivation represent a substantial intrusion into the workings of other branches").

But even if *Highland Capital* is correct, its narrow holding doesn't apply here. Non-parties who appeal denials of legislative privilege raise issues of a constitutional dimension, not bankruptcy issues. *Cunningham v. Chapel Hill Indep. Sch. Dist.*, 438 F. Supp. 2d 718, 723 (E.D. Tex. 2006) (tracing history of the privilege). And if constitutional issues are at stake, courts should hesitate to dismiss based on prudential standing 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).

This Court recognizes the important interests at issue in legislative privilege cases. This Court has appellate jurisdiction if "delaying review would harm 'a substantial public interest' or 'some particular value of a high order.'" *Hughes*, 68 F.4th at 233. 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). Indeed, "[t]he 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 panel's decision "would make [local] legislators full-time motions practitioners." *Id.*

That outcome—troubling in any context—is especially worrying here, where the non-party legislators serve their communities as unpaid volunteers. Tex. Educ. Code § 11.061(d). The panel's decision thus risks deterring citizens from serving their communities simply because someone might disagree with a policy choice and sue them. *Cunningham*, 438 F. Supp. 2d at 723.

Here, the Court has jurisdiction under the collateral order doctrine under *Hughes* and *Bettencourt*. In a legislative privilege case, prudential standing is inconsistent with a court's "virtually unflagging" duty to hear cases within its jurisdiction. *Lexmark*, 572 U.S. at 125–26. Thus, the Court should limit prudential standing to match its purpose.

B. The panel decision conflicts with circuit precedent by converting the non-party standing framework from three factors that "guide" the analysis into three rigid elements.

If the *en banc* Court concludes prudential standing remains a viable doctrine in this circuit in legislative privilege cases, the panel decision still contradicts circuit precedent. The three-factor framework to decide whether a non-party may appeal an order considers:

(1) the non-party's participation;

(2) equitable considerations favoring an appeal; and

(3) the non-party's personal stake in the outcome.

Castillo, 238 F.3d at 349. The panel held these factors are not factors but, rather, elements. Op. at 7 n.2. Assuming the District Parties satisfied the latter two factors, it found they hadn't sufficiently participated in the case and dismissed the appeal. Op. at 9. The panel erred in both respects.

Historically, the Court hasn't treated the *Castillo* factors as elements. *Bettencourt* wrote that "[t]hree factors guide our determining whether the legislators qualify" for non-party standing. 93 F.4th at 315. This characterization accords with prior cases. *E.g.*, *Sanchez v. R.G.L.*, 761 F.3d 495, 502 (5th Cir. 2014) (discussing how "the factors weigh[ed]");

In re Lease Oil Antitrust Litig., 570 F.3d 244, 249 (5th Cir. 2009) (describing the "balancing test").

The three-part non-party standing analysis makes sense as a set of weighted factors. To start, the Court isn't unaccustomed to applying factors. In fact, the Court routinely does so when it addresses preliminary injunctions, where "a sliding scale is utilized" with respect to four factors. *Mock v. Garland*, 75 F.4th 563, 587 (5th Cir. 2023).

The rights at stake should also inform the analysis. Again, delaying review in legislative privilege cases jeopardizes "high-order value[s]" and implicates a privilege with constitutional dimensions. *Hughes*, 68 F.4th at 233. Once information subject to the privilege is shared, that harm can't be undone; the "cat is out of the bag." *See In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.).

The panel seems to take issue that the non-parties here didn't intervene or file their own motions for protection. Op. at 7 n.2 (suggesting non-parties should've moved to intervene), 10–11 (criticizing non-parties for not being involved "in the proceedings on the motion for protective order"). But that's exactly what the *Bettencourt* court said non-party legislators didn't need to do. 93 F.4th at 315–16 (rejecting argument

legislators needed to participate in "exact proceedings giving rise to the order on appeal"), 317 (rejecting idea legislators should "be required constantly to monitor the status of all discovery proceedings in all pending cases …").

Non-party legislators shouldn't have to be "motion practitioners" to protect information subject to the privilege. *Bettencourt*, 93 F.4th at 317. And, up until the panel's decision, that's been the rule in this circuit. In fact, prior cases from this Court confirm that a party doesn't have to seek relief from the district court or participate in the lower court proceedings at all to have standing, so long as they are injured. *Maiz*, 311 F.3d at 339.

Here, the district court compelled non-party legislators to reveal privileged information under threat of sanctions. That's a sufficient injury. *Hughes*, 68 F.4th at 233 (potential sanctions justified appellate jurisdiction); *Maiz*, 311 F.3d at 339. And it's an injury that will continue under the panel's decision dismissing the appeal, which effectively requires the non-parties to file duplicative motions for protection, sit for depositions and risk sanctions for defying the district court's "assert-disclose-review" order, only to then file a nearly identical appeal.

Finally, the panel acknowledges its incomplete understanding of the non-parties' involvement in the district court proceedings. Op. at 11. The panel still found dismissal appropriate as the non-parties supposedly didn't "participate[] in the two years between their dismissal and [the District's] motion." Op. at 11. Without briefs on the topic, the District Parties understand the panel's confusion. The record, however, confirms multiple non-parties, including Superintendent Poole and former-Board President Skinner, participated in the proceedings below as follows:

Pre-dismissal—

- testifying (either in-person or by affidavit) at a preliminary injunction hearing;
- appealing an order granting a preliminary injunction;

Post-dismissal—

- participating in discovery by searching their personal and business email accounts and cell phones in response to requests for production served against the District;
- receiving and objecting to individual and personal subpoenas for documents;
- receiving deposition notices and indicating the intent to assert the privilege;
- being ordered to sit for depositions and reveal privileged information under threat of sanctions; and
- appealing the order to this Court.

ROA.3413–3417, 3496–13, 3519–3523, 3525, 4447, 4454–56, 4500. Taken together, the non-parties participated in the underlying case to a similar extent as the legislators in *Bettencourt*. 93 F.4th at 315–16.

At bottom, whether the *Castillo* test uses mandatory elements or weighted factors, the result should be the same here: The non-parties have standing to appeal the district court's order. Even if prudential standing in legislative immunity cases survives *Lexmark*, the *Castillo* test is a set of weighted factors that guide the standing inquiry—not rigid elements. It doesn't appear this Court struggled to apply the balancing test before, and it shouldn't be an issue here.

C. A governmental entity or high-ranking executive officer with policymaking responsibilities can invoke the privilege.

This Court hasn't "directly answered whether a government entity" or an executive officer with policymaking responsibilities "can invoke the legislative privilege on behalf of individual legislators." Op. at 5. The district courts in this circuit are split on the questions. *Compare* op. at 5, *with, e.g.*, *La. Cleaning Sys., Inc. v. City of Shreveport*, 2018 WL 3039739, at *2 (W.D. La. June 19, 2018). The panel held the District and its Board couldn't invoke the privilege on behalf of individual trustees and declined

to reach the issue of whether a high-ranking executive officer could do so. Op. at 9–10 & n.3.

The legislative privilege is a personal one, so legislators can assert it. *Bettencourt*, 93 F.4th at 321. And their employees can assert the privilege on their behalf as well. *Id.* But because "[t]he legislative privilege 'covers all aspects of the legislative process,'" and others may act at the behest of a legislator, "there is no reasoned basis to draw the line at aides and assistants." *Id.* Accordingly, this Court has allowed third parties to invoke the privilege on a legislator's behalf. *Id.*

Superintendent Poole's ability to invoke the privilege as the District's superintendent should be settled. A school board can employ a superintendent, whose duties include "preparing recommendations for policies to be adopted by the board of trustees." Tex. Educ. Code § 11.201(b), (d)(7). "The board of trustees and superintendent shall work together to … establish district-wide policies." *Id.* § 11.1512(b)(4). As the school board's sole employee tasked by law with helping develop policies, then, a superintendent can assert legislative privilege on behalf of the District and the Board. *City of Shreveport*, 2018 WL 3039739, at *2.

Any other result would be anomalous. While responsible for the District's policymaking functions, trustees rely on their superintendent. A litigant shouldn't be able to backdoor information otherwise shielded by the legislative privilege by deposing an employee. Otherwise, "the free flow of discussion that is such an integral part of the democratic legislative process" would be inhibited. *Cunningham*, 438 F. Supp. 2d at 723 (expressing same concerns); *City of Shreveport*, 2018 WL 3039739, at *2 (same). It'd lead to gamesmanship, where litigants would identify a topic subject to the legislative privilege and go down a list of individuals with knowledge to circumvent the privilege's application. Such a rule, fixated on form over substance, would defeat the venerable purposes the privilege serves. *See, e.g.*, *Hughes*, 68 F.4th at 233.

The Court hasn't decided if a governmental entity may assert the privilege for its legislators. Op. at 5. But some district court cases—and one out-of-state unpublished circuit decision—have concluded that they can't. Op. at 5, 8 (citing *Pen Am. Ctr. v. Escambia Cnty. Sch. Dist.*, 2025 WL 1937264, at *1 (11th Cir. July 15, 2025)). However, those non-binding authorities contradict *Bettencourt*—an on-point, controlling decision.

Consider the relevant statutory framework. An individual trustee can't create or change policy; rather, the District (through the Board) adopts and implements policy. Tex. Educ. Code §§ 11.151(b), (d), 11.1512(b)(4). "Texas law unequivocally delegates to the Board 'the exclusive power and duty to govern and oversee the management of the public schools of the district,'" and the District and the Board are functionally identical under Texas law. *Rivera v. Hous. Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003); *Franka v. Velasquez*, 332 S.W.3d 367, 382–83 (Tex. 2011).

In holding there was "no reasoned basis to draw the line at aides and assistants," *Bettencourt* cuts through procedural hoops and provides a simple rule to determine who can invoke the legislative privilege:

> [The] ability to invoke the privilege comes not from [a] position[]. Instead, it depends on whether the act for which they invoke the privilege was done at the direction of, instruction of, or for a legislator.

93 F.4th at 321.

The application here is simple. By facilitating and participating in policymaking and then implementing the resulting decisions, the District engaged in conduct "within 'the sphere of legitimate legislative activity' or within 'the regular course of the legislative process.'" *Bettencourt*, 93

F.4th at 318. The District worked in tandem with individual trustees to effectuate policy change; that is, the government performed work and then invoked the privilege "at the direction of, instruction of, or for a legislator." *Id.* Thus, the District can invoke the privilege. While an unpublished Eleventh Circuit case held differently, it doesn't cite—and wouldn't be bound by—*Bettencourt*.

Even without *Bettencourt*, the panel's decision favors a rule that elevates form over substance. The panel cites four district court opinions where the courts concluded that neither a governmental entity nor an executive officer could assert the privilege on behalf of non-party legislators. Op. at 9. But that perspective is by no means universal. In one Texas case, a school district asserted the privilege for its trustees without issue. *Cunningham*, 438 F. Supp. 2d at 719–20. And in another case this Court cited favorably in *Hughes*, the court found no issue with a city invoking the privilege for city council members. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1181 (9th Cir. 2018).

The Court should clarify that *Bettencourt* applies to invocations of legislative privilege by governmental bodies acting for their members. Those courts adopting this rule support this approach "because it is the

work of the legislative body that gives rise to the privilege in the first place." *Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, 2021 WL 5882653, at *2 (M.D. Tenn. Dec. 13, 2021). "This inextricable link between the legislative body and the legislative privilege" is sufficient for a governmental body to invoke the privilege. *Id.* Any other rule elevates form over substance without any "reasoned basis." *Bettencourt*, 93 F.4th at 321.

D. The Court should reach the merits and apply the privilege because this case isn't an "extraordinary instance" where the privilege must yield.

The privilege protects legislators' motives from discovery. The doctrine, stemming from the U.S. Constitution, "appl[ies] with equal force to local legislators." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998). There's one exception: "In some extraordinary instances," policymakers might need "to testify concerning the purpose of … official action." *Vill. of Arlington Heights*, 429 U.S. at 268. But the U.S. Supreme Court hasn't held a civil case contained the requisite "extraordinary instances." *Cf. United States v. Gillock*, 445 U.S. 360, 373 (1980) (criminal case). Nor has this Court. *Hughes*, 68 F.4th at 237–38. Intrusions into legislative

privilege are exceedingly rare. *In re Perry*, 60 S.W.3d 857, 862 n.2. (Tex. 2001).

The cases denying plaintiffs a license for forced interrogation span the spectrum of federal claims. *E.g.*, *Village of Arlington Heights*, 429 U.S. at 254, 268 & n.18 (housing); *Bogan*, 523 U.S. at 47, 53 (employment); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021) (toll assessments); *Hughes*, 68 F.4th at 231–32, 237 (election laws); *Bettencourt*, 93 F.4th at 323 (same); *Lee*, 908 F.3d at 1189, 1188 (redistricting); *Pernell v. Florida Board of Governors*, 84 F.4th 1339, 1344 (11th Cir. 2023) (education).

Appellees' claims aren't "extraordinary." They allege discrimination in a hair-length rule. Other Texas courts have held their claims legally nonviable. *George v. Abbott*, 2025 WL 1685239, at *2–3 (S.D. Tex. June 16, 2025); *M.T. v. Tatum Indep. Sch. Dist.*, No. 2:21-CV-00364-RWS, Dkt. 119 at 16–18 (E.D. Tex. Oct. 13, 2023). Because they can't identify sufficiently important interests, "extraordinary instances" don't exist, and Appellees can't interrogate deponents on their motives.

E. The district court abused its discretion by issuing an order to compel depositions after this interlocutory appeal was perfected.

When a notice of appeal is filed, the trial court loses jurisdiction over the appealed issues. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). After the District Parties appealed the order denying-in-part the motion for protection, the district court compelled depositions and authorized sanctions. ROA.4500. That order was issued without jurisdiction and is void.

CONCLUSION

The District Parties ask the Court to rehear this case *en banc*, vacate the panel decision, and then:

- reverse and vacate the district court's order establishing the "assert-disclose-review" deposition procedure;
- prohibit Appellees from invading the privilege;
- vacate the district court's void enforcement order; and
- award the District Parties their taxable costs of appeal.

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2025, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

I further certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I further certify that I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Jonathan Griffin Brush

Jonathan Griffin Brush
Attorney for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 40, the undersigned certifies:

1. This Brief complies with the type-volume limitations of FED. R. APP. P. 40(d)(3)(A) because:

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/s/ Jonathan Griffin Brush

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 3, 2025
Lyle W. Cayce
Clerk

No. 23-20256

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,

Plaintiffs—Appellees,

versus

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1802

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

Barbers Hill Independent School District ("BHISD") instituted a "Hair Policy" in 2019 restricting the length of male students' hair. Plaintiffs, former students and parents in BHISD, allege the Hair Policy and its enforcement amount to race and sex discrimination and infringe students' freedom of expression. As discovery unfolded, plaintiffs sought to depose Superintendent Greg Poole ("Poole") and former Trustee Board President

Fred Skinner ("Skinner"). BHISD, Poole, Skinner, and the Board of Trustees now present an interlocutory appeal concerning legislative privilege.

I.

We draw the following allegations from plaintiffs' Second Amended Complaint. BHISD maintains a Student Code of Conduct, setting standards for behavior and discipline within the district. Hair-length restrictions have long existed in the Student Code of Conduct, limiting the ways male students could wear their hair. Halfway through the 2019–2020 school year, the Board of Trustees amended the hair policy. The new policy provided:

> Male students' hair will not extend, at any time, below the eyebrows, or below the ear lobes. Male students' hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down.

Notably, plaintiffs allege that the administrators restricted hair length when worn down—regardless of whether the student wears his hair up while at school—and removed express language that previously permitted cornrows or locs that complied with the rest of the policy. Plaintiffs sued BHISD, alleging the Hair Policy violates the Fourteenth Amendment's Due Process and Equal Protection guarantees, the First Amendment's speech and expression protections, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Texas Civil Practice and Remedies Code § 106.001.

Procedural history illuminates the issues on appeal. Poole, Skinner, and BHISD's Board of Trustees are designated appellants. But Poole, Skinner, and the Board of Trustees are not parties under the operative complaint. During discovery, plaintiffs sought to depose Poole and Skinner. While BHISD initially consented to the depositions, it maintained that both

deponents were entitled to legislative privilege over certain inquiries. To that end, BHISD moved for a protective order restricting plaintiffs from asking Poole and Skinner about the Board members' "subjective intentions, motivations, thought processes, and any other information not available to the public concerning the adoption of [BHISD's] male hair length policy."

Appellants appeal just the district court's partial denial of BHISD's motion for protection and the discovery policy it outlined. On the denial front, the district court refrained from deciding any privilege issues. It concluded that it would "be better positioned" to decide whether the privilege applied once presented with specific questions and invocations of the privilege at the depositions. In short, the fact-intensive legislative privilege issues were not yet ripe. But the district court partially granted the motion by establishing a procedure for resolving those privilege-application questions. It adopted an "assert-disclose-review" approach: 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. 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. The district court credited *League of United Latin American Citizens v. Abbott* (*LULAC I*), No. EP-21-CV-00259, 2022 WL 1570858 (W.D. Tex. May 18, 2022), for the privilege procedure.[1]

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[1] A motions panel of this court commended the *LULAC I* district court's procedure as "carefully crafted." *League of United Latin Am. Citizens v. Abbott* (*LULAC II*), No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022) (denying motion to stay pending appeal). The parties discuss *LULAC II* at length, but *LULAC II* is an unpublished motions-panel decision. *See Dick v. Colo. Hous. Enters., L.L.C.*, 872 F.3d 709, 711–12 (5th Cir. 2017) (explaining unpublished opinions are not controlling precedent). To preview, we dismiss this appeal on jurisdictional grounds. So, we cannot decide—at this

Shortly thereafter, BHISD, the Board of Trustees, Poole, and Skinner appealed. Appellants contend the district court abused its discretion by compelling disclosure of privileged material, eviscerating the privilege. Back in the district court, BHISD moved to stay the depositions pending appeal, which the district court denied. BHISD later refused to produce Poole and Skinner for their depositions. And appellants then moved this court to stay the district court proceedings. Meanwhile, the district court compelled BHISD to produce Poole and Skinner for their depositions and authorized plaintiffs to seek sanctions. BHISD then moved this court for an emergency administrative stay of the district court proceedings, which the court granted as a temporary administrative stay. But the court carried with the case the motion to stay pending appeal.

Appellants ask the court to decide whether the district court abused its discretion by partially denying the motion for protection and ordering legislators to respond by answering questions such that the testimony might possibly invade the legislative privilege. Legislative privilege is held by the legislator. *La Union del Pueblo Entero v. Abbott* (*LUPE*), 93 F.4th 310, 321 (5th Cir. 2024). Here, the privilege holders have not yet invoked the privilege or otherwise participated in the proceedings. As explained below, prudential standing considerations deprive the court of jurisdiction over this appeal.

II.

Plaintiffs-Appellees challenged appellate jurisdiction, invoking the collateral order doctrine and (albeit briefly) Poole's and Skinner's failure to individually assert the legislative privilege. Although plaintiffs' argument on the latter point is brief, it generates prudential standing concerns that the

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juncture—whether the district court's compulsive "assert-disclose-review" approach merely toes the legislative-privilege line or crosses it.

court addresses *sua sponte*. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt.*, 389 F.3d 491, 498 (5th Cir. 2004) ("Although defendants have not explicitly raised the issue of [constitutional or prudential] standing, we may consider it *sua sponte*."). Even if the district court's order fits within a category of orders that are immediately appealable as collateral orders, we lack jurisdiction anyway: BHISD, the non-party legislators Poole and Skinner, and the non-party Board of Trustees do not have appellate standing.

A.

"The legislative privilege is personal to the legislator." *LUPE*, 93 F.4th at 321 (citing *Gravel v. United States*, 408 U.S. 606, 616 (1972)); *see id.* at 321–22 (recognizing legislators, aides, assistants, and third parties performing legislative acts can invoke the privilege). Multiple district courts have concluded, following that rationale, that the government entity or legislative body itself cannot invoke the legislative privilege on an individual legislator's behalf. *See, e.g.*, *Perez*, 2014 WL 106927, at *1; *A Helping Hand, LLC v. Baltimore Cnty.*, 295 F. Supp. 2d 585, 590 (D. Md. 2003); *ACORN (N.Y. Ass'n of Cmty. Orgs. For Reform Now) v. Cnty. of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007). Our court has not directly answered whether a government entity can invoke the legislative privilege on behalf of individual legislators. It likewise has not addressed who has standing to appeal an order relating to the privilege in such a case. But our circuit's appellate standing precedents, alongside the Eleventh Circuit's recent approach in nearly identical circumstances, provide apt guidance.

Start with a primer on appellate standing. "It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it." *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) (quoting *Ward v. Santa Fe Indep.*

Sch. Dist., 393 F.3d 599, 603 (5th Cir. 2004)). Relevant here, "a party generally may not appeal a district court's order to champion the rights of another." *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994); *Odneal v. Pierce*, 324 F. App'x 297, 302 (5th Cir. 2009) ("An indirect stake in the claims of another party is not sufficient to create standing on appeal."); *In re Deepwater Horizon*, 857 F.3d 246, 252–53 (5th Cir. 2017) (recognizing that prudential standing allows appellant to protect only its own interests, unless appellant's and third party's interests coincide and a genuine obstacle prevents third party from protecting his own interests). This third-party standing rule derives from prudential limitations to our jurisdiction, not constitutional ones. *See In re Deepwater Horizon*, 857 F.3d at 252. Applying a similar third-party standing concept, the Eleventh Circuit has held that a government entity has no standing to appeal an order denying an individual immunity, even if the government entity moved to protect that immunity. *See Kimberly Regenesis, LLC v. Lee Cnty.*, 64 F.4th 1253, 1260 (11th Cir. 2023).

Next, consider our circuit's non-party standing framework—also implicating prudential, not constitutional, standing limits. *Castillo v. Cameron Cnty.*, 238 F.3d 339, 349 n.16 (5th Cir. 2001). Ordinarily, "only parties to a lawsuit, or those that properly become parties," may appeal. *Lewis v. Crochet*, 105 F.4th 272, 281 (5th Cir. 2024) (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam)). But a non-party "may be allowed to appeal" an order that "affects his interests." *Castillo*, 238 F.3d at 349. To determine whether a non-party fits that bill, our circuit assesses "(1) 'whether the nonpart[y] actually participated in the proceedings below,' (2) whether 'the equities weigh in favor of hearing the appeal,' and (3) whether 'the nonpart[y] ha[s] a personal stake in the outcome.'" *LUPE*, 93 F.4th at 315 (quoting *Castillo*, 238 F.3d at 349); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 249 (5th Cir. 2009) (explaining non-parties "are generally not

permitted to appeal a ruling in which they did not participate").[2] When review is sought "after a party is dismissed from the underlying suit, that party is often allowed to appeal," but only if the order "affects its interests" under the three-part test. *Lewis*, 105 F.4th at 281 (quotation cleaned up).

In *LUPE*, both party and non-party appellants sought review of a district court's order concluding several documents were not protected by legislative privilege. 93 F.4th at 314; *see also id.* at 315 (describing ruling ordering non-legislators to submit to depositions and produce non-privileged documents). The court assessed three jurisdictional issues: (1) whether the state legislators had standing to appeal as non-parties; (2) whether the discovery order was subject to interlocutory review; and (3) whether the issue was moot. *Id.* at 315–20. Only *LUPE*'s non-party standing analysis informs the current case. The *LUPE* opinion explained all three *Castillo* elements favored non-party standing. The legislators had "participated adequately" at the district court because they had asserted their legislative privileges in response to third-party subpoenas seeking the same documents at issue in the appeal, and filed briefs and attended hearings about the legislative privilege. *Id.* at 315–16; *see also United States v. Fluitt*, 99 F.4th 753, 762 (5th Cir. 2024) (concluding third parties "participated in the discovery dispute" by asserting privilege, opposing motion to compel, and appealing magistrate judge's order

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[2] Our circuit has never squarely decided whether the non-party standing test identifies required elements or weighted factors. Some of our cases describe the test in the conjunctive—often concluding the appellant has satisfied all three elements. *See, e.g.*, *Castillo*, 238 F.3d at 349–50. Elsewhere, our circuit has described—albeit in dicta—non-party standing's "vague balancing test." *In re Lease Oil Antitrust Litig.*, 570 F.3d at 249. We now clarify that the non-party standing test requires appellant to satisfy all three elements. As implied in *In re Lease Oil*, a balancing test would invite heightened subjectivity, and uncertainty, to non-party prudential standing. *See id.* (suggesting moving to intervene is a "much more certain way of proceeding" than relying on the non-party standing balancing test). Such an approach could lead to inconsistent outcomes and conflicts with precedent describing the test in the conjunctive.

to district judge). The equities weighed in favor of non-party standing because the district court had ordered production of potentially privileged documents and the legislators had "no other mechanism to vindicate their potentially meritorious claims of legislative privilege." *LUPE*, 93 F.4th at 316. And the public interest in preserving the privilege was a "high-order value." *Id.* at 317. What's more, the legislators had a personal stake in the outcome—they created or reviewed the documents while performing their legislative activities. *Id.* at 318. So, the non-party legislators had standing to appeal the denial of the privilege.

The Eleventh Circuit recently combined these two standing concepts, dismissing a legislative-privilege-based appeal for lack of jurisdiction. In the unpublished *Pen American Center, Inc. v. Escambia County School District*, the Eleventh Circuit rejected a school board's attempt to assert legislative privilege on behalf of its members. No. 24-13896, 2025 WL 1937264, at *1 (11th Cir. July 15, 2025) (per curiam). There, plaintiffs sought to depose individual board members, seeking information about their motives in removing certain books from schools. *Id.* at *2. The school board moved for a protective order, asserting legislative privilege. *Id.* The Eleventh Circuit dismissed the appeal. *Id.* at *1. The school board (a party) "lack[ed] standing to assert the legislative privilege of its members, who each individually possess[ed] the privilege." *Id.* at *4. And the appealing school board members (non-parties) also lacked standing to challenge the denial of the protective order. *Id.* While the board had attached declarations by the board members expressing their intentions to invoke the privilege, the board members had not moved, appeared, or "participate[d] in any other way in the proceedings." *Id.* So, the Eleventh Circuit dismissed the appeal for lack of jurisdiction. *Id.* at *5.

B.

Turning to the appeal at issue, BHISD, Poole, Skinner, and the Board of Trustees all appealed. Recall that BHISD filed the motion for protection asserting the legislative privilege. Applying our circuit's third-party and non-party standing limitations, we conclude none of the appellants has standing to challenge the district court's order on appeal. The dispositive circumstance here: no appellant with authority to invoke the privilege has invoked it yet and the non-party legislators have not otherwise participated adequately to confer standing.

1.

Start with BHISD. Although BHISD is a party in the district court, and its motion is the subject of this appeal, BHISD itself does not hold the "personal" legislative privilege. *See LUPE*, 93 F.4th at 321. Because the privilege is personal in nature, many courts have concluded an entity like BHISD cannot assert that privilege on behalf of individual legislators. *Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *4 ("[T]he [asserting entity] lacks standing to assert the legislative privilege of its members, who each individually possess the privilege insofar as they are entitled to it."); *Perez*, 2014 WL 106927, at *1 ("[T]he State of Texas [does not have] standing to assert the legislative privilege on behalf of any legislator . . . that may be deposed. Since no person entitled to assert any privilege has done so, the pending motion [for protective order] is denied as premature."); *Gilby v. Hughs*, 471 F. Supp. 3d 763, 767 (W.D. Tex. 2020) (concluding the secretary of state lacked standing to invoke legislative privilege on behalf of legislators); *A Helping Hand, LLC*, 295 F. Supp. 2d at 590 ("[T]he County Council's motion [for protective order] must be denied because the Council may not assert the privilege on its members' behalf."); *ACORN*, 2007 WL 2815810, at *4 (explaining "it is not up to the Board to assert or waive the privilege; the Board members must do so for themselves," but assuming the privilege was asserted individually (quotation cleaned up)).

The underlying right allegedly infringed by the district court's order belongs to the individual legislators, not BHISD. While BHISD did not receive the relief it sought from its motion, BHISD had no standing to seek that relief on behalf of the legislators in the first place. As a result, we conclude BHISD is not aggrieved by the district court's order and, accordingly, lacks third-party standing to appeal the order for allegedly vitiating the legislative privilege. *See Rohm & Hass Tex., Inc.*, 32 F.3d at 208 ("[A] party generally may not appeal a district court's order to champion the rights of another[.]"); *Kimberly Regenesis, LLC*, 64 F.4th at 1260 (concluding quasi-judicial immunity did not belong to appellant county, so "county was not aggrieved by" and "ha[d] no standing to appeal" order denying county's motion for protection on immunity grounds).

2.

Consider, next, non-party legislators Poole[3] and Skinner. Recall the three non-party standing elements: (1) participation in the district court; (2) equitable considerations favoring appeal; and (3) personal stake in the outcome. *LUPE*, 93 F.4th at 315; *Castillo*, 238 F.3d at 349 (describing the three-part test). Following *LUPE*'s analysis outlined above, assume the equitable-considerations and personal-stake elements support standing. Even if those prongs favor standing, Poole and Skinner have not "participated adequately" at the district court to appeal this particular order. *See LUPE*, 93 F.4th at 316.

To be sure, Poole and Skinner were involved—once upon a time—in the district court proceedings. They were original parties to the action. But,

[3] The parties questioned whether Superintendent Poole is entitled to legislative privilege as an executive officer. We need not resolve that question because even if Poole could invoke the privilege here, he lacks standing to appeal the district court's order.

as best the court can tell, they were involved in no way after their dismissal, including in the proceedings on the motion for protective order. *But see LUPE*, 93 F.4th at 315–16 (rejecting argument that the participation inquiry turns on just the "exact proceedings giving rise to the order on appeal"). Critically, Poole and Skinner have not yet asserted the privilege for themselves or otherwise objected in the district court. Because they have not yet actually asserted the privilege (or otherwise participated in the two years between their dismissal and BHISD's motion), we conclude Poole and Skinner were not involved adequately enough to have appellate standing on this issue.[4] *See Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *4 (concluding non-party board members themselves lacked standing for failure to participate in district court proceedings beyond affidavits affirming intention to invoke the privilege); *Kimberly Regenesis, LLC*, 64 F.4th at 1262 (dismissing individual commissioner's appeal for failure to participate at district court by moving for protective order, attending hearings on motion, filing briefs, or objecting in any manner to rejection of quasi-judicial immunity); *cf. LUPE*, 93 F.4th at 315–16 (concluding non-party legislators had participated sufficiently for standing by asserting legislative privilege themselves and filing briefs on application of privilege in district court); *Overby*, 224 F.2d at 162 (allowing non-party to appeal order denying claim of privilege and demanding document production where appellant had asserted privilege and claimed a property right in the documents).

3.

Lastly, the Board of Trustees lacks standing under either of the two rationales above. Even if the Board had tried to assert the legislative

[4] In finding there is no standing, we also decline to address the other antecedent issue of waiver. The parties have raised this issue extensively, however it has not been decided by the district court and is unnecessary to reach for the purposes of this decision.

privilege, it (like BHISD) is unable to assert the legislative privilege on behalf of the individual legislators. *Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *5 ("[T]he legislative privilege asserted belongs to the Board members not the Board . . . ."). And the non-party Board has not participated adequately in the proceedings below to confer standing, even if the privilege were properly invoked. The Board did not file an amicus brief about these issues—or its interest in preserving the privilege—in the district court. It did not appear at any of the hearings surrounding the legislative privilege. And it was dismissed as a party when plaintiffs filed their Second Amended Complaint. Any way we slice it, the non-party Board of Trustees lacks standing to appeal.

III.

This case's cart precedes its horse. Appellants seek to challenge the district court's order on a legislative privilege issue before any legislator has asserted the privilege. BHISD is not aggrieved by the discovery order, so it lacks third-party standing. The individual legislators have not participated adequately in the district court to confer non-party standing under *Castillo*'s three-part test. And the Board of Trustees—under either theory—also lacks standing to appeal. Absent an appellant with standing, the court lacks jurisdiction and DISMISSES this appeal.[5] The pending motion to stay pending appeal is DISMISSED as moot.

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[5] We decline to reach the legislative privilege issues through appellants' alternative mandamus argument under 28 U.S.C. § 1651. The writ is a "drastic and extraordinary remedy" for "really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). Appellants give the issue short shrift, declining to even address whether the mandamus elements are satisfied such that this is an extraordinary cause. *In re Westcott*, 135 F.4th 243, 245 (5th Cir. 2025) (outlining Supreme Court's "three conditions that must be satisfied before a writ of mandamus may issue"); *Cheney*, 542 U.S. at 380–81 (explaining "three conditions must be satisfied before [writ] may issue" and placing burden on petitioner).

TAB I

No. 23-20256

In the United States Court of Appeals for the Fifth Circuit

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,
Plaintiffs–Appellees,

v.

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,
Defendants–Appellants.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:20-cv-1802

BRIEF FOR THE GOVERNOR OF TEXAS AS AMICUS CURIAE IN SUPPORT OF REHEARING

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 23-20256

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,
Plaintiffs–Appellees,

v.

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,
Defendants–Appellants.

In accordance with Fifth Circuit Rule 29.2, undersigned counsel of record certifies that the following listed persons and entities have an interest in this amicus brief. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Greg Abbott, Governor of Texas
2. Trevor W. Ezell, counsel for Amicus Curiae
3. Anthony J. Rodregous, counsel for Amicus Curiae

/s/ Trevor W. Ezell
TREVOR W. EZELL
Counsel of Record for Amicus Curiae

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TABLE OF AUTHORITIES

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INTEREST OF AMICUS CURIAE

Greg Abbott is Governor of the State of Texas. The Texas Constitution creates a government of "three distinct departments," TEX. CONST. art. II, § 1, and vests all executive power in an Executive Department headed by the Governor, TEX. CONST. art. IV, § 1. As "Chief Executive Officer," the Governor may oversee other executive officers, *Day Land & Cattle v. State*, 4 S.W. 865, 867 (Tex. 1887), and must exercise the residuary of executive power not lodged with them, *Collins v. Yellen*, 594 U.S. 220, 250–256 (2021).

Notwithstanding these executive responsibilities, the Governor also plays a role in the *legislative* work of state government. That may include, among other things, deliberations concerning whether to issue a proclamation to consider possible legislation, how to exercise the authority to approve or disapprove of such legislation, and how to negotiate the details of such legislation in the shadow of the Governor's veto power. *See* TEX. CONST. art. III, § 40; *id.* art. IV, § 14.

That is why a three-judge district court—including one member of this Court—recently approved Governor Abbott's invocation of legislative privilege. *See* Oral Order, *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex. Oct. 8, 2025) (Guaderrama, Smith, Brown, J.J.). That conclusion was consistent with recent Fifth Circuit precedent, a century of Supreme Court thinking, and at least three federal circuits.

The panel here, however, seemed to suggest (in a footnote) that it may be an open question whether "an executive officer" like the Governor may *ever* invoke legislative privilege. *Arnold v. Barbers Hill Indep. Sch. Dist.*, — F.4th —, 2025 WL 3062721, at *5 n.3 (5th Cir. Nov. 3, 2025). That is perhaps understandable, given the parties did not brief the issue at length and cited none of this Court's pertinent precedents. *See* Appellees' Response BOM 24–25; Appellants' Reply BOM 19–21. The opinion's language, however, may nevertheless introduce needless confusion for other executive actors governed by the law of this Circuit.

Accordingly, and regardless of whether the panel (or the en banc Court) grant rehearing on the other issues presented in this case, the panel may wish to clarify that some executive officers, like a Governor, are eligible for protection by the legislative privilege.†

ARGUMENT

I. The Panel May Wish to Revise Footnote 3 Because Binding Precedent Holds that an Executive Official May Invoke Legislative Privilege in an Appropriate Case.

Just last year, this Court stressed that the legislative privilege protects against the disclosure of "documents shared, and communications made," by legislative actors throughout "all aspects of

† All parties consent to the filing of this brief. No counsel for any party authored this brief in whole or in part; no party or counsel made monetary contributions to fund its preparation or submission; and no person other than amicus or his counsel made such a contribution. FED. R. APP. P. 29(b).

the legislative process." *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310, 321–323 (5th Cir. 2024). That has important consequences for who may invoke the privilege. Because inputs for the modern lawmaking process are necessarily broad, the privilege also encompasses both legislative actors and those performing legislative work at their direction. *Id.* at 321. Of course, that includes staff, but it likewise includes "third parties" furnishing information that facilitates consideration of potential legislation. *Id.* at 322.

How do these principles apply to an executive officer? This Court provided clear direction on how to answer that question in 2023, directing courts to consult the Supreme Court's legislative-immunity precedent when construing legislative privilege. *La Union del Pueblo Entero v. Abbott*, 68 F.4th 228, 237 (5th Cir. 2023). As Judge Willett noted there, "the Supreme Court has often analyzed [legislative immunity] in parallel to legislative privilege." *Ibid.* For that reason, the Court held: "[W]e follow the Supreme Court's lead in drawing on both strands even though this case involves a privilege from disclosure rather than an immunity from suit or liability." *Ibid.* In other words, courts in this Circuit must apply Supreme Court precedent concerning legislative immunity to a claim for legislative privilege.

And Supreme Court precedent is clear that legislative immunities and privileges *can* apply to an executive. Nearly a century ago, the Supreme Court recognized that a Governor is part of the "legislative

action in districting the state for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 372–373 (1932). In *Smiley*, the Minnesota Legislature passed congressional maps and claimed the authority to make them law without the Governor's approval. The Supreme Court disagreed. Although Article I, Section 4 of the U.S. Constitution assigns redistricting power to "the Legislature," the Governor is *part* of the lawmaking process. *Id.* at 365–366, 369.

That was a sound interpretation of the Constitution. And the Supreme Court specifically relied on it in *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). There, the Court considered whether an executive officer—namely, a city mayor—could invoke legislative immunity for legislative functions. *Id.* at 55. And relying on its prior observations about a Governor in *Smiley*, the Court concluded that an "official[] outside the legislative branch" could invoke legislative immunity "*even though he [is] an executive official*." *Ibid.* (citing *Smiley*, 285 U.S. at 372–373) (emphasis added). The Supreme Court has never overruled either decision. Only that Court may do so—"even if [a] lower court thinks the precedent is in tension with 'some other line of decisions.'" *Mallory v. Norfolk Southern Ry. Co.*, 600 U.S. 122, 136 (2023).

This binding Supreme Court precedent—applicable in legislative immunity and legislative privilege cases alike—is presumably *why* federal circuits across the country hold that an executive officer like a Governor may invoke legislative privilege.

The Eleventh Circuit, for example, holds that: "The privilege protects the legislative process itself, and therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation." *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015). The First Circuit, likewise, holds that "legislative privilege applies" to a "former Governor, though not a member of the state legislature." *Am. Trucking Ass'n v. Alviti*, 14 F.4th 76, 87, 91 n.8 (1st Cir. 2021). And the Third Circuit held that New Jersey "Governor McGreevey's … actions are properly characterized as legislative and are entitled to immunity." *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007).

Members of this Court have cited some of these decisions approvingly. *See, e.g.*, *Veasy v. Abbott*, 830 F.3d 216, 287 n.14 (5th Cir. 2016) (en banc) (Jones, Jolly, Smith, Clement, Owen, J.J., concurring in part and dissenting in part) (citing *In re Hubbard*). There is no good reason to begin steering the Fifth Circuit away from its sister circuits on this important issue. To that end, the Court could revise footnote 3 to clarify that executive officers, like a Governor, are eligible for protection by the legislative privilege in an appropriate case. Alternatively, the Court could simply omit footnote 3 to avoid inadvertently undercutting the rule of orderliness and neglecting Supreme Court precedent.

II. At the Very Least, the Panel May Wish to Narrow Footnote 3 Because Caselaw Supports the Invocation of Legislative Privilege by the Governor.

Even if courts might disagree about whether legislative privilege applies to executive officers generally, precedent supports its application to the Texas Governor specifically. Last month, a three-judge district court in this Circuit—including one member of this Court—repeatedly approved the Governor's invocation of legislative privilege.

In *LULAC v. Abbott*, plaintiffs sought to inquire into gubernatorial discussions and deliberations concerning possible legislation. When the Governor's counsel asserted legislative privilege, plaintiffs objected that the Governor was an executive official and suggested that any privilege was waived by the involvement of third parties. Tr. of Proceedings Held on A.M. of Oct. 7, 2025, No. 3:21-cv-259, at 28–29, 37 (W.D. Tex.). After being pointed to this Court's 2023 decision holding that legislative privilege encompasses communications with third parties and its 2024 decision holding that legislative privilege hews to a century of Supreme Court precedent on legislative immunity, the three-judge panel sustained the Governor's invocation of legislative privilege six different times. *Id.* at 28, 30, 37, 60, 84, 156.

In fact, the panel sustained the privilege even after plaintiffs filed a motion to reconsider. *See* Oral Order, No. 3:21-cv-259 (W.D. Tex. Oct. 8, 2025) (Guaderrama, Smith, Brown, J.J.); Tr. of Proceedings Held on A.M. of Oct. 8, 2025, No. 3:21-cv-259, at 118 (W.D. Tex.). In the process, the

panel took the admirable step of revisiting one of its own prior decisions. In 2022, the panel had issued an (unpublished) decision denying legislative privilege based on an *Erie* guess about how state courts would classify the Governor's veto power. *LULAC v. Abbott*, No. 3:21-cv-259, 2022 WL 3233406, at *1–2 (W.D. Tex. Aug. 10, 2022). The state case that decision relied on—*In re Turner*, 627 S.W.3d 654 (Tex. 2021)—did not involve a Governor's assertion of legislative privilege at all. And the prior decision did not discuss the Supreme Court precedent recited above. Even so, plaintiffs sought to wield law of the case to blind the panel to this Court's subsequent precedent clarifying the privilege. *Compare* Mot. for Reconsideration, No. 3:21-cv-259, ECF 1260 (W.D. Tex. Oct. 7, 2025), *with* Resp. in Opposition, No. 3:21-cv-259, ECF 1262 (W.D. Tex. Oct. 8, 2025).

The panel rightly revisited its earlier decision based on the clarity provided by the Fifth Circuit's more recent, and binding, decisions on legislative privilege. This had the added benefit of harmonizing decisional law on the Texas Governor. In *Texas v. Holder*, a three-judge panel in the U.S. District Court for the District of Columbia held that legislative privilege shielded communications with Texas Governor Rick Perry concerning a possible special legislative session. No. 1:12-cv-128, 2012 WL 13070113, at *1 (D.D.C. June 7, 2012). Specifically, the court held that "state executive officials 'are entitled to legislative immunity when they perform legislative functions.'" *Ibid.* (quoting *Bogan*, 523 U.S.

at 55). Just as Judge Willett observed in 2023's *La Union del Pueblo Entero* decision, this immunity carries with it "a testimonial and evidentiary privilege." *Ibid.* And the Governor's functions of "convening the legislature and placing items at the top of its agenda" clearly "constitute 'integral steps in the legislative process.'" *Ibid.* (quoting *Bogan*, 523 U.S. at 55).

It would be a shame if brief language in a footnote re-introduced confusion and discord about the Governor's legislative privilege, so soon after recent decisions helpfully clarified its scope. At the very least, then, the panel could narrow footnote 3 to say that, regardless of the privilege's admitted application to at least some executive officers like a Governor, the panel need not address its application *vel non* to the specific executive officer at issue here—namely, a local superintendent.

CONCLUSION

The panel may wish to clarify its opinion to confirm that executive officers are eligible for protection by the legislative privilege.

Respectfully submitted.

GREG ABBOTT
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CERTIFICATE OF SERVICE

On November 19, 2025, 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 Microsoft Defender and is free of viruses.

/s/ Trevor W. Ezell
TREVOR W. EZELL

CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 1,810 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 Century Schoolbook) using Microsoft Word (the same program used to calculate the word count).

/s/ Trevor W. Ezell
TREVOR W. EZELL

TAB J

United States Court of Appeals

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OFFICE OF THE CLERK

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December 03, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-20256 Arnold v. Barbers Hill Indep Sch Dist
USDC No. 4:20-CV-1802

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Dantrell Johnson

By: _____
Dantrell L. Johnson, Deputy Clerk
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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 3, 2025
Lyle W. Cayce
Clerk

No. 23-20256

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,

Plaintiffs—Appellees,

versus

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1802

ON PETITION FOR REHEARING EN BANC

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R.

APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

TAB K

No. 23-20256

IN THE

United States Court of Appeals for the Fifth Circuit

EVERETT DE'ANDRE ARNOLD, ET AL.,
Plaintiffs-Appellees,

v.

BARBERS HILL INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellants.

OPPOSED MOTION TO STAY MANDATE

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

Appellants Barbers Hill Independent School District (the District), Barbers Hill Independent School District Board of Trustees (the Board), Fred Skinner, and Greg Poole (collectively, the District Parties) move to stay this Court's mandate under Fed. R. App. P. 41(d)(1). In support of this motion, the District Parties show the following:

1. This appeal concerns the contours of the legislative privilege for local legislators. The district court ordered Superintendent Greg Poole

and former-Board President Fred Skinner to sit for depositions and disclose information subject to the privilege. ROA.4446–48. The District Parties appealed, but this Court declined to exercise jurisdiction and denied rehearing. *Arnold v. Barbers Hill Indep. Sch. Dist.*, 157 F.4th 749, 753 (5th Cir. 2025); *Arnold v. Barbers Hill Indep. Sch. Dist.*, No. 23-20256, Dkt. 130-2 (5th Cir. Dec. 3, 2025).

2. This Court's mandate shall issue seven days after the petition for rehearing was denied. Fed. R. App. P. 41(b). The District Parties may move to stay issuance of the mandate pending the disposition of a petition for a writ of certiorari. *Id.* 41(d)(1). The Court should grant the motion if the proposed petition "would present a substantial question and [ ] there is good cause for a stay." *Id.* 41(d)(1).

3. The District Parties intend to file a petition for a writ of certiorari with the United States Supreme Court. Thus, to preserve their rights, the District Parties move for a stay. Both elements under Rule 41(d)(1) are met here.

4. Taking the elements in reverse order, if the Court does not stay the mandate, Superintendent Poole and former-Board President Skinner will be forced to disclose information subject to the legislative

privilege. And once information subject to the privilege is shared, that harm can't be undone; the "cat is out of the bag," and the issues will be mooted. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.); *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 443, 448 (5th Cir. 2019) ("once confidential information is released, there is no going back"). The permanent nature of the harm to the District Parties' rights means "good cause" exists for a stay. *See* Fed. R. App. P. 41(d)(1).

5. Next, there are several "substantial question[s]," as well. *Id.* Among others, the District Parties intend to raise the following questions to the Supreme Court:

> (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 District Parties briefly address each question in turn.

6. *First*, the prudential standing question. This Court declined to exercise jurisdiction for "prudential" reasons. *Arnold*, 157 F.4th at 753. But over ten years ago, the Supreme Court explained that courts have a

"virtually unflagging" duty to exercise jurisdiction. *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). "Prudential" reasons aren't a sufficient basis to fail to do so. *Id.*

7. Following *Lexmark*, some circuits don't apply prudential standing doctrines, while others have questioned their future vitality. *See, e.g.*, *Trantham v. Tate*, 112 F.4th 223, 233–24 (4th Cir. 2024); *In re Schubert*, 2023 WL 2663257, at *2 (6th Cir. Mar. 28, 2023); *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020); *In re Capital Contracting Co.*, 924 F.3d 890, 896–97 (6th Cir. 2019); *In re AIO US, Inc.*, 672 B.R. 261, 272 (D. Del. 2025) ("*Lexmark* accordingly marked the death knell of the 'prudential standing' doctrine.").

8. Even some judges on this Court have questioned it. Judge Oldham, for instance, wrote as follows in 2023:

> After *Lexmark*, I harbor doubt as to the validity of prudential standing doctrines like the person aggrieved test. . . .
>
> Several of our sister circuits have either questioned the continuing viability of this doctrine, or narrowed it, in the wake of *Lexmark*. *See In re Schubert*, No. 21-3969, 2023 WL 2663257, at *3 & n.2 (6th Cir. 2023) (Thapar, J.) (suggesting the "person aggrieved" test may no longer be good law); *Matter of Petrone*, 754 F. App'x 590, 591 (9th Cir. 2019) (mem.) (recasting the "person aggrieved" test as a flavor of *Lexmark*'s zone-of-interest test); *In re Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1325 n.3 (11th Cir. 2014) (deciding that after

> *Lexmark*, the person-aggrieved test does not speak to subject-matter jurisdiction). Other circuits have noted possible reverberations from *Lexmark* but declined to measure them. *See In re GT Automation Group, Inc.*, 828 F.3d 602, 605 n.1 (7th Cir. 2016) (raising, but sidestepping, the question of whether prudential bankruptcy rules survive Lexmark); *In re Kaiser Gypsum Company, Inc.*, 60 F.4th 73, 83–84 (4th Cir. 2023) (resolving a party's *Lexmark*-based challenge to the person-aggrieved test on different grounds).
>
> All that said, our precedent is what it is. And I do not question my esteemed colleagues' application of it.

Matter of Salubrio, L.L.C., 2023 WL 3143686, at *4–5 (5th Cir. Apr. 28, 2023) (Oldham, J., dubitante) (also noting "prudential standing could be on its last leg").

9. *Second*, the process to invoke the privilege. This Court opted to join several district courts in holding that the government can't file a motion for protection for its non-party legislators. *Arnold*, 157 F.4th at 753 (collecting cases) (citations omitted). However, the panel's decision wasn't grounded in unanimous authority. Indeed, it contradicts both in-circuit and out-of-circuit cases. *See, e.g.*, *DoorDash, Inc. v. City of New York*, 780 F. Supp. 3d 434, 443 n.2 (S.D.N.Y. 2025); *Doe v. Metro. Gov't of Nashville & Davidson Cnty.*, 2021 WL 5882653, at *2 (M.D. Tenn. Dec. 13, 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1181 (9th Cir. 2018);

Cunningham v. Chapel Hill Indep. Sch. Dist., 438 F. Supp. 2d 718, 719–20 (E.D. Tex. 2006).

10. The petition is due 90 days after the denial of the petition for rehearing. Supreme Court R. 13(1), (3); *Wilson v. Cain*, 564 F.3d 702, 706 (5th Cir. 2009). Because the Court denied rehearing on December 3, 2025, the petition is due on March 3, 2026. The District Parties request a stay until the later of (1) March 4, 2026, the date after the petition's current due date; or (2) the date the Supreme Court makes a final determination on the petition. If the Supreme Court extends the filing deadline, the District Parties will advise the Court. Fed. R. App. P. 41(d)(2)(B).

11. The undersigned has conferred with opposing counsel, who indicated Appellees oppose this request.

PRAYER

For these reasons, the District Parties ask the Court to stay the mandate until the later of (1) March 4, 2026, subject to any extensions provided for in Fed. R. App. P. 41; or (2) the date the Supreme Court makes a final determination on the petition.

Respectfully submitted,

ROGERS, MORRIS & GROVER, L.L.P.

/s/ Jonathan Griffin Brush

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2025, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record.

I further certify that (1) the required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I further certify that I will mail the correct number of paper copies of the foregoing document to the Clerk of the Court when requested.

/s/ Jonathan Griffin Brush

Jonathan Griffin Brush
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 40, the undersigned certifies:

1. This Brief complies with the type-volume limitations of FED. R. APP. P. 40(d)(3)(A) because:

X this brief contains **1,146** words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f), *or*

this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

X this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2025 in 14-point Century font in text and 12-point Century font in footnotes, *or*

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3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 40(d)(3)(A) may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

/s/ Jonathan Griffin Brush

_____

Jonathan Griffin Brush
Attorney for Appellants

TAB L

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 10, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-20256 Arnold v. Barbers Hill Indep Sch Dist
USDC No. 4:20-CV-1802

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Dantrell Johnson

By: _____
Dantrell L. Johnson, Deputy Clerk
504-310-7689

Mr. Jonathan Griffin Brush
Ms. Ashley Michelle Burrell
Ms. Amy Dawn Demmler
Mr. Trevor W. Ezell
Mr. Evan Frohman
Mr. Victor M. Jones
Ms. Alaizah Koorji
Mr. Richard Alan Morris
Ms. Janai S. Nelson
Ms. Patricia Okonta
Mr. Nicholas Petree
Mr. Nik Soni
Ms. Alexandra Sloane Thompson
Ms. Roxanne Tizravesh
Mr. Robert Conor Tomalty
Ms. Michaele N. Turnage Young
Mr. Joseph Wong

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 10, 2025
Lyle W. Cayce
Clerk

No. 23-20256

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,

Plaintiffs—Appellees,

versus

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1802

ORDER:

The Appellants' opposed motion for stay of the mandate pending petition for writ of certiorari is DENIED.

KURT D. ENGELHARDT
United States Circuit Judge

TAB M

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 10, 2025

Mr. Nathan Ochsner
Southern District of Texas, Houston
United States District Court
515 Rusk Street
Room 5300
Houston, TX 77002

No. 23-20256 Arnold v. Barbers Hill Indep Sch Dist
USDC No. 4:20-CV-1802

Dear Mr. Ochsner,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Dantrell Johnson

By: _____
Dantrell L. Johnson, Deputy Clerk
504-310-7689

cc:
Mr. Jonathan Griffin Brush
Ms. Ashley Michelle Burrell
Ms. Amy Dawn Demmler
Mr. Trevor W. Ezell
Mr. Evan Frohman
Mr. Victor M. Jones
Ms. Alaizah Koorji
Mr. Richard Alan Morris
Ms. Janai S. Nelson
Ms. Patricia Okonta
Mr. Nicholas Petree
Mr. Nik Soni
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Ms. Roxanne Tizravesh
Mr. Robert Conor Tomalty
Ms. Michaele N. Turnage Young
Mr. Joseph Wong

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 3, 2025
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Clerk

No. 23-20256

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,

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versus

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1802

JUDGMENT

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges*.

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the appeal is DISMISSED for lack of jurisdiction.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See FED. R. APP. P. 41(B). The court may shorten or extend the time by order. See 5TH CIR. R. 41 I.O.P.

Certified as a true copy and issued as the mandate on Dec 10, 2025

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 3, 2025
Lyle W. Cayce
Clerk

No. 23-20256

EVERETT DE'ANDRE ARNOLD; KADEN BRADFORD; SANDY ARNOLD,

Plaintiffs—Appellees,

versus

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; BARBERS HILL INDEPENDENT SCHOOL DISTRICT'S BOARD OF TRUSTEES; FRED SKINNER; GREG POOLE,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:20-CV-1802

Before HIGGINSON, WILLETT, and ENGELHARDT, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:

Barbers Hill Independent School District ("BHISD") instituted a "Hair Policy" in 2019 restricting the length of male students' hair. Plaintiffs, former students and parents in BHISD, allege the Hair Policy and its enforcement amount to race and sex discrimination and infringe students' freedom of expression. As discovery unfolded, plaintiffs sought to depose Superintendent Greg Poole ("Poole") and former Trustee Board President

Fred Skinner ("Skinner"). BHISD, Poole, Skinner, and the Board of Trustees now present an interlocutory appeal concerning legislative privilege.

I.

We draw the following allegations from plaintiffs' Second Amended Complaint. BHISD maintains a Student Code of Conduct, setting standards for behavior and discipline within the district. Hair-length restrictions have long existed in the Student Code of Conduct, limiting the ways male students could wear their hair. Halfway through the 2019–2020 school year, the Board of Trustees amended the hair policy. The new policy provided:

> Male students' hair will not extend, at any time, below the eyebrows, or below the ear lobes. Male students' hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down.

Notably, plaintiffs allege that the administrators restricted hair length when worn down—regardless of whether the student wears his hair up while at school—and removed express language that previously permitted cornrows or locs that complied with the rest of the policy. Plaintiffs sued BHISD, alleging the Hair Policy violates the Fourteenth Amendment's Due Process and Equal Protection guarantees, the First Amendment's speech and expression protections, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Texas Civil Practice and Remedies Code § 106.001.

Procedural history illuminates the issues on appeal. Poole, Skinner, and BHISD's Board of Trustees are designated appellants. But Poole, Skinner, and the Board of Trustees are not parties under the operative complaint. During discovery, plaintiffs sought to depose Poole and Skinner. While BHISD initially consented to the depositions, it maintained that both

deponents were entitled to legislative privilege over certain inquiries. To that end, BHISD moved for a protective order restricting plaintiffs from asking Poole and Skinner about the Board members' "subjective intentions, motivations, thought processes, and any other information not available to the public concerning the adoption of [BHISD's] male hair length policy."

Appellants appeal just the district court's partial denial of BHISD's motion for protection and the discovery policy it outlined. On the denial front, the district court refrained from deciding any privilege issues. It concluded that it would "be better positioned" to decide whether the privilege applied once presented with specific questions and invocations of the privilege at the depositions. In short, the fact-intensive legislative privilege issues were not yet ripe. But the district court partially granted the motion by establishing a procedure for resolving those privilege-application questions. It adopted an "assert-disclose-review" approach: 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. 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. The district court credited *League of United Latin American Citizens v. Abbott* (*LULAC I*), No. EP-21-CV-00259, 2022 WL 1570858 (W.D. Tex. May 18, 2022), for the privilege procedure.[1]

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[1] A motions panel of this court commended the *LULAC I* district court's procedure as "carefully crafted." *League of United Latin Am. Citizens v. Abbott* (*LULAC II*), No. 22-50407, 2022 WL 2713263, at *2 (5th Cir. May 20, 2022) (denying motion to stay pending appeal). The parties discuss *LULAC II* at length, but *LULAC II* is an unpublished motions-panel decision. *See Dick v. Colo. Hous. Enters., L.L.C.*, 872 F.3d 709, 711–12 (5th Cir. 2017) (explaining unpublished opinions are not controlling precedent). To preview, we dismiss this appeal on jurisdictional grounds. So, we cannot decide—at this

Shortly thereafter, BHISD, the Board of Trustees, Poole, and Skinner appealed. Appellants contend the district court abused its discretion by compelling disclosure of privileged material, eviscerating the privilege. Back in the district court, BHISD moved to stay the depositions pending appeal, which the district court denied. BHISD later refused to produce Poole and Skinner for their depositions. And appellants then moved this court to stay the district court proceedings. Meanwhile, the district court compelled BHISD to produce Poole and Skinner for their depositions and authorized plaintiffs to seek sanctions. BHISD then moved this court for an emergency administrative stay of the district court proceedings, which the court granted as a temporary administrative stay. But the court carried with the case the motion to stay pending appeal.

Appellants ask the court to decide whether the district court abused its discretion by partially denying the motion for protection and ordering legislators to respond by answering questions such that the testimony might possibly invade the legislative privilege. Legislative privilege is held by the legislator. *La Union del Pueblo Entero v. Abbott* (*LUPE*), 93 F.4th 310, 321 (5th Cir. 2024). Here, the privilege holders have not yet invoked the privilege or otherwise participated in the proceedings. As explained below, prudential standing considerations deprive the court of jurisdiction over this appeal.

II.

Plaintiffs-Appellees challenged appellate jurisdiction, invoking the collateral order doctrine and (albeit briefly) Poole's and Skinner's failure to individually assert the legislative privilege. Although plaintiffs' argument on the latter point is brief, it generates prudential standing concerns that the

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juncture—whether the district court's compulsive "assert-disclose-review" approach merely toes the legislative-privilege line or crosses it.

court addresses *sua sponte*. *See Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt.*, 389 F.3d 491, 498 (5th Cir. 2004) ("Although defendants have not explicitly raised the issue of [constitutional or prudential] standing, we may consider it *sua sponte*."). Even if the district court's order fits within a category of orders that are immediately appealable as collateral orders, we lack jurisdiction anyway: BHISD, the non-party legislators Poole and Skinner, and the non-party Board of Trustees do not have appellate standing.

A.

"The legislative privilege is personal to the legislator." *LUPE*, 93 F.4th at 321 (citing *Gravel v. United States*, 408 U.S. 606, 616 (1972)); *see id.* at 321–22 (recognizing legislators, aides, assistants, and third parties performing legislative acts can invoke the privilege). Multiple district courts have concluded, following that rationale, that the government entity or legislative body itself cannot invoke the legislative privilege on an individual legislator's behalf. *See, e.g.*, *Perez*, 2014 WL 106927, at *1; *A Helping Hand, LLC v. Baltimore Cnty.*, 295 F. Supp. 2d 585, 590 (D. Md. 2003); *ACORN (N.Y. Ass'n of Cmty. Orgs. For Reform Now) v. Cnty. of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007). Our court has not directly answered whether a government entity can invoke the legislative privilege on behalf of individual legislators. It likewise has not addressed who has standing to appeal an order relating to the privilege in such a case. But our circuit's appellate standing precedents, alongside the Eleventh Circuit's recent approach in nearly identical circumstances, provide apt guidance.

Start with a primer on appellate standing. "It is a central tenet of appellate jurisdiction that a party who is not aggrieved by a judgment of the district court has no standing to appeal it." *United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) (quoting *Ward v. Santa Fe Indep.*

Sch. Dist., 393 F.3d 599, 603 (5th Cir. 2004)). Relevant here, "a party generally may not appeal a district court's order to champion the rights of another." *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 208 (5th Cir. 1994); *Odneal v. Pierce*, 324 F. App'x 297, 302 (5th Cir. 2009) ("An indirect stake in the claims of another party is not sufficient to create standing on appeal."); *In re Deepwater Horizon*, 857 F.3d 246, 252–53 (5th Cir. 2017) (recognizing that prudential standing allows appellant to protect only its own interests, unless appellant's and third party's interests coincide and a genuine obstacle prevents third party from protecting his own interests). This third-party standing rule derives from prudential limitations to our jurisdiction, not constitutional ones. *See In re Deepwater Horizon*, 857 F.3d at 252. Applying a similar third-party standing concept, the Eleventh Circuit has held that a government entity has no standing to appeal an order denying an individual immunity, even if the government entity moved to protect that immunity. *See Kimberly Regenesis, LLC v. Lee Cnty.*, 64 F.4th 1253, 1260 (11th Cir. 2023).

Next, consider our circuit's non-party standing framework—also implicating prudential, not constitutional, standing limits. *Castillo v. Cameron Cnty.*, 238 F.3d 339, 349 n.16 (5th Cir. 2001). Ordinarily, "only parties to a lawsuit, or those that properly become parties," may appeal. *Lewis v. Crochet*, 105 F.4th 272, 281 (5th Cir. 2024) (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam)). But a non-party "may be allowed to appeal" an order that "affects his interests." *Castillo*, 238 F.3d at 349. To determine whether a non-party fits that bill, our circuit assesses "(1) 'whether the nonpart[y] actually participated in the proceedings below,' (2) whether 'the equities weigh in favor of hearing the appeal,' and (3) whether 'the nonpart[y] ha[s] a personal stake in the outcome.'" *LUPE*, 93 F.4th at 315 (quoting *Castillo*, 238 F.3d at 349); *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 249 (5th Cir. 2009) (explaining non-parties "are generally not

permitted to appeal a ruling in which they did not participate").[2] When review is sought "after a party is dismissed from the underlying suit, that party is often allowed to appeal," but only if the order "affects its interests" under the three-part test. *Lewis*, 105 F.4th at 281 (quotation cleaned up).

In *LUPE*, both party and non-party appellants sought review of a district court's order concluding several documents were not protected by legislative privilege. 93 F.4th at 314; *see also id.* at 315 (describing ruling ordering non-legislators to submit to depositions and produce non-privileged documents). The court assessed three jurisdictional issues: (1) whether the state legislators had standing to appeal as non-parties; (2) whether the discovery order was subject to interlocutory review; and (3) whether the issue was moot. *Id.* at 315–20. Only *LUPE*'s non-party standing analysis informs the current case. The *LUPE* opinion explained all three *Castillo* elements favored non-party standing. The legislators had "participated adequately" at the district court because they had asserted their legislative privileges in response to third-party subpoenas seeking the same documents at issue in the appeal, and filed briefs and attended hearings about the legislative privilege. *Id.* at 315–16; *see also United States v. Fluitt*, 99 F.4th 753, 762 (5th Cir. 2024) (concluding third parties "participated in the discovery dispute" by asserting privilege, opposing motion to compel, and appealing magistrate judge's order

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[2] Our circuit has never squarely decided whether the non-party standing test identifies required elements or weighted factors. Some of our cases describe the test in the conjunctive—often concluding the appellant has satisfied all three elements. *See, e.g.*, *Castillo*, 238 F.3d at 349–50. Elsewhere, our circuit has described—albeit in dicta—non-party standing's "vague balancing test." *In re Lease Oil Antitrust Litig.*, 570 F.3d at 249. We now clarify that the non-party standing test requires appellant to satisfy all three elements. As implied in *In re Lease Oil*, a balancing test would invite heightened subjectivity, and uncertainty, to non-party prudential standing. *See id.* (suggesting moving to intervene is a "much more certain way of proceeding" than relying on the non-party standing balancing test). Such an approach could lead to inconsistent outcomes and conflicts with precedent describing the test in the conjunctive.

to district judge). The equities weighed in favor of non-party standing because the district court had ordered production of potentially privileged documents and the legislators had "no other mechanism to vindicate their potentially meritorious claims of legislative privilege." *LUPE*, 93 F.4th at 316. And the public interest in preserving the privilege was a "high-order value." *Id.* at 317. What's more, the legislators had a personal stake in the outcome—they created or reviewed the documents while performing their legislative activities. *Id.* at 318. So, the non-party legislators had standing to appeal the denial of the privilege.

The Eleventh Circuit recently combined these two standing concepts, dismissing a legislative-privilege-based appeal for lack of jurisdiction. In the unpublished *Pen American Center, Inc. v. Escambia County School District*, the Eleventh Circuit rejected a school board's attempt to assert legislative privilege on behalf of its members. No. 24-13896, 2025 WL 1937264, at *1 (11th Cir. July 15, 2025) (per curiam). There, plaintiffs sought to depose individual board members, seeking information about their motives in removing certain books from schools. *Id.* at *2. The school board moved for a protective order, asserting legislative privilege. *Id.* The Eleventh Circuit dismissed the appeal. *Id.* at *1. The school board (a party) "lack[ed] standing to assert the legislative privilege of its members, who each individually possess[ed] the privilege." *Id.* at *4. And the appealing school board members (non-parties) also lacked standing to challenge the denial of the protective order. *Id.* While the board had attached declarations by the board members expressing their intentions to invoke the privilege, the board members had not moved, appeared, or "participate[d] in any other way in the proceedings." *Id.* So, the Eleventh Circuit dismissed the appeal for lack of jurisdiction. *Id.* at *5.

B.

Turning to the appeal at issue, BHISD, Poole, Skinner, and the Board of Trustees all appealed. Recall that BHISD filed the motion for protection asserting the legislative privilege. Applying our circuit's third-party and non-party standing limitations, we conclude none of the appellants has standing to challenge the district court's order on appeal. The dispositive circumstance here: no appellant with authority to invoke the privilege has invoked it yet and the non-party legislators have not otherwise participated adequately to confer standing.

1.

Start with BHISD. Although BHISD is a party in the district court, and its motion is the subject of this appeal, BHISD itself does not hold the "personal" legislative privilege. *See LUPE*, 93 F.4th at 321. Because the privilege is personal in nature, many courts have concluded an entity like BHISD cannot assert that privilege on behalf of individual legislators. *Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *4 ("[T]he [asserting entity] lacks standing to assert the legislative privilege of its members, who each individually possess the privilege insofar as they are entitled to it."); *Perez*, 2014 WL 106927, at *1 ("[T]he State of Texas [does not have] standing to assert the legislative privilege on behalf of any legislator . . . that may be deposed. Since no person entitled to assert any privilege has done so, the pending motion [for protective order] is denied as premature."); *Gilby v. Hughs*, 471 F. Supp. 3d 763, 767 (W.D. Tex. 2020) (concluding the secretary of state lacked standing to invoke legislative privilege on behalf of legislators); *A Helping Hand, LLC*, 295 F. Supp. 2d at 590 ("[T]he County Council's motion [for protective order] must be denied because the Council may not assert the privilege on its members' behalf."); *ACORN*, 2007 WL 2815810, at *4 (explaining "it is not up to the Board to assert or waive the privilege; the Board members must do so for themselves," but assuming the privilege was asserted individually (quotation cleaned up)).

The underlying right allegedly infringed by the district court's order belongs to the individual legislators, not BHISD. While BHISD did not receive the relief it sought from its motion, BHISD had no standing to seek that relief on behalf of the legislators in the first place. As a result, we conclude BHISD is not aggrieved by the district court's order and, accordingly, lacks third-party standing to appeal the order for allegedly vitiating the legislative privilege. *See Rohm & Hass Tex., Inc.*, 32 F.3d at 208 ("[A] party generally may not appeal a district court's order to champion the rights of another[.]"); *Kimberly Regenesis, LLC*, 64 F.4th at 1260 (concluding quasi-judicial immunity did not belong to appellant county, so "county was not aggrieved by" and "ha[d] no standing to appeal" order denying county's motion for protection on immunity grounds).

2.

Consider, next, non-party legislators Poole[3] and Skinner. Recall the three non-party standing elements: (1) participation in the district court; (2) equitable considerations favoring appeal; and (3) personal stake in the outcome. *LUPE*, 93 F.4th at 315; *Castillo*, 238 F.3d at 349 (describing the three-part test). Following *LUPE*'s analysis outlined above, assume the equitable-considerations and personal-stake elements support standing. Even if those prongs favor standing, Poole and Skinner have not "participated adequately" at the district court to appeal this particular order. *See LUPE*, 93 F.4th at 316.

To be sure, Poole and Skinner were involved—once upon a time—in the district court proceedings. They were original parties to the action. But,

[3] The parties questioned whether Superintendent Poole is entitled to legislative privilege as an executive officer. We need not resolve that question because even if Poole could invoke the privilege here, he lacks standing to appeal the district court's order.

as best the court can tell, they were involved in no way after their dismissal, including in the proceedings on the motion for protective order. *But see LUPE*, 93 F.4th at 315–16 (rejecting argument that the participation inquiry turns on just the "exact proceedings giving rise to the order on appeal"). Critically, Poole and Skinner have not yet asserted the privilege for themselves or otherwise objected in the district court. Because they have not yet actually asserted the privilege (or otherwise participated in the two years between their dismissal and BHISD's motion), we conclude Poole and Skinner were not involved adequately enough to have appellate standing on this issue.[4] *See Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *4 (concluding non-party board members themselves lacked standing for failure to participate in district court proceedings beyond affidavits affirming intention to invoke the privilege); *Kimberly Regenesis, LLC*, 64 F.4th at 1262 (dismissing individual commissioner's appeal for failure to participate at district court by moving for protective order, attending hearings on motion, filing briefs, or objecting in any manner to rejection of quasi-judicial immunity); *cf. LUPE*, 93 F.4th at 315–16 (concluding non-party legislators had participated sufficiently for standing by asserting legislative privilege themselves and filing briefs on application of privilege in district court); *Overby*, 224 F.2d at 162 (allowing non-party to appeal order denying claim of privilege and demanding document production where appellant had asserted privilege and claimed a property right in the documents).

3.

Lastly, the Board of Trustees lacks standing under either of the two rationales above. Even if the Board had tried to assert the legislative

[4] In finding there is no standing, we also decline to address the other antecedent issue of waiver. The parties have raised this issue extensively, however it has not been decided by the district court and is unnecessary to reach for the purposes of this decision.

privilege, it (like BHISD) is unable to assert the legislative privilege on behalf of the individual legislators. *Pen Am. Ctr., Inc.*, 2025 WL 1937264, at *5 ("[T]he legislative privilege asserted belongs to the Board members not the Board . . . ."). And the non-party Board has not participated adequately in the proceedings below to confer standing, even if the privilege were properly invoked. The Board did not file an amicus brief about these issues—or its interest in preserving the privilege—in the district court. It did not appear at any of the hearings surrounding the legislative privilege. And it was dismissed as a party when plaintiffs filed their Second Amended Complaint. Any way we slice it, the non-party Board of Trustees lacks standing to appeal.

III.

This case's cart precedes its horse. Appellants seek to challenge the district court's order on a legislative privilege issue before any legislator has asserted the privilege. BHISD is not aggrieved by the discovery order, so it lacks third-party standing. The individual legislators have not participated adequately in the district court to confer non-party standing under *Castillo*'s three-part test. And the Board of Trustees—under either theory—also lacks standing to appeal. Absent an appellant with standing, the court lacks jurisdiction and DISMISSES this appeal.[5] The pending motion to stay pending appeal is DISMISSED as moot.

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[5] We decline to reach the legislative privilege issues through appellants' alternative mandamus argument under 28 U.S.C. § 1651. The writ is a "drastic and extraordinary remedy" for "really extraordinary causes." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). Appellants give the issue short shrift, declining to even address whether the mandamus elements are satisfied such that this is an extraordinary cause. *In re Westcott*, 135 F.4th 243, 245 (5th Cir. 2025) (outlining Supreme Court's "three conditions that must be satisfied before a writ of mandamus may issue"); *Cheney*, 542 U.S. at 380–81 (explaining "three conditions must be satisfied before [writ] may issue" and placing burden on petitioner).