No. 21-60312

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JACKSON MUNICIPAL AIRPORT AUTHORITY; BOARD OF COMMISSIONERS OF THE JACKSON MUNICIPAL AIRPORT AUTHORITY, each in his or her official capacity as a Commissioner on the Board of Commissioners of the Jackson Municipal Airport Authority; DOCTOR ROSIE L. T. PRIDGEN, in her official capacity as a Commissioner on the Board of Commissioners of the Jackson Municipal Airport Authority; REVEREND JAMES L. HENLEY, JR., in his official capacity as a Commissioner on the Board of Commissioners of the Jackson Municipal Airport Authority; LAWANDA D. HARRIS, in her official capacity as a Commissioner on the Board of Commissioners of the Jackson Municipal Airport Authority; VERNON W. HARTLEY, SR., in his official capacity as a Commissioner on the Board of Commissioners of the Jackson Municipal Airport Authority; EVELYN O. REED, in her official capacity as a Commissioner on the Board of Commissioners of the Jackson Municipal Airport Authority; DOCTOR ROSIE L. T. PRIDGEN, individually as citizens of the City of Jackson, Mississippi, on behalf of themselves and all others similarly situated; LAWANDA D. HARRIS, individually as citizens of the City of Jackson, Mississippi, on behalf of themselves and all others similarly situated; VERNON W. HARTLEY, SR., individually as citizens of the City of Jackson, Mississippi, on behalf of themselves and all others similarly situated; EVELYN O. REED, individually as citizens of the City of Jackson, Mississippi, on behalf of themselves and all others similarly situated; JAMES L. HENLEY, JR., individually as citizens of the City of Jackson, Mississippi, on behalf of themselves and all others similarly situated,

Intervenors-Appellees

v.

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

Respondents-Appellants

On Appeal from the United States District Court
for the Southern District of Mississippi,
No. 3:16-cv-00246-CWR-FKB
District Judge Carlton Reeves

AMICUS BRIEF OF THE STATES OF LOUISIANA AND TEXAS IN SUPPORT OF RESPONDENTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the parties' briefs, have an interest in the outcome of this case:

Jeff Landry, Attorney General of Louisiana

Ken Paxton, Attorney General of Texas

Elizabeth Murrill, Counsel for *Amici Curiae*

/s/ Elizabeth B. Murrill
Elizabeth B. Murrill
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INTEREST OF AMICI CURIAE

Amici are the States of Louisiana and Texas. As sovereign States, *amici* have a compelling interest in guarding the power of their own legislatures—elected by their own citizens—against unlawful federal encroachment. The Tenth and Eleventh Amendments to the Constitution recognize the importance of federalism and of balancing power between the Federal government and the States. U.S. Const. amends. X, XI.

In particular, federal courts are sharply limited in their power to entertain suits against States or issue binding judgments against them. *Id.* amend. XI. While Congress can override State immunity in limited circumstances, it can do so "only by making its intention unmistakably clear in the language of the statute." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 471 (1987). The principle of federalism also extends to protect State officials against excessive federal oversight.

In this appeal, the Appellees ask a federal court to uphold subpoenas against eight members of a State Legislature. If these subpoenas are upheld, the legislators must either produce privilege logs documenting why numerous communications should remain private, or

else reveal private documents so that the court can properly consider the *motives* behind previous votes by these legislators.

Allowing a federal court to probe the motives of State legislators, or even forcing them to mount a detailed defense against such a probe, would undermine the principle of federalism and create an unnecessary split with the Fourth, Ninth, and Eleventh Circuits. In order to protect its own legislators against federal intrusions and ensure that they are not burdened by unlawful scrutiny under the rules of federal courts, *amici* submit this brief in support of reversal.

ARGUMENT

I. LEGISLATIVE PRIVILEGE APPLIES WITH FULL FORCE AGAINST REQUESTS FOR INFORMATION ABOUT STATE LEGISLATORS' MOTIVES FOR LEGISLATIVE VOTES AND LEGISLATIVE ENACTMENTS.

Legislative privilege has deep roots in our history and serves to preserve the separation of powers—both horizontal and vertical—within our government. Legislators must be able to freely discuss and debate ideas as they serve as representatives of the people and should not be subject to suit in courts based on a second-guessing of their motives. The Constitution provides that Senators and Representatives "shall not be

questioned in any other Place . . . for any Speech or Debate in either House." U.S. Const. art. I, § 6, cl. 1 (emphasis added).

Importantly, this clause protects legislators not merely against being imprisoned or fined based on what they say in legislative debate but against even being questioned over their words. "[L]egislators engaged 'in the sphere of legitimate legislative activity' . . . should be protected not only from the consequences of litigation's results, but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)); *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (stating that litigation should not "divert [Legislators'] time, energy, and attention from their legislative tasks to defend the litigation").

While the constitutional guarantee of privilege concerns federal legislators, the same principle also applies to State legislators. The Supreme Court has noted, "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded" as legislative privilege without making its intent expressly clear. *Tenney*, 341 U.S. at 376. The Court even doubted whether

Congress had *any* power "to limit the freedom of State legislators acting within their traditional sphere" but did not announce a holding on the question. *See id.*

To be sure, State legislators can be forced to reveal communications if they are under *criminal* investigation. *See United States v. Gillock*, 445 U.S. 360, 372 (1980); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). A State legislator, naturally, has no claim of privilege against the introduction of evidence of her criminal acts when being prosecuted for those acts.

But in *civil* proceedings, legislative privilege remains in full effect. *See Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416, 423 (D.C. Cir. 1995) ("The prohibition of civil actions is consistent, moreover, with the objective of preserving legislative independence . . . ."); *United States v. Craig*, 537 F.2d 957, 958 (7th Cir. 1976) (en banc). The Ninth Circuit has made clear that even an alleged constitutional violation is insufficient to overcome legislative privilege. *See Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) ("We recognize that claims of racial gerrymandering involve serious allegations . . . . But the factual record in this case falls short of justifying the 'substantial intrusion' into the legislative process" that would result from overriding

the privilege.); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) (stating that legislative testimony "may be barred by privilege" even in "extraordinary circumstances").

And the Eleventh Circuit in *In re Hubbard* recently held that "[legislative] privilege extends to discovery requests, even when the lawmaker is not a named party in the suit: complying with such requests detracts from the performance of official duties." 803 F.3d 1298, 1310 (11th Cir. 2015). The court reasoned, "Discovery procedures can prove just as intrusive" as being made "parties to a suit." *Id.* (quoting *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988)). The court then concluded: "The privilege applies with full force against requests for information about the motives for legislative votes and legislative enactments," and courts may not force legislators to reveal those motives in a civil case. *Id.*

Other courts have reached similar conclusions. *See, e.g.*, *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1988) ("[T]he doctrine of legislative immunity will not allow . . . legislators [to] testify as to their motives."); *Florida v. United States*, 886 F. Supp. 2d 1301, 1303 (N.D. Fla. 2012) (finding no case "in which a state legislator who has not agreed to testify

at a trial has been compelled to sit for a deposition addressing legislative functions")

Here, while *Hubbard* involved production of documents, compiling a privilege log is also a "discovery procedure[]." *See* 803 F.3d at 1303. Furthermore, it is hard to see how a court could compel State legislators to compile a log of information when it cannot compel them to produce the information itself. *See id.* (stating that "inquir[ing] into the motivation behind [a legislative act is] an inquiry that strikes at the heart of the legislative privilege").

In sum, State legislators have legislative privilege against federal civil discovery procedures inquiring into their motives for voting for or passing legislation. Under *Hubbard*'s reasoning, State legislators should not be required to produce a privilege log explaining why certain documents cannot be revealed because of that privilege. This Court should follow that reasoning to avoid an unnecessary circuit split.

II. THIS COURT'S DECISION IN *JEFFERSON PARISH GOVERNMENT* DOES NOT DICTATE A CONTRARY RESULT.

In *Jefferson Community Health Care Centers, Inc. v. Jefferson Parish Government*, this Court considered whether legislative privilege "bar[red] the adjudication of [a Section 1983] claim" against parish

councilmembers. 849 F.3d 615, 624 (5th Cir. 2017). The Court stated that "legislative privilege for state lawmakers is, at best, one which is qualified," that it "must be strictly construed," and that it should be "accepted only to the very limited extent." *Id.* (quoting *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 106927, at *1–2 (W.D. Tex. Jan. 8, 2014)). The Court then concluded: "At any rate, even assuming that the councilmembers' reasons for passing the resolutions are privileged in the sense that they cannot be directly compelled to disclose them, this evidentiary privilege cannot bar the adjudication of a claim." *Id.*

Jefferson's statements about legislative privilege for State legislators offer no meaningful answers to the question in this case. The Court was deciding a different issue between different parties with a different constitutional relationship.

First, the statement that legislative privilege "must be strictly construed," *see id.*, directly contradicts the United States Supreme Court's direction that legislative privilege "ought not to be construed strictly, but liberally." *Tenney*, 341 U.S. at 374 (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (Mass. 1808)); *see also Doe v. McMillan*, 459 F.2d 1304, 1312 n.14 (D.C. Cir. 1972), *aff'd in part, rev'd in part on other grounds*, 412

U.S. 306 (1973); *United States v. Johnson*, 337 F.2d 180, 188 (4th Cir. 1964) ("What we derive from this historical review of the congressional privilege is a firm conviction that the constitutional provision is to be interpreted liberally and not narrowly."), *aff'd*, 383 U.S. 169 (1966).

The *Jefferson* Court failed to engage with—or even mention—*Tenney*, instead drawing the "strictly construed" language from a district court opinion. *See* 849 F.3d at 624 (quoting *Perez*, 2014 WL 106927, at *1–2). The source of *Perez*'s language appears to be a 1980 Supreme Court case—*Trammel v. United States*—in which the Court considered whether to narrow the state-law privilege against adverse *spousal* testimony in federal criminal trials under Federal Rule of Evidence 501.[1] 445 U.S. 40, 43–50 (1980).

[1] In *Perez*, the district court stated: "The 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.'" 2014 WL 106927, at *1 (quoting *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 93–94 (S.D.N.Y. 2003)). In *Rodriguez*, the district court stated: "Privileges consequently 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.'" 280 F. Supp. 2d at 94 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). In *Trammel*, the Supreme Court stated: "Testimonial exclusionary rules and privileges . . . 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 truth.'" 445 U.S. at 50 (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). Quizzically, the *Elkins* opinion directs readers, "For dissenting opinion, see 80 S.Ct. 1453." 364 U.S. at 206.

How a court construes testimonial privileges under Rule 501 has no bearing on how it construes legislative privilege. The source of legislative privilege is constitutional, not statutory, with a history predating the United States. "This privilege 'has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries' and was 'taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 48–49 (1998) (quoting *Tenney*, 341 U.S. at 372); *see also United States v. Johnson*, 337 F.2d 180, 187–88 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966).

Even the inclusion of the Speech or Debate Clause in the United States Constitution "was a reflection of political principles already firmly established in the States.' *Tenney*, 341 U.S. at 373. In short, "it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Bogan*, 523 U.S. at 55 (quoting *Tenney*, 341 U.S. at 377).

Second, *Jefferson* was deciding a different question: whether legislative privilege *barred* the plaintiff's claims outright. 849 F.3d at 624 ("The Parish contends that JCHCC's claims are all barred by legislative immunity and privilege."). The Court was not considering whether parish

officials—let alone State legislators—could be forced to disclose internal communications in discovery.[2] The *evidentiary* protections of legislative privilege were not before the Court, and so, it did not engage in any meaningful analysis of the privilege in the evidentiary context.

Third, *Jefferson* involved different parties with a different constitutional relationship with the federal government—parish councilmembers there, State legislators here. 849 F.3d at 619. Parishes as political subdivisions and their governing bodies are "creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 (5th Cir. 1976) (citing *Williams v. Mayor & City Council of Balt.*, 289 U.S. 36, 40 (1933)).

States, by contrast, "retain 'a residuary and inviolable sovereignty.' They are not relegated to the role of mere provinces or political corporations . . . ." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39, at 245); *see also* U.S. Const. amend. X.

[2] State legislators cannot be directly sued for legislation that they pass or for the motives behind their votes. *See Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) ("[W]e have held that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities.").

While *Jefferson* was deciding a different issue, even if it had held that a federal court has authority to compel members of a State's political subdivision to participate in discovery, that authority does not—and should not—automatically extend to the State. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Imposing a litigation burden on a State's legislators implicates the careful balance between State and federal governments where imposing that same burden on officials of a municipal government simply does not.

Because *Jefferson* was deciding a different issue between different parties with a different constitutional relationship, all of its statements about the legislative privilege of *State legislators* are dicta. *Jefferson* does not—and should not—dictate the result in this case. This Court should instead follow the analysis of *Hubbard* to avoid upsetting the constitutional balance between federal and State powers.

III. AFFIRMING THE DECISION BELOW WILL DISRUPT SETTLED LAW

Forcing legislators to compile a privilege log giving their reasons for not revealing certain documents suggests that federal courts may supervise State legislators. Courts may impose this type of supervision in the criminal context, but never in the civil context. Outside of the narrow bounds of criminal investigations, federal officials should consider the official acts of State government bodies, not the motivations allegedly behind those acts.

Allowing enforcement of these subpoenas against Mississippi legislators will erode that long standing, bright line, civil-versus-criminal distinction. *See Gillock*, 445 U.S. at 373. The Court should not create unnecessary uncertainty in the law but should preserve a predictable, bright-line rule that respects State sovereignty and the balance of State and federal powers.

CONCLUSION

The Court should reverse the District Court's order and prevent enforcement of the subpoenas against the Mississippi legislators.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: June 30, 2021

/s/ Elizabeth Baker Murrill
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,449 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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