

# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

August 25, 2023

Lyle W. Cayce  
Clerk

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No. 21-60312

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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,*

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*versus*

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

*Respondents—Appellants.*

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Appeal from the United States District Court  
for the Southern District of Mississippi  
USDC No. 3:16-CV-246

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Before DENNIS, ELROD, and DUNCAN, *Circuit Judges*.

JENNIFER WALKER ELROD, *Circuit Judge*:\*†

We withdraw our previous opinion, reported at 67 F.4th 678, and substitute the following:

\* \* \*

A group of Mississippi legislators appeals a district court order instructing them to produce: (1) a privilege log; and (2) communications and documents that have been shared with third parties. We hold that the district court did not abuse its discretion in ordering the Legislators to produce a privilege log. But the district court erred in broadly holding that legislative privilege was automatically waived for any documents that have been shared

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\* Judge Dennis joins Part IV and Section V.A of this opinion. Judge Duncan joins Part III and Section V.B of this opinion.

† This opinion is not designated for publication. See 5TH CIR. R. 47.5.

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with third parties. Accordingly, we AFFIRM in part, REVERSE in part, and REMAND for further proceedings.

I

The Jackson-Medgar Wiley Evers International Airport is a major airport located in Jackson, Mississippi. Since 1960, the airport has been operated by the Jackson Municipal Airport Authority, whose five commissioners are selected by the city government. But in 2016, the Mississippi legislature passed, and the governor signed into law, SB 2162. *Id.* § 61-3-6. SB 2162 abolishes the Jackson Municipal Airport Authority and replaces it with a regional authority composed of nine commissioners, only two of whom are selected by Jackson city government. *Id.*

Shortly before the Governor signed SB 2162 into law, a Jackson citizen filed a suit seeking to enjoin the law. The mayor, the city council, the Jackson Municipal Airport Authority, its board of commissioners, and the commissioners in their individual capacities intervened in that lawsuit. The intervenors contend that SB 2162 violates the Equal Protection rights of the citizens of Jackson by eliminating the locally controlled Jackson Municipal Airport Authority for racially discriminatory reasons.

During discovery, the intervenors served subpoenas on eight non-party state legislators who participated in SB 2162's drafting and passage. The Legislators refused to comply with Request #3 in the subpoena, which sought documents and communications related to SB 2162, asserting that any responsive discovery would either be irrelevant or protected by legislative privilege. The magistrate judge, and later the district court, rejected this position. The order noted that because legislative privilege is qualified, the Legislators must produce a privilege log before any assertions can be assessed. It also held that the "privilege has been waived for documents that have been shared with third parties," and that "the Legislators *must produce the*

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*nonprivileged documents* responsive to Request #3.” The Legislators appealed and a panel of this court vacated the district court’s order. *Stallworth v. Bryant*, 936 F.3d 224 (5th Cir. 2019). But the panel did not reach the merits because it held that the Commissioners lacked standing. *Id.* at 229–32.

On remand, the district court allowed the plaintiffs to amend their complaint to cure the standing defect and add two newly appointed commissioners as plaintiffs. The Commissioners again served subpoenas on the Legislators seeking the exact same information as the prior subpoenas. The Legislators again objected on the basis of legislative privilege; the district court again ordered the Legislators to comply with the subpoena; and the Legislators again declined and appealed.

This appeal raises four issues: (1) whether this court has appellate jurisdiction; (2) whether the Commissioners have standing; (3) whether legislative privilege relieves the Legislators from having to submit a privilege log; and (4) whether the district court erred in holding that legislative privilege was waived for any documents that have been shared with third parties.

## II

We review questions of subject-matter jurisdiction *de novo*. *Houston Refin., L.P. v. United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 400 (5th Cir. 2014). A subpoena enforcement order is generally reviewed for abuse of discretion. *United States v. Zadeh*, 820 F.3d 746, 750 (5th Cir. 2016). But we review a district court’s determination of controlling law *de novo*. *In re Avantel, S.A.*, 343 F.3d 311, 318 (5th Cir. 2003).

## III

Generally, appellate jurisdiction is statutorily confined to review of “final decisions.” 28 U.S.C. § 1291. But “the Supreme Court ‘has long given’ § 1291 a ‘practical rather than a technical construction.’” *Leonard v.*

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*Martin*, 38 F.4th 481, 486 (5th Cir. 2022) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Accordingly, “[s]ection 1291 encompasses not only the final decisions that terminate an action, but also a small class of collateral rulings that, although they do not end the litigation, are appropriately deemed final.” *Id.* (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)) (internal quotation marks omitted).

Under this court’s precedent, the Legislators have the right to immediately appeal the district court’s order. Our decisions in *Cates* and *Branch* are instructive. *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 622 (5th Cir. 1973); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 879 (5th Cir. 1981). In *Cates*, we considered whether a subpoena upon a government representative can be used to obtain documents that are not in the custody of that representative. Before addressing the merits, we first considered whether appellate jurisdiction existed. We held that it did because “discovery orders may be appealable” when governmental privilege is involved and the government “is not a party to the lawsuit.” *Cates*, 480 F.2d at 622.

While our decision in *Cates* only considered an instance where the subpoenaed entity was not in custody of the relevant documents, our subsequent opinion in *Branch* observed that “*Cates* clearly extends the right of immediate appeal to the government even when it is itself in custody of the subpoenaed material.” 638 F.2d at 879. Likewise, relying on this court’s holding in *Cates* and *Branch*, the Eleventh Circuit has held that “one who unsuccessfully asserts a governmental privilege may immediately appeal a discovery order where he is not a party to the lawsuit.” *In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015). Thus, in accordance with our precedent and the Eleventh Circuit’s decision in *Hubbard*, we hold that appellate jurisdiction exists in this case. *Id.*; *Cates*, 480 F.2d at 622; *Branch*, 638 F.2d at 879; *see also Leonard*, 38 F.4th at 487 (observing that the Fifth Circuit “allows immediate appeal of orders” that “implicate[] ‘some particular value of a high

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order’ or ‘substantial public interest’ that would be imperiled or destroyed if review were delayed until after entry of an archetypal final judgment.” (quoting *Mohawk*, 558 U.S. at 107)).

The Commissioners argue that we lack appellate jurisdiction here because “[n]othing about the district court’s order forces ‘disclosure’ of any documents.” The Commissioners assert that the order “merely requires the Legislators to provide a privilege log.” Citing our decision in *Banca Pueyo*, the Commissioners argue that we lack appellate jurisdiction here because the order is merely a preliminary step in the resolution of this discovery dispute. *Banca Pueyo SA v. Lone Star Fund IX (US), L.P.*, 978 F.3d 968 (5th Cir. 2020).

But the order here is not merely a preliminary step because it specifically ordered the Legislators to produce any documents that had been shared with third parties. Contrary to Judge Dennis’s partial dissent, the magistrate judge’s finding is not just a “summary of the state of the law regarding legislative privilege.” *Post*, at 15. The order stated:

The Court finds that to the extent documents or information otherwise protected by the legislative privilege have been shared with third parties, the privilege has been waived. Accordingly, *the Legislators must produce those documents.*

Order Granting in Part and Denying in Part Motion to Enforce Subpoenas at 13, *Jackson Mun. Airport Auth. v. Reeves*, No. 16-CV-246 (S.D. Miss. Dec. 19, 2017) (emphasis added).

The magistrate judge held that documents or information that “have been shared with third parties” are non-privileged and that “the Legislators must produce the nonprivileged documents.” Because the Legislators were ordered to produce all non-privileged documents, it necessarily follows that the Legislators were ordered to produce documents that had been shared

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with third parties. That is unquestionably a final discovery order because the Legislators could no longer assert any privilege as to those documents.

And so, *Banca Pueyo* is distinguishable. In *Banca Pueyo*, we held that there was no appellate jurisdiction because the appealed order did “not conclusively determine whether, and to what extent, discovery might be required.” 978 F.3d at 973. Here, the order did so. Accordingly, unlike the order in *Banca Pueyo*, the order here constitutes a final discovery order that is appealable under our precedent. *See Branch*, 638 F.2d at 879; *Cates*, 480 F.2d at 622.

#### IV

Next, we consider standing. The Commissioners have standing in this case based on the amended complaint that was filed after remand. To have standing, the plaintiffs must have suffered an invasion of a legally protected interest that is: (1) “concrete, particularized, and actual or imminent”; (2) “fairly traceable to the challenged action”; and (3) “redressable by a favorable ruling.” *Stallworth*, 936 F.3d at 229–30 (citation omitted). The Commissioners fulfill these conditions.

#### A

##### 1

The Commissioners have standing for the simple reason that they stand to lose their job, and the benefits that come with it. The loss of employment is ordinarily a concrete and particularized injury. *See, e.g., Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175–76 (2011); *Nall v. BNSF Ry. Co.*, 917 F.3d 335, 339–40 (5th Cir. 2019). That is so because the loss of personal, economic benefits received from employment is a traditional Article III injury. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

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This case is no different. As part of their position, the Commissioners are entitled to *per diem* for their services. They may also receive travel expenses, the Commissioners use to attend specialized training in airport administration. Both of those entitlements are tangible, economic benefits. Losing them confers Article III standing. *TransUnion*, 141 S. Ct. at 2204; *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 433–34 (5th Cir. 2013) (volunteer firefighter—compensated with per-fire-call fees and job training—was allegedly sexually harassed; plaintiff had standing to sue); *Langley v. Jackson State Univ.*, 14 F.3d 1070, 1072 (5th Cir. 1994) (university allegedly denied travel expenses to plaintiff based on her race; plaintiff had standing to sue), *overruled on other grounds*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994); *United States v. Ga. Power Co.*, 474 F.2d 906, 922 (5th Cir. 1973) (power company offered *per diem* to white employees but not to black employees; black employees had standing to sue).<sup>1</sup>

The Legislators argue that the Commissioners’ injury is institutional and generalized, pointing out that SB 2162 eliminates all commissioner positions for the airport authority. But an injury does not become institutional just because it applies to more than one person. On the contrary, under our longstanding precedent, government employees have standing to sue when their jobs are eliminated by a new law or other government action. *See, e.g., Image of Greater San Antonio v. Brown*, 570 F.2d 517, 519 (5th Cir. 1978) (holding that former employees had standing challenge a federal law requiring the Department of Defense to reduce the number of civilian employees). And case law from our sister circuits is in agreement. *See Seay v. TVA*, 339 F.3d 454, 462–63 (6th Cir. 2003) (Tennessee Valley Authority eliminated a whole

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<sup>1</sup> Because the Commissioners have standing by virtue of losing the financial benefits described above, we do not address whether the loss of “status” and “authority” supports standing. *Cf. Stallworth*, 936 F.3d at 232 (Higginbotham, J., concurring).



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department; employees whose positions were eliminated had standing to challenge the action); *Braithwaite v. DHS*, 473 F. App'x 405, 412–13 (6th Cir. 2012) (same, as to the Department of Homeland Security).

In short, the Commissioners' injury is personal, not institutional. Losing one's job is different in kind than the injuries involved in *Raines v. Byrd*, 521 U.S. 811 (1997) and other institutional-standing cases. In *Raines*, the legislator-plaintiffs challenged the Line Item Veto Act, complaining that the law would affect the power of their legislative vote. The Court explained that this generalized injury—the “loss of political power”—was not the sort of particularized harm that supports standing. *Id.* at 821. The other authorities on which the Legislators rely likewise turn on general grievances about government power. See *Yaw v. Del. River Basin Comm'n*, 49 F.4th 302, 312 (3d Cir. 2022) (injury was “diminution of legislative power,” no standing to challenge local government ordinance where state legislature allegedly had exclusive jurisdiction); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1216 (10th Cir. 2016) (injury was harm to the “legislature's power,” no standing to challenge amendment to state constitution that limited legislature's power to tax).

Unlike the laws challenged in those cases, SB 2162 personally harms the Commissioners. It takes away the tangible, financial benefits they gain as a result of their positions. We conclude that the Commissioners have standing to challenge a law that eliminates their jobs. *TransUnion*, 141 S. Ct. at 2204; *Nall*, 917 F.3d at 339–40; *Image of Greater San Antonio*, 570 F.2d at 519.

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Further, the alleged injury is imminent because SB 2162 abolishes the Jackson Municipal Airport Authority and thus the Commissioners' positions. On this issue, the Legislators argue that the injury is not imminent because SB 2162 will not immediately abolish the Jackson Municipal Airport Authority. They note that the Authority will continue to exist until the

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Federal Aviation Administration approves the new Jackson Metropolitan Area Airport Authority.

In response, the Commissioners argue that “the time delay that [the Legislators] claim is fatal to the Commissioners’ standing is almost entirely caused by the fact that this lawsuit is pending: the only reason the FAA has not considered the transfer yet is because FAA declines to do so while there is active litigation concerning a contested transfer of airport control.” *See* FAA’s “Notice of Policy on Evaluating Disputed Changes of Sponsorship at Federally Obligated Airports,” 81 Fed. Reg. 36144, 36145 (Jun. 6, 2016). The Legislators never denied that assertion. Nor did they provide any reason to suggest that the FAA may decide not to approve the new authority. Rather, the Legislators merely assert that “[e]ven if the dismissal of the complaint will ultimately lead to approval by the FAA of the new Authority, the process may take a very long time.”

But the fact that the approval process might take a very long time is insufficient to defeat the Commissioners’ standing because the alleged injury here is still likely to occur and is “certainly impending.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Thus, we hold that the Commissioners satisfy the imminence requirement.

## B

Finally, we address traceability and redressability. The alleged injury is traceable to SB 2162 because the law, by its very own terms, eliminates the Commissioners’ positions. As to redressability, the Commissioners here are seeking an injunction against SB 2162 and a declaration that SB 2162 is unconstitutional. The Legislators argue this will not redress any harm because the Commissioners could lose their positions for some other reason. But the redressability prong does not require a remedy that covers every conceivable

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injury, just one that redresses the harm caused by SB 2162. Enjoining the enforcement of SB 2162 would prevent the law from abolishing the Jackson Municipal Airport Authority, and thus the Commissioners' positions. Consequently, the alleged injury is redressable by the relief sought. Based on the operative complaint, the Commissioners have standing in this case.

V

Having considered jurisdiction and standing, we now proceed to the merits. The district court ordered the Legislators to produce: (1) a privilege log; and (2) communications and documents that have been shared with third parties. On appeal, the Legislators argue that this court should reverse both aspects of the order. We address each aspect in turn.

A

First, the Legislators contend that no privilege log should be required because the Commissioners seek only evidence of motive, and any evidence of motive is privileged. And because the Equal Protection claim is based entirely on motive, the Legislators assert that any non-motive evidence would be irrelevant. Put simply, the Legislators argue that all the requested communications would either be privileged or irrelevant. Thus, they conclude that they need not produce a privilege log.

But a privilege log would not be useless because evidence of legislative motive is not necessarily privileged. As the Legislators themselves recognized, legislative privilege can be waived when certain conditions apply. For example, legislative privilege as to certain documents is waived when the Legislator *publicly* reveals those documents. *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) (“[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations.”). Likewise, statements that have no connection whatsoever with “legitimate legislative activity” are not protected by legislative privilege.

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*Hubbard*, 803 F.3d at 1308 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)); see *Tenney*, 341 U.S. at 377 (“Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.”). Accordingly, we agree with the district court that a privilege log is necessary to determine which of the requested documents and communications are protected by legislative privilege.

## B

Although the district court did not abuse its discretion in ordering the Legislators to produce a privilege log, the district court’s determination that legislative privilege had been waived for any “documents or information [that] have been shared with third parties” is overbroad. Legislative privilege applies to communications where the legislator or his agent was acting within “the sphere of legislative activity.” *Tenney*, 341 U.S. at 376. And the privilege is “not limited to the casting of a vote on a resolution or bill; it covers all aspects of the legislative process.” *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007).

As relevant here, communications with third parties outside the legislature might still be within the sphere of “legitimate legislative activity” if the communication bears on potential legislation. *Hubbard*, 803 F.3d at 1308. Consequently, some communications with third parties, such as private communications with advocacy groups, are protected by legislative privilege when they are “a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider.” *Almonte*, 478 F.3d at 107 (quoting *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)). Thus, we disagree with the district court’s broad pronouncement that the Legislators waived their legislative

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privilege for any documents or information that had been shared with third parties.<sup>2</sup>

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Accordingly, we AFFIRM in part, REVERSE in part, and RE-MAND for further proceedings.

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<sup>2</sup> Finally, contrary to Judge Dennis’s partial dissent, our holding on this issue is not an “advisory opinion.” *Post*, at 15. The appellant squarely presented the issue before this court. And as explained in Part III, the magistrate judge made a final determination as to this issue, so we have appellate jurisdiction to consider it.

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JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part:

I respectfully disagree with my colleagues that the district court ordered anything more than the production of a privilege log in this interlocutory appeal. Neither party has ever argued that the district court ordered the Legislators to produce any withheld discovery, and the order itself—contrary to the majority’s selective quotation—is clear: if the Legislators choose to withhold any responsive discovery on the basis of legislative privilege, they must sustain their assertion of privilege with a privilege log which the Commissioners may then challenge. The court will resolve any dispute, only then ordering production if appropriate. This, of course, is how assertions of privilege work in discovery practice. *See* FED. R. CIV. P. 45(e)(2).<sup>1</sup> The Legislators’ challenge to the first step of this process, before any assertion of privilege over specific discovery has been sustained, disputed, or adjudicated, is a challenge to an undetermined and inconclusive discovery dispute. It is unripe for appellate review.

Because the district court only ordered the Legislators to produce “the customary privilege log”—nothing more—I disagree that there is appellate jurisdiction for their interlocutory appeal. However, as a majority of the court finds we have the power to entertain this appeal, I agree with JUDGE ELROD that the Commissioners have standing to assert their Equal Protection claim. Losing a job, and its social and material benefits, is not an

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<sup>1</sup> The district court ordered the Legislators to submit a privilege log pursuant to Federal Rule of Civil Procedure 26(b)(5)(A). Rule 45(e)(2), formerly Rule 45(d), governs assertions of privilege over subpoenaed information, but the text of the two rules, as well as their obligations, are identical. *See* FED. R. CIV. P. 45 advisory committee’s notes to 1991 amendment subsection d and notes to 2007 amendment; *Mosely v. City of Chicago*, 252 F.R.D. 421, 426 (N.D. Ill. 2008) (“Just as Rule 26(b)(5) requires parties lodging a claim of privilege against a discovery request to compile a privilege log, Rule 45(d)(2)(A)(ii) imposes the same obligation on nonparties responding to subpoenas.”).

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“institutional injury” simply because one happens to work for a public institution. I also agree that the Legislators’ argument that legislative privilege is so absolute as to exempt them from all discovery process, even the basic responsibility of sustaining their assertion of privilege as the Federal Rules require, fails.<sup>2</sup> However, because I do not understand the district court to have ordered the production of any discovery, I view the majority’s attempt to reverse the magistrate judge’s statements of law as an advisory opinion which I cannot join.

In sum, I respectfully dissent from Section III of JUDGE ELROD’S opinion above, concur with Section IV and Section V.A, and dissent from the advisory opinion of Section V.B.

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As my disagreement with the majority turns entirely on the nature of the order appealed, a detailed recounting of both the magistrate judge’s order and the district court order overruling the Legislators’ objections to the magistrate judge’s order is necessary.

According to the majority, the magistrate judge’s order held that legislative privilege had been waived for documents that “have been shared with third parties,” and that “the Legislators must produce the nonprivileged documents.” Maj. Op. at 6. Read in the context of the entire order, neither of these quotes means what the majority thinks they do.

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<sup>2</sup> The Legislators’ notion that they need merely invoke legislative privilege to be entitled to it is unknown to federal discovery practice and obviously unworkable. “The person claiming a privilege or protection cannot decide the limits of that party’s own entitlement.” FED. R. CIV. P. 45, advisory committee’s note to 1991 amendment subsection d.

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Starting with the second one first, the magistrate judge’s directive to produce nonprivileged documents is, by its very terms, not an order to produce privileged documents for which the privilege has been waived. Rather, it is an order to produce *nonprivileged* documents.<sup>3</sup> At the time the Commissioners filed their motion to compel, the Legislators had not turned over any discovery in response to Request #3, including discovery over which they asserted no privilege. If the distinction between privileged and nonprivileged documents were not obvious from the plain meaning of the words, it is obvious from the remainder of the sentence in the order, which the majority omits. The omitted portion of the order states that the Legislators “must produce a privilege log identifying the responsive documents withheld from production under a claim of privilege.” The distinction is clear: Nonprivileged documents must be produced, and for privileged documents, a privilege log must be produced. Nothing orders the production of privileged documents for which privilege has been waived.

The other supposed holding of the magistrate judge’s that the majority relies on for jurisdiction—that legislative privilege has been waived for documents shared with third parties—is also a misreading of the magistrate judge’s order. The complete sentence from which the majority selects its quote reads: “The Court finds that to the extent otherwise-privileged documents or information have been shared with third parties, the privilege with regard to those specific documents or information has been waived.” This “finding,” which the majority treats as a holding, is the

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<sup>3</sup> The majority tries to evade this distinction by mischaracterizing the record, saying that “[t]he magistrate judge held that documents or information that ‘have been shared with third parties’ are non-privileged,” Maj. Op. at 7, when in fact the order stated “to the extent documents or information otherwise protected by the legislative privilege have been shared with third parties, the privilege has been *waived*,” Maj. Op. at 6 (quoting the magistrate judge’s order) (emphasis added).



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magistrate judge’s summary of the state of the law regarding legislative privilege, not an application of that law to the specific discovery withheld. Immediately prior to the sentence cited by the majority, the order states that the Legislators “urge the Court to find” that, under the applicable caselaw, legislative privilege applies broadly to all communications with third parties, thus obviating the need to produce a privilege log. But after reviewing the caselaw, the magistrate judge “found” the law to be different than the Legislators’ account of it, notably that legislative privilege could be waived with respect to documents shared with certain third parties. The language the majority quotes is the magistrate judge’s summary of the applicable law, not an application of that law to any specific discovery withheld. Read in context, the language excerpted by the majority is simply the magistrate judge’s response to the Legislators’ argument that all communications, even those with third parties, are shielded by legislative privilege. This was the basis upon which the magistrate judge rejected the Legislators’ position that they need not provide a privilege log. That the magistrate judge qualified his statement about the applicability of the law—noting that “to the extent otherwise-privileged documents or information have been shared with third parties,” privilege would be waived—only demonstrates further that he had not, in fact, made any determination as to what specific discovery must be produced.

Perhaps that is why nothing in the order’s decree actually directs the Legislators to produce any documents they have withheld on the basis of legislative privilege. The decretal portion of the order reads only: “By February 28, 2018, the Legislators must produce the nonprivileged documents responsive to Request #3 and must produce a privilege log identifying the responsive documents withheld from production under a claim of privilege.” Notably absent from this is the directive that the majority

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says is there: produce otherwise privileged documents that have been shared with third parties.

If there were any ambiguity, the district court's order overruling the Legislators' objections to the magistrate judge's order makes clear that the only thing the magistrate judge ordered the Legislators to produce was a privilege log. As the district court stated:

The Magistrate Judge concluded that the state legislators subpoenaed in this action must create the customary privilege log. Once the privilege log is created and reviewed by all, the Magistrate Judge will adjudicate whether the plaintiffs can overcome the traditional privilege afforded to legislators' communications with other legislators and legislative staff. He then indicated that the legislators will likely have to produce their communications with nonlegislative third parties, where the privilege was waived.

I read the magistrate judge's order as the district court did. It directs the Legislators to produce a privilege log, and only after that will the application of legislative privilege to any withheld discovery be adjudicated.<sup>4</sup> Implicit in

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<sup>4</sup> Indeed, the magistrate judge himself laid out these standard steps of asserting and adjudicating claims of privilege in his order, stating further that the parties and the court would follow them:

Considering the claims in this case, the specific request, and the privilege at issue, the Court finds that Fed. R. Civ. P. 26 and L.U.Civ.R. 26 require a privilege log. Accordingly, should the Legislators withhold any documents responsive to Request #3, they must also produce a privilege log identifying all such documents, in accordance with Fed R. Civ. P. 26 and L.U.Civ.R. 26. Should Plaintiffs wish to challenge a privilege claim as to any documents on the Legislators' privilege logs, Plaintiffs must file a motion identifying the specific documents to which they contest the claim of privilege and setting forth their arguments for production under the Rodriguez factors and otherwise. After briefing on any such motion has been completed, the Court will, if necessary, conduct an in camera review, in whole or part, and rule on the motion.

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the statement that the magistrate judge “will adjudicate” any privilege dispute is the proposition that the magistrate judge *has not yet* done so. Any dispute over the application of legislative privilege to the withheld discovery has, as of this appeal, not yet been decided by the district court.

Finally, it is worth noting that what the majority claims the magistrate judge ordered is simply not possible under the Federal Rules. Rule 45(e)(2) provides that any person withholding subpoenaed information under a claim of privilege “must: (1) expressly make the claim; and (2) describe the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim.” That latter requirement of Rule 45(e)(2) is, of course, that of a producing a privilege log. Without the information contained in a privilege log, the Commissioners cannot “asses the claim” and the district court cannot adjudicate any dispute they might have with the Legislators’ assertion. Simply put, there cannot be an order to produce withheld discovery without a privilege log because the parties and the court lack the information needed to determine whether the privilege applies to the withheld discovery. *See Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991) (“[T]he assertion of privilege . . . must also be accompanied by sufficient information to allow the court to rule intelligently on the privilege claim.”); *Peacock v. Merrill*, No. 08-01-B-M2, 2008 WL 687195, at \*3 (M.D. La. Mar. 10, 2008) (“Without . . . the privilege log, it is not possible for Peacock to legitimately contest the asserted privilege and for the Court to rule intelligently upon whether the claim of privilege should be sustained.”). That there can be no adjudication without a privilege log is why the failure to submit a privilege log may result in waiver, rather than an adverse determination on the merits that the privilege does not apply. *See EEOC v.*

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It is nonsensical to read the magistrate judge’s order as both ordering the production of discovery and also stating that it will do so only after a motion to compel and full briefing.

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*BDO USA, L.L.P.*, 876 F.3d 690, 697 (5th Cir. 2017); FED R. CIV. P. 26, advisory committee’s note to 1993 amendment. In this particular case, no one—not the Commissioners, not the district court, not the majority—know whether the discovery the Legislators are withholding contains communications shared with third parties outside the sphere of legislative activity. Yet this is precisely the determination that the majority claims the magistrate judge erroneously made. How the majority knows that the withheld discovery was not shared with third parties for non-legislative purposes when it too lacks this information is beyond comprehension.

Because it is both obvious from the face of the order itself and a necessary conclusion from the procedural rules governing assertions of privilege in discovery, it is clear that the order appealed only directs the Legislators to produce a privilege log. I disagree with the majority’s imagining that there is more. Accordingly, I view the majority’s opinion that the magistrate judge’s statements regarding the scope of legislative privilege were “overbroad” as an advisory opinion that Article III does not empower us to render. Maj. Op. at 12.

I respectfully dissent from Section III of JUDGE ELROD’s opinion, finding appellate jurisdiction, concur in Section IV finding the Commissioners have standing, concur in Section IV.A finding that the Legislators must submit a privilege log to sustain their assertions of legislative privilege, and dissent from Section IV.B’s advisory opinion reversing the district court’s “broad pronouncement” about the scope of that privilege. Maj. Op. at 12.

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STUART KYLE DUNCAN, *Circuit Judge*, concurring in part and dissenting in part:

While I agree that we have appellate jurisdiction, *see* ELROD Op. at 4–7, I respectfully disagree that the individual Commissioners have standing, *see id.* at 7–10; *see also* DENNIS Op. at 1–2. In the majority’s view, the Commissioners are personally injured because eliminating the JMAA will cut off their official expense accounts. No precedent supports that unheard-of theory of standing. *Per diems* are perks tethered to public office, not private rights whose loss personally injures the officeholder. By holding otherwise, the majority obliterates the distinction between personal and institutional injuries for purposes of Article III standing. Instead of remanding for further proceedings in this now-seven-year-old intrastate political squabble, I would reverse and render judgment dismissing the Commissioners’ claims.

The Commissioners claim S.B. 2162 violates the Equal Protection Clause by “abolish[ing] the JMAA and thereby terminat[ing] their employment as Commissioners on the basis of race.” Am. Compl. ¶ 140. The majority decides the Commissioners have standing to press these claims in their individual capacities based on allegations that they are “entitled to receive a *per diem* for their services” as well as “travel expenses . . . use[d] to attend specialized training in airport administration.” ELROD Op. at 7; *see* Am. Compl. ¶ 142. The cases cited by the majority fail to support its view that these asserted harms qualify as personal injuries to the individual Commissioners.

For example, the majority cites cases for the proposition that “government employees have standing to sue when their jobs are eliminated by a new law or other government action.” ELROD Op. at 8 (citing *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 519 (5th Cir. 1978); *Seay v. TVA*, 339 F.3d 454, 462–63 (6th Cir. 2003); *Braithwaite v. DHS*, 473 F. App’x 405, 412–13 (6th Cir. 2012)). But those cases have no bearing here. They are

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garden-variety employment disputes where employees allege they were discharged in violation of federal law. None even mentions standing, but it's easy to see why the plaintiffs were personally injured: they claimed their employers fired them illegally.

This case is entirely different. The Commissioners aren't "employees"; they are political appointees. *See* MISS. CODE ANN. § 61-3-5 (empowering a "municipal airport authority" to "appoint five (5) persons as commissioners"). They are paid no salary. They haven't "lost their jobs"; the local authority to which they were appointed was abolished and replaced with a regional authority. *See Stallworth v. Bryant*, 936 F.3d 224, 226 (5th Cir. 2019) (explaining that S.B. 2162 "transferr[ed] control of the [Jackson] airport from the five-member JMAA to a new nine-member board"). So, this isn't an "employment case." It's a case about a State's decision to reallocate airport governance from a local to a regional board. The Commissioners have sued to stop that restructuring. The question is whether they can do so by alleging, in their individual capacities, that they are personally harmed by the elimination of the JMAA.<sup>1</sup> None of the majority's cited cases comes close to addressing that question.

The majority also cites three cases supposedly standing for the proposition that the Commissioners' *per diems* and travel reimbursements are "tangible, economic benefits" whose loss confers standing. ELROD Op. at 7–8. The majority is again mistaken. In two of those cases, plaintiffs claimed

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<sup>1</sup> It is undisputed that the Commissioners are bringing equal protection claims in their individual capacities only. *See* Compl. Part V, Count VII; Compl. ¶ 142; *see also Stallworth*, 936 F.3d at 229 (explaining "the equal protection claim . . . was brought by only the individual plaintiffs—that is, the JMAA board members suing in their individual capacities").

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their employers denied them *per diems* or travel expenses *based on their race*.<sup>2</sup> In other words, benefits were given to white but not black employees. Nothing like that is alleged here. The third case, a sexual harassment claim by a firefighter, discussed the plaintiff's "benefits" (a "\$2.00 per fire / emergency call") *only* to assess whether she qualified as a Title VII "employee." *Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 439–40 (5th Cir. 2013). She didn't, because her "benefits [were] purely incidental to her volunteer service[.]" *Id.* at 440. And she had standing, not because of anything having to do with "benefits," but because she claimed a fellow firefighter sexually harassed her. *Id.* at 432. The court did not discuss benefits as a ground for standing (in fact, the court did not discuss standing at all).

In sum, none of the majority's cases supports the proposition that the Commissioners have a personal interest in their *per diems* and travel reimbursements that would allow them to sue, in their individual capacity, to enjoin the abolition of the JMAA.

The majority is also incorrect that the injuries alleged here are somehow distinguishable from those in *Raines v. Byrd*, 521 U.S. 811 (1997). *See* ELROD Op. at 8–9. To the contrary, *Raines* undermines the majority's view. *Raines* teaches that individual lawmakers can't sue to vindicate "a loss of political power" but only a "loss of [a] private right." 521 U.S. at 821. That principle defeats the Commissioners' standing. Each loss they assert is political, not personal. They have no "private right" to the perquisites of

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<sup>2</sup> *See Langley v. Jackson State Univ.*, 14 F.3d 1070, 1072 (5th Cir. 1994) (plaintiff claimed, *inter alia*, that she was "denied her sabbatical leave and travel expenses, all on account of [her] race"), *overruled on other grounds, Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994); *United States v. Ga. Power Co.*, 474 F.2d 906, 922 (5th Cir. 1973) ("The company admitted that it had allowed either no or lower per diem payments to blacks called away from their home plants on Georgia Power business than it did to whites under the same circumstances, and the court enjoined such practices prospectively.").

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office. Such benefits exist “solely because [the Commissioners] are Members of [the JMAA].” *Ibid.* The minute they leave office, the perks end. *See ibid.* (“If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead.”). Their loss “thus runs with the [Commissioner’s] seat, a seat which the [Commissioner] hold[s] as trustee for his constituents, not as a prerogative of personal power.” *Ibid.* (cleaned up). Translation: Commissioners enjoy these perks only because they are public servants, not because they have a private right to expense the City of Jackson for a New York Strip or a trip to Vegas.

For their part, the Commissioners try to find support in this statement from *Raines*: “appellees do not claim that they have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*.” *See ibid.* But the Commissioners divorce this statement from its context. *Raines* was discussing *Powell v. McCormack*, 395 U.S. 486 (1969), where a Congressman was allowed to “challenge . . . his exclusion from the House of Representatives (and his consequent loss of salary).” *Raines*, 521 U.S. at 820–21 (citing *Powell*, 395 U.S. at 496, 512–14). As *Raines* explained, there was standing in *Powell* only because Congressman Powell had been “singled out for specially unfavorable treatment as opposed to other Members.” *Id.* at 821. The Court distinguished Powell’s personal harm from a claim of “institutional injury, which necessarily damages all Members of Congress and both Houses of Congress equally.” *Ibid.* (cleaned up).

The Commissioners’ asserted injuries differ critically from the injury in *Powell*. Congressman Powell was excluded from his seat by a House majority after a subcommittee found he had committed financial improprieties as a committee chairman. *See Powell*, 395 U.S. at 489–93. He could therefore sue to redress this personal injury to him (and to his constituents, who also sued). *Id.* at 493; *see also Raines*, 521 U.S. at 820–21.



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By contrast, the Commissioners do not allege they have been singled out for “specially unfavorable treatment.” *Raines*, 521 U.S. at 821. Rather, their claimed injury is that the JMAA itself has been eliminated and, along with it, their positions. This is what *Raines* described as an “institutional injury . . . which necessarily damages all [Commissioners] equally.” *Ibid.*; see also *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016) (“[I]ndividual legislators may not support standing by alleging only an institutional injury.”) (citations omitted). The Commissioners can’t circumvent *Raines* by claiming that sunseting the JMAA zeroes out their expense accounts. Those benefits “run with the seat” and so aren’t “something to which [the Commissioners] *personally* are entitled.” *Raines*, 521 U.S. at 821.

By allowing individual lawmakers standing to sue for an institutional injury, the majority puts our circuit out of step with at least three others.<sup>3</sup> And this standing misadventure is notably harmful because it lets a federal court continue to stick its nose into a political spat. *Cf. id.* at 819–20 (standing should be “especially rigorous” when the merits would require “decid[ing] whether an action taken by one of the other two branches of the Federal Government was unconstitutional”); *Ariz. State Legis. v. Ariz. Indep. Redist. Comm’n*, 576 U.S. 787, 859 (2015) (Scalia, J., dissenting) (arguing the Framers “would be *all the more averse* to unprecedented judicial meddling by federal courts with the branches of their state governments”). Various government parties have been fighting over control of the Jackson airport,

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<sup>3</sup> See *Yaw v. Del. River Basin Comm’n*, 49 F.4th 302, 311 (3d Cir. 2022) (“[I]ndividual legislators lack standing to assert institutional injuries belonging to the legislature as a whole.”); *Maloney v. Murphy*, 984 F.3d 50, 64 (D.C. Cir. 2020) (explaining that legislators do not have standing for harms that “befell the institution as a whole and all legislators collectively”); *Kerr*, 824 F.3d at 1216 (“An individual legislator certainly retains the ability to bring a suit to redress a personal injury, as opposed to an institutional injury.”) (citing *Raines*, 521 U.S. at 824 n.7; *Powell*, 395 U.S. at 550).

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now going on seven years. *See Stallworth*, 936 F.3d at 226–29. The case has already spawned two appeals, yet it remains mired in debates over legislative subpoenas. *See id.* at 228–29. And while JUDGE ELROD’s opinion correctly fixes one aspect of the district court’s overbroad privilege waiver, *see ELROD Op.* at 11–12<sup>4</sup>, it sends the case back for more squabbling. Instead of doing that, I would hold the individual Commissioners are not injured in any judicially cognizable manner, which would go a long way toward ending federal involvement in this political dog fight.

Finally, the majority claims the Commissioners’ injuries are “personal, not institutional.” ELROD Op. at 8. The majority has no choice but to make this claim, because it is black-letter law that *individual* members of a governing body can’t sue to enforce an *institutional* injury. *See, e.g., Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (reiterating that “individual members lack standing to assert the institutional interests of a legislature”). Yet, the majority’s insistence notwithstanding, the Commissioners’ asserted injuries are institutional to the core. They are seeking to stop the abolition of the JMAA, pure and simple. That’s an institutional injury. *See Raines*, 521 U.S. at 821 (explaining that an “institutional injury” is one “which necessarily damages all Members . . . *equally*”) (emphasis added). That should stop their lawsuit in its tracks. *See Kerr*, 824 F.3d at 1214 (“[I]ndividual legislators may not support standing by alleging only an institutional injury.”).

But don’t take it from me. Instead, listen to the district judge. While I disagree with the judge’s standing analysis, he is refreshingly frank about

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<sup>4</sup> I agree with this part of JUDGE ELROD’s opinion, even though, left to my own devices, I would find the legislators had no standing to begin with.

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what's really at stake in this case. In an order approving the amended complaint, the judge writes:

The fundamental question at the heart of this dispute is, who gets to control the airport and its surrounding assets? Is it the local government, which in this case owns and operates the Jackson airport, or the state government, which generally speaking has authority over the composition of airport boards in Mississippi?

Exactly. This suit is nothing more than a political dispute between state and local governments over control of an airport and the land around it. One side has dragged that fight into federal court by tricking it out in equal protection colors. That won't fly.

I respectfully dissent.