No. 23-50201

In the United States Court of Appeals for the Fifth Circuit

LA UNION DEL PUEBLO ENTERO; FRIENDSHIP-WEST BAPTIST CHURCH; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TEXAS IMPACT; MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS; TEXAS HISPANICS ORGANIZED FOR POLITICAL EDUCATION; JOLT ACTION; WILLIAM C. VELASQUEZ INSTITUTE; JAMES LEWIN; FIEL HOUSTON, INCORPORATED,

Plaintiffs-Appellees,

v.

GREGORY W. ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS ET AL.,

v.

SENATOR PAUL BETTENCOURT; REPRESENTATIVE BRISCOE CAIN,

Third-Party Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

REPLY IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR A STAY, AN ADMINISTRATIVE STAY, AND IN THE ALTERNATIVE PETITION FOR MANDAMUS

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INTRODUCTION

Plaintiffs do not dispute that the documents and testimony at issue here are also at issue in *Lulac Texas v. Hughes*, No. 22-50435. Nor do they dispute that the outcome of that appeal will decide whether the documents and testimony at issue here are protected by legislative privilege. Nevertheless, they dispute whether this Court should issue a stay, as it has already done in another case presenting closely related issues pending disposition of *Hughes*. *See Lulac v. Patrick*, No. 22-50662 (5th Cir. July 26, 2022). As the *Hughes* appellants have extensively explained, plaintiffs' jurisdictional arguments fail under binding circuit precedent. And their merits arguments would create a circuit split. This Court should grant a stay pending appeal, or in the alternative grant mandamus relief, to prevent the disclosure of documents and testimony until this Court decides whether they are privileged—presumably in light of *Hughes*.

ARGUMENT

I. Senator Bettencourt and Representative Cain are Entitled to Appeal.

A. The legislators can appeal as third parties.

The legislators need not be parties to the proceedings below to appeal. Although "the general rule" is "that nonparties cannot appeal" a lower court's judgment, "that rule has not been rigidly adhered to; a nonparty may be allowed to appeal if the decree affects his interests." *Castillo v. Cameron Cnty., Tex.*, 238 F.3d 339, 349 (5th Cir. 2001). This Court applies a three-part test to determine whether a non-party can appeal, "analyzing whether the non-parties actually participated in the

proceedings below, the equities weigh in favor of hearing the appeal, and the non-parties have a personal stake in the outcome." *Id.* at 349 (citations and internal quotation marks omitted). Those factors are met here.

First, the legislators participated in the proceedings below by vigorously asserting legislative privilege when served with third-party subpoenas that would cover documents and testimony relevant here. *See, e.g.,* Legislators' Resp. to Mot. to Compel, No. 5:21-cv-844, ECF No. 397. They then took the *Hughes* appeal to vindicate their assertion of legislative privilege. Moreover, as plaintiffs themselves insist (at 1) to show notice, they are represented by the same attorneys from the Office of the Attorney General who represent the State Defendants.[1] In response to Plaintiff's motion to compel concerning Mr. Vera, those attorneys objected to production of documents and testimony based on legislative privilege. Appellants' Mot. App. E. Counsel made similar objections during Mr. Vera's deposition to vindicate legislative privilege. *E.g.*, Mot. App. C at 33, 78. That is undoubtedly why the district court rejected the privilege assertion on the merits—not simply based on the State Defendants' lack of standing to claim privilege. Mot. App. A at 4; App. B. at 8-9.[2]

[1] This shared representation did *not*, however, give either the legislators or their counsel actual notice that Mr. Vera would be deposed or that counsel for plaintiffs intended to insist on disclosure of document production and testimony squarely at issue in *Hughes*, past providing notice of the deposition to counsel in their capacity as representatives the State Defendants.

[2] For this reason, plaintiffs' contention (at 8) that the legislators forfeited legislative privilege in the district court fails. "Forfeiture generally does not apply when a claim is raised or decided in the district court." *Amin v. Mayorkas*, 24 F.4th 383,

Second, the equities favor hearing this appeal. *Castillo*, 238 F.3d at 349. This Court has previously recognized as much, holding "a non-party may appeal orders for discovery if he has no other effective means of obtaining review." *United States v. Chagra*, 701 F.2d 354, 359 (5th Cir. 1983). This Court has, for example, allowed the Comptroller of the Currency to appeal the denial of a privilege assertion as a non-party, even when, like here, the Comptroller did not have custody of the documents at issue. *See Overby v. U.S. Fid. & Guar. Co.*, 224 F.2d 158, 159 (5th Cir. 1955). It reasoned that after production "there would be no further point to the claim of privilege" which "would be irretrievably breached and beyond the protection of an appellate court." *Id.* at 162. "The appellant, asserting a continuing right of control of, and property right in, the documents" could appeal "whether or not he was formally recognized as a party to the suit." *Id.*

The same principle applies here: the legislators request an order preventing the production of documents and testimony they assert is protected by legislative privilege until this Court decides *Hughes*. *See* Order, *Lulac v. Patrick*, No. 22-50662 (5th Cir. July 26, 2022). And the legislative privilege bears strongly on the public interest; it "protects the legislative process itself." *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015).

Third, the legislators have a personal stake in the outcome of this litigation. Absent a stay, documents and testimony they assert are protected by legislative

391 n.4 (5th Cir. 2022) (internal quotation marks omitted); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

privilege will be disclosed with no opportunity for appellate review, *In re: Sealed Case (Med. Records)*, 381 F.3d 1205, 1210 (D.C. Cir. 2004), harming them and marking a "substantial intrusion" into the legislative process, *Lee v. City of Los Angeles*, 908 F.3d at 1187 (internal quotation marks omitted). This is particularly problematic as they were appellants in *Hughes*—meaning they would lose not only their privilege but their right to appeal.

Plaintiffs' contention (at 6-7) that the legislators have forfeited any argument they may appeal as non-parties is meritless. Although an appellant may waive or forfeit an argument "if he fails to adequately brief it," *Miller v. Metrocare Servs.*, 809 F.3d 827, 832 n.5 (5th Cir. 2016), the legislators could not have done so here: this Court has not set a briefing schedule in this case. The legislators thus may raise privilege in this appeal as third parties to the litigation below.

B. This Court Has Jurisdiction Under the Collateral Order Doctrine.

Indeed, it is precisely because they are third parties that they *can* appeal the district court's order under the collateral order doctrine. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 367-70 (5th Cir. 2018). As the *Hughes* appellant have extensively discussed both in briefing and at oral argument, this Court allows such appeals under the collateral order doctrine if the order: "(1) conclusively determine the disputed question, (2) [would] resolve an important issue completely separate from the merits of the action, and (3) [would] be effectively unreviewable on appeal from a final judgment." *Leonard v. Martin*, 38 F.4th 481, 486 (5th Cir. 2022) (quoting

Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr., 913 F.3d 443, 448 (5th Cir. 2019)). And as the legislators' motion explained (at 3-4), those criteria have been met here.

Plaintiffs' authority (at 9-11) is not to the contrary. Their resort to the Supreme Court's opinion in *Mohawk Indus. Inc. v. Carpenter* ignores how this Court has interpreted *Mohawk*. 558 U.S. 100 (2009). As this Court explained in *Smith*, "the [Supreme] Court reasoned [in *Mohawk*] that as between parties, the appellate court can remedy erroneously ordered discovery by remanding for a new trial." 896 F.3d at 367. But *Smith* was "distinguishable: a new trial order can hardly avail a third-party witness who cannot benefit directly from such relief." *Id.* at 367-68. Plaintiffs' citation to *Leonard v. Martin* ignores that *Leonard* itself explained 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." 38 F.4th at 486, 487 (internal quotation marks omitted).

Here, delaying review would "imperil a substantial public interest" or "some particular value of a high order." *Vantage*, 913 F.3d at 449. For centuries, the legislative privilege has "protect[ed] 'against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts'" and has "preclude[d] any showing of how [a legislator] acted, voted, or decided." *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (citation omitted) (third alteration in original). At the federal level, it reflects the principle that it is "not consonant with our scheme of government" of separation of powers "for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Though not

identical, federalism creates an analogous vertical separation of powers. Although the Speech and Debate Clause does not apply to state legislators, courts have held that "principles of comity" and "the interests in legislative independence" underlying that Clause dictate that, absent a compelling federal interest, state legislators receive the same privileges in federal court. *Am. Trucking Ass'ns, Inc.* v. *Alviti*, 14 F.4th 76, 87 (1st Cir. 2021) (quoting *United States v. Gillock*, 445 U.S. 360, 373 (1980)). This rule "allow[s] duly elected legislators to discharge their public duties without concern of adverse consequences outside the ballot box" and "minimiz[es] the 'distraction'" associated with civil discovery. *Lee*, 908 F.3d at 1187 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975)). Deferring review of the district court's order would frustrate these "substantial public interests," *Vantage*, 913 F.3d at 449, by straining federal-state comity and distracting legislators from their public duties.

Plaintiffs' suggested alternative avenues (at 11) for the legislators to obtain review do not resolve this difficulty. Plaintiffs suggest that the legislators might have intervened, objected, and requested the district court certify an appeal. That would require the district court to conclude there is "a substantial difference of opinion" on the certified question. 28 U.S.C. § 1292(b). But the district court has repeatedly explained it views the legislators' objection as "groundless," Mot. App. B. at 9, and has threatened sanctions, *see also, e.g.*, *Hughes,* No. 22-50435*,* ROA.10461. Or, Plaintiffs insist, this Court could remedy the district court's error after final judgment by vacating and remanding for a new trial. But the legislators are not parties to this case in the district court. The inadequacy of such an appeal is precisely why this Court

has allowed third parties to raise privileges in an interlocutory posture. *Smith*, 896 F.3d at 36. Similarly, relying in large part on cases from this Court, the Eleventh Circuit has concluded that "one who unsuccessfully asserts a governmental privilege may immediately appeal a discovery order where he is not a party to the lawsuit." *Hubbard*, 803 F.3d at 1305.

For these reasons, as well as those discussed in *Hughes*, the legislators can appeal under the collateral order doctrine. *See League of United Latin Am. Citizens v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1 n.1 (5th Cir. May 20, 2022).

II. The Legislators Are Entitled To A Stay Pending Appeal.

As explained in their motion (at 8-15) the legislators are entitled to a stay pending appeal because the legislative privilege applies whenever a legislator or his agent "act[s] in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376. Because the privilege "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts," *Helstoski*, 442 U.S. at 489 (quotations marks omitted), it "covers . . . legislators' actions in the proposal, formulation, and passage of legislation," *Hubbard*, 803 F.3d at 1308. Plaintiffs' counterarguments lack merit.

First, plaintiffs (at 12) point to Federal Rule of Appellate Procedure 8, insisting the absence of a stay motion in the district court precludes relief. But attorneys from Office of the Attorney General requested a stay from the district court, which was denied. Mot. App. B at 20. Moreover, where "it clearly appears that further arguments in support of the stay would be pointless in the district court" no further motion is required. *Ruiz v. Estelle*, 650 F.2d 555, 567 (5th Cir. 1981). The district court's

denial of a stay motion and its intonation that "heads will roll" if "Mr. Vera does not produce and talk about" the material at issue in this appeal, Mot. App. B at 36-37, demonstrates no additional motion was required.[3]

Second, plaintiffs' contention that the legislative privilege is not absolute (at 15-16) is unhelpful. The legislators have not argued for an "unqualified" privilege in either this case or *Hughes*. *See* Reply Br. at 10-11, 13-15, *Lulac Texas v. Hughes*, No. 22-50435 (5th Cir. July 27, 2022). Legislative privilege does not apply in the context of federal criminal investigations or prosecutions, for example. *Gillock*, 445 U.S. at 373. But "[t]his is not a federal criminal investigation or prosecution," *Hubbard*, 803 F.3d at 1312, and the Supreme Court has "drawn the line at civil actions." *Gillock*, 445 U.S. at 373. Thus, this Court's sister circuits have refused to uncritically extend *Gillock* beyond the criminal context. *See Hubbard*, 803 F.3d at 1311-12; *Alviti*, 14 F.4th at 87-88; *accord Lee*, 908 F.3d at 1186-88.

Third, plaintiffs' distinction (at 17-18) between cases addressing legislative immunity and legislative privilege is immaterial. Immunity and privilege are "corollary" concepts that derive from the same historical tradition and advance the same essential purposes. *Lee*, 908 F.3d at 1187. They work in tandem: "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). There is no

[3] Plaintiffs' contentions that a stay should be denied because this Court lacks jurisdiction and the legislators did not participate and object below (at 13-14, 19) are wrong for the same reasons that the legislators are entitled to appeal. *Supra*, Part I.

"difference in the vigor with which the privilege protects against compelling a [legislator's] testimony as opposed to the protection it provides against suit." *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995). A legislator "may not be made to answer—either in terms of questions *or* in terms of defending himself from prosecution." *Gravel v. United States*, 408 U.S. 606, 616 (1972) (emphasis added).

Fourth, plaintiffs' assertion (at 18-19) that the legislators have failed to demonstrate irreparable harm fails because their assertion that *Mohawk* controls this case is wrong for the reasons described above. *Supra* Part I. So are their arguments that the legislators have either waived privilege or failed to properly assert it.

III. In the Alternative, This Court Should Issue a Writ of Mandamus.

In the alternative this Court should construe the legislators' motion as a petition for a writ of mandamus and grant relief for the reasons explained in their motion (at 15-18). Many of plaintiffs' arguments that mandamus is not appropriate simply repeat those opposing a stay. For example, plaintiffs complain (at 20-22) that the legislators did not properly object in the district court and did not properly invoke the privilege. As described above, *supra* Part I, those arguments are wrong.

Plaintiffs' contention (at 21) that the legislators have failed to show an indisputable right to relief is also wrong. At bottom, the district court blessed an end-run around this Court's impending judgment in *Hughes*, while disregarding contrary precedent from three courts of appeals. *Alviti*, 14 F.4th at 88-90*; Lee*, 908 F.3d 1175, 1186-88; *Hubbard*, 803 F.3d at 1311-12. It also disregarded the stay in *Lulac v. Patrick*, No. 22-50662, where this Court necessarily found "a strong showing of likelihood to

succeed on the merits" *Vote.Org v. Callanen*, 39 F.4th 297, 302-03 (5th Cir. 2022). In combination, that amounts to a "'clear and indisputable'" showing that "the district court abused its discretion.'" *In re Itron, Inc.*, 883 F.3d 553, 568 (5th Cir. 2018) (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc))

Conclusion

The Court should grant a stay pending *Hughes* or in the alternative a writ of mandamus.

Respectfully submitted.

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Certificate of Service

On April 12, 2023, 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 Symantec Endpoint Protection and is free of viruses.

/s/ Benjamin D. Wilson
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d) because it contains 2,596 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 Equity) using Microsoft Word (the same program used to calculate the word count).

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