

No. 22-50407

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,

*Plaintiffs-Appellees,*

v.

GREG ABBOTT, et al.,

*Defendants,*

RYAN GUILLEN, TEXAS HOUSE MEMBER, BROOKS LANDGRAF,  
TEXAS HOUSE MEMBER & JOHN LUJAN, TEXAS HOUSE MEMBER,

*Third-Party Movants-Appellants.*

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**APPELLANTS' UNOPPOSED MOTION  
TO HOLD THE APPEAL IN ABEYANCE**

Appellants respectfully request that the Court hold this appeal in abeyance, including briefing deadlines, pending further proceedings. The pending appeal involves the question of whether state legislators may be called to testify by deposition and if so, whether they can be compelled to give privileged testimony about the innerworkings of the legislative process over their legislative privilege objections. The legislators sought an emergency stay of the depositions pending their appeal of those issues; the emergency motions panel denied the stay motion. Accordingly, the depositions will soon begin, making it substantially unlikely that even the most expedited appeal could timely

resolve the important questions regarding the scope of the legislators' immunity and privilege before those depositions are to proceed.<sup>1</sup>

Accordingly, rather than ask for this Court's review now on a severely expedited basis only to have additional appellate issues arise as depositions proceed, the legislators seek to hold this case in abeyance in furtherance of judicial economy and conserving the parties' resources. If appropriate pending further proceedings, the legislators would amend their notice of appeal to add future orders regarding the scope of the legislators' privilege. In particular, the district court's deposition procedure anticipates future orders sometime in August that could potentially unseal privileged testimony, making that testimony part of the public record.<sup>2</sup> Holding the appeal in abeyance will permit the legislators to brief the pending immunity and privilege issues on the merits together with any such later orders. Holding the appeal in abeyance would also permit additional legislators who have or will soon be subpoenaed for depositions to join the pending appeal. Plaintiffs do not oppose the relief sought in this motion.

1. Plaintiffs subpoenaed Texas state legislators to testify by deposition as part of plaintiffs' challenge to Texas redistricting legislation. The legislators, who are third parties to the litigation, moved to quash the deposition subpoenas. As the legislators'

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<sup>1</sup> While plaintiffs ultimately did temporarily postpone depositions during the stay briefing, plaintiffs will now be proceeding with the first set of depositions the week of June 20, 2022, continuing through July. Discovery is set to close on July 15, 2022, absent agreement by the parties. And motions to unseal privileged testimony given during the depositions are due August 1, 2022.

<sup>2</sup> See generally *LULAC v. Abbott*, 2022 WL 1570858 (W.D. Tex. May 18, 2022).

motions explained, “plaintiffs are generally barred from deposing local legislators”—much less state legislators—“even in ‘extraordinary circumstances’” and even in redistricting cases. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018); *accord In re Perry*, 60 S.W.3d 857, 861-62 (Tex. 2001) (“all other available evidentiary sources must first be exhausted before extraordinary circumstances will be considered” to permit legislator depositions in redistricting challenge); *In re Hubbard*, 803 F.3d 1298, 1310-11, 1315 (11th Cir. 2015) (quashing document subpoenas for internal legislative documents).

2. On May 18, 2022, the district court denied the legislators’ motion to quash or modify depositions subpoenas or, alternatively, for a protective order. *See LULAC v. Abbott*, 2022 WL 1570858 (W.D. Tex. May 18, 2022). The district court believed that “issues of state legislative privilege are not yet ripe for decision” until the legislators are actually deposed, *id.* at \*1, thereby rejecting the legislators’ arguments that legislative immunity and privilege ordinarily bars plaintiffs from forcing state legislators to sit for depositions, *supra*.

3. The district court further prescribed a procedure to govern the legislators’ depositions. *See LULAC*, 2022 WL 1570858, at \*2-3. The legislators will not only be required to “appear and testify even if it appears likely that legislative privilege may be invoked in response to certain questions,” the legislators will also be required to answer any such questions. *Id.* at \*2. Regardless of whether the legislators raise legislative privilege objections to particular questions, the legislators are under court order to “answer

the question[s] in full” during depositions. *Id.* at \*3. They cannot be instructed not to answer, as a deponent would ordinarily be free to do. *See, e.g., Perry v. Perez*, 2014 WL 106927, at \*3 (W.D. Tex. Jan. 8, 2014) (revising procedure to permit Texas legislators not to answer questions objected to on privilege grounds in last redistricting cycle). Once depositions occur, portions of transcripts containing such privileged testimony will be deemed confidential under the parties’ protective order. *See LULAC*, 2022 WL 1570858, at \*3. Per the Court’s procedure, plaintiffs can then submit that testimony to the Court for *in camera* review for the Court to decide whether it can become part of the public record to be used in the proceedings. *Id.* Any such requests must come by August 1, 2022. *Id.*

4. The legislators filed their notice of appeal on the same day as the district court’s order.

5. The legislators asked plaintiffs to delay the depositions pending the legislators’ appeal. Plaintiffs refused. The legislators then asked the district court to stay the depositions pending appeal, which the district court denied.

6. The legislators also immediately moved for a stay of the depositions pending their appeal in this Court. The motions panel held that this Court has appellate jurisdiction over the legislators’ appeal but went on to deny the stay. *See* May 20, 2022 Order 1 n.1, 9. The panel disagreed that the legislators would be harmed once depositions proceed, “[g]iven ... procedures” set forth by the district court. *Id.* at 9. *But see Whole Woman’s Health v. Smith*, 896 F.3d 362, 367-68 (5th Cir. 2018) (granting stay

pending appeal and observing, in decision on the merits, that third-party's appeal of "forced discovery ... is 'effectively unreviewable' on appeal from the final judgment"); *In re U.S. Dep't of Educ.*, 25 F.4th 692, 705 (9th Cir. 2022) ("the intrusion of the deposition itself" is the harm); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) ("appeal after final judgment will often come too late because the privileged materials will already have been released").

7. The legislators renewed their request for a stay of the depositions in the U.S. Supreme Court in an emergency stay application, which the Court denied on May 31, 2022. *See* 2022 WL 1738936, at \*1 (U.S. May 31, 2022).

8. During the stay briefing, with an intervening order from the district court dismissing many of plaintiffs' claims, *see* Order, 3:21-cv-00259 (W.D. Tex. May 23, 2022), ECF 307, plaintiffs delayed the earliest depositions. Depositions are now set to proceed beginning the week of June 20 and continuing through July. Plaintiffs are likely to subpoena roughly one dozen additional House legislators, officials, and staff.

9. Had plaintiffs agreed to postpone depositions pending appeal or had the depositions been stayed, an appeal of the legislative immunity and privilege issues could have been underway with sufficient time to resolve those important issues before undertaking the depositions. Now without a stay, it appears substantially likely that many or all contemplated depositions will proceed before any appeal could be decided, even on the most expedited schedule. And at that point, there will be additional orders in August or earlier resolving whether the legislators' privileged testimony—to be given

during the depositions as ordered by the district court—can be unsealed and made part of the public record. *See LULAC*, 2022 WL 1570858, at \*3.

10. Accordingly, in light of what is to come absent a stay, the legislators anticipate that they will need to amend their notice of appeal to include any future orders relating to legislative privilege and to add other legislators subpoenaed for depositions.

11. Holding the legislators’ appeal in abeyance pending those further proceedings will permit the legislators and other parties to brief and obtain a decision on all privilege issues at once, in service of the interests of judicial economy and the preservation of the parties’ resources. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (court has “inherent” “power to stay proceedings ... to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants”); *see, e.g., Nat’l Parks Conservation Ass’n v. U.S. E.P.A.*, 991 F.3d 681, 683 (5th Cir. 2021) (case held in abeyance pending further agency proceedings).

12. Plaintiffs do not oppose the relief sought in this motion.

13. For the foregoing reasons, the legislators respectfully request that the Court place this appeal in abeyance, including all briefing deadlines. If the Court so orders, the legislators would be pleased to submit status reports every 30 days to apprise the Court of the status of the district court proceedings.

Respectfully submitted,

Dated: June 7, 2022

/s/ Taylor A.R. Meehan

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### CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d)(2) because it contains 1,416 words, excluding the parts that can be excluded. This motion complies with Rule 32(a)(5)-(6) and Fifth Circuit Rule 32.1 because it has been prepared in proportionally spaced Garamond 14-point font and 12-point footnotes.

Dated: June 7, 2022

/s/ Taylor A.R. Meehan

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*Counsel for Legislators,  
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### CERTIFICATE OF SERVICE

I filed this motion with the Court via ECF, which will electronically notify all parties who have appeared in this case. The document has been scanned and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket Order No. 2020-3.

Dated: June 7, 2022

/s/ Taylor A.R. Meehan

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