

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 22-50662

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF TEXAS, *et al.*,

Defendants

JOAN HUFFMAN, TEXAS SENATE MEMBER, *et al.*,

Movants-Appellants

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS

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JOINT STATUS REPORT

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The parties submit the following joint status report stating their respective positions regarding whether the briefing schedule in this case should continue to be held in abeyance.

1. This is an interlocutory appeal in which appellants, state legislators who are not parties to the underlying litigation, challenge a three-judge district court's order requiring them to produce documents over their assertions of state legislative

privilege. Doc. 467. The dispute arises in the context of the United States' enforcement action under Section 2 of the Voting Rights Act of 1965, in which the United States alleges that the 2021 Texas Congressional plan has a discriminatory purpose and discriminatory result and that the 2021 Texas House plan has a discriminatory result. Doc. 318.

2. During the pendency of this appeal, this Court issued two opinions that bear on the discovery dispute at issue in this appeal. *LULAC Texas v. Hughes*, No. 22-50435, 2023 WL 3494770 (5th Cir. May 17, 2023); *Jackson Mun. Airport Auth. v. Harkins*, No. 21-60312, 2023 WL 3333607 (5th Cir. May 10, 2023).

3. The district court did not apply *Hughes* or *Harkins* in issuing its discovery order, and the United States contends the district court is best positioned to do so in the first instance. The United States therefore believes that it would be premature to brief this appeal at this time. Similarly, there is no basis for summary reversal and vacatur of the district court's order. Instead, the United States respectfully suggests that a remand would be appropriate. A remand would provide the district court, which is most familiar with the case and the specific documents the United States seeks here, an opportunity to consider, in light of *Harkins* and *Hughes*, which documents are appropriately covered by legislative privilege, and for any such documents, whether the special features of this

redistricting case render it an “extraordinary” case in which the privilege must yield. *Hughes*, 2023 WL 3494770, at \*5.

4. Alternatively, in the event that the Court takes no immediate action, the United States believes that the briefing schedule should remain stayed so that the United States can file with the district court a motion under Rule 62.1 of the Federal Rules of Civil Procedure, with appropriate briefing, requesting an indicative ruling on whether and how it would modify its discovery order (Doc. 467) in light of *Hughes* and *Harkins*. If the district court issues such an indicative ruling or indicates that the motion raises a substantial issue, the United States would notify this Court, which could then remand for further proceedings in accordance with Rule 12.1 of the Federal Rules of Appellate Procedure.

5. The Legislators’ position is that this Court should summarily reverse and vacate the district court’s order in light of *Hughes* and *Harkins*, preceded by supplemental briefing if the Court deems necessary. Alternatively, the Court should vacate and remand the district court’s order in light of *Hughes* and *Harkins*. In the stay briefing, both parties agreed this appeal and *Hughes* presented overlapping legal issues. Legislators’ Mot. at 2; U.S. Opp. at 19.

The district court relied on the district court’s reasoning in *Hughes*—which this Court has now rejected—to conclude that the legislative privilege was inapplicable here. *See LULAC v. Abbott*, 2022 WL 2921793, at \*2-6 (W.D. Tex.

July 25, 2022). This Court’s *Hughes* and *Harkins* opinions now make clear that reversal of that order—or vacatur, at the very least—is warranted. *Hughes* was also a case arising under the Voting Rights Act with allegations of discriminatory intent. *See Hughes*, 2023 WL 3494770, at \*1 (slip op. 2). And *Hughes* rejected the district court’s conclusion—adopted by the district court here—that the privilege “must yield.” *Id.* at \*5 (slip op. 13) (quotation marks and alterations omitted). As for the district court’s conclusion that legislative privilege did not shield documents shared with third parties, *LULAC*, 2022 WL 2921783, at \*4, both *Hughes* and *Harkins* compel a different conclusion: “communications with third parties outside the legislature might still be within the sphere of ‘legitimate legislative activity’ if the communication bears on potential legislation.” *Harkins*, 2023 WL 3333607, at \*5 (slip op. 12); *accord Hughes*, 2023 WL 3494770, at \*4 (slip op. 9).

The same analysis applies here. This is not the “extraordinary” case where privilege must yield, *supra*. *Hughes* itself relied on a redistricting case to explain that the privilege would be “‘of little value’” if allegations like those here were deemed an exceptional case where privilege must yield. *See Hughes*, 2023 WL 3494770, at \*6 (slip op. 15-16) (quoting *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187-88 (9th Cir. 2018)).

6. Whichever course the Court chooses, the Legislators note that the stay of the district court's order should remain in place until either this Court or the district court reconsiders that order in light of *Hughes* and *Harkins*. If the stay is lifted, the Legislators will be subject to the district court's order compelling production of documents, even though this Court's *Hughes* opinion, relying on a redistricting case no less, states that legislators ordinarily cannot be compelled to produce documents. *See Hughes*, 2023 WL 3494770, at \*6 (discussing *Lee*). Irreparable harm would necessarily follow because if the Legislators are forced to disclose their documents, then the proverbial "cat is out of the bag" and their legislative privilege is lost. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on May 24, 2023, I electronically filed the foregoing JOINT STATUS REPORT with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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