

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

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

JOINT STATUS REPORT

Pursuant to this Court's September 15, 2022 order, 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 appeal concerns legal issues materially similar to those at issue in *LULAC Texas v. Hughes*, No. 22-50435.

2. Plaintiffs-appellees in *Hughes*, without opposition from the third-party appellants, moved to expedite briefing in that case and requested a resolution of the case no later than October 3, 2022, in order to avoid interference with the district court's trial schedule.

3. A panel of this Court heard oral argument in *Hughes* on August 2, 2022, but it has not yet issued an opinion in that case.

4. In light of the above, the parties do not object at this time to this Court continuing to hold in abeyance the briefing schedule in this case. The parties request that this Court order them to file another joint status report stating their respective positions regarding whether the briefing schedule in this case should continue to be held in abeyance either (1) within seven days of the issuance of a decision in *LULAC Texas v. Hughes*, No. 22-50435, or (2) by December 5, 2022, whichever occurs sooner.

5. Separately, the United States notes that the district court's order at issue in this case has been subject to an administrative stay for over three months (since July 27, 2022). This Court entered the administrative stay on the same day that third-party appellants requested a stay pending appeal, before the United States filed its response. At no point has this Court determined whether a stay of the district court's order is justified under the factors set forth in *Nken v. Holder*, 556 U.S. 418 (2009). In its brief opposing the third-party appellants' motion for a stay

in this case, the United States explained why a stay is not justified based on consideration of the *Nken* factors. See U.S. Opp'n to Mot. for a Stay Pending Appeal. Indefinite imposition of an administrative stay may interfere with the United States' ability to complete trial preparations, proceed to trial, and obtain relief sufficiently in advance of Texas's December 2023 candidate-qualification deadline for 2024 Congressional and State House elections. For the reasons previously expressed, the United States urges this Court to lift its administrative stay. But if this Court is not inclined to do so, the United States respectfully urges the Court to resolve *Hughes* as soon as possible.

The Legislators disagree with the United States' request to lift this Court's stay of July 27, 2022. All parties fully briefed the stay factors in this Court. And this Court ordered that the district court's order compelling the production of legislatively privileged documents be stayed and carried with this case. That was especially prudent given that this Court is currently considering the very same issues of legislative privilege in *LULAC Texas v. Hughes*, No. 22-50435. The stay, moreover, is not "indefinite." And there is no basis for the United States' assumption that this Court has not determined that the stay is justified. The parties are awaiting this Court's guidance in *Hughes*; once decided, *Hughes* ought to guide whether the production of privileged documents (that have already been collected, reviewed, and logged) is in fact required. As the United States implicitly

concedes, there is no exigency. The district court has vacated the original trial date and has not yet set a new trial date. ECF No. 569, 3:21-cv-00259-DCG-JES-JVB. The next relevant election deadline is more than a year away. Principles of judicial economy and the preservation of party resources strongly compel awaiting this Court's guidance in *Hughes* first and then producing documents, if required, second. To require the legislators to produce the documents now, as the United States now requests, would be to pre-decide the legal question pending on appeal here and in *Hughes*: whether the documents are legislatively privileged and thus beyond the scope of discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 4, 2022, 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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