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Via E-filing

Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit

Re: No. 22-50435, *LULAC Texas, et al. v. Hughes, et al.*

Dear Mr. Cayce:

I write in response to Plaintiffs' letter of earlier today bringing to the Court's attention *Turtle Mountain Band of Chippewa Indians v. Howe*, Case No. 23-1597 (8th Cir.), in which the Eighth Circuit sua sponte dismissed an interlocutory appeal by a group of state legislators asserting legislative privilege. *Turtle Mountain* is of no moment in this Circuit.

There is an acknowledged circuit split on whether third parties may assert a claim of privilege in an interlocutory appeal—particularly when the party “asserts a governmental privilege.” *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 84 (1st Cir. 2021). The Eighth Circuit is now on one side of that split. Order at 1, *Turtle Mountain*, No. 23-1597 (8th Cir. Apr. 3, 2023); cf. *In re Grand Jury Subpoenas*, 974 F.3d 842, 844 (8th Cir. 2020) (per curiam) (private parties). This Court is on the other, *LULAC v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1 (5th Cir. May 20, 2022) (citing, *inter alia*, *Whole Woman's Health v. Smith*, 896 F.3d 362, 367-69 (5th Cir. 2018))—as is the Eleventh Circuit applying the law of the pre-split Fifth Circuit, *In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015) (citing, *inter alia*, *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 879 (5th Cir. Unit A Mar. 1981)).

This Court is bound by its earlier decisions on this issue. *E.g.*, *United States v. Walker*, 302 F.3d 322, 325 (5th Cir. 2002). It should follow them because they are correct for the reasons explained in the reply (at 2-9) and at oral argument. And even if this Court were inclined to reconsider the issue, it should not do so here. The Court has “discretion to treat [this] mere appeal as petition for writ of mandamus.” *S. Pac.*

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Transp. Co. v. San Antonio, Tex. ex rel. City Pub. Serv. Bd., 748 F.2d 266, 270 (5th Cir. 1984). And it should exercise that discretion to provide much-needed guidance about the contours of legislative privilege, which has resulted in at least four appeals to this Court in the last year.

Respectfully submitted.

/s/ Lanora C. Pettit

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cc: all counsel of record (via e-mail)

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