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May 15, 2023

Lyle W. Cayce  
Clerk of Court  
U.S. Court of Appeals for the Fifth Circuit  
F. Edward Hebert Building  
600 S. Maestri Place  
New Orleans, LA 70130-3408

**Re: *LULAC Texas, et al. v. Hughes, et al.*, Case No. 22-50435**  
**Argument Held: August 2, 2022**  
**Panel: Richman, Wiener, Jr., Willett**

Dear Mr. Cayce:

I write in response to Appellants' letter regarding *Jackson Municipal Airport Authority v. Harkins*, No. 21-60312 (5th Cir. May 10, 2023).

First, *Harkins* cites *Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973), and *Branch v. Phillips Petroleum Co.*, 638 F.2d 873 (5th Cir. 1981), to conclude appellants may immediately appeal a discovery order. Slip Op. 4-7. These decisions are irreconcilable with the Supreme Court's ruling in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 114 (2009), which held that "the collateral order doctrine does not extend to disclosure orders" adverse to privilege claims because "[e]ffective appellate review can be had by other means." Appellees' Br. 15-23.

Even before *Mohawk*, this Court recognized that *Cates* was "unsound" and relied upon "reasoning . . . rejected by the Supreme Court." *Branch*, 638 F.2d at 877-78 (citing *United States v. Ryan*, 402 U.S. 530 (1971)). No Fifth Circuit decision relied on *Cates*'s jurisdictional ruling for four decades, and sister circuits concluded *Cates* had "been disavowed by the Fifth Circuit itself." *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 257 n.2 (1st Cir. 1989) (citation omitted); Appellees' Br. 19-21.<sup>1</sup>

Second, *Harkins* did not "implicitly" reject any inquiry into legislative purpose, but instead repudiated the Legislators' demand for an absolute privilege, explaining that "evidence of legislative motive is not necessarily privileged." Slip Op. 11. The Supreme Court has made clear

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<sup>1</sup> Even if binding here, *Harkins* may be overruled by this Court *en banc*. *Wearry v. Foster*, 52 F.4th 258, 260 n.1 (5th Cir. 2022). Appellees in *Harkins* obtained an extension to June 14 to seek such review.

such inquiry is permissible. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

*Third*, *Harkins* recognized legislative privilege can sometimes be waived, including where legislators “publicly reveal” the document. Slip Op. 11. Many of the 89 documents deemed waived by Judge Rodriguez likely fall in this category, ROA.10398-10449; thus, if the panel reaches this issue, the trial court—which reviewed each document *in camera*—should resolve this question in the first instance.

Sincerely,

/s/ Uzoma N. Nkwonta  
Uzoma N. Nkwonta

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