No. 22-50407

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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.

On Appeal from the United States District Court for the
Western District of Texas No. 3:21-cv-259-DCG-JES-JVB [Lead Case]

REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL OR, ALTERNATIVELY, PENDING *MERRILL* AND FOR TEMPORARY ADMINISTRATIVE STAY PENDING CONSIDERATION OF MOTION

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REPLY

Plaintiffs have filed a brief opposing the legislators' pending motion for a stay pending appeal. Plaintiffs' jurisdictional arguments invite this Court to ignore binding Circuit precedent. Plaintiffs' merits arguments invite this Court to contravene binding Supreme Court precedent and to reject decisions by other courts of appeals, deepening a split of authority that will soon merit Supreme Court review.

I. Jurisdiction. There is no support for Plaintiffs' repeated assertions that this Court has "no jurisdiction." Pls.' Resp. Br. 1, 5. This case is not *Mohawk*. *Mohawk* involved an interlocutory appeal by the *defendant* to the underlying litigation, not a *third-party* legislator who has been involuntarily subpoenaed. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 105 (2009). That distinction is critical. The Court need not take the legislators' word for that; this Court has already explained the critical distinctions between *Mohawk* and the circumstances here—where a third party is involuntarily subpoenaed and then ordered to comply over their privilege objections. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 367-68 (5th Cir. 2018) ("*Mohawk* does not speak to the predicament of third parties").[1]

[1] Separately, *Mohawk* confirmed that mandamus relief remains available to parties as an "established mechanism[]" for continued "appellate review." 558 U.S. at 111-12. For the reasons below, the legislators are not a party to the underlying litigation here, and binding Fifth Circuit precedent requires the legislators to appeal under 28 U.S.C. §1291. The legislators will follow that binding precedent in forthcoming briefing, but they will also brief their entitlement to mandamus relief, complying with all rules to petition for the same, such that this Court could construe the appeal as a petition for writ of mandamus. *See S. Pac. Transp. Co. v. San Antonio*, 748 F.2d 266, 270 (5th Cir. 1984) (converting appeal to petition for writ of mandamus).

This case is also not *A-Mark*, involving document subpoenas issued to an auctioneer that related to litigation pending in another court. *A-Mark Auction Galleries, Inc. v. Amer. Numismatic Ass'n*, 233 F.3d 895 (5th Cir. 2000). That discovery order did not implicate any privilege arguments nor did it "resolve important issues separate from the merits." *Id.* at 899; *accord Natural Gas Pipeline Co. of Amer. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1411 (5th Cir. 1993) (subpoena *duces tecum* involving personal tax returns relevant to litigation pending in another court).

Rather, this case is an appeal by state legislators. They are third parties, involuntarily subpoenaed for depositions as part of the underlying litigation. The binding precedent of this Court permits their immediate appeal. *See Whole Woman's Health*, 896 F.3d at 367-69; *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 879 (5th Cir. 1981) (circuit precedent "extends the right of immediate appeal to the government"); *Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 622 (5th Cir. 1973) ("discovery orders may be appealable when an executive privilege is involved and the executive or governmental agency is not a party to the lawsuit"); *accord In re Hubbard*, 803 F.3d 1292, 1305 (11th Cir. 2015) (relying on Fifth Circuit precedent for conclusion "the law of this circuit is that one who unsuccessfully asserts a governmental privilege may immediately appeal a discovery order where he is not a party to the lawsuit"); *Whitford v. Vos*, 2019 WL 4571109, at *1 (7th Cir. 2019) (converting mandamus petition to interlocutory appeal). Meanwhile, other courts have entertained such appeals in similar circumstances as mandamus petitions. *See, e.g.*, *In re Kellogg Brown & Root*, 756 F.3d 754, 756 (2014)

(granting petition for writ of mandamus and vacating discovery order transgressing attorney-client privilege); *see also S. Pac. Transp. Co. v. San Antonio*, 748 F.2d 266, 270 (5th Cir. 1984) (converting §1291 appeal to petition for writ of mandamus). Either way, this Court's jurisdiction over the legislators' appeal will be indisputable.

Try as they might, Plaintiffs cannot distinguish this Court's decision in *Whole Woman's Health*. There, a district court compelled the Texas Conference of Catholic Bishops to respond to a third-party subpoena, requiring the Bishops to disclose internal Church documents about Church burials, abortion, miscarriage, and related documents, including internal deliberations regarding the same. 896 F.3d at 366-67. The Bishops raised First Amendment privilege objections to the subpoenas, but the district court compelled the Bishops to produce the documents within 72 hours. *See id.* at 367. This Court stayed the discovery order pending the appeal, for reasons that apply equally here. *See id.*; *see* Legislators' Emergency Mot. to Stay 12, 16-18. Briefs were expedited, and this Court ultimately ruled with the Bishops on the merits. *Whole Woman's Health*, 896 F.3d at 376. On the way to vacating the district court's discovery order, this Court exhaustively evaluated its jurisdiction and concluded that it had jurisdiction for several reasons. *Id.* at 367. The Court rejected the appellee's reliance on *Mohawk*, entailing the same arguments plaintiffs' make here. *Id.* And no different than the circumstances here—there was no dispute that the district court's order was "conclusive" for the Bishops; that "failure to comply with it may result in sanctions"; that "the order resolves important and very novel issues separate from the merits of the litigation"; and that

"the consequence of forced discovery" for a third party "is 'effectively unreviewable' on appeal from the final judgment." *Id.* at 367. Those very same considerations apply to the legislators in full force here. And Plaintiffs' arguments to the contrary improperly relitigate the *merits* of the legislators' privilege arguments—belittling the centuries-old safeguards of legislative immunity and privilege as compared to the Bishop's First Amendment privilege objections (Resp. 9-10)—not the jurisdiction of this Court.

Plaintiffs' remaining jurisdictional arguments have no more merit. For example, they claim that this Court—if it were to set aside *Whole Woman's Health*—could not then construe the appeal as a petition for mandamus because no petition for mandamus has been served. *See* Resp. 10. That argument is premature, as illustrated by Plaintiffs' cited authority. Right now—48 hours after the district court ordered the legislators' depositions and with depositions now only days away—the legislators seek a stay of that order pending further review from this Court. Presumably, this Court's further review will be guided by an expedited briefing schedule. And it will be at that point that Plaintiffs can decide whether the legislators' filings appropriately comply with the Federal Rules so that their appeal may be construed first as an appeal under §1291—as compelled by this Court's precedents—and in the alternative a petition for writ of mandamus. *See E.E.O.C. v. Neches Butane Products Co.*, 704 F.2d 144 (5th Cir. 1983) (concluding party failed to comply with Fed. R. App. P. 21 by the time the Court reached the merits). In short, nothing forecloses this Court from staying the depositions now pending the Court's further review, and responses to Plaintiffs' various

jurisdictional arguments can be appropriately briefed in full in accordance with an expedited briefing schedule.

II. Plaintiffs' remaining arguments do not negate the need for a stay.

A. On the merits, plaintiffs argue that the "order did not reject the Legislators' privilege claims outright, but merely held that the Legislators are not entirely exempt from being deposed" and that, with the district court's novel procedure, they will not face irreparable harm. Resp. 2, 17-18. Respectfully, the order rejects the legislators' motion to quash in its entirety; it orders the legislators to appear for depositions, despite their invocation of legislative immunity and privilege; and it orders the legislators to air privileged testimony, despite their invocation of legislative immunity and privilege, to the United States Department of Justice, counsel for more than two dozen private plaintiffs; and ultimately to the district court, which plans to simultaneously act as an arbiter of privilege and as the factfinder.

For the reasons already argued, there is no controlling precedent in this Circuit that could conceivably require the depositions to proceed. *See* Legislators' Emergency Mot. to Stay 11-12. Contrary to Plaintiffs' arguments (at 15), *dicta* quoting a district court opinion in *Jefferson Community Health Care Center* did not unknowingly create a circuit split requires every court in this Circuit to "strictly construe" legislative privilege in ways other Courts of Appeals have not condoned. *Cf. Gahagan v. United States Citizenship & Immigration Services*, 911 F.3d 298, 304 (5th Cir. 2018) (stating the Court is "always chary to create a circuit split" (quotation marks omitted)). Nor can decisions by trial courts,

applying their bespoke multi-factored privilege test, bind this Court. *See* Resp. 15. To the extent there is disagreement on either score or Plaintiffs' remaining arguments on the merits, the time and place to debate it is after a stay postponing the depositions and in the parties' briefs on the merits.

B. If there were any doubt about the balance of harms, Plaintiffs' response removes it. Plaintiffs confirm that they intend to use "many" of their 325 hours of permitted deposition time for Texas legislators. Resp. 18. Representatives Guillen, Landgraf, and Lujan are just the start. Absent a stay, "many" of Texas's 181 legislators can be assured that they, too, will have to sit for depositions and give privileged testimony. And in Plaintiffs' view, depositions will proceed apace even though the Supreme Court in *Merrill* will clarify the metes and bounds of the very standard governing Plaintiffs' claims, and thus the very relevance (or irrelevance) of any testimony that could be elicited in such depositions. Absent a stay, those extraordinary litigation tactics and the most serious question about the scope of legislative immunity and privilege again evade this Court's review.

* * *

For the foregoing reasons, and those in the legislators' pending motion, a stay is warranted. The legislators respectfully request that the Court stay the depositions pending appeal or, alternatively, stay depositions pending *Merrill*.

Respectfully submitted,

Dated: May 20, 2022

/s/ *Adam K. Mortara*

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** Application for readmission forthcoming*

CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27(d) because it contains 1,623 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: May 20, 2022

/s/ Adam K. Mortara
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Counsel for Legislators,
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CERTIFICATE OF SERVICE

I filed this reply 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: May 20, 2022

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