

Gallagher & Kennedy, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
(602) 530-8000

Kevin E. O'Malley (Bar No. 006420)
kevin.omalley@gknet.com
Hannah H. Porter (Bar No. 029842)
hannah.porter@gknet.com
Ashley E. Fitzgibbons (Bar No. 036295)
ashley.fitzgibbons@gknet.com
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
Facsimile: (602) 530-8500
Attorneys for Arizona Legislators

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota; et al.,
Plaintiffs,
and
DSCC and DCCC,
Plaintiff-Intervenors,
v.
Adrian Fontes, in his official capacity as
Arizona Secretary of State; et al.,
Defendants,
and
RNC and NRSC,
Defendant-Intervenors.

Case No. 2:21-cv-01423-DWL

**RESPONSE TO PLAINTIFFS'
MOTION TO COMPEL DISCOVERY
FROM NON-PARTY ARIZONA
LEGISLATORS**

(Oral Argument Requested)

Senator John Kavanagh, Former Speaker of the House Rusty Bowers, Senator Jake Hoffman, Former Representative John Fillmore, Former Senator Michelle Ugenti-Rita, Senator Kelly Townsend, Former Senate President Karen Fann, Senator JD Mesnard, and Senator David Gowan (collectively the "Legislators") hereby respond to Plaintiffs' Motion to Compel ("Motion").

The Motion seeks to compel the production of approximately 196 documents

1 withheld from production by the Legislators on the grounds of legislative privilege.
2 Plaintiffs' claimed need for the withheld materials is belied by the fact that Plaintiffs have
3 already received approximately 33,000 documents and the publicly available legislative
4 history materials (minutes, summaries, and video recordings of legislative hearings).
5 Moreover, many of the withheld documents do not even concern S.B. 1485, but rather other
6 voting bills that were considered during the same legislative session. And, more than 50 of
7 the withheld documents consist of internal communications between the Legislators and
8 their staff regarding draft legislation, draft minutes and agendas etc., and bill lists.

9 Plaintiffs argue that the privilege should give way because they claim that the
10 documents are "highly relevant" to their intentional discrimination claim. Plaintiffs' view
11 would effectively neuter the legislative privilege in any case involving a claim of
12 discriminatory intent. That is not the law. Though the legislative privilege is "qualified," it
13 is not non-existent. Applying the five-factor balancing test here, the Court should deny the
14 Motion and uphold the legislative privilege.

15 **I. Factual Background.**

16 Plaintiffs served subpoenas on the Legislators seeking not just information
17 concerning S.B. 1485 and S.B. 1003, but also more generally about "actual or potential
18 changes to Arizona law or regulations on voting" and "potential or actual risk of voter fraud
19 related to the Permanent Early Voting List, an unsigned Early Ballot, or a mismatched
20 signature Early Ballot." *See* Doc. 198-1 (categories 2 and 8).

21 Counsel for the Legislators worked with Plaintiffs' counsel regarding the scope of
22 the requests, an appropriate date range, and an agreed-upon list of search terms. These
23 search terms included four other bills (in addition to S.B. 1485 and S.B. 1003) as well as
24 more general terms such as, "PEVL," "early voter list," and others. Even with the time
25 frame limited to the 55th Regular Session of the Arizona legislature, the search terms
26 returned tens of thousands of hits. Counsel for the Legislators spent dozens of hours

1 reviewing the hits for responsiveness and privilege.

2 To date, the Legislators produced approximately 33,000 documents to Plaintiffs.
 3 These documents include thousands of stock emails sent to the Legislators from constituents
 4 or third-party groups advocating certain positions on pending bills or other issues related to
 5 voting and mass emails sent by Legislators to members of the public regarding those bills.¹
 6 In addition to these mass emails, the Legislators produced legislative history documentation
 7 (such as final copies of minutes etc.), and text messages from the Legislators' personal cell
 8 phones. Plaintiffs also have access to extensive publicly available legislative history,
 9 including videos of committee meetings and hearings or votes on the bills, fact and
 10 summary sheets, proposed and final amendments, and calendars for the bills.²

11 The Legislators withheld 196 documents pursuant to the legislative privilege, which
 12 can be generally categorized as follows:

<u>CATEGORIES OF WITHHELD DOCUMENTS:</u>	
Internal communications between legislators and staff regarding proposed legislation	73
Administrative communications between legislators and staff (sharing draft agendas, minutes, bill lists, etc.)	57
Communications between legislators and staff with draft proposed legislation	28
Legislators' communications with third parties regarding proposed legislation	38
TOTAL	196

23
 24 ¹ The Legislators produced these emails subject to an agreement with Plaintiffs that this
 25 production would not constitute a waiver of the privilege for any other document.

26 ² See Arizona Legislature, Bill Status Inquiry – S.B.1485 (last visited March 22, 2023),
<https://apps.azleg.gov/BillStatus/BillOverview/72167?Sessionid=121>.

1 A highlighted copy of the privilege log identifying which documents fall into each of these
2 categories is attached as Exhibit A.

3 After Plaintiffs issued the subpoenas to the Legislators, the Court dismissed
4 Plaintiffs' claim regarding S.B. 1003 for lack of standing. Doc. 154. Thus, all that remains
5 now is Plaintiffs' intentional discrimination claim regarding S.B. 1485.

6 Unsatisfied with the 33,000 produced documents and the publicly available
7 documents regarding S.B. 1485, Plaintiffs seek the 196 documents that have been withheld
8 under the legislative privilege. Plaintiffs assert that any communications between a
9 legislator and a third party are not within the legislative privilege, and, in any event, assert
10 that the legislative privilege should not apply to this case *at all*. Both claims fail.

11 **II. The Legislative Privilege Applies to Communications with Third Parties.**

12 **A. The Legislative Privilege Is Intended to Protect the Legislative Process.**

13 Federal courts have held that state legislators are afforded an “analogous protection”
14 to the privilege for federal legislators arising from the Speech and Debate clause. *Puente*
15 *Arizona v. Arpaio*, 314 F.R.D. 664, 669 (D. Ariz. 2016). Just as the Speech and Debate
16 Clause “establishes a privilege that protects members of Congress from being compelled to
17 testify or produce evidence regarding their legislative activities,” so too do state legislators
18 “enjoy protection from criminal, civil, or evidentiary process that interferes with their
19 ‘legitimate legislative activity.’” *Id.* (internal citations omitted).³

20 One of the key purposes for the legislative privilege is to protect legislators from
21 undue intrusion into their routine actions taken in their legislative capacity. *League of*
22 *Women Voters of Florida, Inc. v. Lee*, 2021 WL 5283949, at *3 (N.D. Fla. 2021) (holding
23 the legislative privilege serves to “prevent parties from harassing legislators . . . for actions
24

25 ³ “The term ‘legitimate’ in this context connotes only that the legislator was engaged in a
26 bona fide attempt to enact legislation, and does not suggest that the legislation was
constitutional or otherwise proper.” *Puente*, 314 F.R.D. at 669 n.3.

1 those legislators take in their legislative capacity”); *see also Lee v. City of Los Angeles*, 908
2 F.3d 1175, 1187 (9th Cir. 2018) (“state and local officials undoubtedly share an interest in
3 minimizing the distraction of divert[ing] their time, energy, and attention from their
4 legislative tasks to defend the litigation”) (internal quotation omitted).

5 In addition, the legislative privilege is also intended to “encourage frank and honest
6 discussion among lawmakers.” *League of Women Voters*, 2021 WL 5283949, at *7
7 (quotation omitted). *Cf. Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530–31 (9th
8 Cir. 1983) (noting that disclosure of communications between federal legislators and
9 constituents could “deter constituents from candid communication with their legislative
10 representatives and otherwise cause the loss of valuable information”).

11 Because the privilege “protects the legislative process itself,” it “therefore covers . .
12 . actions in the proposal, formulation, and passage of legislation.” *In re Hubbard*, 803 F.3d
13 1298, 1308 (11th Cir. 2015). Courts recognize that meetings between legislators and
14 individuals or groups “outside the legislature” to discuss “issues that bear on potential
15 legislation” are “a routine and legitimate part of the modern-day legislative process.”
16 *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *see also Bruce v. Riddle*,
17 631 F.2d 272, 280 (4th Cir. 1980) (“Meeting with ‘interest’ groups, professional or amateur,
18 regardless of their motivation, is a part and parcel of the modern legislative procedures
19 through which legislators receive information possibly bearing on the legislation they are
20 to consider.”).

21 Accordingly, as applied to federal legislators, federal courts, including the Ninth
22 Circuit, have held that legislative privilege applies to communications between a legislator
23 and constituents or third parties about legislation or legislative strategy. *See Miller*, 709
24 F.2d at 530; *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30, 57
25 (D.D.C. 2007). The same should apply to state legislators. The legislative privilege is meant
26 to encompass activities and candid communications that occur as part of the legislative

1 process. Forcing a state legislator to search, review and produce his or her communications
2 with a third party about pending legislation is still an intrusion upon that legislator's routine
3 legislative actions and has the potential to chill the sharing of information with legislators.

4 Hence, in *Puente*, Judge Campbell of this District held that the legislative privilege
5 protects legislators in the different actions they take as part of the legislative process.
6 *Puente*, 314 F.R.D. at 669–70. Specifically, Judge Campbell found that communications
7 with third parties concerning the formation of legislation are part of a legislator's "bona fide
8 legislative activity." *Id.* at 670. This interpretation ensures legislators avoid harassment and
9 "focus on their public duties" in the many actions they take as legislators. *See In re*
10 *Hubbard*, 803 F.3d at 1310.

11 Contrary to Plaintiffs' contention otherwise, *Puente* is not an outlier. Several courts
12 have found legislators' communications with third parties to be a legitimate part of the
13 legislative process and thus within the legislative privilege. *See League of Women Voters*
14 *of Florida*, 2021 WL 5283949, at *3 (finding meeting and communicating with persons
15 outside of the legislature part of the legislative process and within the legislative privilege);
16 *Thompson v. Merrill*, 2020 WL 2545317, at *3 (M.D. Ala. 2020) (concluding activities with
17 third parties can still be protected by the legislative privilege as long as it is for the
18 formulation of legislation); *Jeff D. v. Kempthorne*, No. CV-80-4091-E-BLW, 2006 WL
19 2540090, at *3 (D. Idaho Sept. 1, 2006), *aff'd in part sub nom. Jeff D. v. Otter*, 643 F.3d
20 278 (9th Cir. 2011) ("[E]ven when Holland-Smith is contacting individuals outside the
21 legislator, her purpose is to gather information for a legislator. Under these circumstances,
22 the Court finds that the objected-to information is covered by the legislative privilege.").

23 Plaintiffs cite to decisions from districts outside of the Ninth Circuit that have come
24 to the opposite conclusion. Some of these courts find that the legislative privilege does not
25 cover communications with third parties at all, while others find that communications with
26 third-parties effects a waiver of the privilege. These cases are not binding upon this Court

1 nor are they persuasive in light of the purposes behind the legislative privilege.⁴ These cases
2 tend to take a narrow approach to the privilege by, for example, exempting fact-based
3 documents and communications from the scope of the privilege. *See Bethune-Hill v.*
4 *Virginia State Bd. Of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015); *League of*
5 *Women Voters of Mich. v. Johnson*, 2018 WL 2335805, at *6 (E.D. Mich. 2018). This
6 narrow interpretation is inconsistent with the underpinnings of the privilege itself, which is
7 intended to protect the entire process of formulating legislation regardless of the source of
8 the information that informs a legislator's position.

9 **B. The Legislators' Communications Were Part of Legitimate Legislative**
10 **Activity.**

11 Here, there are 38 communications between legislators and third parties outside of
12 the legislature that have been withheld as privileged. An examination of the log entries for
13 these communications affirms that the communications were regarding bona fide legislative
14 activity.

15 For example, former Senators Ugenti-Rita and Kelly Townsend communicated with
16 a Yavapai County official regarding S.B. 1069. *See* Doc. 198-2 at 2, lines 11, 12. Similarly,
17 Former Senator Townsend also communicated with a Maricopa County official regarding
18 the Maricopa County Election and Emergency Voting Contingency Planning Guide and the
19 Permanent Early Voting List (PEVL). *Id.* at 12, lines 129, 130, 131.

20 Because the Legislators engaged in these third-party communications as part of the
21 legislative process, the Court should find these third-party communications protected by the
22 legislative privilege. Nevertheless, if the Court has any questions regarding whether or not
23 the third-party communications concern legitimate legislative activity, the Legislators
24 support an *in camera* review of the documents.

25 ⁴ Plaintiffs also cite to *Page v. Virginia State Bd. Of Elections*, 15 F. Supp. 3d 657 (E.D.
26 Va. 2014). But that case did not involve privilege claims made by a legislator or holder of
the privilege.

III. The Court Should Uphold the Legislative Privilege.

Unlike the privilege for federal legislators, the federal common law privilege for state legislators is qualified. *Puente*, 314 F.R.D. at 671. Federal courts use a five-factor balancing test to determine whether the privilege will apply: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and issues involved; (4) the role of the government in the litigation; and (5) the purposes of the privilege. *Puente*, 314 F.R.D. at 672.

The application of the five-factor test here supports upholding the Legislators' interests in non-disclosure.

A. The Documents Are Not "Highly Relevant."

The first factor in the balancing test is the relevance of the evidence sought to be protected. Plaintiffs claim the withheld 196 documents must be produced because they are "highly relevant" to their claims. However, Plaintiffs' argument ignores the types of documents withheld and the many materials to which they already have access.

As discussed in Section I, approximately 57 documents can be described as administrative in nature, most of which involve draft agendas, minutes etc. To the extent that agendas and minutes bear any relevance to Plaintiffs' intentional discrimination claims, *drafts* of such documents do not. Because the final documents are fully available to Plaintiffs, there is no need for them to access documents that clearly fall within the scope of the legislative activities protected by the legislative privilege. *See Puente*, 314 F.R.D. at 670. And, in any event, drafts that are not circulated to the entire legislature cannot have relevance as to the legislature's intent as a whole when passing the bill.

Another 28 documents refer to draft bills or draft amendments to those bills. Again, Plaintiffs already have access to the final versions of each bill and amendment introduced at the legislature. And again, these internal drafts exchanged between a legislator and his or her staff that were not shared with other legislators cannot inform the intent of the legislature

1 as a whole.

2 In addition, many of the withheld documents are not specific to S.B. 1485 – the only
3 remaining bill at issue in this case. The subpoenas sought information to a handful of other
4 bills and changes to voting more generally. As a result of Plaintiffs’ broad requests, many
5 of the withheld documents relate to *other* bills not at issue in this matter, further weakening
6 Plaintiffs’ relevancy argument. For example, communications between Former Senator
7 Ugenti-Rita and the Yavapai County Recorder regarding S.B. 1069 were withheld as
8 privileged. Doc. 198-2 at 2. And, as shown in the privilege log, Senator Mesnard withheld
9 19 text messages that relate to his bill, S.B. 1713, and 7 text messages that relate to other
10 non-S.B. 1485 bills, which are not being challenged in this case. *See* Doc. 198-3 at 5-8.
11 Plaintiffs have not brought forth any evidence to show that communications regarding these
12 other bills are “highly relevant” to the remaining claims, especially in light of the thousands
13 of documents Plaintiffs have received.

14 Furthermore, Plaintiffs insist all communications and comments from individual
15 legislators are critical to their allegations of discriminatory intent; however, this is not
16 supported by case law. Courts have questioned the relevancy of an individual legislator’s
17 communications in discerning the intent of the legislature as a whole. “Even in cases where
18 legislative motive is relevant to the merits of a claim, courts have observed ‘it is the
19 motivation of the *entire* legislature, not the motivation of a handful of voluble members that
20 is relevant.’” *Citizens Union of City of N.Y. v. Attorney General of N.Y.*, 269 F. Supp. 3d
21 124, 147 (S.D.N.Y. 2017) (internal citations omitted); *see also In re Kelly*, 841 F.2d 908,
22 912 n.3 (9th Cir. 1988) (“To the extent that legislative history may be considered, it is the
23 official committee reports that provide the authoritative expression of legislative intent . . .
24 Stray comments by individual legislators . . . cannot be attributed to the full body that voted
25 on the bill. The opposite inference is far more likely.”) (internal citations omitted).

26 Plaintiffs already have access to the publicly available documents detailing the

1 legislative history of S.B. 1485 (and the other voting bills considered during the legislative
2 session. This includes minutes, agendas, fact sheets and summaries, and videos of the
3 hearings at which the bills were considered. Thus, Plaintiffs already have the typical
4 materials that courts rely upon to determine legislative intent.

5 Plaintiffs' reliance on the Court's earlier order on the State's motion to dismiss is off
6 base. The Court's order simply acknowledged that, when viewed in the light most favorable
7 to Plaintiffs, contemporaneous statements of legislators can be "some evidence of
8 discriminatory intent" at the pleading stage. Doc. 154, at 56-57. The order does not address
9 the legislative privilege or the purported relevance of the documents at issue. Again, under
10 Plaintiffs' conception, any voting rights claim that passed the motion to dismiss stage would
11 invariably overcome the legislative privilege. That is not the case.

12 Given the questionable relevancy of the withheld documents at issue, this factor does
13 not weigh in favor of disclosure. If the Court has any question as to the relevance of these
14 documents, the Legislators would be open to an *in camera* inspection for the Court to assess
15 whether the remaining documents are substantially relevant to Plaintiffs' remaining claim
16 in this case such that the legislative privilege should not apply.

17 **B. Plaintiffs Have Ample Available Evidence to Support Their Claims.**

18 The second factor, the availability of other evidence, also weighs in favor of
19 upholding the privilege. As explained above, Plaintiffs have over 30,000 documents from
20 the Legislators, as well as the legislative history documents for S.B. 1485. In addition,
21 Plaintiffs have the Legislators' public statements regarding S.B. 1485. Indeed, Plaintiffs
22 have and continue to rely upon a public statement made by Sen. Kavanagh. *See* Doc. 197
23 at 7. Just as in *Puente*, Plaintiffs' access to these materials weighs in favor of upholding
24 the privilege. *Puente Arizona*, 314 F.R.D. at 672 (noting that Plaintiffs had access to the
25
26

1 traditional sources of legislative history in finding that the availability of other evidence
2 weighed in favor of upholding the legislative privilege).

3 **C. The State Maintains an Interest in Upholding S.B. 1485.**

4 As to the third factor, the State is a defendant in this case and seeks to uphold the
5 legislation at issue in this matter. Because of this strong governmental interest, this factor
6 weighs in favor of upholding the legislative privilege. *Puente Arizona*, 314 F.R.D. at 672.

7 **D. Though Plaintiffs Make Serious Allegations, This Factor Is Not**
8 **Determinative.**

9 As to the fourth factor, this voting rights case involves serious issues. But this factor
10 alone is not determinative. *See id.* at 672 (applying the five factors to determine whether
11 the legislative privilege applies, despite plaintiffs making claims alleging constitutionality
12 concerns). The Ninth Circuit has refused to create a “categorical exception” to the
13 legislative privilege for constitutional claims that directly implicate the government’s intent
14 because such a decision would “render the privilege of little value.” *Lee v. City of Los*
15 *Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (internal citations omitted) (affirming trial
16 court’s denial of discovery on the ground of legislative privilege). The Court must examine
17 all five factors, and here the other factors support upholding the legislative privilege.

18 **E. Maintenance of the Legislative Privilege Outweighs Plaintiffs’ Purported**
19 **Interest in the Documents.**

20 The last factor, the purposes behind the privilege, favor application of the privilege.
21 A large majority of the documents being withheld as privileged involve communications
22 between and among the Legislators and their staff. To disclose these internal
23 communications would interfere with the Legislators’ legitimate legislative activity and
24 ability to communicate freely with each other and their staff. Put another way, “[t]o allow
25 Plaintiffs to pry into the most sensitive aspects of the legislative process would ‘chill
26 legislative debate’ and ‘discourage earnest discussions within governmental walls.’”
League of Women Voters of Florida, Inc., 2021 WL 5283949, at *7 (quoting *Comm. For a*

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March 2023, I electronically transmitted a PDF version of this document to the Clerk of Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing.

/s/ Christine C. Marsceill