

1 Kevin E. O'Malley (Bar No. 006420)  
kevin.omalley@gknet.com  
2 Hannah H. Porter (Bar No. 029842)  
hannah.porter@gknet.com  
3 Ashley E. Fitzgibbons (Bar No. 036295)  
ashley.fitzgibbons@gknet.com  
4 GALLAGHER & KENNEDY, P.A.  
2575 East Camelback Road  
5 Phoenix, Arizona 85016-9225  
Telephone: (602) 530-8000  
6 Facsimile: (602) 530-8500  
*Attorneys for Arizona Legislators*  
7

8 UNITED STATES DISTRICT COURT  
9 DISTRICT OF ARIZONA

10 Mi Familia Vota; et al.,  
11 Plaintiffs,  
12 and  
13 DSCC and DCCC,  
14 Plaintiff-Intervenors,  
15 v.  
16 Adrian Fontes, in his official capacity as  
Arizona Secretary of State; et al.,  
17 Defendants,  
18 and  
19 RNC and NRSC,  
20 Defendant-Intervenors.

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

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

21 Pursuant to the Court's May 26, 2023 Order, Senator John Kavanagh, Former  
22 Speaker of the House Rusty Bowers, Senator Jake Hoffman, Former Representative John  
23 Fillmore, Former Senator Michelle Ugenti-Rita, Senator Kelly Townsend, Former Senate  
24 President Karen Fann, Senator JD Mesnard, and Senator David Gowan (collectively the  
25 "Legislators") hereby submit their supplemental brief in support of their response to  
26 Plaintiffs' Motion to Compel ("Motion").

1 Plaintiffs' Motion addressed two issues: (1) whether the legislative privilege applies  
 2 to third party communications; and (2) whether the qualified privilege should be upheld in  
 3 this voting rights case. The two recent decisions from the Fifth Circuit, *Jackson Municip.*  
 4 *Airport Auth. v. Harkins*, 67 F.4th 678, 2023 WL 3333607 (5th Cir. 2023), and *La Union*  
 5 *Del Pueblo Entero v. Abbott*, 68 F.4th 228, 2023 WL 3494770 (5th Cir. 2023), provide  
 6 further support for the Legislators' positions on both issues and are in line with the  
 7 reasoning of *Puente Arizona v. Arpaio*, 314 F.R.D. 664 (D. Ariz. 2016) and *League of*  
 8 *Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446 (N.D. Fla. 2021).

9 First, both *Jackson* and *La Union* unequivocally hold that the legislative privilege  
 10 for state legislators covers the legislative process and thus includes communications  
 11 between state legislators and third parties outside of the legislature regarding pending or  
 12 potential legislation.

13 Second, *La Union* upheld application of the legislative privilege against plaintiffs'  
 14 discovery requests even though the case involved allegations of discriminatory voting rights  
 15 legislation similar to the allegations raised in this case.

16 Together, these decisions lend further support for denying Plaintiffs' Motion to  
 17 Compel.

## 18 **I. Applying the Legislative Privilege to Communications with Third Parties** 19 **Protects State Legislators from Interference with their Legislative Duties.**

### 20 **A. Legislative Immunity and Legislative Privilege Serve Similar Purposes.**

21 Plaintiffs' Reply used the two district court opinions that were reversed by the Fifth  
 22 Circuit in *Jackson* and *La Union* to criticize Judge Campbell's decision in *Puente Arizona*  
 23 *v. Arpaio*, 314 F.R.D. 664 (D. Ariz. 2016) for analogizing to the federal legislative privilege  
 24 and legislative immunity in reaching its decision. *See* Reply, Doc. 209 at 2-4; *see also*  
 25 Motion, Doc. 197, at 5-8.

26 In *La Union*, however, the Fifth Circuit explicitly rejected that same criticism:

1 Plaintiffs also criticize the legislators for drawing on caselaw involving either  
 2 the Constitution’s Speech or Debate Clause or legislative immunity (rather  
 3 than legislative privilege). As for the first point, the legislative privilege that  
 4 protects state lawmakers “is similar in origin and rationale to that accorded  
 5 Congressmen under the Speech or Debate Clause.” Even if the federal  
 6 privilege yields to fewer exceptions than the state privilege, we see no reason  
 7 to differentiate between state and federal lawmakers when determining what  
 8 counts as “legitimate legislative activity.” In other words, the legislative  
 9 privilege’s scope is similar for state and federal lawmakers—even if the  
 10 privilege for state lawmakers has more exceptions. So too for legislative  
 11 immunity, which the Supreme Court has often analyzed in parallel to  
 legislative privilege. Both concepts involve the core question whether a  
 lawmaker may “be made to answer—either in terms of questions *or* in terms  
 of defending ... from prosecution.” While the parallel between them may not  
 run to the horizon, we follow the Supreme Court’s lead in drawing on both  
 strands even though this case involves a privilege from disclosure rather than  
 an immunity from suit or liability.

12 2023 WL 3494770, at \*5 (footnotes and citations omitted).

13 Put another way, legislative immunity and legislative privilege both allow legislators  
 14 to “focus on their jobs rather than motions practice in lawsuits.” *Id.*; *see also Supreme Ct.*  
 15 *of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732 (1980) (noting that except  
 16 for criminal actions, the Court has generally “equated the legislative immunity to which  
 17 state legislators are entitled under § 1983 to that accorded Congressmen under the  
 18 Constitution” in recognition that “a private civil action . . . creates a distraction and forces  
 19 legislators to divert their time, energy, and attention from their legislative tasks to defend  
 20 the litigation”). Furthermore, this “rationale for the privilege—to allow duly elected  
 21 legislators to discharge their public duties without concern of adverse consequences outside  
 22 the ballot box—applies equally to federal, state, and local officials.” *Lee v. City of Los*  
 23 *Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018).

24 Thus, *Puente Arizona* did not err by considering decisions involving federal  
 25 legislative privilege and legislative immunity to determine the proper scope of the privilege  
 26 for state legislators. Indeed, the Ninth Circuit did so in *Lee*. 908 F.3d at 1187 (“While

1 *Tenney*’s holding rested upon a finding of immunity, its logic supports extending the  
 2 corollary legislative privilege from compulsory testimony to state and local officials as  
 3 well.”). Plaintiffs’ criticism is unfounded and contrary to case law.

4 **B. The Privilege Covers the Entire Legislative Process, Including**  
 5 **Communications with Third Parties.**

6 Because the legislative privilege protects “all aspects of the legislative process.”  
 7 *Jackson*, 67 F.4th at 687 (quoting *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d  
 8 Cir. 2007), not just the confidentiality of communications between lawmakers, the privilege  
 9 should be interpreted to cover communications with third parties regarding potential or  
 10 pending legislation. *See id.* (holding that “communications with third parties, such as private  
 11 communications with advocacy groups” that bear on potential legislation are protected by  
 12 the legislative privilege). Otherwise, a large segment of the modern legislative process  
 13 would not be covered by the privilege. The Fifth Circuit rightly reasoned that a privilege  
 14 “that protected so little of the lawmaking process would not rightly be called ‘legislative.’”  
 15 *La Union*, 2023 WL 3494770, at \*4.

16 The Fifth Circuit’s decisions align with *Puente Arizona*, and *League of Women*  
 17 *Voters of Florida*, as well as the other decisions cited in the Response. Indeed, just this  
 18 week, the Eighth Circuit reversed another district court decision that Plaintiffs cited in their  
 19 reply, holding that the legislative privilege covers communications between legislators and  
 20 third parties. *In re N. Dakota Legislative Assembly*, No. 23-1600, 2023 WL 3831550, at \*2  
 21 (8th Cir. June 6, 2023) (“The privilege is not designed merely to protect the confidentiality  
 22 of deliberations within a legislative body; it protects the functioning of the legislature more  
 23 broadly. Communications with constituents, advocacy groups, and others outside the  
 24 legislature are a legitimate aspect of legislative activity. The use of compulsory evidentiary  
 25 process against legislators and their aides to gather evidence about this legislative activity  
 26 is thus barred by the legislative privilege.”).

1           **C. The Logged Third Party Communications Are Privileged.**

2           Here, as explained in the Response, the 38 third-party communications concern bona  
3 fide legislative activity and thus are protected by the legislative privilege. They were not  
4 waived by public disclosure: indeed, the very reason that Plaintiffs have brought the Motion  
5 to Compel is because the documents are not publicly available. *See La Union*, 2023 WL  
6 3494770, at \*4.

7           This case demonstrates the need for a legislative privilege to protect state legislators  
8 from the distraction of civil motions practice. Plaintiffs seek to involve the Legislators in  
9 this case by compelling the production of documents related to Legislators’ consideration  
10 of bills introduced during the 55th Regular Session of the Arizona Legislature. But that is  
11 not all that Plaintiffs seek. After filing the Motion, Plaintiffs’ counsel served deposition  
12 subpoenas upon five of the Legislators and agreed to refrain from scheduling depositions  
13 pending resolution of the Motion to Compel. Thus, if the Motion is granted, Plaintiffs will  
14 seek testimony from the Legislators about their subjective legislative intent (and  
15 presumably the communications at issue in the Motion). This conduct runs afoul of the  
16 principle articulated by the Ninth Circuit in *Lee*, and repeated in *La Union* that “plaintiffs  
17 are generally barred from deposing local legislators, even in ‘extraordinary  
18 circumstances.’” 908 F.3d at 1187 (quotation omitted); *see also La Union*, 2023 WL  
19 3494770, at \*6.

20           **II. The Court Should Uphold the Legislative Privilege.**

21           *La Union* also provides useful insight into the application of the qualified privilege  
22 for state legislators in a voting legislation case. 2023 WL 3494770 at \*5. Similar to  
23 Plaintiffs’ allegations in this case, the plaintiffs in *La Union* “argued that the Legislature  
24 acted with racially discriminatory intent” in passing amendments to laws governing “voter  
25 registration, voting by mail, poll watchers, and other aspects of election integrity and  
26 security.” *Id.* at \*1.

1        *La Union* cautioned that “even when constitutional rights are at stake,” or plaintiffs  
2 have made “allegations involving racial animus,” the qualified legislative privilege does not  
3 always give way. *Id.* at \*5-6. In other words, “the qualifications do not subsume the rule.”  
4 *Id.* at \*5; *see also id.* at \*6 (noting the “Ninth Circuit declined to recognize an ‘exception  
5 whenever a constitutional claim directly implicates the government’s intent,’ because ‘that  
6 exception would render the privilege of little value’” (quoting *Lee*, 908 F.3d at 1188)).

7        Rather than using the five-factor standard used by other courts including *Puente*  
8 *Arizona*, the Fifth Circuit held that voting legislation issues were “far closer on the  
9 continuum of legislative immunity and privilege to the suits under 42 U.S.C. § 1983 at issue  
10 in *Tenney* and *Bogan* than . . . the criminal prosecution under federal law at issue in *Gillock*.”  
11 *Id.* at \*6. Thus, the danger that a court proceeding probing a legislator’s subjective intent  
12 could act as a “deterrent to the uninhibited discharge of their legislative duty” outweighed  
13 the serious nature of the issues involved. *Id.* at \*5 (quotation omitted). Accordingly, the  
14 Fifth Circuit declined to compel the legislators to produce documents relating to the state  
15 legislative process. *Id.* at \*6. *See also In re: North Dakota Legislative Assembly*, 2023 WL  
16 3831550 at \*3 (quashing subpoena in redistricting case based on the “ordinary rule that  
17 inquiry into legislative conduct is strictly barred by the privilege”).

18        As further articulated in the Response, here, the seriousness of the litigation is not  
19 sufficient to overcome the privilege. The documents are not highly relevant, especially  
20 given that Plaintiffs already have access to the publicly available documents including  
21 videos of the hearings at which the bills were considered. *See Puente Arizona*, 314 F.R.D.  
22 at 672 (noting that Plaintiffs had access to the traditional sources of legislative history in  
23 finding that the availability of other evidence weighed in favor of upholding the legislative  
24 privilege). And, as in *La Union*, the purposes behind the privilege favor application of the  
25 privilege. The need to protect legislators from undue intrusion into the legislative process  
26 via discovery in a civil lawsuit outweighs any claimed need for the documents at issue. *See*

1 *La Union*, 2023 WL 3494770, at \*5-6.

2 **III. Conclusion.**

3 The Court should uphold the legislative privilege and deny Plaintiffs' Motion to  
4 Compel. The Legislators also support an *in camera* review to the extent that it is necessary  
5 to determine application of the privilege.

6 DATED this 9th day of June 2023.

7 GALLAGHER & KENNEDY, P.A.  
8

9 By: /s/ Hannah H. Porter

10 Kevin E. O'Malley

11 Hannah H. Porter

12 Ashley E. Fitzgibbons

13 2575 East Camelback Road

14 Phoenix, Arizona 85016-9225

15 *Attorneys for Arizona Legislators*

16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on this 9th day of June 2023, I electronically transmitted a  
18 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.

19 /s/D. Ochoa  
20  
21  
22  
23  
24  
25  
26