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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota; Arizona Coalition for Change; Living United for Change in Arizona; and League of Conservation Voters, Inc. d/b/a Chispa AZ,

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. CV-21-01423-PHX-DWL

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY FROM NON-PARTY ARIZONA LEGISLATORS PURSUANT TO FED. R. CIV. P. 37 AND 45

(EXPEDITED RULING REQUESTED)

INTRODUCTION

The Arizona legislators' response to Plaintiffs' motion to compel, ECF No. 202 ("Opp."), confirms that Plaintiffs are entitled to the discovery they seek. The legislators provide no persuasive reason to depart from the overwhelming weight of authority that does not protect legislators' communications with parties *outside* the legislature. The legislators also fail to grapple with the specific reasons why the qualified privilege for internal legislative communications must give way in the particular circumstances of this case.

First, state legislative privilege does not extend to legislators' communications with third parties outside the legislature. A majority of courts have reached this conclusion, recognizing the significant difference between internal discussions among legislators, which the privilege is meant to protect, and legislators' communications with outside parties. The legislators rely on a small handful of contrary cases, but Plaintiffs already explained in their Motion, ECF No. 197 ("Mot."), why these decisions are mistaken and unpersuasive—and the legislators offer no rationale that would support this Court embracing these outlier authorities. Further, the legislators argue that the scope of state legislative privilege should match that of federal legislative privilege. But the Supreme Court has specifically rejected that analogy.

Second, to the extent that legislative privilege does apply to any of the specified communications, Plaintiffs overcome that limited, qualified privilege. The legislators agree with Plaintiffs on the five-factor test that governs this inquiry, but misapply it and fail to acknowledge the unique importance of the evidence to Plaintiffs' intentional discrimination claim. When properly analyzed, the factors support disclosure here. Accordingly, for the reasons explained in Plaintiffs' Motion, the Court should order the legislators to produce the documents they have withheld on legislative privilege grounds.

I. THE LEGISLATORS' RESPONSE CONFIRMS THAT PLAINTIFFS ARE ENTITLED TO OBTAIN COMMUNICATIONS WITH OUTSIDE PARTIES

As set forth in Plaintiffs' Motion, an overwhelming majority of courts agree that state legislative privilege does not protect legislators' communications with third parties

outside the legislature. *See* Mot. 4-5 (collecting cases). Another decision, filed on the same day the Plaintiffs filed their Motion, holds similarly that communications between "individual legislator(s)" and third parties "are not protected by the state legislative privilege because the communications are with third parties, not between members of the Assembly or between members of the Assembly and their staff." *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 22-cv-22, 2023 WL 2697372, at *2 (D.N.D. Mar. 14, 2023) (citing *Jackson Mun. Airport Auth. v. Bryant*, No. 16-cv-246, 2017 WL 6520967, at *7 (S.D. Miss. Dec. 19, 2017)), *appeal filed*, No. 23-1597 (8th Cir. Mar. 28, 2023).

This majority rule makes sense. As the legislators themselves acknowledge, the privilege protects "frank and honest discussion *among lawmakers*" and "earnest discussions *within governmental walls*." Opp. 5, 11 (quoting *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 458, 459 (N.D. Fla. 2021)) (emphasis added); *see United States v. Gillock*, 445 U.S. 360, 373 (1980) (the privilege protects "candor in . . . internal exchanges"). Legislators do not have the same expectation of privacy when they go outside the legislature to engage with members of the public, and communications with those outsiders do not carry the same status as internal legislative discussions.

The legislators rely on a small number of decisions that have held otherwise, including especially *Puente Arizona v. Arpaio*, 314 F.R.D. 664 (D. Ariz. 2016). *See* Opp. 6. But Plaintiffs explained in their Motion why *Puente* is unpersuasive and should not be followed, as other courts have explicitly recognized. *See* Mot. 5-8. The legislators nowhere respond to the errors underpinning *Puente* or the subsequent decisions identifying those mistakes. To the contrary, the legislators repeat the mistakes themselves.

First, *Puente Arizona* relied on cases concerning *federal* legislative privilege to ascertain the scope of *state* legislative privilege. *See Puente*, 314 F.R.D. at 670 (citing *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983); *Jewish War Veterans of the U.S. of Am., Inc. v. Gates*, 506 F. Supp. 2d 30 (D.D.C. 2007)). The legislators themselves rely on the same two cases. Opp. 5. As Plaintiffs explained, however, multiple courts have recognized this as legal error. *See La Union Del Pueblo Entero v. Abbott*, No. 21-cv-844,

2022 WL 1667687, at *3-4 (W.D. Tex. May 25, 2022); *Jackson Mun. Airport Auth.*, 2017 WL 6520967, at *7-8.

The legislators double down on *Puente*'s error, explicitly arguing that state legislative privilege should match the scope of federal legislative privilege. *See* Opp. 4, 5. But the Supreme Court has specifically "refused 'to recognize an evidentiary privilege similar in scope to the Federal Speech or Debate Clause for state legislators.'" *Harris v. Arizona Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1069 (D. Ariz. 2014) (three-judge panel) (quoting *Gillock*, 445 U.S. at 366), *aff'd*, 578 U.S. 253 (2016); *see also Florida v. United States*, 886 F. Supp. 2d 1301, 1303-04 (N.D. Fla. 2012) ("[A] state legislator's privilege is not coterminous with the privilege of a member of Congress under the Constitution's Speech and Debate Clause."). The privilege for federal legislators is grounded in constitutional text and unique federal separation-of-powers concerns. By contrast, the privilege for state legislators is a creation of federal common law and "is not on the same constitutional footing." *Gillock*, 445 U.S. at 370. It therefore is "less protective than [its] constitutional counterpart[]." *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 87 (1st Cir. 2021); *see In re Grand Jury*, 821 F.2d 946, 948 (3d Cir. 1987) (state legislative privilege does not extend to the "full range of legislative activities normally protected by the Speech or Debate Clause"); *Jackson Mun. Airport Auth.*, 2017 WL 6520967, at *4 (legislative privilege "provides state legislators less protection than it does members of Congress").

Second, *Puente Arizona* conflated the doctrine of legislative *immunity* with the doctrine of legislative *privilege*. *See* Mot. 6-7. The legislators repeat this error, as well, as they rely on cases dealing with the distinct concept of legislative immunity. *See* Opp. 5 (citing *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007), a legislative immunity case as discussed in Plaintiffs' Motion, and *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980), which likewise addressed immunity for legislative acts). Because of this, the legislators never address the fundamental difference, for purposes of privilege, between internal legislative discussions and communications with outsiders. That difference is the

key reason why communications with outside third parties are ones "for which no one could seriously claim privilege." *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), *aff'd,* 293 F. Supp. 2d 302 (S.D.N.Y. Aug. 18, 2003).

Finally, the other cases the legislators rely on provide no reason to depart from the majority rule. The legislators cite (Opp. 6) two district court decisions from the Eleventh Circuit, *League of Women Voters of Fla. v. Lee*, 340 F.R.D. 446 (N.D. Fla. 2021), and *Thompson v. Merrill*, No. 16-cv-783, 2020 WL 2545317 (M.D. Ala. May 19, 2020). As Plaintiffs have already explained, however, those decisions relied on (and were bound by) a faulty Eleventh Circuit decision, *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015), which does not bind this court. *See* Mot. 8. *Hubbard*—and likewise *League of Women Voters* and *Thompson*—does not "recognize a distinction between the concepts of legislative privilege, legislative immunity, and the Speech and Debate Clause as applied to state legislators" and is "inconsistent" with the "apparent majority view . . . of the legislative privilege as a limited, qualified privilege." *Jackson Mun. Airport Auth.*, 2017 WL 6520967, at *9 and n.10; *see La Union Del Pueblo Entero*, 2022 WL 1667687, at *4 (distinguishing *Thompson* on this basis). Again, the legislators offer no basis for following *Hubbard* and its misguided progeny.

The legislators also point to *Jeff D. v. Kempthorne*, No. 80-cv-4091, 2006 WL 2540090, at *3 (D. Idaho Sept. 1, 2006), *aff'd in part sub nom. Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011). But that opinion "cites no authority for the proposition that a state legislator['s] communications with third parties are privileged." *La Union Del Pueblo Entero*, 2022 WL 1667687, at *4. The court's analysis primarily concerned whether a legislative budget analyst could claim legislative privilege. After concluding that she could, the court simply stated that the privilege protected communications with third parties when the analyst's "purpose [was] to gather information for a legislator" without any further discussion or citation of authority. *Jeff D.*, 2006 WL 2540090, at *3.

Last, the legislators assert generically that the cases Plaintiffs have cited are not "persuasive in light of the purposes behind the legislative privilege" and "tend to take a

narrow approach to the privilege by, for example, exempting fact-based documents and communications from the scope of the privilege." Opp. 7. But that has nothing to do with the legal question posed by this motion, which involves claims of privilege over third-party communications, not "fact-based" communications. In any event, as shown above, Plaintiffs' position is entirely consistent with the purpose of state legislative privilege. It is the legislators who seek to expand the scope of that privilege far beyond its purposes by immunizing all conversations between legislators and third parties from discovery. The legislators' assertion of legislative privilege over third-party communications is meritless.

II. PLAINTIFFS OVERCOME THE QUALIFIED PRIVILEGE

The legislators do not dispute that state legislative privilege is a qualified privilege. *See* Opp. 8. They agree, too, that a five-factor test governs this inquiry, which considers "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." *La Union Del Pueblo Entero*, 2022 WL 1667687 at *6 (internal quotation marks omitted).

As Plaintiffs explained in their Motion, these factors support disclosure here because (i) the evidence sought is highly relevant to Plaintiffs' intentional discrimination claim; (ii) there is no substitute for this uniquely valuable direct evidence of legislative intent; (iii) this litigation seeks to vindicate equal access to the fundamental right to vote; (iv) the legislature's decision-making process is at the center of the litigation; and (v) the legislators have only raised a speculative fear of chilling legislative deliberation. *See* Mot. 9-12.

The legislators concede the importance of this voting rights case, which seeks to vindicate the constitutional right "preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886); *see* Opp. 11. That "important federal interest[]" strongly supports overcoming the qualified privilege here. *Gillock*, 445 U.S. at 373. So too does the government's "direct role in the litigation," *Favors v. Cuomo*, 285 F.R.D. 187, 220 (E.D.N.Y. 2012), in which the legislature's "decision-making process remains at the core

of the plaintiffs' claims," *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 341 (E.D. Va. 2015).

Nevertheless, the legislators insist that the communications and documents Plaintiffs seek are not relevant to their intentional discrimination claim, and that the availability of other evidence lessens the unique value of these materials in proving that claim. *See* Opp. 8-11. They are mistaken.

Most notably, the legislators are wrong that individual legislators' communications are not relevant to legislative intent. *See* Opp. 9. This Court has twice made clear in this case that such evidence bears on Plaintiffs' constitutional claim. *See* ECF No. 154, at 55 (legislators' statements can be "probative when evaluating a discriminatory purpose claim"); *id.* at 57 (concluding that Representative Kavanagh's statement "provides plausible support for Plaintiffs' overall claim"); ECF No. 184, at 18 (emphasizing that the Court "already addressed, and rejected," the argument that legislators' statements are irrelevant to discriminatory intent); *id*. at 23 & n.11 (reiterating that "[c]ommunications with government actors are potentially relevant 'contemporary statements' under *Arlington Heights*," and citing cases recognizing the same). The legislators' inapposite citations to cases concerning the value of individual legislators' comments in statutory interpretation and First Amendment claims do not undermine this Court's conclusion. *See* Opp. 9 (citing *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988); *Citizens Union of City of N.Y. v. Att'y Gen. of N.Y.*, 269 F. Supp. 3d 124, 147 (S.D.N.Y. 2017)). Whether an individual legislator's statements establish legislative intent for purposes of statutory interpretation is a separate question than whether the statements are relevant for purposes of a discrimination claim. And regardless, even if one legislator's statements cannot necessarily be imputed to other legislators, an individual legislator's motivation can still "constitute an important part of the case presented against, or in favor of" the challenged legislation. *Bethune-Hill*, 114 F. Supp. 3d at 340. Legislators' communications remain highly relevant to Plaintiffs' claim.

That is also true for discovery related to legislation closely linked to S.B. 1485, despite the legislators' suggestions otherwise. *See* Opp. 9. These bills from the same

legislative session also concerned changes to the Permanent Early Voting List (PEVL). *See* S.B. 1069, 55th Leg., 1st Reg. Sess. (Ariz. 2021); S.B. 1713, 55th Leg., 1st Reg. Sess. (Ariz. 2021). S.B. 1069, in particular, was an effort to remove voters from the PEVL for failure to vote, just like S.B. 1485, and was sponsored by the same state senator who sponsored S.B. 1485. *See* Ariz. State Legislature, Bill History for SB1069, https://apps.azleg.gov/BillStatus/BillOverview/74391. Plaintiffs' requests are thus narrowly targeted to documents and communications that will help them ascertain the legislative intent behind the law at issue in this case. The direct relevance of the evidence sought supports disclosure.

Plaintiffs also have a strong need for this unique evidence. The legislators acknowledge that the material they have produced to date consists largely of "thousands of stock emails," which by definition are unlikely to offer insight into legislators' internal decision-making processes. Opp. 3. The legislators also emphasize the availability of public legislative history materials. But this is nowhere near as probative of legislative intent as internal communications, "given the practical reality that officials 'seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority.'" *Veasey v. Perry*, No. 13-cv-193, 2014 WL 1340077, at *3 (S.D. Tex. Apr. 3, 2014) (quoting *Smith v. Town of Clarkton*, *N.C.*, 682 F.2d 1055, 1064 (4th Cir. 1982)). Finally, the legislators claim that Plaintiffs do not need draft bills and amendments, because they have access to the final versions of bills and amendments introduced in the legislature. Opp. 8. This gets the matter backwards: Plaintiffs seek discovery into the decision-making process behind the final legislative actions leading to S.B. 1485. Draft materials can demonstrate legislators' considerations and motivations during that process. In short, despite the legislators' productions, they have withheld the discovery most likely to shed light on the core issues of this case. The unique value of this direct evidence supports overcoming the privilege here.

On the other side of the ledger, the legislators have pointed only to speculative fears about chilling legislative candor. The legislators have given no concrete reason to think that the specific disclosure of the materials in dispute will stifle frank deliberation. Nor have

they pointed to any evidence of deleterious effects in states where courts have required the production of material covered by a qualified legislative privilege. *See, e.g., Benisek v. Lamone*, 241 F. Supp. 3d 566, 576-77 (D. Md. 2017) (three-judge panel); *Bethune-Hill*, 114 F. Supp. 3d at 342-43; *La Union Del Pueblo Entero*, 2022 WL 1667687 at *7; *League of Women Voters of Michigan v. Johnson*, No. 17-14148, 2018 WL 2335805, at *5 (E.D. Mich. May 23, 2018); *Baldus v. Brennan*, No. 11-cv-562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011). The speculative possibility of chilled legislative candor is "outweighed by the highly relevant and potentially unique nature of the evidence," in this case concerning the equal right to vote. *Baldus*, 2011 WL 6122542, at *2

The legislators also argue that Plaintiffs are seeking a "categorical exception" to legislative privilege. Opp. 11; *see also id*. at 12 (expressing a concern that under Plaintiffs' approach "every communication with staff or a legislative colleague" will be "subject to production when a plaintiff files suit"). That is incorrect; Plaintiffs seek no such categorical rule. Rather, in this particular case, in which Plaintiffs already have made a plausible showing of discriminatory intent, based among other things on statements by key legislators, Plaintiffs have shown that the relevant factors support disclosure of specific communications directly relevant to the law in question. This is exactly how the qualified state legislative privilege is supposed to operate.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order to compel the Arizona legislators to produce the documents they have withheld under legislative privilege.[1]

[1] Although the Court should grant the motion in its entirety, in the alternative *in camera* review is warranted to evaluate the legislators' privilege claims on an individualized basis. *See Favors*, 285 F.R.D. at 220 (taking this approach). The legislators do not oppose *in camera* review. *See* Opp. 7, 10, 12.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2023, a copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY FROM NON-PARTY ARIZONA LEGISLATORS PURSUANT TO FED. R. CIV. P. 37 AND 45** was filed electronically with the Arizona District Court Clerk's Office using the CM/ECF System for filing, which will provide a Notice of Electronic Filing to all CM/ECF registrants, and was served via e-mail on the following recipients:

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