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19 **UNITED STATES DISTRICT COURT**
20 **DISTRICT OF ARIZONA**

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

25 Plaintiffs,

26 and

27 DSCC and DCCC,

28 Plaintiff-Intervenors,

v.

Adrian Fontes, in his official capacity as
Arizona Secretary of State; et al.,

Defendants,

and

RNC and NRSC,

Defendant-Intervenors.

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Case No. CV-21-01423-PHX-DWL

**PLAINTIFFS' SUPPLEMENTAL
BRIEF 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

Plaintiffs have moved to compel the Arizona legislators to produce documents and communications withheld under the state legislative privilege, and have explained in briefing why that privilege does not shield those materials from disclosure. First, the privilege does not protect the legislators' communications with outside parties beyond the legislature. *See* ECF No. 197, at 4-8; ECF No. 209, at 1-5. And second, Plaintiffs have demonstrated that there are sufficiently weighty federal interests to overcome any qualified privilege that does exist over the Arizona legislators' communications. *See* ECF No. 197, at 8-12; ECF No. 209, at 5-8. The Court has requested supplemental briefing to address two Fifth Circuit decisions, *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228 (5th Cir. 2023), and *Jackson Municipal Airport Authority v. Harkins*, 67 F.4th 678 (5th Cir. 2023), in connection with Plaintiffs' motion. *See* ECF No. 221. Plaintiffs cited numerous district court decisions across multiple jurisdictions, including trial court decisions in *Pueblo Entero* and *Jackson Municipal Airport*, for the proposition that the state legislative privilege does not extend to communications between a legislator and a third party outside the legislative branch. ECF No. 197, at 4-5; ECF No. 209, at 1-2.

As explained below, the *Pueblo Entero* and *Jackson Municipal Airport* decisions are unpersuasive and reflect a minority view concerning the application of the privilege to third-party communications. Nor do these rulings alter the conclusion that the legislators in this case should be required to produce both communications with third parties and other communications for which Plaintiffs have demonstrated that the privilege must yield. In particular, the Fifth Circuit decisions (1) ignore the core purpose of the privilege; (2) conflate legislative privilege and immunity, and mistakenly apply federal constitutional protections arising from the Speech or Debate Clause to the narrower privilege for state legislators; and (3) ignore general waiver principles. Regardless, neither *Pueblo Entero* nor *Jackson Municipal Airport* applied the five-factor test that all parties here agree applies to assess whether, even *if* legislative privilege applies, the important federal interests at stake here overcome that privilege. The Court should grant Plaintiffs' motion.

I. The Fifth Circuit Opinions Unreasonably Expand State Legislative Privilege To Communications Outside Of The Legislature.

Even taking the recent decisions in *Pueblo Entero* and *Jackson Municipal Airport* into account, a majority of courts have held that state legislators’ communications with third parties are not privileged. *See* ECF No. 197, at 4-5 (collecting cases); ECF No. 209, at 2 (same). The Fifth Circuit decisions provide no persuasive reason to depart from the better-reasoned majority view.

First, *Pueblo Entero* and *Jackson Municipal Airport* ignore the core purpose of the legislative privilege: protecting “candor in . . . internal exchanges,” *United States v. Gillock*, 445 U.S. 360, 373 (1980), and encouraging “frank and honest discussion among lawmakers.” *Comm. for a Fair & Balanced Map v. Ill. State Bd. Of Elections*, No. 11-cv-5065, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011). The privilege protects internal legislative deliberations from disclosure to those outside the legislature. Communications with third parties, who neither deliberate over nor vote on legislation, are not the kind of “internal exchanges” that the Supreme Court recognizes as protected by the privilege. *Gillock*, 445 U.S. at 373; *see* ECF No. 197, at 4-5; ECF No. 209, at 2.

In reaching a contrary result, the Fifth Circuit relied on *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015), and *Almonte v. City of Long Beach*, 478 F.3d 100 (2d Cir. 2007), in asserting that “communications with third parties outside the legislature might still be within the sphere of ‘legitimate legislative activity’ [protected by the legislative privilege] if the communication bears on potential legislation.” *Jackson Mun. Airport*, 67 F.4th at 687 (quoting *In re Hubbard*, 803 F.3d at 1308); *see also id.* (quoting *Almonte*, 478 F.3d at 107); *Pueblo Entero*, 68 F.4th at 236 & nn.42, 45 (similar, citing *Hubbard* and *Almonte*).¹ Both

¹ One of the concurring judges in *Jackson Municipal Airport* viewed this discussion of the legislative privilege as effectively an “advisory opinion” because the district court had not actually “ordered the production of any discovery.” 67 F.4th at 688 (Dennis, J., concurring in part and dissenting in part). The third member of the panel would have found no standing if “left to [his] own devices,” but joined this portion of the court’s opinion. *Id.* at 693 & n.3 (Duncan, J., concurring in part and dissenting in part).

1 the *Hubbard* and *Almonte* decisions, however, are inapposite for reasons Plaintiffs have
2 previously explained.

3 In particular, *Hubbard* does not distinguish between legislative privilege and
4 legislative immunity, and *Almonte* discusses legislative immunity, not legislative privilege.
5 These are different doctrines, animated by different purposes and with different scope. *See*
6 ECF No. 197, at 6-7; ECF No. 209, at 3-4. Unlike legislative immunity, which protects
7 legislators from liability based on legislative activity broadly, state legislative privilege
8 specifically and narrowly protects legislators' expectations of privacy in "internal
9 exchanges." *Gillock*, 445 U.S. at 373; *see Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95
10 (S.D.N.Y. 2003) (distinguishing legislative immunity from privilege).

11 In *Gillock*, the Supreme Court specifically distinguished *Tenney v. Brandhove*, 341
12 U.S. 367 (1951)—on which *Pueblo Entero* relies—because that case concerned immunity.
13 *See Gillock*, 445 U.S. at 371 ("Gillock relies heavily on *Tenney* The issue there,
14 however, was whether state legislators were immune from civil suits . . .").² *Pueblo Entero*
15 makes the very mistake that the Supreme Court cautioned against in the *Gillock* case,
16 conflating "common-law absolute immunity from civil actions" and "compelled discovery
17 of documents." 68 F.4th at 239-40. Plaintiffs' motion here implicates the latter, not the
18 former.

19 ***Second***, *Pueblo Entero* conflated the legislative privileges enjoyed by state and
20 federal legislators, concluding that it could "draw[] on caselaw involving . . . the
21 Constitution's Speech or Debate Clause." *Pueblo*, 68 F.4th at 237. But the Supreme Court
22 "refuse[s] 'to recognize an evidentiary privilege similar in scope to the Federal Speech or
23 Debate Clause' for state legislators." *Harris v. Arizona Indep. Redistricting Comm'n*, 993
24 F. Supp. 2d 1042, 1069 (D. Ariz. 2014) (quoting *Gillock*, 445 U.S. at 366), *aff'd*, 578 U.S.

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26 ² *See Pueblo Entero*, 68 F.4th at 235 & n.39 (citing *Tenney*). The Court in *Tenney* referred
27 to legislative immunity from suit as a "privilege" enjoyed by legislators. 341 U.S. at 372.
28 But it is clear in context that the opinion was discussing legislative immunity, not an
evidentiary privilege.

1 253 (2016). The privilege for federal legislators is grounded in the text of the federal
2 Constitution and reflects federal separation-of-powers concerns. *See Gillock*, 445 U.S. at
3 368-70. State legislators’ privilege, on the other hand, “is not on the same constitutional
4 footing.” *Id.* at 370. Any reliance on cases applying the privilege for federal legislators is
5 therefore misplaced. *Cf.* ECF No. 209, at 2-3.

6 To compound its error, the authority that the Fifth Circuit relied on ostensibly to
7 show that the Supreme Court has analyzed legislative immunity and legislative privilege in
8 parallel addressed exclusively the privilege for *federal* legislators. *See Gravel v. United*
9 *States*, 408 U.S. 606, 616 (1972). This ignores that the privilege for state legislators is “less
10 protective than [its] constitutional counterpart[.]” *Am. Trucking Ass’n, Inc. v. Alviti*, 14
11 F.4th 76, 87 (1st Cir. 2021).

12 The Fifth Circuit observed that “the legislative privilege that protects state
13 lawmakers ‘is similar in origin and rationale to that accorded Congressmen under the
14 Speech or Debate Clause.’” *Pueblo Entero*, 68 F.4th at 237 (quoting *Sup. Ct. of Va. v.*
15 *Consumers Union of U.S., Inc.*, 446 U.S. 719, 732 (1980)). But the Fifth Circuit omitted the
16 first part of that quote, which shows that the Supreme Court was referring to legislative
17 *immunity*, not privilege. *See Consumers Union*, 446 U.S. at 732 (“We have also recognized
18 that state legislators enjoy common-law immunity from liability for their legislative acts,
19 an immunity that is similar in origin and rationale to that accorded Congressmen under the
20 Speech or Debate Clause.”). The Fifth Circuit’s dual decisions thus misapply governing law
21 on legislative immunity and the scope of the Speech or Debate Clause in erecting a barrier
22 to obtaining legislators’ third-party communications. The decisions mark a dramatic
23 departure from the well-settled narrow scope of state legislators’ evidentiary privilege.

24 **Third**, the Fifth Circuit’s expansion of state legislative privilege contravenes the
25 well-established principles of waiver. “As with any privilege, the legislative privilege can
26 be waived when the parties holding the privilege share their communications with an
27 outsider.” *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10. Yet under the
28 Fifth Circuit’s reasoning, a legislator could share internal deliberations with any number of

1 parties beyond those within the legislative branch without waiving privilege, so long as
2 those communications ostensibly relate to the “legislative process.” *Pueblo Entero*, 68 F.4th
3 at 235; *Jackson Mun. Airport*, 67 F.4th at 687.

4 In attempting to explain why there was no waiver despite the undisputed disclosure
5 of information outside the legislature, *Pueblo Entero* suggested that the state legislators “did
6 not send privileged documents to third parties *outside* the legislative process; instead they
7 brought third parties *into* the process.” 68 F.4th at 237. That is a distinction without a
8 difference. The privilege protects legislators from having to divulge internal deliberations
9 to those outside the legislature—it does not allow legislators “to discuss those matters with
10 some outsiders but then later invoke the privilege as to others.” *Almonte v. City of Long*
11 *Beach*, No. 04-cv-4192, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005).³ If traditional
12 principles of waiver did not apply to the legislative privilege, then third parties themselves
13 could assert privilege over their communications with legislators. No court has ever upheld
14 such an invocation of privilege by a third party.

15 Finally, the *Pueblo Entero* court also worried that an exception to legislative
16 privilege for third-party communications “would swallow the rule almost whole.” *Pueblo*,
17 68 F.4th at 236. The facts of this case belie that concern. Only approximately 38 of the 196
18 documents that the Arizona legislators withhold are communications with third parties. *See*
19 ECF No. 202, at 3. It is instead the Fifth Circuit’s approach that distorts the privilege beyond
20 its intended application to internal legislative discussions, by shielding all kinds of
21 communications that have been shared with third parties outside the legislature. The Fifth
22 Circuit’s unwarranted expansion of the legislative privilege is precisely the type of
23 “judicially created limitation that handicaps proof of the relevant facts” that the Supreme
24 Court warned against in *Gillock*. 445 U.S. at 374.⁴

25 ³ The Second Circuit’s opinion in *Almonte*, 478 F.3d 100, arose from an appeal of a later
26 decision in the case and did not address the district court’s ruling on this issue of privilege.

27 ⁴ Since this Court requested supplemental briefing, a divided Eighth Circuit panel followed
28 the Fifth Circuit’s approach in one other case on which Plaintiffs have relied, holding that
the state legislative privilege protects third-party communications. *See In re N. Dakota*

II. To The Extent The Privilege Applies, Plaintiffs Have Overcome The Qualified Legislative Privilege In This Case

Separately, nothing in either *Pueblo Entero* or *Jackson Municipal Airport* undermines Plaintiffs’ showing of the reasons why any qualified legislative privilege must yield in this case. *See* ECF No. 197, at 9; ECF No. 202, at 8. *Jackson Municipal Airport* did not assess whether the federal interests in that litigation outweighed the privilege. The court in *Pueblo Entero* reaffirmed that state legislative privilege must give way “where important federal interests are at stake.” *Pueblo*, 68 F.4th at 237-38 (quoting *Gillock*, 445 U.S. at 373).

Here, Plaintiffs and the Arizona legislators agree that a five-factor test governs whether Plaintiffs overcome the privilege. Neither *Pueblo Entero* nor *Jackson Municipal Airport* discussed or otherwise applied this test. To the contrary, the Fifth Circuit improperly relied on cases about *absolute* legislative immunity to determine the circumstances under which a *qualified* legislative privilege can be overcome. *See Pueblo*, 68 F.4th at 238-39 (citing *Tenney and Bogan v. Scott-Harris*, 523 U.S. 44 (1998)).

Citing a Ninth Circuit decision, the Fifth Circuit also expressed concern about an exception to legislative privilege ““whenever a constitutional claim directly implicates the government’s intent.”” *Pueblo Entero*, 68 F.4th at 239 (quoting *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018)). But Plaintiffs have already addressed why the *Lee* decision, which the legislators also cited in their opposition, does not control this case. Unlike in *Lee*, Plaintiffs here do not call for a “categorical exception” to state legislative privilege “whenever a constitutional claim directly implicates the government’s intent.”

Legislative Assembly, No. 23-1600, 2023 WL 3831550, at *2 (8th Cir. June 6, 2023) (citing *Jackson Mun. Airport*, 67 F.4th at 686-87). However, as the partial dissent observed, the legislators (and thus the majority opinion) entirely “fail[ed] to address the issue of waiver.” *Id.* at *3 (Kelly, J., concurring in part and dissenting in part). Moreover, the decision is unpersuasive for the same reasons as the Fifth Circuit decisions. It also relies on legislative immunity decisions, *see id.* at *2 (citing *Tenney*, 341 U.S. at 376; *Almonte*, 478 F.3d at 107; *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)), and erroneously equates the privileges for federal and state legislators, *id.* at *1. The better-reasoned approach to third-party communications is still that of the majority of district courts to have considered the question: such communications are not the internal legislative discussions that the state legislative privilege protects.

1 *Lee*, 908 F.3d at 1188. Rather, Plaintiffs' showing is tied to the case-specific factors in this
2 case. *See* ECF No. 209, at 8.

3 Accordingly, for the same reasons that Plaintiffs have already explained, those
4 factors, applied to the specific circumstances of this case, support granting Plaintiffs'
5 Motion to Compel. Plaintiffs have shown that (1) they seek evidence that is highly relevant
6 to their intentional discrimination claim, (2) there is no substitute for this uniquely valuable
7 evidence of legislative intent, (3) Plaintiffs seek to vindicate equal access to the fundamental
8 right to vote, (4) the legislature's decision-making process is at the heart of the litigation,
9 and (5) the legislators have provided no evidence for their speculative fear of a chilling
10 effect on legislative deliberation. *See* ECF No. 197, at 9-12; ECF No. 209, at 5-8.

11 **III. At A Minimum, The Court Should Conduct *In Camera* Review.**

12 Although the Court should grant the motion in its entirety, in the alternative *in*
13 *camera* review is warranted to evaluate the legislators' privilege claims on an individualized
14 basis. *See Favors v. Cuomo*, 285 F.R.D. 187, 220 (E.D.N.Y. 2012) (taking this approach).
15 The legislators do not oppose *in camera* review, *see* ECF No. 202, at 7, 10, 12, and neither
16 Fifth Circuit decision casts doubt on this commonsense procedure for resolving questions
17 about whether the qualified privilege has been overcome.

18 **CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order
20 to compel the Arizona legislators to produce the documents they have withheld under
21 legislative privilege.
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1 Dated: June 9, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2023, a copy of the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF 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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