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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. CV-21-01423-DWL

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY FROM THIRD-PARTY SUBPOENA RECIPIENTS PURSUANT TO FED. R. CIV. P. 37 AND 45

INTRODUCTION

The Legislators[1] and third-party subpoena recipients' ("Objectors'") response to Plaintiff's motion to compel discovery confirms that Plaintiffs' requested documents should not be produced.

First, the Objectors fail to explain why the legislative privilege should apply to documents sought from non-legislator third-party recipients. Objectors concede that the fundamental concern of the privilege—avoiding legislator burden and distraction—is absent when documents are sought from third parties. And they cannot claim that inquiry into legislative communications would interfere with the legislative process without appealing to confidentiality concerns, which are at their nadir when legislators communicate externally with third-parties. Moreover, such concerns cannot reasonably be applied to shield communications (such as e-mails and texts at issue here) that not only are in the possession of third-parties, but *originated* with them. Left with no rational justifications for applying the privilege, the Objectors rely on an extreme and poorly reasoned 2-1 decision by the Fifth Circuit, *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310, 322 (5th Cir. 2024), that is out of step with the law in this circuit. As the dissenting opinion in that case recognizes, *La Union* extraordinarily expands the scope of the legislative privilege. Instead of grappling with the justifications for the privilege or, in the alternative, providing a reasoned basis for why the qualified privilege should not yield here, the Objectors urge this Court to apply a brand new test announced in *La Union.* Following Objectors' reading of *La Union* would effectively foreclose any avenue for any plaintiff to obtain any communications to which a legislator was a party. This Court should decline to adopt such a radical and sweeping expansion of the privilege.

Second, the First Amendment privilege does not shield the requested documents from production either. The Objectors cannot overcome this Court's previous, unequivocal holding that as a matter of law, under the Ninth Circuit's decision in *Perry v.*

[1] "Legislators" in this reply refer to the parties identified in Plaintiffs' motion to compel.

Schwarzenegger, 591 F.3d 1147, 1162 (9th Cir. 2010) the First Amendment privilege does not apply to external communications. But even if the First Amendment privilege were not inapplicable as a matter of law, the declaration offered by the Free Enterprise Club ("FEC") fails to support a *prima facie* case that disclosure would impede its members' First Amendment rights. Accordingly, for the reasons set forth in Plaintiffs' initial Motion papers and below, this Court should order the Objectors to produce the withheld documents.

ARGUMENT

I. Objectors' Response Confirms that The Legislative Privilege Does Not Shield From Production Legislator Communications In the Possession, Custody, Or Control Of Third-Parties.

A. The Objectors fail to justify the application of the legislative privilege.

As Plaintiffs argued in their motion to compel, the fundamental concern of the legislative privilege is to avoid imposing burden upon legislators and distracting them from official duties. ECF No. 283 ("Mot.") at 8; *see also* Order, ECF No. 237, at 13 (quoting *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018)). The Objectors acknowledge that because the subpoenas at issue are directed to third parties, that concern is absent here: "the Legislators do not bear the burden of directly producing the subpoenaed documents." ECF No. 292 ("Resp.") at 6. That concession alone should foreclose Objectors' invocation of legislative privilege to shield from discovery documents in the possession of the third-party subpoena recipients.

Unable to rely on legislator burden concerns, the Objectors argue that disclosure would chill future legislator deliberations. The Objectors argue that the legislative privilege's "animating purpose is not limited to the maintenance of confidentiality." Resp. at 5 (quoting ECF No. 237, at 14), and go on to insist that the privilege aims to address a purportedly different concern: "interference with the legislative process." *Id.* at 5-6. "Legislative process," however, is obviously just a thinly veiled appeal to confidentiality concerns, as the Objectors go on to argue that disclosure would "chill[] future dialogue between lawmakers and third parties." *Id.* at 6. That argument is premised upon the

suggestion that there is an objective and legitimate expectation of privacy in legislator and third-party communications any time those communications concern the "legislative process." But this Court and others have observed that confidentiality concerns are not the driving force behind the legislative privilege. *See* Mot. at 7-8 (citing ECF No. 237, at 14; *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 454 n.2 (N.D. Fla. 2021); *Cano v. Davis*, 193 F. Supp. 2d 1177, 1179 (C.D. Cal. 2002); *Sol v. Whiting*, 2013 WL 12098752, at *3 (D. Ariz. Dec. 11, 2013)); *cf. In re N. D. Legis. Assembly*, 70 F.4th 460, 464 (8th Cir. 2023) (noting that the "privilege is not designed merely to protect the confidentiality of deliberations within a legislative body"). Because there is no legitimate expectation of privacy in documents that legislators send to third-parties (and vice versa), compelling disclosure of such documents in the possession, custody or control of the third-parties would not chill legislator deliberations and cannot justify application of the legislative privilege.

The Objectors' citation to *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983), does not move the needle. In that case, the court held that the legislative privilege protected against disclosing the identity of a constituent informant of a Congressional investigation. *Id.* at 530-31. The Objectors have offered nothing to show that this case involves similar sensitivities. And they cannot legitimately argue otherwise, given that their privilege logs, which include the authors and recipients of the communications, have been publicly filed in this case.

Nor can the Objectors argue that disclosure would constitute an improper "judicial inquir[y]" into "legislative or executive motivation." Resp. at 6 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)). As this Court has already held, "contemporaneous statements by individual state legislators may be relevant under the *Arlington Heights* framework to show discriminatory intent in the passage of legislation." ECF No. 237, at 19. *Arlington Heights* makes clear that the "historical background of the decision," "the sequence of events leading up to the challenged decision,"

and "contemporary statements by members of the decisionmaking body" are all relevant evidence that are proper subjects of judicial inquiry. 429 U.S. at 268. Accordingly, the Objectors' argument on this score provides no basis to shield the requested documents from disclosure.

B. This Court should decline to apply *La Union*'s radical expansion of legislative privilege.

Lacking any valid justifications for invoking the legislative privilege, the Objectors lean heavily on *La Union*, 93 F.4th at 322. That case presents a stunningly broad expansion of the legislative privilege. It should not guide this Court for three reasons.

First, *La Union* is in tension with the Ninth Circuit's holding in *Lee*, 908 F.3d at 1187. *Lee* explained that the rationale for the privilege implicates the legislators' interest in minimizing the "distraction" of "divert[ing] their time, energy, and attention from their legislative tasks to defend the litigation." *Id.* The panel majority in *La Union* brushes that justification aside, instead rationalizing the application of the privilege by pointing to the mere fact that the communications at issue related to the legislative process. 93 F.4th at 322. To the extent *La Union* addresses legislator burden at all, its reasoning is specious. *La Union* declared, without explanation, that discovery requests to third parties somehow burden legislators because the sought materials revealed "content of the legislators' communications." *Id.* at 317-18. It is unclear, however—and the majority opinion in *La Union* offers no clues—how compelling disclosure of communications in the possession of *third-parties* burdens *legislators* upon whom the subpoenas impose no obligations whatsoever. The *La Union* majority posits that requiring legislators to monitor discovery requests in all cases would burden legislators to "preserve their claims of legislative privilege." *Id.* at 318. That circular reasoning assumes the existence of the privilege to justify its application. This Court should decline to follow *La Union*, and instead straightforwardly apply the reasoning articulated by the Ninth Circuit in *Lee*. Legislators do not have to "divert their time, energy, and attention from their legislative tasks" when, as

here, Plaintiffs' subpoenas impose obligations only on the third party recipients. 908 F.3d at 1187.

Second, *La Union* was wrongly decided; the panel majority there embraces a radical and extreme expansion of the legislative privilege that this Court should reject. Without qualification, the panel majority in *La Union* held that the privilege "extends to material provided by or to third parties involved in the legislative process." 93 F.4th at 323-24. Read broadly, that language suggests that the privilege applies anytime third parties and legislators communicate about any matter, as long as those third parties are vaguely "involved" in the legislative process. That rule would amount to an extraordinary expansion of the legislative privilege. It cannot be the case, for example, that public mailings that legislators send to donors and/or constituents who might influence the legislative process are covered by the privilege. As the dissent in *La Union* aptly observed, the privilege cannot apply to "any random party volunteer or operative who ever communicated with a legislator on a given topic." *Id.* at 331. The panel majority's holding is especially remarkable when applied to any documents that *originate* with third parties and are then sent to legislators. As the dissent again observed, "the majority cites no authority that allows the extension of legislative privilege" to "documents the third parties produced independently." *Id.* To the contrary, it defies logic to hold that documents originating with third parties who choose to communicate with public officials become shielded from disclosure by legislative privilege merely because the communications are sent to a legislator. *Id.* at 323. Given how the Ninth Circuit has articulated and applied legislative privilege, there is no reason to believe that it would adopt the extreme view represented by the panel majority's decision in *La Union*.

Third, even if this Court were to follow *La Union*, any reasonable application should be cabined to facts that are absent here. In *La Union*, the panel majority emphasized that the third-party who was compelled to produce documents, the chair of the Harris County Republican Party Ballot Security Committee, had been "brought into the legislative process" because the legislators specifically "sought his comments" on draft bill language.

Id. at 322. By contrast, here, the Objectors offer nothing to suggest that the legislators invited the subject communications created and sent to them by third parties. In fact, the produced privilege logs show that in many cases, the third parties included on these communications affirmatively reached out to public officials. And under the rationale of the panel majority in *La Union*, the legislative privilege would not, and should not, be applied to communications coming from the legislators unless the legislators were expressly soliciting the recipients' comments on particular legislation. Even by the standards articulated in *La Union*, the Objectors cannot claim that the third parties in question were "brought into" the legislative process. Again, the Objectors cannot assert legislative privilege over the requested documents merely because legislators happen to be included on the sought communications.

Because *La Union* is in tension with binding precedent of this Circuit, presents an extreme and ill-founded expansion of the scope of the legislative privilege, and is in any event distinguishable, this Court should decline to apply it to this case.

C. Even if the legislative privilege were applicable, that qualified privilege yields to Plaintiffs' interests.

In their motion to compel, Plaintiffs argued that that the five-factor test previously applied by this Court to determine when the qualified privilege yields supports compelling disclosure by the third parties in question. Mot. at 9-11. That is because two of the factors that this Court previously found counsel against disclosure—availability of the evidence and purpose of the privilege—weigh decisively in favor of disclosure here. *Id.* at 10. Plaintiffs cannot obtain this evidence from other sources and legislators will not be burdened by this Court's requiring production of the documents by the third-party subpoena recipients. *Id.* Objectors do not respond at all to these points.

Without providing a reasoned basis for why application of the five-factor test previously adopted by this Court would now be error, Objectors urge this Court to adopt instead the *La Union* panel majority's newly minted qualified privilege test. This Court should not adopt that new test for several reasons. First, the test itself rests on a faulty

premise. The panel majority purports to ground *its* test on a rule that a court may hold that the qualified legislative privilege should "yield" only under "extraordinary instances" (93 F.4th at 323), but no binding precedent imposes such a requirement. The "extraordinary instances" language comes from *Arlington Heights*, *see La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 237 (5th Cir. 2023) (quoting *Arlington Heights*, 429 U.S. at 268), which did not address qualified privilege at all. Instead, *Arlington Heights* merely explained that individual legislators may be called to *testify* about the purpose of a challenged law in "extraordinary instances." 429 U.S. at 268. The Ninth Circuit similarly held in *Lee* that under *Arlington Heights*, only "extraordinary instances" justify *deposing* individual legislators about their motives. 908 F.3d at 1187-88. Nothing in *Arlington Heights* or *Lee* suggests that plaintiffs must make an "extraordinary" showing to seek, as Plaintiffs do here, *non*-testimonial evidence bearing on voter discrimination, such as documents showing the "historical background of the decision," "the sequence of events leading up to the challenged decision," and "contemporary statements by members of the decisionmaking body." *Arlington Heights*, 429 U.S. at 267-68.

Moreover, the qualified privilege test articulated by the panel majority in *La Union* is yet another reflection of its extraordinary expansion of the legislative privilege. As this Court has recognized, the Ninth Circuit has held that there are instances in which the qualified privilege afforded to state legislators must yield. ECF No. 237, at 8 (quoting *Lee*, 908 F.3d at 1187-88). The *La Union* panel majority's test would all but eliminate that possibility, transforming the qualified privilege into an absolute one. Thus, for example, this Court recognized that cases involving protection of voting rights implicate "serious" federal interests, ECF No. 237, at 19-20. But in articulating the first factor of its qualified privilege test, the panel majority in *La Union* found that "[C]ases involving only civil rights claims," are *never* important enough to warrant disclosure of legislator communications. 93 F.4th at 324. Similarly, the panel majority's second factor essentially limits the ability to overcome the legislative privilege to cases brought by the federal government, for under it,

only a plaintiff that is somehow acting similar to the United States as a "sovereign" and seeks relief "above and beyond" the kind sought by private plaintiffs may assert claims that overcome the qualified privilege. *Id.* And in applying its third factor—the ability of plaintiffs to bring suits frequently—the *La Union* panel holds that cabining legislative privilege at all in voter discrimination cases would destroy the concept of legislative privilege. *Id.* at 325-26 n.23. That reasoning is backwards; the availability of a private right of action assumes a means to obtain evidence to vindicate that right. The *La Union* panel majority's test for when the legislative privilege would yield is thus at odds with *Arlington Heights* and with the law applied by this Court, *see* ECF No. 237, at 15. Adoption of the Fifth Circuit panel majority's test would all but foreclose any plaintiffs' ability to overcome legislative privilege to obtain the sort of documentary evidence that the Supreme Court in *Arlington Heights* envisioned as potentially supporting claims of voter discrimination.

In sum, if this Court decides that the legislative privilege applies at all (and it should not) to the documents sought from the third-party subpoena recipients here, it should decline Objectors' invitation to adopt the *La Union* panel majority's "thumb on the scale" standards for evaluating the invocation of the legislative privilege. Reapplying the five-factor test already adopted by this Court in the "distinct" situation in which Plaintiffs seek documents from third-party non-legislators, ECF No. 237, at 23 n.10, the qualified legislative privilege should yield to Plaintiffs' interest in the documents.

II. The Objectors' Attempts to Invoke the First Amendment Privilege Fail.

Applying *Perry*, this Court has twice held, when granting Plaintiffs' motion to compel the Republican Party of Arizona ("RPA") to comply with a subpoena, that an organization's external communications fall outside the scope of the First Amendment associational privilege. *See Mi Familia Vota v. Fontes*, 344 F.R.D. 496, 516 (D. Ariz. 2023); *Mi Familia Vota v. Hobbs*, 343 F.R.D. 71, 85 (D. Ariz. 2022). But according to the FEC's strained interpretation of those orders, this Court held merely that documents sought by Plaintiffs "might" be excluded from the privilege's scope. Resp. at 11. Not so. This Court

did not equivocate: "an external communication between one of the RPA's custodians and a third party" is not "information covered by the First Amendment" privilege. *Fontes*, 343 F.R.D. at 514. Objectors cite to no intervening authority or faulty reasoning that would justify this Court's abrogating the law of the case doctrine and reconsidering its prior holding.[2] *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) ("[A] court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case."); *United States v. Mackenzie*, 2023 WL 2708926, at *5 (D. Ariz. Mar. 30, 2023) (Lanza, J.).

As the cases cited in this Court's RPA order explain, "the common denominator among *Perry*'s examples of potentially privileged information is that all involve internal communications or information otherwise held in confidence within a political party or association." *Fontes*, 344 F.R.D. at 513. Applying the First Amendment privilege to external communications would effectively expand the First Amendment right of association to a right to secretly lobby the government, a proposition that courts have firmly rejected. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 2016 WL 5922315, at *7 (W.D. Tex. Oct. 11, 2016). This Court has approvingly cited cases declining to apply First Amendment privilege to external communications, *see Fontes*, 344 F.R.D. at 513-14; Objectors offer no persuasive reason why the Court should reverse course.

In any event, even if the Objectors' assertion of First Amendment privilege did not fail as a matter of law with respect to external communications like those at issue here, the Objectors have failed to make the necessary *prima facie* showing that disclosure would expose association members to "(1) harassment, membership withdrawal, or

[2] In support of their position that the First Amendment privilege applies to external communications, Objectors cite *In re Kincaid*, 2023 WL 5933341, *6 (D.D.C. 2023). But this Court has already acknowledged and declined to apply that case. *See Fontes*, 344 F.R.D. at 514 n.11.

discouragement of new members, or (2) other consequences which objectively suggest an impact on, or chilling of, the members' associational rights." *Perry*, 591 F.3d at 1160.

Farley and Lewis have failed to submit any evidence that their speech would be impacted at all by disclosure. Their failure to provide any evidence to make a *prima facie* showing by itself warrants overruling their First Amendment privilege objection.

The FEC does not satisfy its *prima facie* burden either, for the declaration it submitted does not support its claims of a chilling effect. The FEC claims that disclosure of conversations would deter legislators and other parties from communicating with the FEC. In support, the FEC offers a declaration from its President, Scot Musi, attesting to the purported chilling effects of disclosure. ECF No. 292-1. Musi's conclusory "understanding and belief" that unidentified individuals would be discouraged from associating with the FEC if they did not believe that FEC would keep their communications confidential, *id.* ¶ 13, provides scant evidence of a chilling effect. *Compare Perry*, 591 F.3d at 1163 (submitting testimony from specific individual group members attesting to the impact of compelled disclosure of internal communications); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 2018 WL 2441518, at *11 (N.D. Cal. May 31, 2018) (similar).

The FEC's putative retaliation-based justification fares no better. The FEC claims disclosure would expose "legislators and coalition partners" to retaliation because FEC staff members have been harassed in the past for their association with the FEC. Resp. at 12. But the FEC does not explain how disclosure of the contents of its communications with legislators would subject its members to harassment, when the fact of communications between the legislators and the FEC has already been disclosed. That the FEC chose to disclose on its privilege logs the names of the senders and recipients of such communications "undermines any suggestion" that disclosure of the communications would "create[] an impermissible chilling effect." *Fontes*, 344 F.R.D. at 516 n.13.

Finally, the FEC claims that disclosure of these communications would reveal "FEC's deliberations and strategic priorities," which Musi "believes" are sensitive and

confidential. ECF No. 292-1 ¶ 6. But a subjective belief that communications between FEC members and public officials would be kept confidential is insufficient to support invocation of a First Amendment privilege. By sharing documents reflecting such "strategic priorities" and "deliberations" with public officials, the FEC has abandoned any right to assert a First Amendment privilege concerning those documents; by its "own actions," the FEC has "already disclosed the contents of its communications to the public" by sharing them with public officials. *Sol*, 2013 WL 12098752, at *3.

Regardless, if the FEC is concerned about the disclosure of any specific information in the communications to the public, it can seek to designate the documents as confidential pursuant to the governing protective order in this case. *See Fla. State Conf. of Branches & Youth Units of NAACP v. Lee*, 568 F. Supp. 3d 1301, 1307 (S.D. Fla. 2021). The FEC's bald assertions that these documents contain sensitive information does not justify withholding them from production merely because they were discussed with legislators.

Accordingly, there is no basis to consider whether Plaintiffs can "demonstrate a sufficient need for the discovery to counterbalance [any First Amendment] infringement" under *Perry*'s second step, 591 F.3d at 1164. As a matter of law, there is no First Amendment privilege for an organization's external communications, like those at issue here. But even if this Court were to apply a balancing test, Plaintiffs' need for discovery outweighs the Objectors' purported First Amendment interests. This Court has noted that "[w]hat motivated the Arizona legislature to enact S.B. 1485 is at the heart of this litigation," ECF No. 237, at 19. And as discussed, the Objectors have not made even a *prima facie* showing that requiring the third-party subpoena recipients to disclose the communications at issue would meaningfully chill their speech. The Objectors' assertion of a First Amendment privilege should therefore be overruled.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order to compel the third-party subpoena recipients to produce the documents they have withheld.

Dated: May 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024, a copy of the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM THIRD-PARTY SUBPOENA RECIPIENTS** 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.

*/s/*Lee H. Rubin