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14  
15 **UNITED STATES DISTRICT COURT**  
16 **DISTRICT OF ARIZONA**

17 Mi Familia Vota; et al.,  
18 Plaintiffs,  
19 and  
20 DSCC and DCCC,  
21 Plaintiff-Intervenors,

21 v.

22 Adrian Fontes, in his official capacity as  
23 Arizona Secretary of State; et al.,  
24 Defendants,  
25 and  
26 RNC and NRSC,  
27 Defendant-Intervenors.

Case No. CV-21-01423-DWL

**JOINT SUMMARY OF  
DISCOVERY DISPUTE  
REGARDING LEGISLATIVE  
PRIVILEGE**

1 **INTRODUCTION**

2 Pursuant to the Court’s December 15, 2021, Order (Doc. 85), Plaintiffs Mi Familia  
3 Vota, Arizona Coalition for Change (“AZC4C”), Living United for Change in Arizona  
4 (“LUCHA”), and League of Conservation Voters, Inc. d/b/a Chispa AZ (“Plaintiffs”) and  
5 non-party Arizona legislators submit the following joint summary of their discovery  
6 dispute. The dispute concerns the assertion of legislative privilege over documents  
7 responsive to several Rule 45 subpoenas (“Subpoenas”) served on key legislators on  
8 January 7 and April 27, 2022.

9 **JOINT SUMMARY OF DISCOVERY DISPUTE**

10 Plaintiffs claim that the Arizona legislature enacted SB 1485 in order to burden the  
11 rights of voters of color. In June 2022, this Court held that Plaintiffs had plausibly alleged  
12 that the legislature enacted this bill with discriminatory purpose, based among other things  
13 on contemporaneous statements by Representative Kavanagh and the legislature’s other  
14 activities with regard to supposed claims of voter fraud, when viewed in the light most  
15 favorable to Plaintiffs. *See* June 24, 2022 Order, ECF No. 154. Consistent with that Order,  
16 Plaintiffs’ Subpoenas seek information from certain state legislators that Plaintiffs assert  
17 are relevant to their claim, including documents and communications relating to legislation  
18 regarding voting from the 55th Legislative Session.

19 The parties have engaged in an extensive meet-and-confer process regarding the  
20 Subpoenas. One of the key points of dispute during these discussions has been the  
21 applicability and scope of legislative privilege. After good-faith discussions on both sides  
22 and the production of approximately 33,000 documents in response to the Subpoenas, the  
23 legislators continue to withhold a number of documents based on this privilege, including  
24 but not limited to communications between legislators and third parties outside the  
25 legislature.

26 Plaintiffs and the legislators disagree over the assertion of privilege and request that  
27 the Court set a briefing schedule to resolve this dispute.  
28

1                    **PLAINTIFFS' POSITION**

2                    The legislators cannot withhold responsive documents under the legislative  
3 privilege for two reasons. *First*, the legislators cannot assert legislative privilege over  
4 communications they or their staff had with third parties. Legislative privilege protects  
5 “candor in . . . internal exchanges” *within* the legislature. *United States v. Gillock*, 445 U.S.  
6 360, 373 (1980). As nearly all courts to address the question have held, therefore, the  
7 privilege does not extend to communications with outsiders, who do not participate in the  
8 process of deliberating over and voting for legislation.<sup>1</sup>

9                    Plaintiffs acknowledge that one decision in this District has held the the legislative  
10 privilege does extend to communications with third parties. *See Puente Arizona v. Arpaio*,  
11 314 F.R.D. 664 (D. Ariz. 2016). However, *Puente Arizona*'s analysis is flawed, and other  
12 courts recognize that the case is an outlier and is unpersuasive. *See, e.g., La Union Del*  
13 *Pueblo Entero*, 2022 WL 1667687, at \*4; *Jackson Mun. Airport Auth. v. Bryant*, 2017 WL  
14 6520967, at \*8.

15                    *Second*, even as to documents to which legislative privilege applies, that privilege  
16 is not absolute. *See, e.g., In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987). As a qualified  
17 privilege, the legislative privilege must yield “where important federal interests are at  
18 stake,” such as the fundamental right to vote. *Gillock*, 445 U.S. at 373. Courts apply a five-  
19 factor test to determine whether legislative privilege is overcome, considering “(i) the  
20 relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii)  
21 the seriousness of the litigation and the issues involved; (iv) the role of the government in  
22 the litigation; and (v) the possibility of future timidity by government employees who will  
23 be forced to recognize that their secrets are violable.” *La Union Del Pueblo Entero*, 2022  
24 WL 1667687 at \*6 (internal quotation marks omitted).

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26 <sup>1</sup> *See, e.g., La Union Del Pueblo Entero v. Abbott*, No. 21-cv-844, 2022 WL 1667687, at \*3 (W.D.  
27 Tex. May 25, 2022); *League of Women Voters of Michigan v. Johnson*, No. 17-cv-14148, 2018  
28 WL 2335805, at \*6 (E.D. Mich. May 23, 2018); *Jackson Mun. Airport Auth. v. Bryant*, No. 16-cv-  
246, 2017 WL 6520967, at \*7 (S.D. Miss. Dec. 19, 2017); *Bethune-Hill v. Virginia State Bd. of*  
*Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015); *Favors v. Cuomo*, 285 F.R.D. 187, 212  
(E.D.N.Y. 2012).

1 As to factor (i), the communications of legislators are highly relevant to Plaintiffs’  
2 intentional discrimination claim, as this Court has already recognized. *See* June 24, 2022  
3 Order, ECF No. 154, at 55- 57; October 27, 2022 Order, ECF No. 184, at 23 and n.11. As  
4 to factor (ii), there is no substitute for this direct source of such important evidence. As to  
5 factor (iii), this litigation involves important federal rights, because Plaintiffs seek to  
6 vindicate Arizonans’ equal protection under the Fourteenth Amendment, and in particular  
7 their equal access to the fundamental right to vote. As to factor (iv), the legislators’ central  
8 role in this litigation, which turns on their motivations and purposes in passing SB 1485,  
9 further supports disclosure here. Finally, factor (v) is not particularly relevant here and is  
10 insufficient to overcome the other factors that weigh strongly in favor of disclosure.  
11 Accordingly, as applied to this case, Plaintiffs can show that these factors support  
12 disclosure of many or all documents withheld under legislative privilege.

### 13 **THE LEGISLATORS’ POSITION**

14 The documents in dispute fall under the legislative privilege as consistently held by  
15 federal courts. *First*, federal courts, including a well-reasoned decision from Judge  
16 Campbell of this District, have found communications between legislators and third parties  
17 created in connection with legislative activity protected by the legislative privilege. *Puente*  
18 *Arizona*, 314 F.R.D. at 670–71; *see also League of Women Voters of Florida, Inc. v. Lee*,  
19 2021 WL 5283949, at \*3 (N.D. Fla. 2021). One of the key purposes for the legislative  
20 privilege is to protect legislators from undue intrusion into their routine actions taken in  
21 their legislative capacity. *League of Women Voters*, 2021 WL 5283949, at \*3; *see also Lee*  
22 *v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018) (“state and local officials  
23 undoubtedly share an interest in minimizing the distraction of divert[ing] their time,  
24 energy, and attention from their legislative tasks to defend the litigation”) (internal  
25 quotation omitted). Meeting or communicating with constituents or other third parties are  
26 vital and routine components of the legislative process, and therefore a legislator’s  
27 communications with third-party attorneys, lobbyists, and constituents regarding the  
28 formulation of legislation are covered by the legislative privilege. *League of Women*

1 *Voters*, 2021 WL 5283949, at \*3.

2 **Second**, the Legislators’ interest in maintaining the privilege over these disputed  
3 documents overcomes the Plaintiffs’ claimed need to obtain the privileged material.  
4 Plaintiffs already have access to the most relevant legislative intent information, namely  
5 the public legislative history materials concerning SB 1485, which includes videos of the  
6 legislative hearings. *Puente Arizona*, 314 F.R.D. at 672 (noting that Plaintiffs had access  
7 to the traditional sources of legislative history in finding that the availability of other  
8 evidence weighed in favor of upholding the legislative privilege). In addition, in the course  
9 of good-faith discussions with Plaintiffs’ counsel over the last several months, the  
10 Legislators produced approximately 33,000 documents to the Plaintiffs. These documents  
11 included emails and text messages from the Legislators’ personal cell phones,  
12 notwithstanding the questionable relevancy of an individual legislator’s communications  
13 to the overall legislative intent. In short, Plaintiffs have access to ample information about  
14 these bills (including the Legislators’ contemporaneous public statements).

15 The fourth and fifth factors also favor application of the legislative privilege. The  
16 State is a defendant in the case and has sought to uphold the challenged legislation.  
17 Moreover, applying the privilege would serve to “protect legislators from unwarranted  
18 interference with their legislative activity,” *Puente Arizona*, 314 F.R.D. at 672, and to  
19 “encourage frank and honest discussion among lawmakers.” *League of Women Voters*,  
20 2021 WL 5283949, at \*7 (quotation omitted). A large majority of the documents being  
21 withheld as privileged involve communications between and among the Legislators and  
22 their staff. To disclose these internal communications would interfere with the Legislators’  
23 legitimate legislative activity and ability to communicate freely with each other and their  
24 staff. While voting rights cases involve serious issues, the balance of the factors in this case  
25 weigh in favor of maintaining the legislative privilege over the documents in dispute.

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**CERTIFICATION OF COUNSEL**

Undersigned counsel certify that they have attempted to resolve this discovery dispute through personal consultation (via written communications and telephonic conferences) and sincere efforts as required by Local Rule of Civil Procedure 7.2(j). Despite these good-faith efforts, the parties have been unable to resolve their dispute.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 2, 2023, a copy of the foregoing **JOINT SUMMARY OF DISCOVERY DISPUTE** 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 served via e-mail on the following recipients:

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