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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. 2:21-cv-01423-DWL

JOINT RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM THIRD-PARTY SUBPOENA RECIPIENTS

Non-party legislators Former Senator Michelle Ugenti-Rita, Former Senator Kelly Townsend, Senator JD Mesnard, Speaker Ben Toma, Former Representative Becky Nutt, and Senator Rick Gray (collectively the "Legislators"); non-parties Aimee Yentes, Mark Lewis, Dan Farley, and the Free Enterprise Club (collectively "Recipients", and together with the Legislators, the "Respondents") hereby jointly respond to Plaintiffs' Motion to Compel Discovery from Third-Party Subpoena Recipients Pursuant to Fed. R. Civ. P. 37 and 45 (the "Motion").

As this Court is aware, Plaintiffs previously issued subpoenas to several current and former Arizona state legislators for communications regarding S.B. 1485 and other voting legislation. The Court upheld the legislators' claim of legislative privilege and denied Plaintiffs' motion to compel after performing an *in camera* review. *See* Doc. 237, Doc. 242. The Court's order, however, noted an unresolved question regarding "whether the state legislative privilege would be implicated by a subpoena to a third party to obtain that party's communications with a member of a state legislature." Doc. 237, p. 23 n.10. The Court recognized that this issue had not been briefed or raised by the parties and that none of the decisions cited addressed the issue. *Id.* Accordingly, the Order did not come to a "definitive conclusion[]" on whether Plaintiffs would be able to subpoena those privileged communications directly from non-legislators. *Id.*

Now that the issue is squarely before the Court in the form of Plaintiffs' Motion, there is a Fifth Circuit decision directly on point which fully rejects Plaintiffs' arguments: *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310 (5th Cir. 2024) ("*La Union*").[1]

Like this case, *La Union* involved a discrimination challenge to a state voting registration statute. And as in this case, plaintiffs in *La Union* sought to compel the production of communications with state legislators from third parties after they had been denied direct discovery from the state legislators. The Fifth Circuit affirmed that the

[1] The Motion does not cite to this decision at all.

legislative privilege applied, even though the discovery was not directed to the state legislators themselves. *Id.* at 321-23. Furthermore, the Fifth Circuit held that the case did not present "extraordinary" circumstances such that the legislative privilege should yield. *Id.* at 323-25.

This Court should follow the Fifth Circuit's reasoning and reject Plaintiffs' attempt to evade the legislative privilege. In addition, the subpoenas infringe upon the Recipients' First Amendment rights because the disclosure of the subpoenaed documents would unjustifiably burden the Recipients' associational and political activity.

I. Factual Background.

In August 2023, Plaintiffs' counsel issued 10 document subpoenas to individuals who were listed on the Legislators' privilege logs. Each of these subpoenas asked the recipients to produce documents and communications identified on the Legislators' privilege logs (attached as Exhibit A to each of the subpoenas) as well as communications with Arizona state legislators "related to SB 1485, SB 1003, or other potential or enacted voting legislation introduced in the same legislative term related to the Permanent Early Voting List." *See, e.g.*, Doc. 283-2 at 12.

Undersigned counsel objected to the subpoenas on behalf of the Legislators. The parties engaged in multiple meet-and-confer meetings and were ultimately able to narrow the scope of the present dispute to the subpoenas issued to the Free Enterprise Club, Aimee Yentes, Dan Farley, and Mark Lewis, each of whom objected to the subpoenas on both legislative privilege and First Amendment grounds. *See* Doc. 283-6, Doc. 283-7.

The Free Enterprise Club's privilege log identifies approximately 303 individual text messages with the Legislators concerning not just S.B. 1485, but also S.B. 1103, S.B. 1106, and S.B. 1713. *See* Doc. 283-10.

As to Mr. Farley and Mr. Lewis, they are in possession of one email chain, in which they corresponded with Former Senator Kelly Townsend regarding proposed legislation.

See Doc. 283-8 (listing May 2, 3, and 6 emails with Sen. Townsend). This email chain was included in the Legislators' privilege log and was provided to the Court in connection with the Court's *in camera* review. *See* Doc. 240-1 at 10-11, rows 114-121 (listing emails between Mark Lewis, Sen. Townsend and Dan Farley).

II. The Legislative Privilege Applies to Communications between Legislators and Third Parties Even If the Discovery Request Is Issued to a Non-Legislator.

As discussed above, when the Court issued its order on the motion to compel documents directly from the legislators, it did not have the benefit of the Fifth Circuit's *La Union* decision, which was issued a few days after the Court allowed briefing on this dispute. *La Union* resolves all of the questions posed by the Court in favor of upholding the legislative privilege against the discovery sought here.

The plaintiffs in *La Union* alleged that the state legislature had enacted a voter registration law with an intent to discriminate against racial minorities. 93 F.3d at 314. After the Harris County Republican Party intervened in the lawsuit, Plaintiffs sought to compel the production of documents and communications exchanged between the Harris County Republican Party and state legislators. *Id.* After the district court allowed the discovery over the legislators' claim of legislative privilege, the legislators appealed and the Fifth Circuit reversed. *Id.*

As a preliminary issue, the Fifth Circuit held that the state legislators had standing to appeal the discovery order. In reaching that decision, the Fifth Circuit held that even though the discovery requests were directed to the Harris County Republican Party, the requests imposed a burden upon the state legislators. *Id.* at 317.

While one purpose of the legislative privilege is to protect against the cost and inconvenience of trial, "[e]qually important is the privilege's function to guard against 'judicial interference' by protecting legislators from courts' seeking to 'inquire into the motives of legislators' and 'uncover a legislator's subjective intent in drafting, supporting,

or opposing proposed or enacted legislation.'" *Id.* (quoting *La Union del Pueblo Entero v. Abbott*, 68 F.4th 228, 238 (5th Cir. 2023) ("*Hughes*")). Discovery requests that reveal a legislator's communications "even if served on non-legislators, nonetheless burden—and therefore deter—legislators from 'the uninhibited discharge of their legislative duty.'" *Id.* at 318 (quoting *Hughes*, 68 F.4th at 238). "It is therefore no less burdensome to the privilege's purpose of protecting 'the exercise of legislative discretion . . . [from] judicial interference.'" *Id.* (quoting *Hughes*, 68 F.4th at 238).

Furthermore, the Fifth Circuit held that allowing the production of legislator communications from other parties is inconsistent with the scope of the legislative privilege, which includes communications between legislators and third parties. *Id.* at 318. "The legislators' communications do not lose their protected character merely because they are stored with a third party." *Id.* at 319. Accordingly, the Fifth Circuit rejected the plaintiffs' "indirect attack on the privilege's scope." *Id.* at 318 (quoting *Hughes*, 68 F.4th at 236).

The Fifth Circuit further clarified that "when a legislator brings third parties into the legislative process, those third parties may invoke the privilege on that legislator's behalf for acts done at the direction of, instruction of, or for the legislator." *Id.* at 322. And because the emails with the third part "were created, transmitted, and considered *within* the legislative process itself, [] the legislators have not waived their claims of privilege. Put another way, waiver has not occurred because those emails have not been publicly released *outside* of the legislative process." *Id.* at 323.

La Union aligns neatly with this Court's previous decision on legislative privilege. The Court has already affirmed that because the legislative privilege's "animating purpose is not limited to the maintenance of confidentiality," the privilege is not waived when a legislator communicates with those outside the legislature. Doc. 237 at 14.

Rather, the privilege serves to protect against interference with the legislative process itself, in order "to allow duly elected legislators to discharge their public duties

without concern of adverse consequences outside the ballot box." *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187 (9th Cir. 2018); *see also* Doc. 237 at 25. Indeed, as underscored in *Arlington Heights*, the Supreme Court "has recognized ever since *Fletcher v. Peck*" in 1810 that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," so that testimony of an individual legislator was "usually to be avoided." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n. 18 (1977).[2] Thus, the privilege covers communications between legislators and third parties outside of the legislature, which are "'part and parcel' of the modern legislative process." *See* Doc. 237 at 14 (quoting *Hughes*, 68 F.4th at 236; *see also id.* at 24.

Here, although the Legislators do not bear the burden of directly producing the subpoenaed documents, the disclosure and use of privileged legislator communications in this case in response to Plaintiffs' subpoenas will interfere with the legislative process by chilling future dialogue between lawmakers and third parties.

If a legislator knows that his or her written communications will not be protected from use in a lawsuit even if the Court upholds the legislator's privilege claim, he or she will likely choose not to engage in those communications going forward so as to protect their preliminary opinions from public disclosure and critique. *Cf. Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983) (holding that the Congressional legislative privilege "protects freedom of speech in the legislative forum" and finding that the forced disclosure of a constituent source could "deter constituents from candid communication with their legislative representatives and otherwise cause the loss of valuable information"). Even if a subpoena is not directed to the legislator, the danger remains that production of

[2] In this way, the legislative privilege is similar to the deliberative process privilege, which protects the formulation of agency policy and promotes frank and independent discussion among decisionmakers. *See F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

privileged communications would act as a "deterrent to the uninhibited discharge of their legislative duty." *See Hughes*, 68 F.4th at 238 (internal quotation omitted).

Here, the Legislators asserted their personal legislative privilege and the Court upheld that claim. Plaintiffs' tactic would effectively nullify the Legislators' privilege claims and allow Plaintiffs to use the very documents that the Court held are privileged.

Because the disclosure of the communications, regardless of who holds the communications, will interfere with the legislative process and chill future discussions during the legislative process, the Court should find that the privilege applies to the communications sought.

III. This Is Not an "Extraordinary Case" in Which the Privilege Must Yield.

While the legislative privilege for state legislators is qualified, the Supreme Court has held that the privilege should "yield" only in "extraordinary instances." *Arlington Heights*, 429 U.S. at 266. Neither the Supreme Court nor the Ninth Circuit has specifically defined those "extraordinary" circumstances, but the Ninth Circuit has refused to create a "categorical exception whenever a constitutional claim directly implicates the government's intent." *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018) (holding that the district court correctly barred the depositions of officials involved in the redistricting process because they were subject to the legislative privilege); *cf. City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (refusing to allow depositions of city officials with respect to their individual motives for enacting regulation).

Some federal district courts (including this one) have previously applied a five-factor balancing test to determine whether to apply the legislative privilege. That five-factor test has never been adopted by a Circuit court. Indeed, several Circuit decisions within the last year have rejected the use of such a test. *See Hughes*, 68 F.4th at 239-40; *In re N.D. Legis. Assembly*, 70 F.4th 460, 465 (8th Cir. 2023) ("Dicta from *Village of Arlington Heights* does not support the use of a five-factor balancing test in lieu of the ordinary rule that inquiry

into legislative conduct is strictly barred by the privilege."); *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1345 (11th Cir. 2023) ("None of our sister circuits have subjected the privilege to such a test, and at least four of them have rejected this approach.").

La Union is the first Circuit court decision to enumerate the characteristics of an "extraordinary" civil case in which the legislative privilege yields. In so doing, the Fifth Circuit eschewed guesswork about the potential relevance of the requested documents and instead focused on the characteristics of the case itself to determine if it is "closer on the continuum of legislative . . . privilege to the suits under 42 U.S.C. § 1983 at issue in *Tenney* and *Bogan* than it is to the criminal prosecution under federal law in *Gillock*." 93 F.4th at 324 (quoting *Hughes*, 68 F.4th at 240).

The Fifth Circuit identified three characteristics of an extraordinary case:

(1) "the civil case must implicate important federal interests beyond a mere constitutional or statutory claim";

(2) "the civil case must be more akin to a federal criminal prosecution than to a case in which a private plaintiff seeks to vindicate his own rights," i.e. the cause of action "provides additional and unique relief—above and beyond what may be sought by typical private plaintiffs"; and

(3) " the civil case cannot be brought so frequently that it would, in effect, destroy the legislative privilege."

Id. at 324.

The Fifth Circuit found none of these elements present. The challenge to Texas' voting registration law did not implicate "any important federal interest *beyond* constitutional or statutory claims of racial animus" and it did not share any characteristics common to federal criminal prosecutions. *Id.* at 325. Accordingly, the court upheld the legislative privilege with respect to the communications between the local Republican party and state legislators.

Applying the Fifth Circuit's test yields the same results in this case. This is a civil case that does not implicate any federal interest beyond alleged racial animus (claims also present in *Lee*). Plaintiffs' cause of action here will not provide any additional relief beyond that typically sought by other private plaintiffs. Moreover, allowing discovery into legislator communications in this case would effectively open up legislator communications in any case involving an alleged discriminatory legislative intent. In short, this case does not present any "extraordinary" circumstances in which the legislative privilege must yield.

To be clear, when the legislature's motive is pertinent in a case, "it is the motivation of *the entire legislature*, not the motivation of a handful of voluble members, that is relevant." *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) (emphasis added). The motives of a single legislator, even if stated publicly, cannot be imputed to the legislature as a whole. *See United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350, 210 L. Ed. 2d 753 (2021) (rejecting "cat's paw" theory of imputing a bill's sponsors allegedly improper motives onto other members); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *55 (D. Ariz. Feb. 29, 2024) (holding that even if a senator "expressed discriminatory remarks" during Senate Judiciary Committee meetings, "Plaintiffs may not impute his motives to the other individual legislators or the Arizona Legislature as a whole").

Individual legislators may vote to adopt a bill for many reasons, which makes discerning legislative intent extremely hazardous. *See City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (the court "prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task," since "individual legislators may vote for a particular statute for a variety of reasons").

Accordingly, what an individual legislator may have said in communications with a third party regarding pending legislation has *de minimis* relevance when discerning collective legislative intent. Plaintiffs simply have not articulated any meaningful grounds for interfering with the legislative process by seeking the production of legislators' communications with third parties, including communications the Court already held were properly withheld as protected by the legislative privilege.

IV. The Subpoenas Also Violate the Recipients' First Amendment Privileges.

Once "the opponents of disclosure" make "a prima facie case of arguable First Amendment infringement," a subpoena's proponent bears the burden to "demonstrate a sufficient need for the discovery to counterbalance that infringement." *In re Anonymous Online Speakers*, 661 F.3d 1168, 1174 (9th Cir. 2011) (citation omitted).

Moreover, courts are "quicker to find that the burden or expense in question is undue and offer protection as needed to alleviate it" when a party subpoenas a non-party. *Mi Familia Vota v. Hobbs*, 343 F.R.D. 71, 81 (D. Ariz. 2022) (quotation marks and citation omitted); *see also Va. Dep't of Corr. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019) ("Nonparties are 'strangers' to the litigation, and . . . should not be drawn into the parties' dispute without some good reason, even if they have information that falls within the scope of party discovery." (alterations adopted and citations omitted)).

This Court should quash the Subpoenas because (1) the Private Third Parties have made a prima facie showing that the Subpoenas would burden their First Amendment interests, and (2) Plaintiffs' interests in the communications cannot counterbalance those burdens.

A. The Subpoenas Burden the Recipients' First Amendment Interests.

First Amendment privilege has never been limited to information purely internal to an organization. Rather, courts have applied the privilege to "internal *and external* communications" when disclosure "could result in 'chilling the free exercise of political

speech and association.'" *In re Kincaid*, 2023 WL 5933341 (D.D.C. Aug. 9, 2023) (emphasis added) (quoting *F.E.C. v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. 1981)); *cf. Tree of Life Christian Sch. v. City of Upper Arlington*, 2012 WL 831918, at *3 (S.D. Ohio Mar. 12, 2012) (quashing subpoena seeking information about major donor outside organization, noting that "disclosure of the donor's identity . . . will almost certainly put at least some strain on the relationship between Plaintiff and its donor"). In these instances, the question is not whether communications included third parties, but instead, "whether disclosure of the information will have a deterrent effect on the exercise of protected activities." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (internal citations omitted); *see also Dole v. Serv. Empl. Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (explaining "inquiry is directed to whether [disclosure] 'would have the practical effect of discouraging the exercise of constitutionally protected political rights" (quotation marks omitted) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958)).

Although this Court suggested in a prior order that legislators' communications with third parties *may* be discoverable from those parties, it expressly reserved judgment on that issue, which has not been presented or briefed until now. *See* Doc. 237 at 23 (noting the "third parties identified in Legislators' privilege log… might have other grounds for resisting compliance" besides legislative privilege). And while the Court indicated that some parts of another subpoena (to the Republican Party of Arizona ("RPA")) might fall outside First Amendment privilege "if [they] involve external communications [with] third parties," that situation was distinct from this one because the RPA's "facially deficient" privilege log meant the Court did not then have an opportunity to fully analyze the issue in "the nuanced manner in which the First Amendment privilege operates." *Mi Familia Vota v. Fontes*, 344 F.R.D. 496, 515, 521 (D. Ariz. 2023).

Here, the Subpoenas would compel the Private Third Parties to disclose text

message conversations between parties who believed they were speaking privately. Although these communications reveal no racial animus, they do include significant back-and-forth about the intricacies of the legislative process, including strategizing about committee hearings and vote counts, predicting and analyzing legislators' votes, and the like. Disclosing these messages to political opponents would undermine FEC's associational and petitioning rights for three reasons.

First, it would "infringe on the relationship between" the FEC and third parties like legislators and coalition partners, and chill them from continuing to associate with FEC, because it would publicize sensitive conversations these third parties had with FEC personnel in confidence. *Tree of Life Christian Sch.*, 2012 WL 831918, at *4; *see* Exhibit A, Mussi Decl. ¶¶ 11-13 (describing how FEC's "work depends on personal relationships and involves private conversations in which it is essential that individuals feel free to share their ideas and confidence, without fear that those communications will be shared with the public").[3]

Second, it would expose legislators and coalition partners to an increased risk of retaliation by publicizing the extent of their association with FEC, which has faced threats of violence and other retaliation for its advocacy work. *Id.* ¶¶ 7-10 (describing threats of violence and other hostility and retaliation FEC faces for its advocacy, as well as third parties' fears of retaliation for associating with FEC).

Third, it would undermine FEC's effective advocacy by revealing its confidential "deliberations and strategic priorities." *Id.* ¶ 6.

These burdens, corroborated by record evidence, were not developed or considered in other parties' prior objections to subpoenas involving third-party communications, and they demonstrate that the Subpoenas burden the Recipients' First Amendment interests.

[3] This is further demonstrated by the Legislators' own strenuous opposition to disclosure.

B. Any Value from the Subpoenas Cannot Outweigh the Injury to Plaintiffs' First Amendment Rights.

As an initial matter, the Recipients have not "abandoned" their objections that the Subpoenas "were overbroad and sought irrelevant information," Mot. at 2 n.1. On the contrary, because the First Amendment privilege analysis is a balancing test, fully half the equation "take[s] into account, for example, the importance of the litigation, the centrality of the information sought to the issues in the case, the existence of less intrusive means of obtaining the information," all of which a court weighs against "the substantiality of the First Amendment interests at stake." *Perry*, 591 F.3d at 1161 (internal citations omitted). "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)." *Id.*; *see also, e.g.*, *Mi Familia Vota v. Fontes*, 344 F.R.D. 496, 516 (D. Ariz. 2023) (noting subpoena proponents "must establish a substantial need for the withheld documents that outweighs the intrusion into the [third parties'] constitutional rights," and that "the relevance and need for the document clearly depend on the contents of the document itself" (quoting *La Union Del Pueblo Entero v. Abbott*, 2022 WL 17574709, at *8 (W.D. Tex. Dec. 9, 2022))).

Plaintiffs cannot make that showing. They seek from FEC approximately 303 text messages, nearly all between FEC employee Aimee Yentes and various legislators; many of these messages concern procedural matters like "timing" of various hearings, "timing of floor vote[s]," counting and predicting "votes," and technical details regarding the bills' language and effect (for example, discussions of "retroactivity" and "chain of custody"). Ex. 9 to Mot. to Compel (FEC privilege log); *see Boe v. Marshall*, 2022 WL 14049505, at *2–3 (M.D. Ala. Oct. 24, 2022) (quashing subpoena seeking advocacy group's records, including "communications with the Alabama Legislature," as having "little—if any—relevance" to constitutionality of legislation group supported). Moreover, the Subpoenas

seek documents that this Court *already* determined were not significant enough to outweigh considerations of legislative privilege.[4]

In sum, disclosing these communications between legislators and Recipients would add no value to this litigation that could justify the harm it would cause to Recipients' First Amendment rights.

V. Conclusion.

For the foregoing reasons, the Court should uphold the legislative and First Amendment privileges and deny Plaintiffs' motion to compel.

DATED this 19th day of April, 2024.

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[4] Relevant here, the Court noted that the Legislators had "already produced over 30,000 documents" that might serve as "alternative evidence." Doc. 237 at 20.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2024, I electronically transmitted a 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.

/s/D. Ochoa