IN THE SUPREME COURT OF IOWA

No. 22-0401

SENATOR ROBY SMITH, et al.,

Plaintiffs,

v.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

Appeal from the Iowa District Court for Polk County
Sarah Crane, District Judge

APPELLANTS' REPLY BRIEF

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The Iowa Constitution protects the rights of people to freely "make known their opinions to their representatives and to petition for a redress of grievance." Iowa Const. art. I, § 20. Indeed, public communication "with senators is an integral part of the senate's performance of its constitutionally granted authority to enact laws." *Des Moines Register and Trib. Co. v. Dwyer*, 542 N.W.2d 491, 499 (Iowa 1996) (citing 8 Works of Thomas Jefferson 322–23 (Ford ed.

1904)). And for decades this Court's precedent gives individuals petitioning legislators expansive protection from prying eyes.

So, it is unsurprising that this Court found a right for citizens to contact their legislators without "any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the conversation." *Id.* at 501. This Court not only safeguards the citizenry's involvement in the legislative process, but also recognizes that its involvement is *part of* the legislative process.

In the underlying case, League of United Latin American Citizens ("LULAC") challenge two acts by serving subpoenas seeking production of communications regarding those bills on 11 Legislators. Order Regarding Motions to Compel Discovery (the "Order"), at *2; App. 87. Their legal theory depends in part on proving unlawful discrimination underlying the passage of those acts. *Id.* at 2, 6–7; *cf. AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 36 (Iowa 2019) (explaining the Court's general policy against considering evidence from legislators or former legislators about legislative intent). Yet despite LULAC's contentions, it is not clear that their subpoenas will provide evidence in support of their suit and thus whether they are appropriate under Iowa's Constitution, statutes, or long-standing precedent.

The district court properly recognized that Iowa legislators are protected by legislative privilege and that the documents LULAC seeks fall within the scope of that privilege. But then it went astray, finding legislative privilege to be qualified rather than absolute. Still worse, it abrogated that qualified legislative privilege. In abrogating the Legislators' legislative privilege and granting LULAC's motions to compel, the district court applied a five-factor standard adopted from an out-of-state federal court. Order, at *3 (citing *Benisek v. Lamone*, 241 F. Supp.3d 566, 573 (D. Md. 2017); App. 88.

In granting LULAC's motions to compel, the district court abused its discretion. This Court should reverse.

I. Legislative privilege protects communications with Legislators regarding legislation.

In our Republic, legislators represent citizens and must be democratically accountable to those who elect them. That legislative process includes constituents and other citizens communicating with their legislators regarding upcoming legislation and advocating for positions or changes that better support their interests. Thus, as with much in the political sphere, the proper recourse and restraints on legislative conduct are elections, not civil lawsuits. *Teague v. Mosley*, 552 N.W.2d 646, 650 (Iowa 1996) (citing *Tenney*

v. Brandhove, 341 U.S. 367, 378 (1951)). The importance of the legislative process to our governmental system has led this Court to absolutely protect legislators when engaged in that process. *See also Ryan v. Wilson*, 300 N.W. 707, 712–16 (Iowa 1941) (recognizing "absolute privilege respecting a communication of a public official").

That absolute privilege further fits within a broader legal framework that holds the intent of legislators is rarely, if ever, relevant during litigation. *See*, *e.g.*, *AFSCME Iowa Council 61*, 928 N.W.2d at 37–42 (declining as improper to consider "evidentiary fact-finding on motives of individual legislators" in multiple contexts). That too fits with this Court's prior holding that a government body "is not required or expected to produce evidence to justify its legislative action." *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007); *see Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 86 (Iowa 2022).

To the extent that this Court declines to apply *Dwyer* and instead finds a qualified legislative privilege, this case should not be one in which that qualified privilege is abrogated. LULAC alleges an equal protection violation, that certain similarly situated voters are being treated differently. *See AFSCME*, 928 N.W.2d at 32. As there is no suspect class involved, rational basis review applies. *Id.*

Rational basis "is a 'very deferential standard.'" *Id.* (quoting *NextEra Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 46 (Iowa 2012)). Under that standard, this Court "decline[s] to weigh the subjective motivations of legislators in [its] rational basis review under the Iowa Constitution." *Id.* at 42. As the Legislators' intent is irrelevant to the adjudication of LULAC's claims, the motion to compel should be denied based on the interbranch comity concerns inherent in legislative privilege.

A. Longstanding Iowa precedent recognizes Legislators' absolute immunity from producing documents.

Legislative privilege in Iowa is absolute. Previously, this Court has held the judiciary lacks the power to order the Legislature to release records because that would interfere with the Legislature's constitutional powers. *See Dwyer*, 542 N.W.2d at 501–03. In *Dwyer*, this Court held that the Legislature's decisions as to whether to produce phone records involved "the legislature's exclusive domain." *Id.* at 496. Ordering their production would be "to embrace an imbalance . . . between the judicial and legislative branches" that "would be inconsistent with the principle of respect due to co-equal branches and would undermine the founded independence of all three branches of state government." *Id.*

That decision was based on this Court's understanding that "communicat[ing] on matters of legislation with the public" is part of the legislative process. *Id.* at 499. Indeed, *Dwyer* memorialized that "a citizen's right to contact a legislator in person, by mail, or by telephone without any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the conversation" was of the utmost importance. *Id.* at 502.

Dwyer itself broke no new ground but reaffirmed a longstanding common-law tradition of judicial deference to legislative privilege. *See id.* at 495 (quoting 1 William Blackstone, *Commentaries on the Laws of England* 164 (13 ed. 1800)). That tradition may have started with England's parliament but continues uninterrupted in Iowa's courts today in the form of immunity for legislators acting in their official capacities. *See Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005) ("Absolute immunity ordinarily is available to certain government officials such as legislators, judges, and prosecutors acting in their official capacities.") (citing *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)); *Teague*, 552 N.W. 2d at 649–50 (adopting absolute "legislative immunity" for elected county officials performing legislative functions and applying it to section 1983 claim and purported state statutory claim).

And in Iowa, speaking with constituents constitutes protected legislative activity. Most relevant here, *Dwyer* put no qualification on its holding that the judiciary lacked authority to order the release of the Legislature's communications. *See Dwyer*, 542 N.W.2d at 503.

B. The district court erred by relying on out-of-district federal precedents rather than relying on Iowa law.

The district court erred by relying on inapposite federal cases that balance the interests of state legislators with the federal interest in enforcing federal law in federal court. See Order at *3, *6–*11 (citing *Benisek v. Lamone*, 241 F. Supp. 3d 566 (D. Md. 2017)); App. 88, 91–96. That test makes sense where federal sovereign interest is supreme. But the Supreme Court has explained that "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government" with another. *United States v. Gillock*, 445 U.S. 360, 370 (1980).

Indeed, whether *Benisek*, issued by the federal district court in Maryland, remains good law was recently brought into question in the Supreme Court of Maryland. *See Matter of 2022 Legis. Districting of State*, 282 A.3d 147, 200 (Md. 2022). Maryland's highest court agreed with a Special Magistrate that distinguished *Benisek*

on two grounds: "(1) that case was an action in federal court asserting that the Congressional redistricting process violated federal law and (2) the Supreme Court had ultimately vacated and remanded the case with instructions to the lower court to dismiss the action." *Id.* (citing *Rucho v. Common Cause*, 139 S.Ct. 2484, 2508 (2019)).

Rejecting *Benisek*'s five-factor test, the Supreme Court of Maryland held that the legislative privilege protecting legislators from discovery applied despite the allegations of discriminatory redistricting.[1] *Id.* While that court found that it was "at best unclear whether the holding concerning the federal common law privilege" survived in federal court, it declined to apply *Benisek* in state court. *Id.*

Contrary to the LULAC's arguments that this Court would be the first to find an absolute legislative privilege rooted in the common law, Maryland recently reaffirmed that has been longstanding in its case law. *Id.* at 193–94 (citing *Gill v. Ripley*, 724 A.2d 88 (Md. 1999) ("An absolute immunity for legislators, with respect to conduct and statements made in the course of legislative proceedings, is as venerable as judicial immunity, having been traced back to 1399.")). That court noted the importance of "legislative privilege"

[1] This Court may take judicial notice that as of December 14, 2022, Maryland renamed its high court to be the "Supreme Court of Maryland" rather than the "Court of Appeals of Maryland."

as "an important protection of the independence and integrity of the legislature" and indicated that it would read legislative privilege "broadly to serve that purpose" including "anything generally done in a session of the [legislature] by one of its members in relation to the business before it." *Id.* (quoting *Montgomery County v. Schooley*, 627 A.2d 69 (Md. 1993)).

Indeed, despite LULAC's brief suggesting that this Court would be the first in the country to "adopt an absolute legislative privilege," other Courts have found an absolute privilege as to a legislator's communications regarding core legislative functions. *Compare* Appellee's Br. at 26 *with Edwards v. Vesilind*, 790 S.E.2d 469, 480 (Va. 2016) ("A legislator's communication regarding a core legislative function is protected by legislative privilege, regardless of where and to whom it is made.") *and Coffin v. Coffin*, 4 Mass. 1, 27 (1808) (holding that the legislative sphere includes "every thing said or done by [the legislator], as a representative, in the exercise of the functions of that office").

And other states have continued to take an expansive view of legislative privilege to "protect the legislature from intrusion by the other branches of government and to disentangle legislators from the burden of litigation and its detrimental effect on the legislative processes." *Stivers v. Beshear*, 659 S.W.3d 313, 322 (Ky. 2022) (quot-

ing *Vesilind*, 790 S.E.2d at 478); *see also Kent v. Ohio H.R. Democratic Caucus*, 33 F.4th 359, 361–65 (6th Cir. 2022) (exploring the history and roots of broad legislative privilege from Colonial England through present times); *Whalen v. Hanley*, 63 P.3d 254, 258 (Alaska 2003) ("Legislative immunity, where it applies, is absolute, and not merely qualified."); *see also Artus v. Town of Atkinson,* 2009 WL 3336013, at *5 (D.N.H. Oct. 14, 2009) (applying absolute legislative immunity against a claim relying on alleged improper motive).

LULAC's attempts to distinguish apposite cases as inapposite is unavailing. Appellee's Br. at 34–35. For example, LULAC attempts to distinguish the case of Florida by contending that Florida "recognizes both an absolute legislative immunity and a qualified legislative privilege." Appellee's Br. at 36 (citing *Penthouse, Inc. v. Saba*, 399 So. 2d 456, 458 (Fla. Dist. Ct. App. 1981) and *League of Women Voters of Fla. v. Fla. H.R.*, 132 So. 3d 135, 147 (Fla. 2013)). But Florida is illustrative in its differences from Iowa.

First, the Florida Constitution's article III, section 20(a) "explicitly places legislative 'intent'" at the center of a challenge to certain election laws. *League of Women Voters of Fla.*, 132 So. 3d at 157. No Constitutional provision relevant in this litigation calls on the Courts to specifically judge the Legislature's intent. Indeed, the

most relevant Iowa Constitutional provision specifically admonishes Courts to allow citizens to petition legislators without fear of public recourse. *See* Iowa Const. art. I § 20. Florida's Supreme Court held that Constitutional Amendment specifically "increased" the "scope of judicial review of the validity of an apportionment plan . . . requiring a commensurately more expanded judicial analysis of legislative compliance." *Id.* (internal citation omitted).

Second, and unlike existing law in Iowa, LULAC's cited Florida cases reference no statute or other authority explaining the role citizens play in the legislative process. LULAC recognizes that both this Court and the United States Supreme Court find absolute immunity appropriate for claims rising from their "legislative activities." Appellee's Br. at 35.

This Court held in *Dwyer* that communicating "on matters of legislation with the public" is part of the procedure of the Senate. *Dwyer*, 542 N.W.2d at 499. Finding that "a citizen's right to contact a legislator . . . without any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the conversation" is necessary for "the senate[] to carry out its responsibilities." *Id.* at 501. In Iowa, that type of com-

munication is a core protected legislative activity subject to absolute immunity and privilege. This Court should reverse the district court's determination and quash the legislative subpoenas.[2]

C. Even if legislative privilege in Iowa is qualified, it is inappropriate to pierce in this case.

Even if legislative privilege is found to be qualified in state civil proceedings, that qualified privilege should not be pierced here. LULAC's broad subpoenas seek all documents related to two election bills. *See* Plaintiff's Mtn. to Compel, Ex. 1, at *7–8; App. 47–48. That includes documents and communications springing from "any individuals who are not Legislators." *Id.* at *7; App. 47. But those documents, evidence about the legislative process and legislator's motivations, is not relevant to any claim that they bring. *See AFSCME Iowa Council 61*, 928 N.W.2d at 36. Allowing LULAC to pierce legislative privilege in this case, where the evidence has no probative value to the claims against an Iowa statute, would effectively render the qualified privilege a nullity.

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[2] LULAC also raises other privileges that are qualified rather than absolute. Appellee's Br. at 40. While the privileges held by officers or journalists are privileged under state law or precedent, that does not bear on legislative privilege. *Cf. id.* (citing Iowa Code § 622.11). To the extent LULAC is looking for comparisons in the law to justify whether a privilege is qualified or absolute, their highlighting of the absolute legislative immunity from suit seems to be a closer comparator. Appellee's Br. at 35–36 (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 49–50 (1998)).

LULAC contends that some legislators had improper intent behind passing the election laws, such as offering as a justification "voter fraud" but fails to contend why that rationale is legally relevant. *See* Plaintiff's Mtn. to Compel, Ex. 1, at 8; App. 48. As Justice John Paul Stevens recognized, "detecting voter fraud" is a state interest that "is unquestionably relevant to the State's interest in protecting the integrity and reliability of the electoral process." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008); *see Brnovich v. Democratic National Committee*, 141 S.Ct. 2321, 2340 (2021) ("One strong and entirely legitimate state interest is the prevention of fraud."). Even putting aside binding Supreme Court precedent holding concern for election security to be a reasonable justification for an election bill, the individual motivations of legislators are irrelevant to the constitutionality of an Iowa statute under the Iowa constitution. *See AFSCME Iowa Council 61*, 928 N.W.2d at 36; *Donnelly v. Bd. Of Trs. Of Fire Ret. Sys.*, 403 N.W.2d 768, 771 (Iowa 1987); *Willis v. City of Des Moines*, 357 N.W.2d 567, 571 (Iowa 1984).

LULAC attempts to distinguish from those binding Iowa precedent regarding election law challenges and statutory interpretation by contending that the proper inquiry is whether a law "would have been enacted in its current form absent" a discriminatory purpose. Appellee's Br. at 47 (citing *Harness v. Watson*, 47 F.4th 296,

310 (5th Cir. 2022) (en banc)). LULAC relies on *Harness v. Watson*, a decision upholding the constitutionality of Mississippi's prohibition on felons voting. *Harness* upheld Mississippi's ban despite being challenged on racial discrimination grounds. *Id.* Moreover, *Harness* raised no issue of legislative privilege and involved no legislative subpoenas. *Id.*

The most recent Supreme Court opinion to assess discriminatory intent in the voting rights context listed various high-quality evidence that it considered sufficient to determine whether a legislature acted with improper discriminatory intent. *Brnovich*, 141 S. Ct. at 2349. Contrary to footnote 4 in Appellee's Brief attempting to distinguish *Brnovich*, the Court looked at more than the actions of a single legislator in coming to that determination. Appellee's Br. at 49. *Brnovich* explained that the district court sufficiently explored discriminatory intent when it "considered the historical background and the sequence of events leading to [the statute's] enactment; it looked for any departures from the normal legislative process; it considered relevant legislative history; and it weighed the law's impact on different racial groups." *Id.* Notably missing from the necessary analysis to determine intent was private communications of or with state legislators.

Brnovich also helped to explain the difference between partisan motives and racial motives in assessing the legality of Arizona's

election law, with only racial claims raising heightened scrutiny. *Id.* at 2350; *see id.* at 2343 & n.16 ("According to the dissent, an interest served by a voting rule, no matter how compelling, cannot support the rule unless a State can prove to the satisfaction of the courts that this interest could not be served by any other means. Such a requirement has no footing in the text of § 2 or our precedent construing it.") (internal citation omitted). That type of racial discrimination claim is not found here, belying a need for heightened scrutiny.

D. LULAC relies on inapposite First Amendment case law to argue for strict scrutiny, when election law requires rational basis review.

LULAC contends in this appeal that the challenged laws "were deliberately designed to disfavor voters with certain viewpoints" and that the claim is subject to "strict scrutiny." Appellee's Br. at 48–49. Seeking review under strict scrutiny is necessary for their motion to compel, because Iowa law is clear that if the proper standard for review is rational basis, then there is no need for discovery as to a legislator's intent. *AFSCME*, 928 N.W.2d at 42 ("We likewise decline to weigh the subjective motivations of legislators in our rational basis review under the Iowa Constitution.") (collecting cases).

This attempt to gerrymander scrutiny through creative claims is unavailing. Indeed, rather than point to equal protection or election law jurisprudence to justify strict scrutiny, Appellees principally rely on two cases focused on viewpoint discrimination at public universities. Appellee's Br. at 48–49 (citing *Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 685 (U.S., 2010) and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). LULAC's reliance on those cases here is odd. *Christian Legal Society* involved plaintiffs challenging a University of California policy as unconstitutional viewpoint discrimination. *Id.* at 696. But the Supreme Court found that the school's policy did not constitute viewpoint discrimination and declined to apply strict scrutiny. *Id.* at 697. *Rosenberger* is similarly unavailing, finding that a public university denying funds to a religious publication to be unconstitutional viewpoint discrimination. 515 U.S. at 845–46. Neither of those cases bears on the appropriate standard of review in this case.

Indeed, unlike in racial equal protection challenges to election laws, strict scrutiny is inappropriate when a complaint alleges no discrimination against a suspect class. *See*, *e.g.*, *Rucho*, 139 S. Ct. at 2502–03 (explicitly declining to apply a "predominant intent" theory and strict scrutiny in a partisan gerrymandering context); *LULAC v. Perry*, 548 U.S. 399, 423 (2006) (upholding a legislative

gerrymander as constitutional because plaintiffs failed to establish "legally impermissible use of political classifications"). When a constitutional challenge does not involve a suspect class, many states' highest courts use rational basis scrutiny. *See*, *e.g.*, *King v. State*, 818 N.W.2d 1, 25 (Iowa, 2012) ("Unless a suspect class or a fundamental right is at issue, equal protection claims are reviewed under the rational basis test."); *In re Initiative Petition No. 426, State Question No. 810*, 465 P.3d 1244, 1254 (Okla., 2020); *Greene v. Commissioner of Minnesota Dept. of Human Services*, 755 N.W.2d 713, 726 (Minn. 2008).

LULAC's purported viewpoint discrimination does not allege discrimination against a suspect class. *See Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005) (listing "race, alienage, or national origin" as suspect classes but declining to find illegal immigrants to be a suspect class entitled to strict scrutiny) (citing *Plyler v. Doe*, 457 U.S. 202, 223 (1982)). When a suspect class or fundamental right is not implicated, this Court applies rational basis scrutiny.[3]

[3] To the extent LULAC contends that strict scrutiny applies because voting is a fundamental right, that issue is not briefed and thus waived on this appeal. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 98 (Iowa 2012). Even if not waived, LULAC contends it needs the subpoenaed documents due to purported discrimination, not due to denial of a fundamental right. Appellee's Br. at 48 (contending the challenged laws are "deliberately designed to disfavor

Sanchez, 692 N.W.2d at 817. And under rational basis review, the discovery LULAC seeks is unnecessary and the motions to compel should be denied. *See*, *e.g.*, *AFSCME*, 928 N.W.2d at 42.

E. The district court's application of out-of-state federal precedent improperly weighed the five factors to pierce legislative privilege.

If this Court agrees with the district court in finding that the legislative privilege is qualified and applies to LULAC's subpoenas, and it decides to use the five-factor *Benisek* test rejected by Maryland's Supreme Court, then it should find those factors weigh in favor of reversal. The district court used five factors to balance the significance of the interests at stake against the intrusion of the discovery sought and its possible chilling effect on litigation, including: "1) the relevance of the evidence sought, 2) the availability of other evidence, 3) the seriousness of the litigation, 4) the role of the State, as opposed to individual legislators in the litigation, and 5) the extent to which the discovery would impede legislative action." Order at *3 (citing *Benisek*, 241 F. Supp. 3d at 574); App. 88.

The district court improperly relied on a racial gerrymandering case to determine that the Legislators' intent is relevant to LULAC's equal-protection challenge. *Id.* at 6 (citing *Bethune-Hill v.*

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voters with certain viewpoints"). To the extent discriminatory intent is not relevant in this suit, there is no justification sufficient to abrogate the Legislators' privilege.

Virginia State Bd. of Elections, 114 F. Supp. 3d 323 (E.D. Va. 2015)). Recognizing that LULAC's claims alleged discriminatory intent, the district court applied case law explaining that "discriminatory intent is relevant and extremely important as evidence" without allowing for that case's analytically important inclusion of alleged "racially motivated decisions." *Id.* (first quote); *Bethune-Hill*, 114 F. Supp. 3d at 339 (second quote); *see* Appellee's Br. at 46 (agreeing that the district court found the documents relevant to "LULAC's claim that the legislature unconstitutionally enacted the challenged laws to intentionally discriminate against voters with certain political views").

As explained above, even in states that allow for piercing qualified legislative privilege, that type of discovery is only necessary when the Legislators' motivations are at issue in the case. Here, the allegedly discriminated-against class is purported partisans. Appellee's Br. at 46. But, as the district court recognized, this Court does not generally rely on individual legislator's opinions in its review of statutory meaning. Order at *6 (quoting *Iowa State Ed. Assoc.-Iowa Higher Ed. Ass'n v. Public Employee Relations Bd.*, 269 N.W.2d 446 (Iowa 1968)); App. 91. No Legislator's intent in enacting the challenged statutes bears on whether this Court finds that, for example, election integrity is a rational basis to pass a law. *See Crawford*, 553 U.S. at 191.

Next, the district court found that LULAC cannot obtain the communications through other means—despite simultaneously ordering the intervening political parties to provide their communications with the legislators about the bills. Order at *8, *15; App. 93, 100. To the extent LULAC is trying to find documents or communications demonstrating an invidious intent through communication with outside political groups, it is not clear why a subpoena aimed at those groups would fail to provide the communications that they seek without implicating many of the concerns raised in *Dwyer* and by the Iowa Constitution.

Unfortunately, the district court failed to weigh the burdens on the citizen-legislators trying to respond to the subpoenas and the impact that discovery would have towards impeding legislative action. There is currently no process for the part-time citizen legislators to monitor, record, and keep every single communication they make or receive. *See Artus*, 2009 WL 3336013, at *4 ("Legislative immunity is particularly important at the local level because if it is not granted, local legislators, who are often 'part-time citizen-legislator[s],' might be 'significantly deter[red]' from 'service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.'") (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998)). It is unclear how LULAC expects prompt compliance with broad requests seeking information from

all external communications on these bills. LULAC's lengthy explanation as to why the Legislators should be subject to the broad and demanding discovery process highlights why this Court has historically remained so skeptical of opening the door to discovery aimed at the Legislature to assess the legality of the bills it passes. *See* Appellee's Br. at 52–54; *Dwyer*, 542 N.W.2d at 497–98; *Willis*, 357 N.W.2d at 571.

While the Legislators are not the target of this litigation, that counsels against broad discovery aimed at them, rather than, as the district court found, weighing in favor of compelling discovery. Order at *9; App. 94. Unlike in *Benisek*, which found a limited personal stake for the legislators in the result of redistricting, here the question is whether communications between citizens and their legislators will be the subject of litigation. *Cf. id.* (quoting *Benisek*, 241 F. Supp. 3d at 576). While the defendants in the underlying suit are State officials—and not the Legislators—to the extent LULAC believes that the Legislators' private communications made during the act of legislating are relevant and central to their claims, that implicates a direct legislative interest. This factor too weighs against piercing even a qualified legislative privilege.

Overall, even if this Court chooses to apply the five-factor *Benisek*-test, those factors weigh against abrogating legislative privilege and against granting LULAC's motion to compel.

F. Compelling production here violates separation of powers between coordinate branches of government.

One of the primary purposes of the legislative privilege is to protect the Legislature and legislators from the indignities and burdens of litigation. *See Vesilind*, 790 S.E.2d at 478 (following the reasoning of the D.C. and Fourth Circuits that "subjecting legislators to discovery procedures can prove just as intrusive as naming legislators as parties to a lawsuit") (cleaned up); *League of Women Voters of Florida, Inc. v. Lee*, 2021 WL 5283949, at *2 (N.D. Fla Nov. 4, 2021) ("[L]egislative privilege furthers the policy goals behind legislative immunity by preventing parties from using third-party discovery as an end-run around legislative immunity—harassing legislators through burdensome discovery requests.").

Forcing the Legislators to comply with the district court's order renders the protections of legislative privilege toothless. *See*, *e.g.*, *Clayland Farm Enterprises, LLC v. Talbot Cnty., Maryland*, 2018 WL 4700191, at *5 (D. Md. Oct. 1, 2018) ("[T]he 'practical policy rationale justifying' absolute legislative privilege 'lends support to a bright line rule that legislators do not have to comply with discovery requests related to their legitimate legislative activities.") (citation omitted); *Artus*, 2009 WL 3336013, at *4 ("To subject a legislator to the burdens of discovery and a trial based on a plaintiff's

allegations of illicit motives would undermine the goals of legislative immunity.").

Beyond the practical harm to the Legislators, allowing the district court's order compelling production causes the institutional harm that *Dwyer* sought to avoid. 542 N.W.2d at 495. There, this Court explained the importance of leaving "intact the respective roles and regions of independence of the coordinate branches in government." *Id.* That could impede legislative functions and weaken the public's access to its elected representatives. Legislative privilege and separation of powers are critical components of Iowa's Constitutional order. The district court's order to compel must therefore be reversed.

II. Compelling production here violates the public's privacy interests and rights under article I, section 20 of the Iowa Constitution.

Even if this Court decides to find a legislative privilege, to apply the *Benisek*-test, and on that ground to pierce the privilege, LULAC's subpoenas also contravene the Iowa Constitution. Article I, section 20, of the Iowa Constitution provides that "[t]he people have the right freely . . . to make known their opinions to their representatives and to petition for a redress of grievance." Iowa Const. art. I, § 20. As explained above, in *Dwyer* the Iowa Supreme Court recognized "a citizen's right to contact a legislator in person, by mail, or

by telephone with-out any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the conversation." *Dwyer*, 542 N.W.2d at 501.

This Court embraced the privacy rights of Iowa's citizens and their integral role in the legislative process. "Apart from the inconvenience or possible harassment generated, a citizen subjected to inquiry about contacting a senator, may, on refusing to discuss the content, find negative inferences are drawn from that fact alone." *Id.* And it favorably cited cases spanning the country embracing a similar logic. *Id.* at 499. Even if this Court decides to break new ground and find legislative privilege does not apply here, it should embrace its prior declaration of protection of Iowa's voters and citizen; and their Constitutional right to petition their legislators.

LULAC's subpoenas exclusively seek external documents and communications—the citizens who communicated with the Legislators regarding their thoughts are not even necessarily on notice that the subpoena threatens *their* Constitutional rights. And as *Dwyer* explained at length, even putting the citizens on notice, and requiring their appearance in court to protect that interest, is a harm itself. *Id.* at 501.

This is the wrong case for this Court to chart a new path that allows legislators' communications with external citizens or groups to be subject to discovery in litigation. Rather than a case where

legislative intent may play some role in the litigation, here it will likely serve little-to-no purpose. This Court has long been skeptical about the evidence provided by legislators in litigation as to the meaning of the words the Legislature passes—and for good reason. Even more so when that disclosure could have negative chilling effects, as warned about by *Dwyer*. Thus, it is important that the people's rights under article I, section 20 of the Iowa Constitution be protected by reversing the order to compel.

CONCLUSION

The Court should reverse the grant of LULAC's motion to compel its legislative subpoenas.

Respectfully submitted,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ *Eric H. Wessan*
Solicitor General

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/s/ *Eric H. Wessan*
Solicitor General

CERTIFICATE OF FILING AND SERVICE

I certify that on March 20, 2023, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Eric H. Wessan*
Solicitor General

IN THE SUPREME COURT OF IOWA

No. 22–0401

SENATOR ROBY SMITH, SENATOR JIM CARLIN, SENATOR CHRIS COURNOYER, SENATOR ADRIAN DICKEY, SENATOR JASON SCHULTZ, SENATOR DAN ZUMBACH, FORMER SENATOR ZACH WHITING, REPRESENATIVE BROOKE BODEN, REPRESENTATIVE BOBBY KAUFMANN, REPRESENTATIVE CARTER NORDMAN, and REPRESENTATIVE JEFF SHIPLEY,

Plaintiffs,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

Writ of Certiorari to the Iowa District Court for Polk County
Sarah Crane, District Judge

APPENDIX

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA,

Plaintiff,

v.

IOWA SECRETARY OF STATE PAUL PATE, in his official capacity, and IOWA ATTORNEY GENERAL THOMAS MILLER, in his official capacity,

Defendants.

No. CVCV061476

AMENDED PETITION IN LAW AND EQUITY

COMES NOW Plaintiff League of United Latin American Citizens ("LULAC") of Iowa praying for permanent injunctive relief restraining Defendants Iowa Secretary of State Paul Pate (the "Secretary") and Iowa Attorney General Thomas Miller (the "Attorney General") from enforcing and implementing various provisions of Senate File 413 (2021) ("SF 413") and Senate File 568 (2021) ("SF 568," and together with SF 413, the "Voter Suppression Bills" or the "Bills"), as well as a declaratory judgment that implementing the challenged provisions of the Bills violates the Iowa Constitution. In support thereof, Plaintiff states the following:

STATEMENT OF THE CASE

1. Last year, voter turnout broke records in Iowa. Over 1.7 million Iowans—more than 75 percent of all registered voters—participated in the 2020 general election. More than 1 million of those voters cast absentee ballots, setting another record. Each of Iowa's 99 counties had voter turnout rates that surpassed the national average of 66 percent, and voter turnout surpassed *80 percent* in six counties. The record turnout was reflected across many demographics but was

especially notable among the 15 percent of Iowans who are members of minority groups, including Iowa's Latino community, which constitutes around 6 percent of the state's population.

2. These historic levels of direct engagement in the democratic process should be lauded. Yet one of the Iowa Legislature's top post-election priorities was to pass omnibus election bills that restrict nearly every form of voting that Iowans—particularly minority voters—relied on in 2020. Among their provisions, the Voter Suppression Bills:

- Reduce the opportunities for voters to register before elections (Section 22 of SF 413);
- Significantly reduce the number of days when voters can request absentee ballots (Sections 43 and 45 of SF 413);
- Shorten the absentee voting period by more than one week (Section 47 of SF 413);
- Reduce the number of days when county auditors can send out absentee ballots (Sections 45 and 47 of SF 413);
- Reduce the number of days for most voters to return their absentee ballots and apply ballot-receipt deadlines unequally (Sections 1, 52, 54, and 66 of SF 413);
- Inhibit or eliminate the ability of election officials to establish convenient opportunities for absentee voting at satellite voting stations, county auditors' offices, and drop boxes (Sections 50–51 and 53 of SF 413 and Section 40 of SF 568);
- Criminalize the act of assisting voters with returning their absentee ballots and prevent voters from using a person of their choice to return their ballots (Section 43 of SF 568);

- Shorten the length of time when polls are open on election day (Section 36 of SF 413); and
- Reduce the amount of time that employers must provide to certain employees on election day so they can vote (Section 41 of SF 413).

3. What makes the Bills baffling—and fatally unconstitutional—is that they lack any cognizable justification for these burdensome effects on the franchise. The Bills are largely a grab-bag of amendments and new restrictions that lack any unifying theme other than making both absentee *and* election day voting more difficult for lawful Iowa voters.

4. The Bills' sponsors have emphatically and repeatedly asserted that these new laws are not meant to combat voter fraud, which has been virtually nonexistent in Iowa. Instead, their stated purpose is only to "ensure election integrity." But according to the Secretary—Iowa's chief election official—*and* prominent Republican officials, Iowa's elections are already secure; there is nothing inherent in the system that would call the integrity of the state's elections into question or require remedial action from the Legislature, let alone these extreme measures that will impose significant burdens on voters.

5. The Bills' sponsors do not deny that Iowa's elections are secure. Instead, they have asserted that additional measures are necessary to *reassure* Iowans—who turned out in record numbers in 2020—that this is the case. But to the extent any Iowans are concerned about the security of the state's elections, it is the result of efforts to plant and sow baseless mistrust, not because there is any evidence that the integrity of the state's elections is legitimately in doubt.

6. Moreover, none of the Bills' challenged provisions will actually serve to make elections more secure or increase the public's confidence in the electoral process. Instead, they will impose undue and unjustified burdens on a wide range of lawful voters, including some of the

state's most vulnerable and underrepresented citizens: minority voters, elderly voters, disabled voters, voters with chronic health conditions, voters who work multiple jobs, and voters who lack access to reliable transportation or consistent mail service. If the concept of "election integrity" encompasses secure elections in which *all* voters have fair opportunities to participate so that the results accurately reflect the will of Iowa's electorate, then the Voter Suppression Bills directly hinder that goal.

7. This is because the Bills are exercises in voter suppression, disguised as a solution to a problem that exists only in the fertile imaginations of their creators. The Bills are not a response to voter fraud; their sponsors have said as much, and at any rate, there is no evidence of widespread fraud in Iowa's elections that requires a response (much less as draconian a response as this). Nor are the Bills a remedy for diminished confidence in elections; the state's elections are secure, and a record number of Iowans were able to make their voices heard in last year's election.

8. Instead, the Voter Suppression Bills are cynical manipulations of the electoral process that *create* problems—burdens for both absentee and in-person voters that do not serve any articulable state interests—without solving any.

9. Because these unnecessary voting restrictions independently and collectively impose an undue burden on the fundamental right to vote and violate multiple provisions of the Iowa Constitution, they should be declared unconstitutional and permanently enjoined.

JURISDICTION AND VENUE

10. This Court has jurisdiction under Iowa Code § 602.6101.

11. Venue in Polk County is proper under Iowa Code § 616.3(2) because the cause or some part thereof arose in the county.

PARTIES

12. League of United Latin American Citizens of Iowa is part of LULAC, an organization that has approximately 150,000 members throughout the United States and Puerto Rico and more than 600 members in Iowa. LULAC is the largest and oldest Latino civil rights organization in the United States. It advances the economic condition, educational attainment, political influence, health, housing, and civil rights of all Hispanic nationality groups through community-based programs operating at more than 1,000 LULAC councils nationwide. LULAC of Iowa is comprised of 22 councils located throughout the state. Its members and constituents and each of its councils include voting-age Latino citizens of Iowa who are disproportionately burdened by the Voter Suppression Bills. LULAC of Iowa must also divert substantial resources and attention from other critical missions to address the adverse impacts the challenged provisions will have on its members and constituents and assist them in attempting to surmount these new barriers to voting. Moreover, but for the Voter Suppression Bills' criminalization of most forms of assistance for absentee voters, LULAC of Iowa would support programs to help voters return their absentee ballots. The criminalization of that activity effectively forecloses an additional opportunity for LULAC of Iowa to engage in one-on-one communication with voters about the importance of voting and further undermines its ability to effectively associate with its members and constituents. Because of the Voter Suppression Bills, LULAC of Iowa has suffered and will continue to suffer irreparable harm. Unless set aside, the state's enforcement of the challenged provisions will inflict injuries for which LULAC of Iowa has no adequate remedy at law.

13. Iowa Secretary of State Paul Pate is named as a Defendant in his official capacity. He is Iowa's chief state election official, state commissioner of elections, and state registrar of voters and, as such, is responsible for the administration of elections. *See* Iowa Code §§ 47.1(1)–

(3), 47.7(1). His responsibilities include, but are not limited to, setting forth "uniform election practices and procedures" and supervising local election officials regarding the proper methods of conducting elections. *Id.* § 47.1(1)–(3).

14. Iowa Attorney General Thomas Miller is named as a Defendant in his official capacity. He is Iowa's chief legal officer and, among other duties, "[s]upervise[s] county attorneys in all matters pertaining to the duties of their offices" and "[i]nform[s] prosecuting attorneys and assistant prosecuting attorneys to the state of all changes in law and matters pertaining to their office." *Id.* § 13.2(1). In this capacity, he supervises prosecutions of violations of the Voter Suppression Bills.

FACTUAL ALLEGATIONS

I. Iowa has a long history of secure elections with robust voter participation.

15. For decades, Iowa's voter turnout rate has consistently been higher than the national average. The citizens of this state have a strong tradition of direct participation in the democratic process, and since Iowa enacted no-excuse absentee voting in 1990, voters have increasingly demonstrated their preference to vote absentee.

16. Under Iowa law, any registered voter may vote absentee, either in person or by mail.

17. Voters who wish to vote absentee in person may do so by requesting and casting an absentee ballot at the county auditor's office or at a satellite absentee voting station.

18. Voters who prefer to vote absentee by mail must first request that an absentee ballot be mailed to them. These voters can then return their absentee ballots in one of several ways. They can (1) mail their ballots back to county auditors' offices; (2) return their ballots to county

auditors' offices in person; (3) place their ballots in drop boxes, where available; or (4) return their ballots in person to satellite absentee voting stations.

19. Between 2000 and 2020, Iowans' use of absentee ballots rose from 21.2 percent of all voters to *63 percent*. This phenomenon preceded the widely observed uptick in absentee voting during the 2020 general election: in 2016 and 2018, more than 40 percent of Iowa voters cast their ballots absentee.

20. Although many Iowans have opted to use the state's no-excuse absentee voting, in-person voting on election day also remains an option.

21. Both methods of voting—absentee and election day in-person—have helped facilitate increasing rates of electoral participation. Indeed, Iowa's 76 percent voter turnout rate in 2020 was among the highest in the nation. More than *1.7 million* Iowans voted in the 2020 presidential election, which broke all previous state records for voter participation.

22. In the wake of this historic turnout, the Secretary—the state election commissioner—proclaimed that "the [voting] process went very smoothly in Iowa" and that the state was able to "provide safe and secure elections."

23. The Secretary's approbation echoed statements made by other election administrators and elected officials, like Senator Chuck Grassley's glowing endorsement of Iowa's election system: "I have confidence in Iowa's ability to conduct a fair, secure and free election. Our state takes election integrity seriously, earning credibility among the electorate for its absentee ballot system, including service members in the military. Whether voting by absentee ballot or in person, Iowa's Secretary of State and 99 county auditors have a proven track record that Iowans trust."

24. Iowa's media outlets concurred: according to *The Dispatch-Argus*, the 2020 election produced "record-breaking turnout with no reported cases of election fraud."

II. The Iowa Legislature enacts sweeping restrictions designed to impede access to the franchise.

25. The record-breaking turnout among voters and the testimonials of the Secretary, Senator Grassley, and other officials make clear that Iowa's elections are secure and inspire confidence in the Hawkeye State.

26. But even though Iowa's laws created an environment for secure elections and record turnout, the Legislature hurriedly voted to pass fast-tracked bills that curtail or eliminate many of the provisions that made it possible for Iowans to exercise their fundamental right to vote.

27. First, Republican lawmakers introduced SF 413, which is responsible for most of the Voter Suppression Bills' provisions challenged in this lawsuit, on February 18, 2021.

28. County auditors—who are charged with implementing Iowa's election laws in their respective counties—quickly announced their opposition to various provisions of SF 413, including the restrictions it places on their discretion to set up satellite absentee voting stations.

29. The Iowa State Association of County Auditors opposed SF 413, with its president, Sioux County Auditor Ryan Dokter, explaining, "Not being able to plan ahead for satellites, and being under the pressure of a shortened absentee window of 18 days creates that potential to create errors, because there's just so much more people coming to your building all at once versus a little more spread out."

30. Linn County Auditor Joel Miller called the legislation—particularly the new penalties it imposes on election officials—"[a]n affront to every county auditor in the state with a passion for creativity, election integrity and increasing voter turnout."

31. And, at the public hearing on SF 413, Adams County Auditor Becky Bissell testified that "[s]maller rural counties have a large elderly population who typically choose to vote absentee because of weather or health concerns. Why are we making it harder for them to vote?" Auditor Bissell further remarked—in reference to the elimination of the postmark deadline for absentee ballots in favor of a strict election day receipt deadline—that "[t]o rely solely on the postal system puts our voters at risk."

32. Faith leaders opposed SF 413, questioning whether limiting accessibility to voting opportunities serves the interests of a democratic society.

33. Public opposition also ran strong. Of the more than 1,200 public comments lodged in response to the House iteration of SF 413, fewer than three dozen expressed support for its enactment.

34. At the public hearing on SF 413, representatives from organizations dedicated to elderly, disabled, and minority voters spoke out against many of the challenged provisions.

35. Iowa City Councilor Janice Weiner—a former U.S. Foreign Service officer who, when serving abroad, had pointed to Iowa as a shining example of democratic opportunity—observed that reducing the window for absentee voting will disadvantage the elderly, snowbirds, victims of domestic violence, and rural voters. She also noted that she had previously assisted voters with returning their signed and sealed absentee ballots to election officials because these voters had no one else to help them, and that she will now be prohibited from doing so.

36. Despite this opposition, SF 413 passed the Iowa Senate and House of Representatives along strict party lines within days of its introduction: the Senate passed the legislation on February 23, with the House following on February 24.

37. Governor Kim Reynolds signed SF 413 into law on March 8, 2021. It took effect immediately. *See* SF 413 § 73.

38. On May 19, 2021—the final day of the Iowa Legislature's 2021 session—SF 568 passed the Iowa Senate and House of Representatives with an amendment that was introduced that same day. SF 568, in relevant part, introduces additional restrictions on the establishment of satellite absentee voting stations and the ability of Iowans to assist other voters with their absentee ballots. Governor Reynolds signed SF 568 into law on June 8, 2021.

39. The Voter Suppression Bills impose unjustified burdens on lawful Iowa voters at every step of the voting process, reducing their opportunities to register, vote absentee, and vote in person on election day.

A. Voter Registration Restrictions

40. Prior to the enactment of the Voter Suppression Bills, new voters had until ten days before a general election (and 11 days before other elections) to register to vote using various means. Although in-person registration is still possible at certain locations before election day, *see* Iowa Code § 48A.7A(3), and on election day itself at polling places, *see id.* § 48A.7A(1), the Bills now require that all other methods of registration be closed 15 days before any election. *See* SF 413 § 22 (amending Iowa Code § 48A.9(1)); *see also id.* §§ 24, 45.

B. Absentee Voting Restrictions

41. The Voter Suppression Bills drastically reduce the time period during which voters can request absentee ballots. Under the prior law, Iowans could request an absentee ballot up to 120 days before an election. Now, they can request absentee ballots only *70* days before an election. *See id.* § 43 (amending Iowa Code § 53.2(1)). Because the Bills also require county auditors to stop processing mailed absentee ballot requests 15 days before election day—as

opposed to the previous requirement that they stop ten days before general elections—it reduces the amount of time voters have to request absentee ballots by mail from 110 days to 55 days. *See id.* § 45 (adding Iowa Code § 53.2(11)).

42. The Voter Suppression Bills shorten the absentee voting period. Under the prior law, Iowans had up to 29 days to cast an absentee ballot, either in person or by mail. The Voter Suppression Bills reduce this period to only 20 days. *See id.* § 47 (amending Iowa Code § 53.8(1)(a)).

43. The Voter Suppression Bills reduce the number of days allotted for election administrators to distribute absentee ballots. Previously, county auditors could mail absentee ballots beginning 29 days before an election and ending ten days before election day, giving county auditors a total of 19 days to mail ballots. But the Bills leave county auditors with just five days to complete the same process: now, absentee ballots can only be mailed during the period starting 20 days before election day and ending 15 days before election day. *See id.* §§ 45, 47 (adding Iowa Code § 53.2(11) and amending Iowa Code § 53.8(1)(a)).

44. Not only do the Voter Suppression Bills significantly reduce the amount of time voters have to obtain absentee ballots, they also make it more difficult for voters to return those ballots by mail. In previous elections, absentee ballots returned by mail were considered timely if they were received by officials before the polls closed on election day *or* if they were postmarked by the day before the election and delivered to officials by the Monday following election day. Accordingly, absentee voters could mail their ballots at any point up until the day before the election and trust that they would be counted.

45. The Voter Suppression Bills, by contrast, provide that most absentee ballots will be counted *only* if they are received before the polls close on election day. *See id.* § 54 (amending

Iowa Code § 53.17(2)); *see also id.* §§ 52, 55. According to lawmakers, if this election day receipt deadline had been in place for the 2020 general election, over *6,500 Iowans* would have been disenfranchised.

46. The former postmark deadline for absentee ballots still applies, however, to ballots submitted by Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") voters and voters participating in the Secretary's Safe at Home address secrecy program—but not to any other absentee voters. *See id.* §§ 1, 66.

47. Voters who cast their absentee ballots in person are also burdened by the Voter Suppression Bills.

48. Previously, county auditors could exercise their discretion and apply their specialized knowledge of their communities to set up satellite absentee voting stations at senior centers and other high-traffic locations. Iowans could also petition county auditors to open satellite voting sites in certain areas. Satellite absentee voting stations were used throughout Iowa during the 2020 general election, with some counties establishing multiple locations.

49. The Voter Suppression Bills eliminate county auditors' discretion to open satellite voting stations based on their expertise; instead, SF 413 mandates that such locations can be established *only* "upon receipt of a petition signed by not less than one hundred eligible electors requesting that a satellite absentee voting station be established at a location to be described on the petition." *Id.* § 51 (amending Iowa Code § 53.11(1)).

50. SF 568, in turn, makes it more difficult to successfully petition for satellite absentee voting stations: under the new law, county auditors may decline to open these locations for various standardless reasons, *even if* they receive petitions with adequate numbers of signatures. *See* SF 568 § 40 (amending Iowa Code § 53.11(1)).

51. Restricting the authority of county auditors to open satellite offices in convenient locations means that absentee voters will either need to drive farther to vote in person at county auditors' offices or cast their absentee ballots by mail—which, as discussed above, now runs the risk that the ballots will not be received in time to be counted.

52. The Bills also restrict in-person absentee voting by limiting the number of days that satellite absentee voting stations can be open—from 29 days to only 20 days. *See* SF 413 § 50 (amending Iowa Code § 53.10(1)).

53. Finally, the Voter Suppression Bills restrict the use of ballot drop boxes, another vehicle that Iowa voters used to safely and securely return their absentee ballots during the 2020 general election. Specifically, the Bills permit each county auditor to establish only *one* drop box—regardless of the county's size or population—and only at the auditor's office. *See id.* § 53 (adding Iowa Code § 53.17(1)(c)). Previously, Iowa law did not expressly limit the number of drop boxes that auditors could establish.

54. The burdens the Bills impose on absentee voting are compounded by their new restrictions on voter assistance. Previously, voters could enlist anyone of their choosing, from friends and members of their churches to colleagues and neighbors, to return their absentee ballots to election officials. Such assistance was particularly useful for vulnerable voters like elderly Iowans, victims of domestic violence, and voters who live alone. The Bills, by striking contrast, prohibit all but a limited set of individuals—family members and housemates—from providing such assistance to most voters (the "Voter Assistance Ban"). *See* SF 413 §§ 48, 53, 56, 62; SF 568 § 43.

55. And while blind and physically disabled voters may designate delivery agents to return their absentee ballots, such delivery agents are limited to returning only *two* ballots per election. *See* SF 568 § 43 (amending Iowa Code § 53.33(3)–(4)).

56. Anyone who assists another voter by returning the voter's absentee ballot in violation of the new laws is now guilty of election misconduct in the third degree, *see* SF 413 § 8—a serious misdemeanor under Iowa law. *See* Iowa Code § 39A.4(2).

C. Election Day Voting Restrictions

57. The Voter Suppression Bills also target Iowans who vote in person on election day.

58. Previously, polling places stayed open from 7:00 a.m. until 9:00 p.m. on election day during general elections. But the Voter Suppression Bills now mandate a closing time of 8:00 p.m. for *all* elections. *See* SF 413 § 36 (amending Iowa Code § 49.73(2)).

59. The Bills also cut back on protections for workers who need to take time off to vote on election day. Previously, voters who did not have three consecutive non-working hours to vote when polls were open were entitled to take time off, without fear of penalty. Under the Voter Suppression Bills, however, that protection extends only to voters who do not have *two* consecutive non-working hours to vote when the polls are open. *See id.* § 41 (amending Iowa Code § 49.109).

D. Other Provisions

60. Other provisions of the Voter Suppression Bills are designed, in ways big and small, to make the voting process more difficult and less accessible for Iowans.

61. Previously, Iowa voters were marked "inactive," and thus put at risk that their registrations would be canceled, if postage paid preaddressed return cards sent by county auditors—"on which the registered voter may state the registered voter's current address"—were

returned as either undeliverable or indicating that the voters no longer lived at the addresses on record. Iowa Code § 48A.29. A voter's registration would then be canceled if the voter remained inactive for two successive general elections. *See id.* § 48A.30(1)(g).

62. Under the Voter Suppression Bills, this process is accelerated and puts voters at greater risk of unwarranted cancelation. Voters who do not vote in even a *single* general election are automatically marked "inactive," kickstarting a process that may ultimately result in their removal from the voter rolls. SF 413 § 25 (amending Iowa Code § 48A.28(1)–(2)).

63. The Voter Suppression Bills also prohibit county auditors from proactively sending absentee ballot applications to voters. Now, absentee ballot applications can be distributed only in response to a voter's request, *see id.* § 43 (amending Iowa Code § 53.2(1))—a restriction that serves no purpose other than to inhibit county auditors' attempts to expand access to the franchise in their communities.

64. Historically, county auditors and organizations have prefilled certain background sections of absentee ballot applications—by entering the voter's name and address, for example—to streamline the application process. But the Bills bar that practice and permit only the types and dates of elections to be prefilled. *See id.* § 44 (adding Iowa Code § 53.2(2)(d)).

65. The Voter Suppression Bills' burdens extend to election officials as well. Upon the Secretary's notice of a *technical infraction* committed by a county auditor—which could be *any* "apparent technical violation of a provision of" the state's election code, no matter how minor, Iowa Code § 39A.6(1)—the auditor must pay a fine of up to $10,000, and the matter is referred to the Attorney General for potential criminal proceedings. *See* SF 413 §§ 9–10 (amending Iowa Code § 39A.6(3) and adding Iowa Code § 39A.6(4)).

66. Moreover, it is now a serious misdemeanor for an election official to interfere with poll watchers and other partisan challengers, *see id.* § 7 (adding Iowa Code § 39A.4(1)(b)), even if those individuals attempt to disrupt or otherwise impede the electoral process.

67. Finally—and ominously—the Voter Suppression Bills now deputize law enforcement agencies and the state patrol to "prevent" violations of the election code. *Id.* § 42 (adding Iowa Code § 50.52). By moving beyond investigation and enforcement and into prevention, the Bills implicitly sanction the use of voter intimidation tactics by law enforcement.

III. The Legislature's justifications for the Voter Suppression Bills lack any support, are pretextual, and are insufficient to justify burdens on the fundamental right to vote.

68. Each provision of the Voter Suppression Bills challenged in this lawsuit burdens Iowa voters, making the voting process more difficult and making it less likely that every vote will be counted. Taken as a whole, the Bills target and restrict virtually *every aspect* of the voting process—registering to vote, requesting and submitting absentee ballots, and even in-person voting on election day.

69. These burdens are not justified by any legitimate, much less compelling, state interests.

70. According to SF 413's House sponsor, "[t]his bill has never had nor does it have anything to do with fraud." The purpose of the bill, its supporters claim instead, is to ensure election integrity; prevent voters from casting early votes they later regret; and reduce the length of each election season because their constituents are purportedly tired of being contacted by candidates.

71. But nothing in the challenged provisions of the Bills actually serves any of these ostensible interests. Instead, the Bills simply make it harder for Iowans to cast ballots and have those ballots counted.

72. There is no evidence of widespread unlawful voting in Iowa, and certainly no evidence of fraud attributable to the voting procedures targeted by the Voter Suppression Bills.

73. Nor do any of the challenged provisions actually address Iowans' purported weariness with campaigns or reduce the amount of unwanted interaction between voters and candidates. And even if this justification were genuine, the fact that some voters are tired of politicians does not justify imposing a burden on Iowans' opportunities to vote and make their voices heard.

74. Because the Iowa Constitution safeguards the right to vote and the freedom to engage in political expression, it prohibits the enforcement of laws—like the Voter Suppression Bills—that attempt to impede the exercise of these sacred constitutional rights.

CAUSES OF ACTION

COUNT I

Violation of Article II, Section 1 of the Iowa Constitution (Right to Vote):

75. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

76. Article II, Section 1 of the Iowa Constitution mandates that all adult residents "shall be entitled to vote at all elections," except those otherwise disqualified by Article II, Section 5. "Voting is a fundamental right in Iowa," and "regulatory measures abridging the right to vote 'must be carefully and meticulously scrutinized.'" *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 848, 856 (Iowa 2014) (quoting *Devine v. Wonderlich*, 268 N.W.2d 620, 623 (Iowa 1978)).

77. The challenged provisions of the Voter Suppression Bills impose burdens on voters generally, with particularly severe impacts on the right to vote for minority voters, elderly voters,

rural voters, young voters, poor voters, new voters, and voters with disabilities. These voters are more likely to vote absentee or lack flexible schedules that allow them to vote on election day.

78. These burdens are not justified by correspondingly weighty interests.

79. The impact of the Voter Suppression Bills is substantial, severe, and unnecessary. The Iowa Legislature gutted the well-functioning absentee voting system that facilitated record turnout in 2020, when—for the first time in a general election—more Iowans voted absentee than in person on election day. Iowa's election system had consistently received bipartisan plaudits for its integrity and security, and that did not change in the run up to the 2020 general election or during its aftermath.

80. Instead of restoring faith in the integrity of Iowa's elections, the Voter Suppression Bills destroy confidence in the openness, accessibility, and fairness of the state's elections.

81. Shortening the absentee ballot request and voting timeframes reduces Iowans' opportunities to vote absentee and places additional, unnecessary strains on voters and election administrators. Moreover, these challenged provisions provide even less time for voters and election officials to address voter or administrative errors.

82. These burdens are not theoretical; if the Voter Suppression Bills' requirement that all but two narrow categories of absentee ballots be received by county officials by the close of polls on election day had been in place during the 2020 general election, thousands of Iowans who voted absentee would have been disenfranchised because their ballots—which were indisputably cast before election day—arrived at county auditors' offices after the polls closed.

83. Restricting the number of drop boxes and the ability of county auditors to establish opportunities for absentee voting at their offices and satellite absentee voting stations places undue

burdens on voters who wish to cast their absentee ballots in person to avoid the uncertainties of mail delivery.

84. Iowans who vote on election day now have less time to do so—not only because the polls will close earlier, but also because they are guaranteed fewer hours off of work to cast their ballots.

85. Many Iowans have traditionally relied on individuals they trust to return their absentee ballots, but the Voter Suppression Bills now criminalize such assistance when provided by all but a limited group of people, severely restricting the ability of most absentee voters to return their ballots. Individuals who live alone and away from immediate family members are especially impacted by the Voter Assistance Ban. This hardship is compounded by the reductions in the absentee ballot request and voting timeframes, as well as the elimination of the postmark receipt deadline for most voters. In short, voters who had previously relied on assistance from individuals other than the limited categories listed in the Bills now have even less opportunity to receive absentee ballots and ensure that their ballots are returned in time to be counted.

86. The individual and collective impacts of the challenged provisions of the Voter Suppression Bills are severe and will substantially burden Iowa voters, including Plaintiff's members.

87. None of these provisions serves a compelling or even a legitimate government interest.

88. Absent relief from this Court, the Voter Suppression Bills will burden Iowans' right to vote, which violates Article II, Section 1 of the Iowa Constitution.

COUNT II

Violation of Article I, Section 7 of the Iowa Constitution (Free Speech and Association):

89. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

90. Article I, Section 7 of the Iowa Constitution protects "the liberty of speech." The Supreme Court of Iowa has "said that 'the Iowa Constitution generally imposes the same restrictions on the regulation of speech as does the federal constitution.'" *Bierman v. Weier*, 826 N.W.2d 436, 451 (Iowa 2013) (quoting *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997)).

91. The Voter Assistance Ban violates the free speech and association guarantees of the Iowa Constitution.

92. The Voter Assistance Ban prohibits core political expression. Efforts to encourage and aid Iowa voters are "the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988); *see also NAACP v. Button*, 371 U.S. 415, 437 (1963) ("'Free trade in ideas' means free trade in the opportunity to persuade to action . . . ." (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1945))).

93. The Voter Assistance Ban violates the Iowa Constitution because it infringes on the rights of free speech and free expression and is not justified by any compelling state interest. In particular, other Iowa laws already criminalize any undue influence or voter fraud that the Voter Assistance Ban might be intended to address. *See* Iowa Code § 39A.2–4.

94. Absent relief from this Court, the Voter Assistance Ban will prevent Plaintiff and its members from engaging in constitutionally protected conduct, which violates Article I, Section 7 of the Iowa Constitution.

COUNT III

Violation of Article I, Section 6 of the Iowa Constitution (Equal Protection):

95. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

96. "The foundational principle of equal protection is expressed in article I, section 6 of the Iowa Constitution," *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009), which provides that "[a]ll laws of a general nature shall have a uniform operation." "The essential promise of equal protection is that 'all persons similarly situated should be treated alike.'" *Clayton v. Iowa Dist. Ct.*, 907 N.W.2d 824, 827 (Iowa Ct. App. 2017) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)).

97. The Voter Suppression Bills subject Iowa's absentee voters to arbitrary and disparate treatment because they mandate that ballots cast under identical circumstances will not be counted on equal terms. They require county auditors to reject most—*but not all*—absentee ballots that arrive after 8:00 p.m. on election day. But some absentee ballots will be counted if they arrive at county auditors' offices by the Monday following election day so long as their envelopes bear adequate postmarks.

98. The Voter Suppression Bills thus treat ballots cast by similarly situated Iowans differently, denying some their fundamental right to vote.

99. Under the Bills, if two Iowa voters—one of whom is a Safe at Home voter, the other of whom is not—live next door to each other and mail their absentee ballots at the same time on the day *before* election day, and the ballots arrive at their county auditor's office at the same time on the day *after* election day, only one of those absentee ballots would be counted.

100. In a similar vein, UOCAVA voters who reside on the other side of the Canadian border, and whose properly postmarked absentee ballots arrive at their county auditors' offices by the Monday after election day, would have their votes counted. But Iowans who spend the winter months in locations like Florida or Arizona—or who are abroad during the voting period but ineligible for UOCAVA—would be disenfranchised if they returned their ballots under identical circumstances. This also holds true for college students voting absentee from out-of-state schools.

101. Absent relief from this Court, the Voter Suppression Bills will impose an arbitrary and disparate mechanism for determining whether Iowans' votes—including the votes of Plaintiff's members—will be counted, which violates Article I, Section 6 of the Iowa Constitution.

COUNT IV

Violation of Article I, Sections 6 and 7 of the Iowa Constitution (Viewpoint Discrimination):

102. Plaintiff realleges and incorporates by reference all prior paragraphs of this Complaint and the paragraphs in the counts below as though fully set forth herein.

103. Equal protection forbids "'[f]encing out' from the franchise a sector of the population because of the way they may vote." *Carrington v. Rash*, 380 U.S. 89, 94 (1965); *see also Adams v. Fort Madison Cmty. Sch. Dist.*, 182 N.W.2d 132, 134 (1970) ("[T]he voting power of an individual voter or group of voters may not be cut down or eliminated by [] irrelevant factors . . . .").

104. Likewise, constitutional guarantees of free speech protect citizens against "a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring); *see also Bierman*, 826 N.W.2d at 451 (noting that Iowa Constitution's free speech protections mirror First Amendment's).

105. The Voter Suppression Bills target individuals who are more likely to vote for Democratic Party candidates, including Latino voters and other voters of color. The Iowa Legislature, with intent to achieve a partisan advantage, has manipulated the state's election mechanics in ways that restrict or eliminate methods of voting that are disproportionately used by Plaintiff's members and the communities they serve because of their perceived political views—and, in doing so, imposed unjustified barriers on Plaintiff's members' ability to participate in the political process.

106. Absent relief from this Court, the Voter Suppression Bills will serve to impermissibly target and burden voters—including Plaintiff's members—because of their political beliefs, which violates Article I, Sections 6 and 7 of the Iowa Constitution

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter the following relief against the Defendants:

A. An order declaring that Sections 1, 22, 36, 41, 43, 45, 47, 50–53, 54, and 66 of SF 413, Sections 40 and 43 of SF 568, and all other sections incorporating these and the other challenged provisions into the Iowa election laws violate the Iowa Constitution;

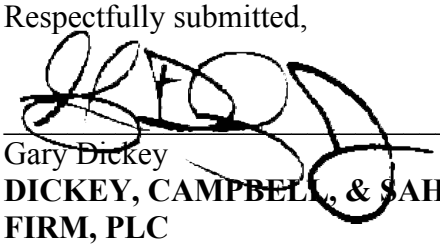
B. An order enjoining Defendants, their respective agents, officers, employees, and successors, and all persons acting in concert with each or any of them from implementing, enforcing, or giving any effect to the challenged provisions;

C. An order awarding Plaintiff its costs, disbursements, and reasonable attorneys' fees incurred in bringing this action; and

D. Such other and further relief as the Court deems just and proper.

Dated this 9th day of June, 2021.

Respectfully submitted,



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Counsel for Plaintiff

**Admitted pro hac vice*

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA,

Plaintiff,

v.

IOWA SECRETARY OF STATE PAUL PATE, in his official capacity, and IOWA ATTORNEY GENERAL THOMAS MILLER, in his official capacity,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and REPUBLICAN PARTY OF IOWA,

Intervenor-Defendants.

No. CVCV061476

PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM LEGISLATORS

COMES NOW Plaintiff League of United Latin American Citizens ("LULAC") of Iowa and hereby submits the following Motion to Compel Discovery from Senators Jim Carlin, Chris Cournoyer, Adrian Dickey, Jason Schultz, Roby Smith, Dan Zumbach, and Zach Whiting and Representatives Brook Boden, Bobby Kaufmann, Carter Nordman, and Jeff Shipley (collectively, the "Legislators").

Plaintiff issued identical subpoenas to each of the Legislators, seeking documents shared with *non-legislators* concerning the challenged laws at issue in this case—Senate File 413 ("SF 413") and Senate File 568 ("SF 568")—and the justifications for their passage. The Legislators

have refused to produce their communications with the public, claiming legislative privilege—despite the absence of any Iowa authority establishing or recognizing such a privilege and the fact that, even in jurisdictions that do recognize a common law legislative privilege, it is well settled that communications with *non-legislators* are unprotected. The Legislators' objections thus lack merit and, given the rapidly approaching discovery deadline in this matter, Plaintiff moves this Court to order the Legislators to comply with Plaintiff's subpoenas and produce responsive documents immediately.

FACTUAL BACKGROUND

Between November 19 and December 17, 2021, Plaintiff served third-party subpoenas on the Legislators, requesting that each produce several narrow categories of documents in their possession. *See, e.g.*, Ex. 1. Plaintiff expressly limited its requests to documents that were *shared with non-legislators*, thus excluding any internal communications among legislators or their staffs. Subject to that important limitation, the requests sought documents or communications concerning: (1) the consideration, enactment, implementation, and enforcement of SF 413, House File 590 ("HF 590"), and/or SF 568; (2) the state interests or other justifications for the enactment of SF 413, HF 590, and/or SF 568; and (3) the presence or absence of voter fraud in Iowa.

On December 3, 2021, counsel representing all 11 Legislators sent written objections to Plaintiff's subpoenas. *See* Ex. 2. For each document request, the Legislators asserted legislative privilege, invoked their so-called privacy interests under Article I, Section 20 of the Iowa Constitution, and claimed that the subpoenas were overly broad, unduly burdensome, and sought materials not relevant to the case.

In response to these objections, Plaintiff's counsel requested a meet and confer, which occurred on December 6, 2021. During that conference, counsel for the Legislators reiterated their

position that the legislative privilege barred *all* discovery sought by Plaintiff and confirmed that the Legislators would not be producing any documents in response to the subpoenas. To date, the Legislators have yet to produce a privilege log that sets forth the information necessary to evaluate their specific claims of privilege. *See* Iowa R. Civ. P. 1.503(5).

Plaintiff thus files this motion to enforce its subpoenas and ensure the Legislators' compliance with the Iowa Rules of Civil Procedure.

ARGUMENT

I. The legislative privilege is inapplicable to the documents requested by Plaintiff.

The existence of *any* legislative privilege under Iowa law is far from settled,[1] but even if such a privilege exists, Plaintiff's subpoenas fall outside of it because each request was expressly limited to materials that were "shared with, received from, or otherwise transmitted to, any individuals who are not Legislators." Ex. 1.

Where recognized, the legislative privilege is well understood to have limits. Chief among those limits is that the privilege does not shield communications with non-legislators. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015) (ordering production of "any documents or communications shared with, or received from, any individual or organization outside the employ of the legislature"); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 668 (E.D. Va. 2014) (denying legislative privilege to consultant independently

[1] As the Iowa Attorney General has explained, unlike the U.S. Constitution and the vast majority of state constitutions, "[n]oticeably absent from the Iowa constitutional scheme is a provision ensuring that legislators will not be held accountable in any other tribunal or place for their speeches and debates." 1979 Iowa Op. Att'y Gen. 173 (Iowa A.G.), 1979 WL 20966, at *2. In that same opinion, the Attorney General opined that Iowa legislators enjoy a legislative privilege derived from English common law; however, the opinion failed to identify a single Iowa court that had recognized or applied this common law legislative privilege. *Id*. at *3.

contracted by partisan political party); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) ("[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011) (ordering production of documents that "were communicated to or shared with non-legislative members"); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) ("As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider."); *see also* Mem. Order at 20–23 & n.5, *N.C. State Conf. of NAACP v. McCrory*, Nos. 1:13cv658, 1:13cv660, 1:13cv861 (M.D.N.C. Feb. 4, 2015), ECF No. 231 (collecting cases); *Perez v. Perry*, No. SA-11-CV-360-OLG, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014). These cases are consistent with long-standing Iowa precedent recognizing that "[i]t is generally held that information given in the presence of third parties who are not within the scope of the privilege destroys the confidential nature of the disclosures and renders them admissible." *State v. Flaucher*, 223 N.W.2d 239, 241 (Iowa 1974).

Because Plaintiff's subpoenas seek only information that is unprotected by the legislative privilege—that is, communications and documents shared with non-legislators—the Legislators must comply with those subpoenas and produce documents responsive to Plaintiff's requests.

II. Even if the legislative privilege were implicated, it should yield to the needs of the case and the important constitutional rights at stake.

Even when the legislative privilege is available and properly invoked, it is not absolute, and courts have repeatedly held that in cases such as this it must yield to protect the citizenry's important constitutional rights. In such cases, courts ordinarily employ a balancing test to decide whether to order legislators to produce documents or testify, in which the court must consider

"(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 government in the litigation; and (v) the purposes of the privilege." *Bethune-Hill*, 114 F. Supp. 3d at 338 (quoting *Page*, 15 F. Supp. 3d at 666). All of these factors favor disclosure here.

First, the documents requested include common sources of evidence regarding the intent behind challenged laws, which is directly relevant to Plaintiff's claims. Specifically, Count IV of Plaintiff's amended petition alleges that SF 413 and SF 568 were passed with the purpose and intent of discriminating against voters who are more likely to vote for Democratic Party candidates in violation of Article I, Sections 6 and 7 of the Iowa Constitution. *See* Am. Pet. in Law & Equity ¶¶ 102–06 (June 9, 2021). The Legislators' intent is therefore centrally relevant to this claim, and allowing the Legislators to shield all of their communications—including those with non-legislators—would seriously hamper the ability of Plaintiff and this Court to conduct a reasonable inquiry into the legislative motive behind the challenged laws.

Second, the important constitutional rights at issue in this case, including the fundamental right to vote, counsel strongly in favor of enforcing Plaintiff's subpoenas.[2] Numerous courts analyzing this factor have found that the importance of voting rights cases warrants broad discovery and disclosure, even when a party asserts the legislative privilege in an attempt to shield

[2] *Cf. Dunn v. Dunn*, 163 F. Supp. 3d 1196, 1207 (M.D. Ala. 2016) ("[T]he normally predominant principle of utilizing all rational means for ascertaining truth . . . . is at its strongest in civil-rights cases." (quoting *Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007))); *Floyd v. City of New York*, 739 F. Supp. 2d 376, 381–82 (S.D.N.Y. 2010) ("Another important factor is whether a lawsuit involves a matter of public concern such as civil rights—a factor that will usually support disclosure."); *Hinsdale v. City of Liberal*, 961 F. Supp. 1490, 1495 (D. Kan. 1997) ("Caution should be especially taken in recognizing a privilege in a federal civil rights action, where any assertion of privilege must overcome the fundamental importance of a law meant to protect citizens from unconstitutional state action.").

documents from production. *See, e.g.*, *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 154 (Fla. 2013) (holding that legislative privilege must yield to plaintiffs' discovery requests "where the violations alleged are of an explicit state constitutional provision prohibiting partisan political gerrymandering and improper discriminatory intent in redistricting"); *Veasey v. Perry*, No. 2:13-CV-193, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014) (requiring disclosure despite legislative privilege claims because "interest in enforcing voting rights statutes is, without question, highly important"), *aff'd in part, rev'd in part on other grounds*, 796 F.3d 487 (5th Cir. 2015); *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574–75 (D. Md. 2017) (allowing depositions and document discovery despite assertions of legislative privilege in redistricting case due to "significance of the . . . interests at stake"); *Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015) (allowing depositions of state legislators in case challenging Tennessee Voter Identification Act despite invocation of legislative privilege); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–03 (S.D.N.Y. 2003) (requiring legislators to respond to discovery despite legislative privilege claim in redistricting case because case "raise[d] serious charges about the fairness and impartiality of some of the central institutions of our state government"). So too here. Indeed, Plaintiff's subpoenas are narrowly tailored to address these issues, because it limits the scope of requested materials to documents or communications concerning the challenged laws and the methods of voting impacted by the new legislation—and only to the extent those materials were shared with non-legislators.

Furthermore, both the role of the government and the purposes of the privilege favor disclosure. The "government's role in the instant litigation is direct," and the "subjective decision-making process [is] at the core of [one of] plaintiff[']s claim[s]," which supports disclosure. *Favors*, 285 F.R.D. at 219–20. As to the purpose of the privilege, it is meant to protect legislators

from distraction and to promote legislative independence. *Bethune-Hill*, 114 F. Supp. 3d at 342. The distraction interest is significantly less of a concern when the request is for documents rather than testimony. *Id*. And any concerns about legislative independence stem principally from disclosure of legislators' communications with other legislators, which Plaintiff explicitly excluded from its requests. The Legislators should therefore be compelled to produce the requested documents.[3]

III. The Legislators' remaining objections cannot shield them or the requested documents from discovery.

Beyond legislative privilege, the Legislators raise multiple other objections to producing documents, all of which should similarly be rejected. First, the Legislators claim that the production of the requested documents would "violate the privacy interests of third parties . . . and their rights under article I, section 20 of the Iowa Constitution 'to make known their opinions to their representatives and to petition for a redress of grievances.'" Ex. 2. But the mere assertion of privacy—absent more—cannot shield these documents from production; the parties can address any legitimate privacy interests through an appropriate protective order. *See* Iowa R. Civ. P. 1.504.

The Legislators' objections to the scope of Plaintiff's requests also lack merit. The subpoenas seek documents shared with non-legislators regarding (1) the consideration, enactment,

[3] Putting aside the Legislators' implausible privilege objections, the Iowa Rules require at a bare minimum that they produce a privilege log with sufficient specificity to enable Plaintiff and the Court to assess their claims. Iowa R. Civ. P. 1.503(5). Under Iowa R. Civ. P. 1.512(2)(b)(2), a party (or non-party) "resisting discovery through assertion of a privilege has the burden of showing that a privilege exists and applies," *Exotica Botanicals, Inc. v. Terra Int'l, Inc*., 612 N.W.2d 801, 804–05 (Iowa 2000) (citing *Hutchinson v. Smith Lab., Inc.*, 392 N.W.2d 139, 141 (Iowa 1986)), and the law makes no exception for legislative privilege. Therefore, even if the Court recognized a common law legislative privilege under Iowa law, and even assuming that privilege applies here, the Legislators have yet to provide a privilege log, which makes it impossible for Plaintiff to assess the merits of each assertion of privilege.

implementation, and enforcement of SF 413, HF 590, and/or SF 568; (2) the state interests or other justifications for the enactment of SF 413, HF 590, and/or SF 568; and (3) the presence or absence of voter fraud in Iowa. *See* Ex. 1. Given that the bills specifically mentioned in the first two requests are the subject of the instant litigation, and that at least one of the Legislators—Senator Schultz—publicly offered voter fraud as a justification for the new restrictions on the voting process,[4] it is hard to see how these requests could be more targeted or more relevant to this case.

As discussed above, the legislative intent behind SF 413 and SF 568 is central to Plaintiff's claim under Count IV of its amended petition, which alleges that the challenged laws were introduced and enacted with intent to discriminate against voters who support Democratic candidates. A document or communication that is probative of such intent is not just reasonably calculated to lead to admissible evidence—it *is* evidence. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016) (considering data legislators received and reviewed concerning racial impact of challenged legislation and concluding that legislation was passed with discriminatory intent); *see also Powers v. State*, 911 N.W.2d 774, 781 (Iowa 2018) (plaintiffs "need only advance some good-faith factual basis demonstrating how the [information is] reasonably calculated to lead to admissible evidence germane to an element or factor of the claim or defense" (quoting *Fagen v. Grand View Univ.*, 861 N.W.2d 825, 835 (Iowa 2015))).

Plaintiff's subpoenas seek precisely the types of documents that courts have relied on repeatedly in assessing legislative intent, including in voting rights cases. *See, e.g.*, *McCrory*, 831

[4] *See* Erin Murphy, *Iowa Lawmaker Uses Debunked Fraud Claims to Support Election Bill That Would Reduce Early Voting Period,* Quad-City Times (May 17, 2021), https://qctimes.com/news/state-and-regional/govt-and-politics/iowa-lawmaker-uses-debunked-fraud-claims-to-support-election-bill-that-would-reduce-early-voting/article_abb9f77c-9b1c-51e9-837a-76d14b34b99e.html.

F.3d at 230; *Benisek*, 241 F. Supp. 3d at 575. The stakes here are just as high, and fulsome discovery just as important to the resolution of Plaintiff's constitutional claims. The Court should therefore reject the Legislators' attempt to withhold relevant, responsive documents.

CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests that this Court compel the Legislators to produce immediately all documents responsive to Plaintiff's subpoenas.

Dated: December 23, 2021

Respectfully submitted,

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EXHIBIT 1

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA, Plaintiff, v. IOWA SECRETARY OF STATE PAUL PATE, in his official capacity, and IOWA ATTORNEY GENERAL THOMAS MILLER, in his official capacity, Defendants, and REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and REPUBLICAN PARTY OF IOWA, Intervenor-Defendants.	Case No. CVCV061476 **SUBPOENA TO PRODUCE BOOKS, DOCUMENTS, ELECTRONICALLY STORED INFORMATION OR TANGIBLE THINGS**

To: Representative Carter Nordman, 20346 Mill Creek Lane, Adel, IA 50003

X YOU ARE COMMANDED to produce at the time, date, and place specified below the following books, documents, electronically stored information, or tangible things, and permit their inspection, copying, testing, or sampling of the material: Attached Exhibit A.

Place: McCormally & Cosgrove, PLLC, 4508 Fleur Drive, Des Moines, Iowa 50321 or by emailing to shayla@mciowalaw.com
Date: 21 days from the date of service

Form of electronically stored information to be produced: in a commonly used file type such as portable document format (PDF).

Date: 11/19/2021

Attorney's Signature

The name, address, email, and telephone number of the attorney representing Plaintiffs, who issues or requests this subpoena is:

Respectfully submitted,

/s/ Shayla McCormally

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Alan R. Ostergren
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Counsel for Intervenors

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled on the 19th day of November, 2021.

By: □ U.S. Mail □ Facsimile
□ Hand Delivered □ Overnight Courier
□ Federal Express x Other – E-mail

Signature: /s/ Caitlin Moravec

Iowa Rules of Civil Procedure 1.1701(4) and 1.1701(5)

1.1701(4) Protecting a person subject to a subpoena.

a. Avoiding undue burden or expense; sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

b. Command to produce materials or permit inspection.

(1) Appearance not required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(2) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises, or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

1. At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

2. These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

c. Attendance. Any party shall be permitted to attend at the same time and place and for the same purposes specified in the subpoena. No prior notice of intent to attend is required.

d. Quashing or modifying a subpoena.

(1) When required. On timely motion, the issuing court must quash or modify a subpoena that:

1. fails to allow a reasonable time to comply;

2. requires a person who is neither a party nor a party's officer to travel more than 50 miles from where that person resides, is employed, or regularly transacts business in person, except that a person may be ordered to attend trial anywhere within the state in which the person is served with a subpoena;

3. requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

4. subjects a person to undue burden.

(2) When permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

1. disclosing a trade secret or other confidential research, development, or commercial information; or

2. disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

3. a person who is neither a party nor a party's officer to incur substantial expense to travel more than 50 miles to attend trial.

(3) Specifying conditions as an alternative. In the circumstances described in rule 1.1701(4)(d)(2), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

1. shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

2. ensures that the subpoenaed person will be reasonably compensated.

1.1701(5) Duties in responding to a subpoena.

a. Producing documents or electronically stored information. These procedures apply to producing

documents or electronically stored information:

(1) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(2) Form for producing electronically stored information not specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(3) Electronically stored information produced in only one form. The person responding need not produce the same electronically stored information in more than one form.

(4) Inaccessible electronically stored information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of rule 1.504(1)(b). The court may specify conditions for the discovery.

b. Claiming privilege or protection.

(1) Information withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

1. expressly make the claim; and

2. describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(2) Information produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

Attachment A

For a statement of your obligations in producing documents under this subpoena, see Iowa Rule of Civil Procedure 1.1701(5), the text of which is set out in the subpoena itself. Documents are to be produced within twenty-one (21) days of receiving this subpoena. For questions regarding the scope of this request, please contact John Geise at 202-968-4652. Where possible, documents should be produced electronically to John Geise (JGeise@elias.law), Jonathan Hawley (JHawley@elias.law), and William Hancock (WHancock@elias.law) at Elias Law Group LLP, 10 G St NE Ste 600, Washington, DC 20002 or McCormally & Cosgrove PLLC, 4508 Fleur Drive, Des Moines, Iowa 50321. Your production should be made pursuant to the Definitions and Instructions below.

DEFINITIONS

Except as specifically defined below, the terms used in these requests shall be constructed and defined in accordance with the Iowa Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

1. "Auditor" means the auditor of a county in Iowa.

2. "Communication" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfers of information via email, report, letter, text message, voicemail message, written memoranda, note, summaries and/or records of telephone and/or in-person conversations, and other means.

3. "Date" means the exact day, month, and year, if ascertainable, or, if not, the best available approximation (including relationship to other events).

4. "Document" or "documents" has the broadest possible meaning under Iowa Rule of Civil Procedure 1.512 and includes, but is not limited to, the following items within the possession, custody, or control of Defendant, whether such items are typed, printed, recorded,

reproduced by any mechanical or electronic process, copied, written by hand, or in draft or final: contracts; communications; correspondence; electronic messages; telegrams; memoranda; statements; records; reports; books; diaries; forecasts; orders; bills; invoices; checks; indexes; data sheets; data processing cards; analytical records; computer disks; computer tapes or other computer format; minutes and/or records of meetings and conferences; reports and/or summaries of interviews; reports and/or opinions of consultants; records, reports and/or summaries of negotiations; brochures; lists; periodicals; pamphlets; circulars; trade letters; newspaper clippings; press releases; notes; drafts; copies; marginal notations; photographs; drawings; tape recordings; letters; and all other written, printed, recorded or graphic matter or sound reproductions, however produced or reproduced.

5. "HF 590" means House File 590, introduced during the 89th Iowa General Assembly and substituted by SF 413 on February 24, 2021. It encompasses related draft legislation and all versions of the bill and related legislation introduced in or considered by the Iowa General Assembly, as well as the final enacted legislation.

6. "Legislator" or "Legislators" means current members of the Iowa General Assembly, their predecessors and successors, and their employees, staff, agents, and representatives.

7. "Person" means not only natural persons, but also firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, trusts, groups, and organizations; federal, state, or local governments or government agencies, offices, bureaus, departments, or entities; other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof.

8. "Secretary" or "Secretary of State" means Defendant Iowa Secretary of State Paul Pate, his predecessors and successors, and their employees, staff, agents, and representatives, as well as all employees, agents, and representatives of the Office of the Iowa Secretary of State.

9. "SF 413" means Senate File 413, enacted by the 89th Iowa General Assembly and signed by the Governor of Iowa on March 8, 2021. It encompasses related draft legislation and all versions of the bill and related legislation introduced in or considered by the Iowa General Assembly, as well as the final enacted legislation.

10. "SF 568" means Senate File 568, enacted by the 89th Iowa General Assembly and signed by the Governor of Iowa on June 8, 2021. It encompasses related draft legislation and all versions of the bill and related legislation introduced in or considered by the Iowa General Assembly, as well as the final enacted legislation.

11. "State interest" means any justification for laws that burden the right to vote or any another fundamental right, as understood by the Iowa Supreme Court in *Devine v. Wonderlich*, 268 N.W.2d 620 (Iowa 1978), and *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206 (Iowa 2018), and/or the U.S. Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

12. "Voter" means any registered voter in Iowa and all other persons eligible to register to vote in Iowa.

13. "You" and "your" refer to Representative Nordman, and his employees, staff, agents, and representatives, as well as all employees, staff, agents, and representatives of the Office of Representative Nordman.

INSTRUCTIONS

1. Plaintiff requests that you produce materials and serve responses and any objections on Plaintiff's counsel within twenty-one (21) days after service of the subpoena.

2. If you object to any part of a request, set forth the basis of your objection and respond to all parts of the request to which you do not object.

3. If, in responding to this subpoena, you encounter any ambiguities when construing a request or definition, set forth the matter deemed ambiguous and the construction used in responding.

4. With respect to any document withheld from production on a claim of privilege or work product protection, provide a written privilege log identifying each document individually and describing the basis of the claimed privilege and all information necessary for Plaintiff to assess the claim.

5. In responding to this subpoena, produce all documents available to you or subject to your access or control. Documents requested include those in your actual or constructive possession or control, as well as that of your attorneys, investigators, experts, and anyone else acting on your behalf.

6. Documents are to be produced as they are kept in the ordinary course of business. Accordingly, documents should be produced in their entirety, without abbreviation, redaction, or expurgation; file folders with tabs or labels identifying documents responsive to these requests should be produced intact with the documents; and documents attached to each other should not be separated.

7. All documents are to be produced in electronic form. Documents that are produced electronically should be produced in native format with all metadata intact. The parties may negotiate a separate production format for any documents that are not reasonably producible or readable as standard image files, such as audio files or large spreadsheets.

8. For documents produced in Tagged Image File Format ("TIFF") that originated in electronic form, metadata shall be included with the data load files described above and shall include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared drive or server); and MD5 hash value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name and address; "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

9. Each request and subparagraph thereof are to be answered separately. If there are no documents responsive to a request, so indicate.

10. Each document produced should be categorized by the number of the document request in response to which it is produced.

11. If any otherwise responsive document was, but is no longer, in existence or in your possession, custody, or control, identify the type of information contained in the document, its current or last known custodian, the location/address of such document, and the identity of all persons having knowledge or who had knowledge of the document, and also describe in full the circumstances surround its disposition from your possession or control.

12. These requests for production are continuing in nature, up to and during the trial. Materials sought by these requests for production that become available after you serve your

responses must be disclosed to counsel for Plaintiff by supplementary response or responses after receipt of such documents, but in any event no later than 14 days after receipt.

13. If you learn that an answer is in some material respect incomplete or incorrect, promptly amend your responses to these requests for production. If you expect to obtain further information or expect the accuracy of a response may change between the time responses are served and the time of trial, you are requested to state this fact in your response.

14. If you contend that it would be unreasonably burdensome to obtain and provide all of the documents called for in response to any document request or any subsection thereof, then in response to the appropriate document request: (a) produce all such documents as are available to you without undertaking what you contend to be an unreasonable request; (b) describe with particularity the efforts made by you or on your behalf to produce such documents; and (c) state with particularity the grounds upon which you contend that additional efforts to produce such documents would be unreasonable.

15. The singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

16. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

17. "Any" and "all" include the collective as well as the singular and shall mean "each" and "every," and these terms shall be interchangeable.

18. "Relating to," "regarding," or "concerning" and their cognates are to be understood in their broadest sense, and shall be construed to include pertaining to, commenting on, memorializing, reflecting, recording, setting forth, describing, evidencing, or constituting.

19. A reference to an entity or official in these requests shall be construed to include its officers, directors, partners, members, managers, employees, representatives, agents, consultants, staff, or anyone acting on its behalf.

20. These document requests apply to documents created, prepared, or revised in whole or in part, or sent, received, or transmitted on or after January 1, 2020, unless otherwise limited or expanded by a particular request.

SUBPOENAED DOCUMENTS

REQUEST NO. 1. All documents relating to the consideration, enactment, implementation, and enforcement of SF 413, HF 590, and/or SF 568, to the extent that such documents were shared with, received from, or otherwise transmitted to, any individuals who are not Legislators. Documents responsive to this request include, but are not limited to:

a. All documents relating to any meetings you participated in regarding SF 413, HF 590, and/or SF 568 with any individuals who are not Legislators, including meeting agendas, presentations, notes, minutes, summaries, and recordings; and

b. All communications between any person who is not a Legislator and you or your employees, staff, agents, or consultants regarding SF 413, HF 590, and/or SF 568, including communications with the Governor of Iowa, the Secretary, any Auditor, any employee or representative of the Heritage Foundation, any employee or representative of Heritage Action for America, any employee or representative of the American Legislative Exchange Council, lobbyists, advocates, and any other member of the public.

REQUEST NO. 2. All documents identifying or discussing the state interests or other justifications for the enactment of SF 413, HF 590, and/or SF 568, to the extent that such documents were shared with, received from, or otherwise transmitted to, any individuals who are not Legislators.

REQUEST NO. 3. All documents, including reports, studies, referrals, and indictments, concerning the presence or absence of voter fraud in Iowa, to the extent that such documents were shared with, received from, or otherwise transmitted to, any individuals who are not Legislators.

EXHIBIT 2

THOMAS J. MILLER
ATTORNEY GENERAL

SAMUEL P. LANGHOLZ
ASSISTANT ATTORNEY GENERAL

1305 E. WALNUT ST.
DES MOINES, IA 50319
Main: 515-281-5164 • Direct: 515-281-8583
Email: sam.langholz@ag.iowa.gov
www.iowaattorneygeneral.gov

IOWA DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

December 3, 2021

Shayla McCormally
McCormally & Cosgrove, P.L.L.C.
4508 Fleur Drive
Des Moines, IA 50321
VIA EMAIL

Re: Objection to Subpoenas in Case No. CVCV0061476 to Senators Jim Carlin, Chris Cournoyer, Adrian Dickey, Jason Schultz, Roby Smith, Dan Zumbach, and Zach Whiting, and Representatives Brooke Boden, Bobby Kaufmann, Carter Nordman, and Jeff Shipley

Dear Shayla,

The Attorney General's Office represents the above-referenced members of the Iowa Senate and the Iowa House of Representatives (collectively, "the Legislators") with respect to the subpoenas that you have served—or you have stated you are intending to serve—on them seeking materials related to their official duties as members of the Iowa Legislature. Charlie Smithson also represents the above-referenced members of the Iowa Senate.

The Legislators object to the production of books, documents, electronically stored information, and tangible materials requested in the subpoenas under Iowa Rule of Civil Procedure 1.1701(4)(b)(2). You broadly seek all documents related to two election bills that were ultimately enacted into law and now challenged in your lawsuit and information about voter fraud—excluding only communications with other legislators. You specifically include requests for documents from meetings with or communications from any member of the public about these bills.

All of the requested materials are protected by legislative privilege. Producing any responsive materials would also violate the privacy interests of third parties not party to your litigation and their rights under article I, section 20, of the Iowa Constitution "to make known their opinions to their representatives and to petition for a redress of grievances." In addition, the subpoenas are overly broad and unduly burdensome and do not seek material that's relevant to your constitutional challenge to Iowa's election statutes.

In light of these objections, the Legislators will not be producing any materials in response to the subpoenas.

Please do not hesitate to reach out by email at sam.langholz@ag.iowa.gov or by phone at (515) 281-8583 if you would like to discuss further. And please direct any further communication about the subpoenas for these legislators to my attention.

Sincere regards,

Samuel P. Langholz
Assistant Attorney General

W. Charles Smithson

Charlie Smithson
Legal Counsel and Secretary of the Senate

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA, Plaintiff, v. IOWA SECRETARY OF STATE PAUL PATE, in his official capacity, and IOWA ATTORNEY GENERAL THOMAS MILLER, in his official capacity, Defendants.	Case No. CVCV061476 **Subpoenaed Legislators' Resistance to Motion to Compel**

COME NOW Senators Jim Carlin, Chris Cournoyer, Adrian Dickey, Jason Schultz, Roby Smith, and Dan Zumbach; former Senator Zach Whiting; and Representatives Brooke Boden, Bobby Kaufmann, Carter Nordman, and Jeff Shipley (collectively, "the Legislators") and submit this resistance to the League of United Latin American Citizens of Iowa ("LULAC")'s motion to compel seeking to enforce its subpoenas against the Legislators.

TABLE OF CONTENTS

INTRODUCTION

LULAC subpoenaed ten members of the Iowa Legislature and one former member seeking a broad range of documents related to enactment of the election statutes challenged in this suit. LULAC now seeks to enforce these subpoenas over the objection of the Legislators. But doing so would breach the separation of powers required by the Iowa Constitution and is not appropriate anyway under the Iowa Rules of Civil Procedure for third-party subpoenas.

Longstanding legislative privilege protects the Legislators from these subpoenas. And as the Iowa Supreme Court recognized in *Des Moines Register & Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996), it would violate the separation of powers for the Iowa judiciary to order the production of documents that the Iowa Legislature has protected. Enforcement of the subpoenas would also violate the privacy interests of third parties not party to this suit and their rights under article I, section 20, of the Iowa Constitution "to make known their opinions to their representatives and to petition for a redress of grievance." And the subpoenas are too broad and unduly burdensome, especially since they seek material not relevant to LULAC's constitutional challenge Iowa's election statutes.

LULAC's motion to compel should be denied. But if the Court decides to grant it, the Court should stay any order to compel to provide the Legislators time to seek appellate review.

FACTUAL BACKGROUND

LULAC sued the Secretary of State and the Attorney General challenging several provisions of Iowa's elections law under the Iowa Constitution. *See* Am. Pet. ¶¶ 13–14. It points mainly to statutory amendments reducing the time for requesting and submitting absentee ballots, regulating the process for returning absentees ballots and in-person absentee voting, and reducing the hours that polling places are open on election day by one hour. *See id.* ¶¶ 2, 40–67. And it brings four state constitutional claims.

First, LULAC alleges that these provisions, individually and collectively, unduly burden the right to vote under article II, section 1, of the Iowa Constitution. *See* Am. Pet. ¶¶ 75–88. Second, it contends that the limits on who may return another voter's absentee ballot violate the right to free speech and association under article 1, section 7. *See id.* ¶ 89–94. Third, it alleges that the statute's treatment of absentee ballots that arrive after the polls have closed violates the equal-protection requirement of article I, section 6. *See id.* ¶ 95–101. And fourth, it claims that the challenged provisions unconstitutionally target Democratic voters because of their political beliefs in violation of the equal-protection and free-speech protections of sections 6 and 7 of article I. *See id.* ¶ 102–06. LULAC thus seeks a declaratory judgment that the challenged provisions violate the Iowa Constitution and an injunction against the Secretary of State and Attorney General prohibiting their enforcement of the provisions. Am. Pet. ¶ A–B.

In November and December 2021, LULAC subpoenaed Senators Jim Carlin, Chris Cournoyer, Adrian Dickey, Jason Schultz, Roby Smith, and Dan Zumbach; former Senator Zach Whiting; and Representatives Brooke Boden, Bobby Kaufmann, Carter Nordman, and Jeff Shipley. The substantively identical subpoenas to each of the Legislators broadly seek all documents

related to two election bills that ultimately enacted into law the provisions challenged in this suit. *See* Plaintiff's Motion to Compel Discovery from Legislators, Ex. 1, at 7–8. They also sought documents "concerning the presence or absence of voter fraud in Iowa." *Id.* at 8. The subpoenas specifically requested documents from meetings with or communications from "any individuals who are not Legislators," including "lobbyists, advocates, and any other member of the public." *Id.* at 7. And they exclude internal communications that were only with other legislators. *See id.* at 7–8.

The Legislators served a timely objection to their subpoenas on LULAC. *See* Plaintiff's Motion to Compel Discovery from Legislators, Ex. 2. They informed LULAC that they would not produce any materials in response to the subpoena because "[a]ll of the requested materials are protected by legislative privilege." *Id.* They also objected that any production would "violate the privacy interests of third parties not party to your litigation and their rights under article I, section 20, of the Iowa Constitution 'to make known their opinions to their representatives and to petition for a redress of grievances.'" *Id.* And they objected that "the subpoenas are overly broad and unduly burdensome and do not seek material that's relevant to your constitutional challenge to Iowa's election statutes." *Id.*

LULAC later conferred with the Legislators' counsel, who confirmed their position that legislative privilege covers the entire scope of documents requested by the subpoena and that no narrowing of LULAC's current request could avoid the privilege. And LULAC eventually filed this motion to compel seeking to enforce the subpoenas against the Legislators.

LEGAL STANDARD FOR MOTION TO COMPEL

A party may only seek discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action" or "reasonably calculated to lead to the discovery of admissible evidence." Iowa R. Civ. P. 1.503(1); *see also Powers v. State*, 911 N.W.2d 774, 781 (Iowa 2018). A party serving a third-party subpoena "must take reasonable steps avoid imposing undue burden or expense on a person subject to the subpoena." Iowa R. Civ. P. 1.1701(4)(a). And when the Court rules on a motion to compel enforcing the subpoena, it "must protect a person who is neither a party or a party's officer from significant expense resulting from compliance." *Id.* at 1.1701(4)(b)(2)(2). The Court must also "quash or modify a subpoena that . . . [r]equires disclosure of privileged or other protected matter, if no exception or waiver applies" or "[s]ubjects a person to undue burden." *Id.* at 1.1701(d)(1)(3)–(4); *see also Powers*, 911 N.W.2d at 781 ("[T]o avoid compliance with a valid subpoena, the party objecting to the subpoena must establish a countervailing interest, such as privilege, confidentiality, undue burden, or undue expenses.").

ARGUMENT

LULAC's motion to compel seeking to enforce its third-party subpoenas against the Legislators should be denied. Most importantly, enforcement of the subpoenas would violate the separation of powers because the Legislators are protected by legislative privilege. Compelling production would also violate the privacy interests and rights under article I, section 20, of the Iowa Constitution of third parties not party to this suit or even represented in discovery dispute. Attempting to overcome these constitutional issues is even less appropriate here because LULAC seeks documents that are not relevant, or likely to lead to evidence that is relevant, to consideration of its claims under the Iowa

Constitution. And its request is too broad and unduly burdensome. For any of these reasons, LULAC's motion to compel should be denied.

I. Legislative privilege protects all the Legislators' documents subpoenaed by LULAC.

Long before the people of Iowa vested the legislative power with the Iowa Legislature and the judicial power with the Iowa courts, the common law recognized that legislators are protected by legislative privilege. *See Tenney v. Brandhove*, 341 U.S. 367, 372–76 (1951) (discussing the roots of legislative privilege dating to "the Parliamentary struggles of the Sixteenth and Seventeenth Centuries"); *see also* Iowa Const. art. III, div. 2, § 1 ("The legislative authority of this state shall be vested in a general assembly . . . ."); *id.* art. V, § 1 ("The judicial power shall be vested in a supreme court, district courts, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish."); *id.* art. III, div. 1, § 1 (dividing the "powers of the government of Iowa" into "three separate departments—the legislative, the executive, and the judicial" and prohibiting the breach of that separation absent explicit constitutional authority).

Legislative privilege provides immunity "from suit and other civil processes when acting within the sphere of legitimate legislative activity." Mason's Manual of Legislative Procedure § 568 (2020 ed.).[1] This includes protection from compulsory production of testimonial or documentary

[1] Both House and Senate rules adopt Mason's Manual of Legislative Procedure for matters not covered by their rules. *See* 89th Gen. Assemb. H. Rule 5, https://perma.cc/2GHY-KDJK ("The rules of parliamentary practice in Mason's Manual of Legislative Procedure shall govern the house in all cases where they are not inconsistent with the standing rules of the house, joint rules of the house and senate, or customary practice of the house."); 89th Gen. Assemb. S. Rule 3, https://perma.cc/D4L9-KCNL ("In cases not covered by senate rules or joint rules, Mason's Manual of Legislative Procedure shall govern.").

evidence. *See, e.g.*, *id.* ("[L]egislators are immune from being questioned outside their chambers for their participation in the sphere of legitimate legislative activity."); *Edwards v. Vesilind*, 790 S.E.2d 469, 478 (Va. 2016). Whether framed as protection from suit or compelled evidence, legislative privilege has its roots in protecting legislators from the burdens and costs of litigation related to their legislative duties. *See Edwards*, 790 S.E.2d at 478 (following the reasoning of the D.C. and Fourth Circuits that "subjecting legislators to discovery procedures can prove just as intrusive as naming legislators as parties to a lawsuit" (cleaned up)). And it helps ensure that Legislators can perform their legislative duties without interference or fear that they'll later be subject to harassment. *See League of Women Voters of Florida, Inc. v. Lee*, No. 4:21CV186, 2021 WL 5283949, at *2 (N.D. Fla Nov. 4, 2021) ("[Legislative privilege furthers the policy goals behind legislative immunity by preventing parties from using third-party discovery as an end-run around legislative immunity—harassing legislators through burdensome discovery requests.").[2]

Of course, the protections of legislative privilege are not unlimited. Legislators are protected only when performing legislative functions. Mason's Manual of Legislative Procedure § 570; *Edwards*, 790 S.E.2d at 479–80; *cf. Minor v. State*, 819 N.W.2d 383, 394–95 (Iowa 2012) (describing functional approach to judicial-process immunity in Iowa). But communication with the public and the enactment of legislation are both at the core of those legislative

[2] Because these practical harms—and the institutional harms caused by the breach of the separation of powers—would occur if the Legislators are compelled to comply with LULAC's subpoenas, if the Court rejects their claim of legislative privilege and grants the motion to compel, any order to compel should be stayed to provide them time to seek appellate review before the harms protected by the legislative privilege occur.

duties covered by the privilege. *See Des Moines Reg. & Trib. Co. v. Dwyer*, 542 N.W.2d 491, 499 (Iowa 1996) ("Public communication with senators is an integral part of the senate's performance of its constitutionally granted authority to enact laws."); *Edwards*, 790 S.E.2d at 480 ("A legislator's communication regarding a core legislative function is protected by legislative privilege, regardless of where and to whom it is made.").

This legislative privilege is not mentioned directly in the Iowa Constitution. But even though it's "not expressly declared to be part of the law of this state by constitution or statute, the common law has always been recognized as in force in Iowa." *Iowa Civil Liberties Union v. Critelli*, 244 N.W.2d 564, 568 (Iowa 1976); *cf. State v. Wright*, 961 N.W.2d. 396, 404 (Iowa 2021) (interpreting the constitutional "prohibition against unreasonable seizures and searches" consistent with "a great constitutional doctrine of the common law"). And the common law isn't implicitly repealed by "[c]onstitutional or statutory provisions . . . unless the intention to do so is plain." *Id.*

Thus, for example, the Iowa Supreme Court has held that the Iowa Constitution "does not manifest a plain intention to abrogate the inherent common-law power of courts to adopt rules of practice." *Id.* at 569. And it has recognized other common law privileges and immunities, like the mental-process privilege, judicial deliberative privilege, and judicial process immunity. *See Office of Citizens' Aid/Ombudsman v. Edwards*, 825 N.W.2d 8, 19–21 (Iowa 2012) (applying the long-recognized mental-process privilege and contrasting it with the absolute judicial deliberative privilege); *Venckus v. City of Iowa City*, 930 N.W.2d 792, 800–02 (Iowa 2019) (reaffirming judicial-process immunity). Likewise, the common-law legislative privilege is in force in Iowa.

See Opinion No. 79-5-23, 1979 Op. Iowa Atty. Gen. 173, 1979 WL 20966, at *3–4 (May 21, 1979).

Indeed, without using the term "legislative privilege," the Iowa Supreme Court has already recognized that legislators are absolutely immune while acting in their official capacities. *See Hlubek v. Pelecky*, 701 N.W.2d 93, 96 (Iowa 2005) ("Absolute immunity ordinarily is available to certain government officials such as legislators, judges, and prosecutors acting in their official capacities." (citing *Owen v. City of Independence*, 445 U.S. 622, 637 (1980))); *Teague v. Mosley*, 552 N.W. 2d 646, 649–50 (Iowa 1996) (adopting absolute "legislative immunity" for elected county officials performing legislative functions and applying it to section 1983 claim and purported state statutory claim); *see also In re D.C.V.*, 569 N.W2d 489, 494–95 (Iowa 1997) (suggesting, without deciding, that questioning of an agency leader in a court hearing about the agency's appropriations request "may have invaded the realm of legislative immunity").

And using the closely related vocabulary of separation of powers, the Court has held that the judiciary lacks the power to order the release of records from the Legislature because it would interfere with the Legislature's constitutional powers. *See Dwyer*, 542 N.W.2d at 501–03. That case involved open-records requests for legislative phone records, which the Iowa Senate asserted were confidential. The Court reasoned that article III, section 9—which provides "[e]ach house shall . . . determine its rules of proceedings"—deprived the judiciary of "the power to interfere with or contradict" the legislative determination that the records were confidential. *Id.* at 503.

In doing so, the Court broadly read "rules of proceedings" to cover any procedures related to communications with the public given the "integral part" that the communication plays in the legislative process. *Id.* at 499. And the

Court clarified that it didn't matter whether the procedure was formally adopted or just informal practices. *See id.* at 502.

The Court also justified its decision because of the importance of communication between the public and legislators. It quoted Thomas Jefferson explaining that "to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any." *Id.* at 499. And it cited several other courts that agreed elected officials could maintain the confidentiality of communications because of the "chilling effect" and "lack of candor or unwillingness to participate in the decision making process" that would flow from compelled disclosure. *Id.* at 499–500 (cleaned up).

At bottom, in *Dwyer* the Court essentially reaffirmed a long common-law tradition of deferring to legislative privilege. *See id.* at 495 ("[F]or it hath not been used aforetime that the justices should in any wise determine the privileges of the parliament the determination and knowledge of that privilege belongs to the parliament and not to the justices." (quoting 1 William Blackstone, *Commentaries on the Laws of England* 164 (13 ed. 1800) (cleaned up)). And *Dwyer*—as well as the common law legislative privilege more generally—precludes LULAC's attempt to enforce its subpoenas here.

LULAC's subpoenas to the Legislators broadly seek all documents related to two election bills that were enacted into law. *See* Plaintiff's Motion to Compel Discovery from Legislators, Ex. 1, at 7–8. This includes documents from meetings with or communications from "any individuals who are not

Legislators," including "lobbyists, advocates, and any other member of the public." *Id.* at 7. All these documents requested by the subpoenas fall within the scope of the legislative privilege. Documents related to the enactment of laws and communications with others about those bills are within the core legislative sphere. It matters not who the communications were with. LULAC cannot enforce its subpoenas against the Legislators.

While LULAC's motion to compel might have more force in another lawsuit in federal court or a different state, it's largely off base here. For starters, LULAC fails to even cite *Dwyer*, 542 N.W.2d 491, which recognizes the Legislature's power to determine the confidentiality of legislative documents and communications and precludes contrary judicial orders. Considering *Dwyer*—and other Iowa cases recognizing absolute legislative immunity and showing a strong respect for the common law—it's likely that the Iowa Supreme Court will also recognize a robust legislative privilege in the context of a subpoena.

Cherry-picking authority from other jurisdictions, LULAC instead asks this Court to apply a toothless version of legislative privilege with contours that conveniently ebb to accommodate LULAC's subpoena. It contends that the privilege should only cover communications with other legislators, and not the external communications that it seeks. *See* Plaintiff's Motion to Compel Discovery from Legislators at 3–4, 7. But such a narrow privilege conflicts with *Dwyer*'s holding that the judiciary doesn't have power to order production of documents kept confidential by the Legislature and its rationale based on the importance of communications with *the public*—not just other legislators. *See Dwyer*, 542 N.W.2d at 495–503. In fact, the privilege LULAC describes would be redundant of the deliberative-process privilege, which already protects internal government communications. And it would undermine one of the main

purposes of legislative privilege—protecting legislators from the burdens of litigation and potential harassment. There's no reason to believe that Iowa would narrow the privilege in this way.

LULAC also argues that any legislative privilege in Iowa should be qualified and subject to a multi-factored balancing test rather than absolute. But nearly all the cases LULAC cites are from federal court, considering federal rights. And in that context the separation-of-power considerations are offset by the separate sovereign interest of the federal government. But that's not at issue in state court. And the Iowa Supreme Court recognizes an absolute legislative immunity. *Hlubek*, 701 N.W.2d at 96. And an absolute "judicial deliberative privilege." *Office of Citizens' Aid/Ombudsman*, 825 N.W.2d at 19. *Dwyer* too had no qualification on its holding that the judiciary had no power to order the release of Legislative documents. *See Dwyer*, 542 N.W.2d at 503. Legislative privilege is also absolute in state court civil litigation.

But even if LULAC is right that privilege should be qualified, there is no reason to pierce it here. As detailed in Part III below, LULAC hasn't demonstrated that evidence about the legislative process and individual legislator's motivations is not relevant to any claim they bring. They cite no Iowa authority even suggesting that such individual motivations would have any bearing to claim under the Iowa Constitution. And if the privilege could be pierced here in a run-of-the-mill suit challenging the constitutionality of an Iowa statute, the legislative privilege would soon offer little protection at all.

Finally, LULAC contends that the Legislators need to provide a privilege log to assert legislative privilege. *See* Plaintiff's Motion to Compel Discovery from Legislators at 7 n.3. But Rule 1.1701(5)(b) requires no such thing. The rule merely requires the Legislators to "[e]xpressly make the claim" and "[d]escribe the nature of the withheld documents . . . in a manner that,

without revealing information itself privileged or protected, will enable the parties to assess the claim." Iowa R. Civ. P. 1.1701(5)(b)(1). The Legislators expressly made the claim in their objection—and again here. And they've sufficiently described what's being withheld because it's clear from the terms of the subpoenas themselves that everything requested falls under the privilege.

In any event, legislative privilege is not like attorney-client privilege or other privileges that exist just to protect confidentiality. "Because the purpose of legislative privilege is to protect the legislature from intrusion by the other branches of government and to disentangle legislators from the burden of litigation and its detrimental effect on the legislative process, a legislator is generally not required to produce a detailed privilege log in order to invoke the privilege." *Edwards*, 790 NS.E.2d at 478. Even having to locate and identity potentially responsive documents to prepare a privilege log would undermine the protections of the privilege. *See id.*

Legislative privilege protects the Legislators from these subpoenas. And it would violate the separation of powers for the Iowa judiciary to order production of these protected documents over their objection. LULAC's motion to compel should be denied on this basis alone.

II. Compelling production would violate the privacy interests and rights under article I, section 20, of the Iowa Constitution of third parties not party to this suit.

Article I, section 20, of the Iowa Constitution provides that "[t]he people have the right freely . . . to make known their opinions to their representatives and to petition for a redress of grievance." Iowa Const. art. I, § 20. Over two decades ago in *Dwyer*, the Iowa Supreme Court recognized "a citizen's right to contact a legislator in person, by mail, or by telephone without any fear or

suspicion that doing so would subject the citizen to inquiries from the press or anyone else regarding the nature of the conversation." *Dwyer* 542 N.W.2d at 501. The Court elaborated, "Apart from the inconvenience or possible harassment generated, a citizen subjected to inquiry about contacting a senator, may, on refusing to discuss the content, find negative inferences are drawn from that fact alone." *Id.* And it favorably cited a New Jersey court's reasoning it could "'think of little else'" than disclosing communication between an elected official and the public, "'which would have a more chilling effect on the free and open communication on which elected officials should be able to rely.'" *Id.* at 499 (quoting *N. Jersey Newspaper Co. v. Freeholders*, 584 A.2d 275, 276 (N.J. App. Div. 1990)).

The Court in *Dwyer* relied on this right as further justification for the Legislature's decision to maintain confidentiality of its communications with the public and as support for the Court's holding that it couldn't constitutionally interfere by ordering release. But even if this Court concludes that legislative privilege offers no protection here, this constitutional right offers an independent basis not to enforce LULAC's subpoena.

Given that it was 1996, the Court in *Dwyer* only discusses in-person, mail, and telephone communications. *See id.* at 501. But there's no reason the right shouldn't apply to other modern modes of communications. And just as recognized in *Dwyer*, releasing the communications sought by LULAC would chill members of the public from engaging with their legislators out of fear that their communications will become public. *See id.* at 499, 501. Not only does this harm the Legislators and their ability to perform their legislative duties, but it also harms the citizens of Iowa directly who have this constitutional right infringed. Indeed, these members of the public are not even on notice that this subpoena threatens their rights. And as *Dwyer* explains, even putting them on

notice and requiring them to appear here to protect that interest is itself a harm that the right protects. *See id.* at 501. The Court should protect these rights under article I, section 20, of the Iowa Constitution by denying LULAC's motion to compel.

III. LULAC seeks documents that are not relevant, or likely to lead to evidence that is relevant, to consideration of its claims under the Iowa Constitution.

LULAC asserts that it needs the subpoenaed documents as evidence for "the legislative intent behind" the challenged statutes. *See* Plaintiff's Motion to Compel Discovery from Legislators at 8. And it points specifically to one legislator who "publicly offered voter fraud as a justification" for the statutes. *Id.* But even if LULAC has a valid legal theory for its claim, the individual motivations of legislators are irrelevant to the constitutionality of an Iowa statute under the Iowa Constitution. And LULAC hasn't cited a single Iowa case holding to the contrary.

That may be because the Iowa Supreme Court has repeatedly held that the views of an individual legislator are not persuasive in determining legislative intent. *See, e.g.*, *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 36 (Iowa 2019) (reaffirming that evidence from legislators is "inadmissible on the subject of legislative intent" and noting that "Iowa legislators individually and collectively can have multiple or mixed motives"); *Willis v. City of Des Moines*, 357 N.W.2d 567, 571 (Iowa 1984) ("We have rejected as inadmissible opinions offered by legislators on the subject of legislative intent."); *Tennant v. Kuhlemeier*, 120 N.W. 689, 690 (Iowa 1909) ("[T]he opinions of individual legislators, remarks on the passage of an act or the debates accompanying it, or the motives or purposes of individual legislators, or the intention of the

draughtsman are too uncertain to be considered in the construction of statutes."). The Court has explained:

> The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable. Accordingly we are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning. This unwillingness exists even where, as here, the legislators who testify are knowledgeable and entitled to our respect."

Iowa State Ed. Association-Iowa Higher Ed. Ass'n v. Public Emp. Relations Bd., 269 N.W.2d 446, 448 (Iowa 1978).

More recently, the court rejected a challenge to Iowa's public sector collective bargaining statutes based on an alleged improper motive to "impinge on freedom of association with AFSCME." *AFSCME Iowa Council 61*, 928 N.W.2d at 41. The court held that it would "not inquire into the subjective motives of individual legislators" agreeing that it should not "peer past the statutory text to infer some invidious legislative intention." *Id.* (cleaned up). LULAC has offered no reason that Court would deviate from this consistent precedent here. Its subpoena doesn't see relevant information. And its motion to compel should be denied.

IV. LULAC's subpoenas are too broad and unduly burdensome.

The burden on citizen-legislators of having to locate potentially responsive documents among the myriad of formal and informal ways that the public communicates with them is part of the justification for the legislative privilege. But it is also an independent basis for denying LULAC's motion to compel discovery from these non-parties under Rule 1.1701. That rule requires LULAC to "take reasonable steps avoid imposing undue burden or expense" in

the Legislators. Iowa R. Civ. P. 1.1701(4)(a). And the Court "must protect a person," like each Legislator, "who is neither a party or a party's officer from significant expense," *Id.* at 1.1701(4)(b)(2)(2), and "must quash or modify a subpoena that . . . [s]ubjects a person to undue burden." *Id.* at 1.1701(d)(1)(4).

LULAC's requests are an undue burden and expense. Citizen legislators are contacted in many ways. For example, Representative Jeff Shipley has an official and unofficial email account; Facebook and Twitter accounts capable of receiving communications in multiple ways; home and capitol mailing addresses; and a personal cell phone all publicly listed for the public to contact him. *See* Iowa Legislature, Representative Jeff Shipley, https://perma.cc/4EVD-TZ4N; Facebook, Jeff Shipley, https://www.facebook.com/peaceloveiowa. Citizen-legislators cannot control how the public will try to reach them. Nor would we particularly want them to since their public availability and responsiveness is a feature—not a bug—of representative democracy at the state level.

Citizen-legislators can't realistically be expected to remember every communication or other document that they received about a particular bill during a previous legislation. Nor can we expect them to have a system in place to collect and index all communications through the various channels to be able to respond to broad subpoena requests like LULAC's. And given the dispersed and varied software systems and devices of different types, there is no easy centralized way to search for these documents. Thus even the process of trying to locate and collect responsive materials or confirming that they don't have any responsive documents is a burden.

This burden is undue given the lack of any relevance of the requested documents to the merits of LULAC's constitutional claims or any likelihood of discovering any relevant evidence. Not to mention, these subpoenas were

served as the Legislators were preparing for a new legislative session that has now convened. *See* Iowa const. art. III, div.2, § 2 ("The general assembly shall meet in session on the second Monday of January of each year."). Any required compliance with the subpoena will thus be time that prevents them from completing their legislative duties during this session. The Court should deny LULAC's motion to compel because its subpoena is too broad and unduly burdensome under Rule 1.1701.

CONCLUSION

Whether considered under normal principles of third-party subpoenas or the unique common law and constitutional protections due to Iowa legislators, LULAC's motion to compel should be denied. But if the Court still grants the motion, the Legislators request that any order to compel be stayed so that they may seek appellate review and the Iowa Supreme Court may decide whether to permit review before the legislative privilege is breached.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties of record by delivery in the following manner on January 10, 2022:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ EDMS	

Signature: */s/ Samuel P. Langholz*

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA,

Plaintiff,

v.

IOWA SECRETARY OF STATE PAUL PATE, in his official capacity, and IOWA ATTORNEY GENERAL THOMAS MILLER, in his official capacity,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and REPUBLICAN PARTY OF IOWA,

Intervenor-Defendants.

No. CVCV061476

PLAINTIFF'S REPLY TO LEGISLATORS' RESISTANCE TO MOTION TO COMPEL

COMES NOW Plaintiff League of United Latin American Citizens ("LULAC") of Iowa hereby submits the following Reply in support of its Motion to Compel Discovery from Senators Jim Carlin, Chris Cournoyer, Adrian Dickey, Jason Schultz, Roby Smith, Dan Zumbach, and Zach Whiting, and Representatives Brook Boden, Bobby Kaufmann, Carter Nordman, and Jeff Shipley (collectively the "Legislators").

INTRODUCTION

The Legislators' Resistance puts the cart before the horse, arguing for a broad and absolute legislative immunity inconsistent with the common law and found nowhere in Iowa's Constitution. And it does so without first demonstrating that the documents at issue are even subject to the legislative privilege. They are not. For that reason alone, the Court should grant Plaintiff's request

and require the Legislators to produce the documents requested here without delay.

In any event, the common law legislative privilege is qualified; even if it were applicable here, it should yield to the important interests at issue in this litigation, including the fundamental right to vote under Iowa's Constitution. Both federal and state courts have repeatedly found that cases implicating the right to vote justify overriding the common law legislative privilege. The Legislators ignore this authority and point to a single case from Virginia—a jurisdiction where the legislative privilege is more robust because it is explicitly provided for in the state constitution rather than just a feature of common law—and *Des Moines Reg. & Trib. Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996), a case that did not involve legislative privilege at all, and instead concerned the court's ability to adjudicate a dispute over a Senate rule exempting certain of its records from public records requests. Neither case supports extending the common law legislative privilege beyond its traditional limits.

The Legislators' remaining arguments fare no better. They invoke the privacy interests of unnamed constituents and once again cite the Iowa Supreme Court's inapposite holding in *Dwyer*, but the public records requests at issue in that case bear little similarity to Plaintiff's subpoenas, which are limited in scope. The Legislators also seek far greater relief than is necessary. Rather than treat "privacy" as blanket privilege—which it is not—the parties are free to propose, and the Court has authority to enter, an appropriate protective order to avoid any public disclosure of confidential materials. *See* Iowa R. Civ. P. 1.504.

Finally, the Legislators' assertions that the requested documents are irrelevant and Plaintiff's subpoenas overly broad and unduly burdensome are insufficient to deny the requested discovery here. Plaintiffs have met the bar for relevancy under Iowa law, their requests are appropriately targeted in both time and scope, and they remain willing to work with the Legislators

should they provide any specific evidence of burden. Thus far, they have not. This Court should reject the Legislators' arguments and require them to produce responsive documents in their possession.

ARGUMENT

A. The documents at issue here are not subject to the legislative privilege.

The Legislators' Resistance largely ignores the central issue in Plaintiff's Motion to Compel, which is that the documents Plaintiff requested are not subject to the legislative privilege. As explained in the Motion, Plaintiff specifically requested only those documents that were "shared with, received from, or otherwise transmitted to, any individuals who are not Legislators." Pl.'s Mot. at 3 (quoting Ex. 1). Cases explaining that such documents fall outside the common law legislative privilege are legion, *id.* at 3-4, and are consistent with the well-understood principle in Iowa law that "information given in the presence of third parties who are not within the scope of the privilege destroys the confidential nature of the disclosures and renders them admissible." *State v. Flaucher*, 223 N.W.2d 239, 241 (Iowa 1974).

The Legislators' Resistance offers only a paragraph seeking to rebut this point, and their arguments do not hold water. *See* Legs.' Resist. at 7-8. In the face of a raft of case law holding that the common law legislative privilege does not apply to communications outside the Legislature, *see* Pl.'s Mot. at 3-4, the Legislators cite only to the Iowa Supreme Court's statement in *Dwyer* that communications with the public are a core part of being a legislator, 542 N.W.2d at 499, and the Virginia Supreme Court's observation in *Edwards v. Vesilind*, 790 S.E.2d 469 (Va. 2016), that under *Virginia's* explicit state constitutional Speech or Debate Clause protections, "a legislator's communication regarding a core legislative function is protected by legislative privilege, regardless of where and to whom it is made." *Id.* at 480. Neither is apposite here. In *Dwyer*, the Iowa Supreme Court assessed whether the Senate's constitutional authority to "determine its rules

of proceedings" allowed the Senate to exempt its records from public records requests, and in that context the Iowa Supreme Court adopted a test "interpret[ing] legislative *rules of proceeding* broadly[.]" *Dwyer*, 542 N.W.2d at 498 (emphasis added). By contrast, the very same year that the Iowa Supreme Court issued its decision in *Dwyer*, it issued another opinion reaffirming, that "[a]n asserted *privilege* is narrowly construed because it is an exception to our rules governing discovery." *Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa 1996) (emphasis added). The Senate's authority to "determine its rules of proceedings" and exempt materials from public records laws says nothing about legislative privilege—or whether the common law legislative privilege should be extended in a manner previously unrecognized in Iowa to shield communications with non-legislators. Such a construction of legislative privilege would be in stark contrast to the overwhelming weight of authority in other jurisdictions and the concept that privileges under Iowa law are to be "narrowly construed." *Carolan*, 553 N.W.2d at 886.

Edwards also provides little help for the Legislators' argument because it interpreted a significantly more robust legislative privilege under Virginia law. Specifically, Virginia's constitution, like the federal constitution, has a Speech or Debate Clause, which was the source of the legislative privilege at issue. *Edwards*, 790 S.E.2d at 472. Iowa's constitution, as the Legislators acknowledge, does not. Legs.' Resist. at 8 ("[L]egislative privilege is not mentioned directly in the Iowa Constitution."); *accord* 1979 Iowa Op. Att'y Gen. 173 (Iowa A.G.), 1979 WL 20966, at *2 ("Noticeably absent from the Iowa constitutional scheme is a provision ensuring that legislators will not be held accountable in any other tribunal or place for their speeches and debates.").

Because Virginia has a Speech or Debate Clause, the *Edwards* court's analysis of legislative privilege focused on cases interpreting similar constitutional provisions. 790 S.E.2d at

477-80. But federal courts have explained that these constitutional protections are not the same as the common law legislative privilege, which is the only privilege the Legislators have plausibly asserted. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015) ("[T]he principles animating immunity for state legislators under common law—while significant—are distinguishable from those principles underlying the constitutional immunity afforded federal legislators."); Legs.' Resist. at 8. And while the Legislators marshalled only *Edwards's* inapposite holding, Plaintiff offered a raft of case law demonstrating that its requests fall outside the applicable common law legislative privilege. Pl.'s Mot. at 3-4. Those cases, unlike *Edwards*, applied the common law privilege and are much more instructive to the question here.

Those cases also confirm that no common law privilege can apply to Plaintiff's subpoena, which seeks only communications with individuals *outside the Legislature*. This Court should therefore grant Plaintiff's Motion to Compel and order the Legislators to expeditiously turn over responsive documents.

B. The common law legislative privilege is qualified and should yield given the important interests at issue in this litigation.

While acknowledging that the legislative privilege in Iowa is solely based on the common law, Legs.' Resist. at 6, 8-9, the Legislators nonetheless invoke *Edwards* once again and attempt to assert an absolute legislative privilege inconsistent with the common law. But numerous courts have recognized that in the absence of explicit speech or debate clause protections, like the Virginia constitutional provision at issue in *Edwards*, the common law legislative privilege is qualified—that is, even when it applies, it must yield to important countervailing interests. That is why courts have repeatedly permitted discovery concerning legislators' communications in cases involving the right to vote. *See* Pl.'s Mot. at 5-6 (citing *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 154 (Fla. 2013), *Veasey v. Perry*, No. 2:13-CV-193, 2014 WL

1340077, at *2 (S.D. Tex. Apr. 3, 2014), *Benisek v. Lamone*, 241 F. Supp. 3d 566, 574–75 (D. Md. 2017), *Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015), and *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–03 (S.D.N.Y. 2003)).

In contrast to *Edwards*, the federal and state case law cited in Plaintiff's motion is again more instructive because the legislative privilege at issue in those cases was based solely on common law. *See id.* And the Legislators are wrong to think that this comparison is any less valid simply because the Iowa Supreme Court has recognized an absolute common law legislative immunity. *See* Legs.' Resist. at 9. Federal courts, in relying on the same common law principles, also grant absolute legislative immunity to state legislators while still qualifying the legislative privilege. *See*, *e.g.*, *Perez v. Perry*, No. SA-11-CV-360-OLG-JES, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) ("While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified.") (cleaned up).

The Legislators attempt to distinguish these federal court cases by pointing to "separation-of-powers considerations," Legs.' Resist. at 12, but that distinction falls apart when compared against case law from other states that confer only a common law legislative privilege. Florida's constitution, for example, is similar to Iowa's in offering no speech or debate clause protections, and its courts accordingly apply the common law standard when reviewing claims of legislative privilege. *See Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 522-23 (Fla. Dist. Ct. App. 2012). Like other courts examining common law legislative privileges, the Florida Supreme Court has held that the legislative privilege for Florida legislators is qualified. *See League of Women Voters of Fla.,* 132 So. 3d at 147. Specifically, the Florida Supreme Court requires a two-step inquiry, asking "whether the information sought falls within the scope of the privilege," and, even if it does, "whether there is a "compelling, competing interest [that] outweighs the purposes

underlying the privilege." *Id*. This is similar to the five-step approach Plaintiff offered in its Motion to Compel. Pl.'s Mot. at 4-5.

By contrast, *Dwyer* has little relevance to any discussion of legislative privilege, as *Dwyer* did not address legislative privilege at all and instead concerned the Legislature's ability to pass a rule to make certain records exempt from public records requests. *Dwyer*, 542 N.W.2d at 493. There, a newspaper sought access to detailed phone records kept by the Senate and the Department of General Services through Iowa's public records laws, and then proceeded to litigation when both the Senate and general services refused to provide them based on Senate rules. *Id.* The *Dwyer* court held that the case was nonjusticiable because the Iowa Constitution specifically granted the Legislature the ability to determine its own rules of proceedings and the rule at issue fell within this authority. *Id.* at 501. The issues here are not remotely similar, and the balance of the separation of powers is starkly different. First, enforcing the subpoena at issue in this case would not involve any judicial intrusion into powers constitutionally delegated to the Legislature. *But see Dwyer*, 542 N.W.2d at 496. What's more, *Dwyer* involved the Legislature's right to exempt certain records from public records requests based on its own constitutionally delegated authority. *Id.* But here, the Legislators ask this Court to interpret the common law to confer a blanket privilege over not just their internal records, but any documents sent to or received by individual legislators regardless of the source or recipient, and to designate such records exempt from a judicially enforceable subpoena despite their relevance in any underlying litigation. If anything, the separation of powers provides ample reason to reject the Legislators' attempt to strip the judiciary of significant authority in effecting the discovery process based on an unrecognized and unsupported interpretation of the common law legislative privilege.

And even if the privilege applied, it must yield to the important interests at stake in this

lawsuit. This case is not, as the Legislators suggest, merely a "run-of-the-mill suit challenging the constitutionality of an Iowa statute," Legs.' Resist. at 12, but rather implicates the fundamental right to vote and raises serious constitutional questions about Iowa's latest omnibus voting legislation. Courts across the country have found that the importance of voting rights cases warrants broad discovery and disclosure, even when a party asserts the legislative privilege to shield documents from production. Pl.'s Mot. at 5-6. Plaintiff is entitled to the same fulsome discovery here.[1]

C. Any third-party privacy interests can be addressed by an appropriate protective order, and not by wholesale refusal to comply with discovery.

The Legislators' concerns that production of responsive documents would curtail citizen's rights under article I, section 20 of the Iowa constitution "to make known their opinions to their representatives and to petition for a redress of grievances" are premature, misplaced, and insufficient to justify their attempt to evade discovery. Legs.' Resist. at 13. Having failed to identify or even search for any responsive documents, *see id.* at 12-13, it is unclear how the Legislators have determined that *all* responsive materials would implicate these concerns. And while the Legislators again cite *Dwyer* to justify their refusal to respond to the subpoena on these grounds, *Dwyer* said nothing of the sort; the Court neither relied on the privacy interests that the

[1] The Legislators also contend that, when legislative privilege is asserted, a party need not produce a privilege log, once again relying solely on *Edwards*. Legs.' Resist. at 12-13. That is not the law in Iowa, which treats all assertions of privileges the same. *See* Iowa R. Civ. P. 1.503(5). Furthermore, parties relying on the common law legislative privilege are routinely required to produce privilege logs. *See, e.g., Citizens Union of City of N.Y. v. Attorney General of N.Y.*, 269 F. Supp. 3d 124, 149 (S.D.N.Y. 2017) (discussing privilege log which included claims of legislative privilege); *Bethune-Hill*, 114 F. Supp. 3d at 344-45 (requiring privilege log in legislative privilege case, finding log insufficient, and ordering party seeking privilege to revise log "remember[ing] that there must be sufficient detail to allow the Plaintiffs to discern whether or not the documents withheld are withheld in compliance with the [court's legislative privilege rulings]"); *Favors v. Cuomo*, 285 F.R.D. 187, 221-225 (S.D.N.Y. 2012) (discussing and finding inadequate privilege logs submitted by parties asserting legislative privilege). There is no reason to exempt the Legislators from that requirement here.

Legislators now invoke under article I, section 20 for its ruling (in fact, the Court did not mention article I, section 20 whatsoever), nor in any way suggested that such privacy interests created a privilege which could justify the withholding of relevant documents in response to a subpoena.

Furthermore, the considerations involved in responding to a subpoena are vastly different from the public records requests at issue in *Dwyer*. Anyone can make a public records request about any issue. *See* Iowa Code § 22.2(1) (2022) ("Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."). A subpoena, by contrast, can only be issued by a party to a lawsuit, must be limited to records that are relevant to a given lawsuit, and must not overly burden the respondent. Indeed, the standards bear no relationship to each other. *See*, *e.g.*, *Mediacom Iowa, L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 69 (Iowa 2004) (Iowa's public records law "pertains to parties seeking access to government documents and ordinarily has no application to discovery of such information in litigation."). Plaintiff has fulfilled the subpoena requirements here, *see infra* at 10-14, and these constraints on subpoenas provide further reason to discount the Legislator's complaints.

Finally, to the extent this Court is concerned about the privacy issues raised by the Legislators, the solution is not a wholesale bar on Plaintiff's requested discovery. Iowa R. Civ. P. 1.504 allows the Court to craft protective orders to address privacy concerns, including requiring "[t]hat discovery be conducted with no one present except persons designated by the court." Plaintiff, moreover, has attempted to meet and confer on the scope of the subpoena among other issues, and counsel for the Legislators has indicated that "no narrowing of LULAC's current request could avoid the privilege," Legs.' Resist. at 4, which suggests that the Legislators' misguided interpretation of legislative privilege is the primary reason for withholding documents

and they have made little attempt, if any, to determine the extent to which their purported privacy concerns are implicated by Plaintiff's subpoena. That should have been the Legislators' first step, before asking the Court to endorse a blanket objection on privacy grounds. *See AgriVest P'ship v. Cent. Iowa Prod. Credit Ass'n*, 373 N.W.2d 479, 483 (Iowa 1985) ("Privilege is an exception to the discovery rules and, consequently, is to be construed narrowly.").

D. Plaintiff's document requests are relevant to its claims.

The Legislators also misstate the role of discovery and misconstrue Iowa law in suggesting that Plaintiff's document requests are irrelevant. "The rules providing for discovery" are "liberally construed . . . to provide the parties with access to all relevant facts." Iowa R. Civ. P. 1.501(2). For these purposes Iowa courts take "a broad view of relevancy," *State v. Thompson*, 954 N.W.2d 402, 407 (Iowa 2021), and Plaintiff's requested documents clear this "low bar." *State v. Fritz*, 895 N.W.2d 488, 488 (Iowa Ct. App. 2016); *State v. Cory*, 873 N.W.2d 551, 551 (Iowa Ct. App. 2015). Plaintiff's requests fall easily within this requirement as they have been narrowly tailored to address only issues concerning the laws being challenged in this lawsuit, and to seek only communications with individuals outside the Legislature. Plaintiff contends, among other things, that the Legislature intentionally discriminated against certain voters based upon their viewpoint, specifically alleging that SF 413 and SF 568 target individuals who are more likely to vote for Democratic Party candidates, including Latinx voters and other voters of color, in violation of Sections 6 and 7 of the Iowa Constitution. *See* Compl. ¶ 105. To that end, Plaintiff requested the Legislators' communications with individuals outside the Legislature regarding the challenged laws. Such communications are "reasonably calculated to lead to the discovery of admissible evidence." Iowa R. Civ. P. 1.503(1). For example, if Legislators asked for and received data regarding partisan usage of drop boxes, absentee voting, or other targeted means and then sought to restrict only those types of voting utilized extensively by Democrats, such evidence would

demonstrate an illicit motive. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016) (holding the North Carolina legislature acted with an illicit racial motive in part due to the fact that "the General Assembly requested and received a breakdown by race of DMV-issued ID ownership, absentee voting, early voting, same-day registration, and provisional voting," and then targeted those types of voting used by African-Americans).

The Legislators' argument that the views of individual legislators are irrelevant to legislative intent is both wrong and a red herring. Legs.' Resist. at 15-16. The Legislators point to two inapposite types of cases for their assertion concerning the irrelevance of legislator's motivations. First, they repeatedly highlight cases involving the use of legislator's motivations to determine statutory meaning, an entirely different context than the issue in this case. *See Willis v. City of Des Moines*, 357 N.W.2d 567, 571 (Iowa 1984) (explaining Iowa courts will not look to individual legislator's views "in the construction of statutes"); *Iowa State Ed. Association-Iowa Higher Ed. Ass'n v. Public Emp. Relations Bd.*, 269 N.W.2d 446, 448 (Iowa 1978) (expressing that Iowa courts will not "rely upon the interpretations of individual legislators for statutory meaning"); *Tennant v. Kuhlemeier*, 120 N.W. 689, 690 (Iowa 1909) (noting the question at issue was the use of legislative intent to determine "the construction of statutes"). These cases do not provide any support for the Legislators' contention that legislative intent is irrelevant here.

Second, the Legislators point to the recent case of *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21 (Iowa 2019), but it too does not endorse the notion that individual legislator's motivations are irrelevant. Rather, *AFSCME* involved a constitutional challenge to a statute under the Equal Protection Clause, which was subject to rational basis review because the statute did not implicate any suspect classifications or fundamental rights. *Id*. at 33. The court explained that "*rational basis review* is purposefully limited and does not include evidentiary fact-finding on the

motives of individual legislators." *Id.* at 37 (emphasis added). Here, however, Plaintiff's two speech claims are subject to strict scrutiny, and the *AFSCME* Court explained that the considerations then are different. *See id.* at 40 ("Strict scrutiny applies when a suspect classification or fundamental right is involved."). Plaintiff's claims other than their two speech claims are also subject to a more searching review, as they implicate equal protection and the constitutional right to vote and are evaluated under the *Anderson-Burdick* standard. The U.S. Supreme Court has explained that "the rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Important in the Court's analysis of the appropriate standard of review is whether the challenged laws are "reasonable, nondiscriminatory restrictions" on the right to vote. *Id.* Plaintiff has alleged that the laws challenged here are not reasonable and are discriminatory, and the discovery they ask of the Legislators goes directly towards proving that the laws are discriminatory and hence should be subject to more searching review. Any limitations placed on a Court's evidentiary inquiry when conducting *rational basis* review are irrelevant here.

In any event, Plaintiff does not ask any individual legislator for their view of the challenged legislation. Instead, Plaintiff seeks discovery into communications the Legislators were having with people outside the Legislature surrounding these bills, which could be probative of intent. *See, e.g.*, *N.C. State Conf. of NAACP*, 831 F.3d at 230. Without having seen those communications, it is impossible to speculate on what they contain. However, they are certainly likely to lead to admissible evidence, Iowa R. Civ. P. 1.503(1), and clear the "low bar" required to make them relevant for the purposes of discovery. *Fritz*, 895 N.W.2d at 488.

E. Plaintiff's requested discovery is proportional to the needs of the case and not unduly burdensome.

Finally, the Legislators fail to demonstrate that Plaintiff's subpoena is unduly burdensome, nor would such an objection by itself exempt the Legislators from their duty to comply with the subpoena. Rule 1.1701 requires Plaintiff "to take reasonable steps to avoid imposing undue burden and expense" on third parties, and Plaintiff took those steps. Plaintiff's subpoena makes only three requests of the Legislators, two of which concern legislation considered and passed over a five-month period, and one of which concerns the narrow issue of voter fraud and seeks only documents created or exchanged after January 1, 2020. *See* Pl.'s Mot. Ex. 1. These temporal limitations significantly limit the universe of documents that must be searched, and—consistent with its responsibilities under Rule 1.1701—Plaintiff is willing to confer with the Legislators to narrow the scope of documents and communications that must be searched if some are more readily accessible than others. *See* Legs.' Resist. at 17. Indeed, the Legislators note that Plaintiff already asked at the meet and confer on this issue. *Id.* at 4. Plaintiff asked whether the Legislators would be willing to respond to any narrower requests but was rebuffed due to the Legislators' assertion that all responsive documents were privileged. *Id.*

In any event, "a claim that complying with a subpoena would result in undue burden and expense is generally not sufficient to preclude discovery of relevant materials," *Golden Enterprises, LLC v. Iowa District Court for Polk County*, 884 N.W.2d 225, 225 (Iowa Ct. App. 2016) (citing *Berg v. Des Moines Gen. Hosp. Co.*, 456 N.W.2d 173, 177 (Iowa 1990)), and the Legislators have the burden of demonstrating good cause for a protective order, which they must seek to avoid discovery. *Pollock v. Deere & Co.*, 282 N.W.2d 735, 739 (Iowa 1979). By offering only vague complaints about searching for documents in response to Plaintiff's limited requests and rejecting Plaintiff's invitation to meet and confer regarding the scope of their searches, the

Legislators fail to advance any plausible grounds to excuse their failure to comply with Plaintiff's subpoena.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's Motion to Compel and order the Legislators to turn over responsive documents in their possession without further delay.[2]

Dated: January 18, 2022

Respectfully Submitted,

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[2] The Legislators maintain that, if this Court orders them to produce the requested documents, it should stay any order to compel in order to provide them time to seek appellate review, but that would defeat the purpose of the requested discovery. *See* Legs.' Resist. at 7 n.2. While the decision of whether to grant a stay is within this Court's discretion, that "[d]iscretion is abused unless the evidence clearly and convincingly shows that the need for a stay outweighs the potential for harm or prejudice to the other litigants." *Chicoine v. Wellmark, Inc.*, 894 N.W.2d 454, 459 (Iowa 2017). Here, the documents at issue are plainly outside the legislative privilege, trial in this matter is rapidly approaching, and the Legislators cite to no case law to support the idea that a stay is needed or justified here. Requiring the production of documents plainly outside any conception of the common law legislative privilege will not cause any "harms protected by the legislative privilege [to] occur," Legs.' Resist. at 7 n.2, and the prejudice to Plaintiff of a stay of an order granting its Motion to Compel is significant. The Court should order the documents at issue produced without delay and deny the Legislators' request to stay any such ruling.

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Exhibit A

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA, **Plaintiff,** **v.** **IOWA SECRETARY OF STATE PAUL PATE, in his official capacity, and IOWA ATTORNEY GENERAL THOMAS MILLER, in his official capacity,** **Defendants,** **and** **REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and REPUBLICAN PARTY OF IOWA,** **Intervenor-Defendants.**	**CASE NO. CVCV061476** **ORDER REGARDING MOTIONS TO COMPEL DISCOVERY**

Hearing was held on 1/21/2022 by videoconference on multiple pending discovery motions. The Parties appeared through counsel.

I. Background Facts and Procedural Posture.

Plaintiff League of United Latin American Citizens (LULAC) of Iowa filed suit challenging Senate File 413 (2021) and Senate File 568 (2021). These bills enacted changes to Iowa's voting laws, including changes to procedures involving voter registration, absentee ballots, and voting hours. Plaintiff alleges the laws are an unconstitutional violation of the Right to Vote under Article II, Section 1 of the Iowa Constitution (Count I); violation of Free Speech and

Association under Article I, Section 7 of the Iowa Constitution (Count II); violation of Equal Protection under Article I, Section 6, of the Iowa Constitution (Count III); and Viewpoint Discrimination in violation of Article I, Sections 6 and 7 of the Iowa Constitution (Count IV). The Republican Party of Iowa and various Republican National Committees intervened (Intervenors).

LULAC served discovery on the Intervenors and served subpoenas on certain non-party Legislators. The Intervenors and Legislators object to discovery and have asserted various privileges.

II. Motion to Compel Legislator's Responses to Subpoena.

LULAC served document subpoenas on non-party Legislators: Senators Jim Carlin, Chris Cournoyer, Adrian Dickey, Jason Schultz, Roby Smith, Dan Zumbach, and Zach Whiting and Representatives Brook Boden, Bobby Kaufmann, Carter Nordman, and Jeff Shipley (collectively Legislators). The subpoenas seek production of communications regarding SF 413, SF 568, and/or HF 590 with anyone who is not a legislator. Legislator is defined to include the Legislators' employees, staff, agents, and representatives: therefore, the subpoenas do not seek communications internal to a Legislator's staff. The Legislators have refused to respond to the subpoenas and have invoked legislative privilege and the privacy interests of the third parties with whom they communicated about SF 413, SF 568, and/or HF590, citing Article I, Section 20 of the Iowa Constitution. The Legislators have not collected responsive documents or prepared a privilege log and, instead, ask for a generalized ruling preventing any discovery.

A. Legislative Privilege.

The Legislators assert a legislative privilege exists that shields the requested discovery. This Court finds that a legislative privilege exists, but also finds that the privilege is qualified.

Federal legislators are protected by the Speech and Debate Clause in the U.S. Constitution. (U.S. Const. Art. I, §6). However, by its terms, that clause protects only federal legislators. Benisek v. Lamone, 241 F.Supp.3d 566, 573 (D. Md. 2017). Federal Courts have developed a common law legislative immunity and legislative privilege that protects state legislators. Id. Under federal common law, state legislators are immune from civil liability based on actions taken in "the sphere of legitimate legislative activity." Id. (citing Tenney v. Brandhove, 341 U.S. 367, 376 (1951)). Legislative immunity is not at issue here, as LULAC does not seek any civil liability against the Legislators.

Federal common law also recognizes a qualified legislative privilege for state legislators. "While legislative privilege is undoubtedly robust, the Supreme Court's decisions make clear that the privilege does not *absolutely* protect state legislative officials from discovery into communications made in their legislative capacity." Benisek, 241 F. Supp. 3d at 574 (emphasis in original). Therefore, Federal Courts "balance the significance of the federal interests at stake against the intrusion of the discovery sought and its possible chilling effect on legislative action." Id. at 574. Federal Courts apply a five-factor standard that evaluates: 1) the relevance of the evidence sought, 2) the availability of other evidence, 3) the seriousness of the litigation, 4) the role of the State, as opposed to individual legislators in the litigation, and 5) the extent to which the discovery would impede legislative action. Id. at 575.

The Iowa Constitution does not have a corollary to the Speech and Debate Clause of the Federal Constitution. However, common law, as well as the separation of powers enshrined in the Iowa Constitution, require recognition of a legislative privilege. See Tenney, 341 U.S. at 372-76 (identifying roots of common law legislative privilege); Iowa Const. Art. III, §1 ("The powers of the government of Iowa shall be divided into three separate departments—the legislative, the

executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these department shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted."). In League of Women Voters of Florida v. Florida House of Representatives et al, 132 So.3d 135 (Fla. 2013) the Florida Supreme Court recognized a qualified legislative privilege based on the separation of powers, despite the lack of a speech and debate clause in the Florida Constitution. League of Women Voters of Florida, 132 So.3d at 145-46. The Florida Supreme Court further held, however, that such privilege is qualified when balancing against "another compelling, competing interest." Id. at 146 ("Although separation of powers principles require deference to the Legislature in refusing to provide compelled testimony in a judicial action, we emphasize that the legislative privilege is not absolute.").

There are two steps to a legislative privilege analysis: first, whether the information sought falls within the scope of the privilege, and second, whether the purposes underlying the legislative privilege are outweighed by a compelling, competing interest. League of Women Voters of Florida, 132 So.3d at 147.

i. Applicability of Legislative Privilege.

LULAC asserts that it seeks communication only between Legislators and non-legislators. LULAC defined Legislators to include their staff, so the issue of the Legislators freedom to debate ideas within their staff is not implicated. See Benisek, 241 F.Supp.3d 577 (noting that legislator-staff communications may test the soundness of ideas by positing wide-ranging positions, but ultimately finding the competing interest compelled production of such communications in that case). The preliminary question here is whether Legislators' communications with individuals who are not other legislators or staff members are encompassed by the legislative privilege.

Some federal caselaw suggests that communications with third parties cannot be protected by legislative privilege. See Rodriguez, 280 F.Supp.2d at 101 ("a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation [is] a session for which no one could seriously claim privilege."); Committee for a Fair and Balanced Map v Illinois State Board of Elections, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) (holding communications between non-parties and outsiders, including lobbyists and the Democratic Congressional Campaign Committee were not protected by the legislative privilege).

Some more recent decisions have taken a more nuanced approach. See Bethune-Hill v. Virginia State Bd. of Elections, 114 F.Supp.3d 323 (E.D.Va. 2015) ("[W]hether the privilege should … extend in varying concentric degrees to third parties [is a question] to be addressed with the qualified balancing analysis rather than with any kind of 'per se' rule."); Puente Arizona v. Arpaio, 314 F.R.D. 664, 670 (D. Ariz. 2016) (holding emails with third-parties, lobbyists, and constituents were in connection with bona fide legislative activity and, therefore, legislative privilege was applicable); Edwards v. Vesilind, 790 S.E.2d 469, 483 (Va. 2016) (analyzing communications of third-parties based on whether the third party was acting as an "alter ego" to legislators or providing unsolicited communications and rejecting lower court's blanket conclusion that, as a matter of law, communications between legislators and third parties cannot be protected by legislative privilege).

Here, LULAC seeks Legislators' communications about the consideration and enactment of laws: Senate File 413 (2021), Senate File 568 (2021), and proposed HF 590. Even if communications were held with third-parties (non-legislators and non-staff members), they were generally part of the Legislators' legislative process. Therefore, the Court finds that the qualified legislative privilege will apply, subject to the balancing of competing interests.

ii. Balancing of Interests.

The federal common law has established a five-factor balancing test that this Court finds persuasive.

1) Relevance.

The first factor is the relevance of the evidence sought. Generally, an individual legislator's opinion on the interpretation of a statute and the legislative intent is not admissible. "Accordingly we are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning." Iowa State Ed. Association-Iowa Higher Ed. Ass'n v. Public Employment Relations Bd., 269 N.W.2d 446 (Iowa 1978) (declining to discuss or rely on testimony of legislators and turning to traditional tools of statutory construction).

Here, some of Plaintiff's claims allege a discriminatory intent to pass laws targeting a particular group of citizens. Count IV alleges a violation of Equal Protection and Free Speech under the Iowa Constitution, alleging the SF413 and SF 568 target "individuals who are more likely to vote for Democratic Party candidates, including Latino voters and other voters of color." (6/10/2021 2nd Am. Pet. ¶105). This claim alleges the Legislature's intent was to impose unjustified barriers on those groups' ability to vote and participate in the political process. (Id. ¶¶ 105-06).

The claim at issue in Count IV is not based on the interpretation of the statutes, but instead, a claim against the law-making process itself. Therefore, legislative intent is relevant to this type of claim. "Unlike other cases, where the deliberative process or the legislative privilege may be employed to prevent the government's decision-making process from being swept up unnecessarily into the public domain, this is a case where the decisionmaking process is the case." Bethune-Hill v. Virginia State Bd. of Elections, 114 F. Supp.3d 323 (E.D. Va. 2015) (citing Comm.

For a Fair & Balanced Map v. Illinois State Board of Elections, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011)).

"In an Equal Protection Clause case, proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence." Bethune-Hill, 114 F. Supp. 3d at 339. Further, recent Federal Court decisions have recognized that a claim of legislative action taken with "the purpose and effect of burdening a group of voters' representational rights" can be analyzed within the framework of First Amendment's free speech protections. Shapiro v. McManus, 203 F. Supp. 3d 579, 596 (D. Md. 2016). Shapiro recognizes a claim for a law drafted with the specific intent to impose a burden on a citizen because of the political party with which they are affiliated. Id. (denying motion to dismiss claim brought by Republican Maryland voters alleging redistricting done with the purpose of diluting their votes based on political expression/party registration violates the First Amendment). In the context of Shapiro, the burden was in the form of vote dilution. Here the alleged burdens are the alleged restriction or elimination of voting methods disproportionately used by a certain group of citizens. (6/10/21 2d. Am. Pet. at ¶105). This analysis under a free speech framework requires proof of specific intent. Therefore, the relevance factor weighs in favor of granting discovery.

The Parties' briefing makes some references to the ultimate standards applicable to the Plaintiff's claims. This ruling makes no decision regarding admissibility of evidence. It appears there is disagreement between the Parties regarding the parameters of Plaintiff's claims and the applicable legal standards. At this stage in the case, it would be inappropriate for the Court to announce, in the abstract, conclusions regarding legal standards that have not been fully briefed. Therefore, decisions about future admissibility and confidential treatment of documents at trial will be addressed in future proceedings. See Nashville Student Organizing Committee v. Hargett,

123 F. Supp. 3d 967 (2015) (Allowing discovery under an "attorney eyes only" protective order and noting that the decision as to admissibility "will likely turn on the applicable legal standard(s), how probative the testimony is relative to that standard (or standards), and the degree to which the testimony intrudes upon legislative deliberations. Under the circumstances of this case, these are considerations that are not suitable for resolution in the abstract.").

2) Availability of other evidence.

The Legislators have not identified other means of obtaining this information. Legislator's communications seem likely to be a primary source of determining whether the laws at issue were enacted with discriminatory intent. "[A]s numerous district courts have stated, the practical reality is that officials seldom, if ever, announce that they are pursuing a course of action because of an invidious discriminatory intent (as opposed to a legitimate policy reason)." Nashville Student Organizing Committee v. Hargett, 123 F. Supp. 3d 967, 970 (M.D. Tenn. 2015). This factor weighs in favor of discovery.

3) Seriousness of the litigation.

The claims at issue here invoke the important public right of voting and whether voting has been burdened for certain groups of citizens based on discriminatory intent. Although most of the caselaw addresses federal interests in voting rights, the significance of the public interest is equally serious when based on state constitutional claims. The claims here are based on Iowa constitutional provisions securing the right to vote, the right to free speech and association, and the right to equal protection. Whether secured by federal or state constitutional provisions, voting remains of fundamental importance in our state constitutional system. "Voting is a fundamental right in Iowa, indeed in the nation." Chiodo v. Section 43.24 Panel, 846 N.W.2d 845, 848 (Iowa 2014). Courts emphasize the unique importance of voting rights in a representative system. "The

right to vote is found at the heart of representative government and is preservative of other basic civil and political rights." Id. "Few issues could be more serious to preserving our system of representative democracy." Benisek, 241 F. Supp. 3d at 576 (allowing discovery of legislative communications in case where the Republican plaintiffs alleged redistricting plan purposefully diluted Republican voters in Maryland). Here, "the issues presented also implicate – as do redistricting cases – the potential that a majority political party has attempted to entrench its own power by limiting the ability of certain voters to influence (or, here, participate in) the election process." Nashville Student Organizing Committee, 123 F. Supp. 3d at 971 (allowing discovery in case alleging Tennessee passed a law intended to suppress the voting rights of Tennessee college students). This factor weighs in favor of discovery.

4) Role of the state, as opposed to individual legislators

The fourth factor considers whether individual legislators are the targets of litigation. Here, the Legislators are not parties to the ligation. Instead, Plaintiff has filed suit against State officials in the executive branch in their official capacity. The Legislators "have no personal stake in the litigation and face no direct adverse consequence if the plaintiffs prevail." See Benisek, 241 F. Supp. 3d at 576 (noting lack of personal stake or direct personal consequences to Democrat members of redistricting commission and legislators with regard to challenge to redistricting plan). Therefore, this factor weighs in favor of discovery.

5) Extent to which discovery would impede legislative action.

There remains a concern that discovery would impede the legislative process. "Because legislators bear significant responsibility for many of our toughest decisions, legislative immunity provides legislators with the breathing room necessary to make these choices in the public's interest without fear of undue judicial interference or personal liability." Bethune-Hill, 114 F.

Supp. 3d at 332-33. "The state legislative privilege protects a 'distraction' interest—to guard legislators form the burdens of compulsory process—and a 'legislative independence' interest—to encourage legislators to engage deeply in the legislative process and act boldly in the public interest without fear of personal consequence." Id. at 341.

Certainly the discovery sought here implicates both the distraction interest and the legislative interest. Therefore, this factor weighs against production. However, this Court finds these concerns can be mitigated and, when balanced against the other competing, serious interests, require production. The concerns are mitigated, first, by LULAC's commitment not to seek discovery of Legislator-Staff communications or Legislator-Legislator communications. Although in some cases courts have ordered disclosure of such communications, this category of communications is not at issue here. See e.g. Benisek, 241 F.Supp.3d at 576-77 (noting "weightier" concerns implicated by legislator-staff communications, yet allowing discovery to proceed).

The communications here raise a lower interest in the legislative privilege. "The legislative privilege is strongest as applied to communications among legislators and between legislators and their immediate aides." Bethune-Hill, 114 F. Supp.3d at 343. Further, the importance of the issues raised overrides the concerns of disruption and interference. See League of Women Voters of Florida, 132 So.3d at 148 (noting challengers seek to vindicate public and fundamental democratic right to elect representatives of their choice). As the Florida Supreme Court noted, if the Legislature alone is responsible for determining what may be shielded in discovery, in a case such as this, the legislature could "circumvent the constitutional standards regarding intent to favor or disfavor a political party or an incumbent by concealing evidence of that intent from the public." Id. at 149. Although the Florida constitution contains an explicit prohibition on political

gerrymandering, here, the Plaintiff's claims are based on specific rights in the Iowa Constitution (right to vote, equal protection, free speech). Further, the legislative privilege urged by the Legislators is not explicitly referenced in the Iowa Constitution either.

"[T]his case is wholly unlike the traditional lawsuit challenging a statutory enactment, where the testimony of an individual legislator is not relevant to intent in statutory construction …" Id. at 151. A 'chilling effect' is of less concern if the type of communication to be chilled is one that is constitutionally prohibited. Id. at 151 (noting the purpose of the prohibition on partisan political gerrymandering and improper discriminatory intent is in fact to have a chilling effect on such actions). It is still likely that non-discriminatory communications or communications unrelated to the intent behind the challenged laws may be responsive to the discovery requests. However, the Court finds the interests of Legislators in those communications can be protected through the Protective Order entered below.

B. Third Party Privacy Right.

The Legislators also seek to invoke a third-party right to privacy. The Legislators identify Article I, Section 20 of the Iowa Constitution, which states: "The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives and to petition for a redress of grievances." Iowa Const. Art. I, §20. The language of the provision does not expressly refer to a right of privacy in contacts with Legislators. Instead, it protects the right to make one's opinions known. However, the Iowa Supreme Court has recognized a concern regarding what other courts refer to as a "chilling effect." In Des Moines Register Tribune Co. v. Dwyer, 542 N.W.2d 491 (Iowa 1996), the Iowa Supreme Court referred to: "a citizen's right to contact a legislator in person, by mail, or by telephone without any fear or suspicion that doing so would subject the citizen to inquiries from the press or anyone else

regarding the nature of the conversation." Dwyer, 542 N.W.2d at 501. Federal Courts recognize a similar concern in the context of First Amendment freedoms to associate:

> [T]he government must justify its actions not only when it imposes direct limitations on associational rights, but also when governmental action would have the practical effect of discouraging the exercise of constitutionally protected political rights.
>
> …
>
> The compelled disclosure of political associations can have just such a chilling effect.

Perry v. Schwarzenegger, 591 F.3d 1126, 1139 (9th Cir. 2009). Unlike in Perry, the documents at issue here are not internal communications within a political entity, but third-party communications with Legislators.

Although the chilling effect is a valid concern, here, the Court finds such concerns can be mitigated. This is not an open records case, such as Dwyer, so the concerns about publicity are less prevalent. Privacy interests of third-parties in the discovery process can be protected by an appropriate protective order. In addition, the compelling and competing interests discussed above must be taken into consideration. Although discovery of a third-party's communication with a Legislator could chill such speech, it may also reveal relevant information regarding an alleged discriminatory intent of the legislation intended to limit the ability of some Iowans to vote. Plaintiff has sought discovery that is rationally related to a compelling government interest and limited its requests in a way that is the least restrict means of obtaining the desired information. See Perry, 591 F.3d at 1140.

IT IS THEREFORE ORDERED that the Motion to Compel Legislators' Discovery Responses is **GRANTED IN PART AND DENIED IN PART.**

With regard to Request No. 1: the motion to compel is granted in part and denied in part. To the extent this request seeks work product of Legislators in the form of meeting summaries or

notes, the request is DENIED. The Court finds Legislators' individual work product is subject to the legislative privilege and Plaintiff has not overcome that privilege. To the extent the request seeks actual communications or documents exchanged between a Legislator and non-Legislator, the request is granted.

With regard to Request No. 2: the motion to compel is granted.

With regard to Request No. 3: the motion to compel is granted.

III. Motion to Compel Intervenor-Defendants' Responses to Discovery.

Intervenors raise aFirst Amendment privilege, invoking Perry, in response to discovery requests. As noted above, this Court recognizes a concern regarding chilling of free speech due to compelled disclosure. Here, LULAC argues such concerns are limited by seeking only communications by Intervenors with Defendants, Iowa Legislators, or Iowa State and local officials. LULAC indicates that it does not seek communications internal to the Intervernors. This is an important limitation, as it avoids government intrusion into the development of political or policy ideas within a political organization.

A First Amendment privilege applies to the communications sought. However, Plaintiff may overcome the privilege by demonstrating the information is rationally related to a compelling government interest and the least restrictive means of obtaining the desired information. Perry, 591 F.3d at 1140. As discussed above, the Plaintiff's claims relate to a compelling government interest, the validation of constitutional protections for equal protection, free speech, and the right to vote. "Voting is a fundamental right in Iowa, indeed in the nation." Chiodo v. Section 43.24 Panel, 846 N.W.2d 845, 848 (Iowa 2014). "The right to vote is found at the heart of representative government and is preservative of other basic civil and political rights." Id. "Few issues could be

more serious to preserving our system of representative democracy." Benisek, 241 F. Supp. 3d at 576.

Further, the Court finds Plaintiff has narrowed its discovery to avoid the serious free speech concerns at issue in Perry, where the focus of the case was internal discussions. Here, the request is least restrictive because Plaintiff agrees to narrow the request to those targeted at discovering legislative intent, which is consistent with the documents that were produced in Perry.

Perry related to a voter initiative amending the California Constitution to provide that only marriage between a man and a woman was valid in California. In Perry, the Ninth Circuit weighed the First Amendment concerns of the proponents of the voter initiative against the discovery needs of the plaintiffs claiming Due Process and Equal Protection violations. Id. at 1140-41. The Court found that the declarations provided by the proponents made a prima facie showing of infringement. The Court also found the plaintiffs had shown the information sought was reasonably calculated to lead to the discovery of admissible evidence, but had not demonstrated a sufficient need to overcome the First Amendment concern. Notably, the Court emphasized that the proponents had already agreed to produce communications actually disseminated to voters, including communications targeted to discrete voter groups. Therefore, the question of the voters' intent could be gained from other sources. Id. at 1144-45.

In Perry, the Proponents agreed to produce communications with those who voted on the law to help determine to the intent behind the law: the relevant actors were the voters, because it was a ballot initiative. Therefore, to the extent LULAC seeks the Intervenors' communications with those who voted on the law, such discovery is supported by a stronger interest. However, just as in Perry, the internal communications of political entities (Intervenors) have a stronger basis for protection. Id.

LULAC has argued that it seeks only external communications. However, it appears some of the discovery requests or deposition topics are written broadly enough to cover internal discussions. (See e.g. Deposition Notice ¶1 ("Any and all involvement of Intervenor, including internal and external communications, relating to the drafting, passage, or implementation of SF 413 and/or SF 568")); (Request for Production No. 4, seeking production of "all documents and communications regarding …" without qualifying such request to external communications). Some discovery requests also seek discussions with other Intervenors or political entities, as opposed to Defendants, Legislators, or Iowa State or Local Officials. To the extent LULAC seeks internal communications or communications between the various Republican Intervenor Groups or political entities, the Court finds the balancing of interests weighs against compelled production and the free speech concerns have not been overcome. Documents relating to the intent of various third-parties do not necessarily reflect the intent of Legislators, if they were never communicated with those Legislators. Although the Court finds communications with Defendants, Legislators, and State or Local Officials relating to the laws at issue are supported by a compelling interest sufficient to overcome any First Amendment privilege, this is not the case for internal communications or communications with other political entities. See Perry, 591 F.3d at 1144-45 (noting that the information sought by the plaintiffs could be obtained from messages actually communicated to voters and protecting internal communications).

IT IS THEREFORE ORDERED that the Plaintiff's Motion to Compel Intervenors' Discovery Responses is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that the Intervenors' Motion for Protective Order is **GRANTED IN PART AND DENIED IN PART**.

Intervenors shall produce responsive discovery regarding the existence of facts (reports, studies) and regarding communications with Legislators, Defendants, and State or Local Officials. Intervenors are not required to produce internal communications or communications with other Intervenors or political entities.

IV. Protective Order.

IT IS HEREBY ORDERED that a Protective Order is entered to protect the confidentiality of documents in discovery production.

Discovery shall proceed through the meet and confer process. Intervenors or Legislators may designate any documents or information they believe is protected by the Legislative Privilege or First Amendment Privilege as "Attorneys' Eyes Only (AEO)" or "Confidential." AEO information shall only be provided to Counsel of Record, Legal Staff, any applicable expert witness who signs an agreement to follow the Protective Order, and Court staff. Confidential information may be shared with the Parties. Documents identified as AEO or Confidential cannot be used for any purpose other than this litigation, shall be held in confidence, and must be filed under seal if filed in the case.

To the extent any Party believes it is necessary for a client representative to be able to access AEO information to prepare the case, they may file a motion identifying such specific person. Designation of documents as AEO or Confidential does not constitute a final determination and either Party may motion the Court to determine an appropriate level of production for any particular document or information. The Parties shall develop a procedure for protecting privileged information at depositions. Admissibility and confidentiality at trial shall be addressed by the trial judge.

Any objections asserted by Intervenors or Legislators in response to discovery shall specifically identify whether documents are being withheld based on the objection. See Iowa R. Civ. P. 1.503(5)(a) (When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."). To the extent Intervenors or Legislators withhold documents within the category the Court finds generally should be produced (for example, based on other discovery objections or privileges not addressed here), Intervenors and Legislators must produce a privilege log. A privilege log is not required for any category of information on which a motion to compel was denied in this order.

IT IS SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV061476	LEAGUE OF UNITED LATIN AMERICAN CITIZENS VS PAUL PATE ET AL
Type:	OTHER ORDER

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

Electronically signed on 2022-02-28 13:45:49

CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this appendix because it is only being filed electronically.

/s/ *Eric H. Wessan*
Solicitor General

CERTIFICATE OF FILING AND SERVICE

I, Eric H. Wessan, hereby certify that on the 20th day of March, 2023, I, or a person acting on my behalf, filed this appendix and served it on counsel of record to this appeal with via EDMS.

/s/ *Eric H. Wessan*
Solicitor General