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

BRENNA BIRD
Attorney General of Iowa

SAMUEL P. LANGHOLZ
Chief Deputy Attorney General

W. CHARLES SMITHSON
Legal Counsel & Secretary of the Senate

ERIC H. WESSAN
Solicitor General
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5164
(515) 281-4209 (fax)
eric.wessan@ag.iowa.gov
sam.langholz@ag.iowa.gov
charlie.smithson@legis.iowa.gov

ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

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,

BRENNA BIRD
Attorney General of Iowa

/s/ Samuel P. Langholz
SAMUEL P. LANGHOLZ
Chief Deputy Attorney General

/s/ *Eric Wessan*
ERIC WESSAN
Solicitor General

Iowa Department of Justice
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164
(515) 823-9117

(515) 281-5112
(515) 281-4209 (fax)
sam.langholz@ag.iowa.gov
eric.wessan@ag.iowa.gov

ATTORNEYS FOR
CERTIORARI PLAINTIFFS

/s/ W. Charles Smithson
W. CHARLES SMITHSON
Legal Counsel and
Secretary of the Senate
Iowa State Capitol
1007 E. Grand Avenue
Des Moines, Iowa 50319
(515) 281-5307
charlie.smithson@legis.iowa.gov

ATTORNEY FOR CERTIORARI
PLAINTIFFS SENATOR ROBY
SMITH, SENATOR JIM CAR LIN,
SENATOR CHRIS
COURNOYER, SENATOR
ADRIAN DICKEY, SENATOR
JASON SCHULTZ, SENATOR
DAN ZUMBACH AND FORMER
SENATOR ZACH WHITING

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/s/ *Eric H. Wessan*
Solicitor General

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This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 5,205 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/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