IN THE SUPREME COURT OF THE STATE OF IOWA

Supreme Court No. 22-0401
Polk County District Court No. CVCV061476

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,
Certiorari Plaintiffs,
v.

IOWA DISTRICT COURT FOR POLK COUNTY,
Certiorari Defendant.

Writ of Certiorari to the Iowa District Court in and for Polk County
The Honorable Sarah Crane Presiding

League of United Latin American Citizens of Iowa's Brief in Place of Certiorari Defendant

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ROUTING STATEMENT

This certiorari action raises questions of first impression regarding the existence and scope of a legislative privilege from discovery requests in litigation under Iowa law. Moreover, the district court action involves critical questions concerning the constitutionality of two recently enacted Iowa election statutes, and the motion to compel challenged in this certiorari action concerns evidence directly relevant to determining whether those statutes were passed with an invidious purpose. The Court should retain this action because these are fundamental and urgent issues of broad public importance requiring prompt determination. *See* Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

In this certiorari proceeding, eleven Iowa Senators and Representatives seek review of the district court's order compelling them to produce their communications with third parties about two recently enacted election laws. Plaintiff League of United Latin American Citizens of Iowa ("LULAC") challenges those election laws under the Iowa Constitution, alleging (among other claims) that the legislature enacted them to intentionally discriminate against voters with certain political views. *See* App. 25–26 ¶¶ 103–106. LULAC therefore sought discovery about the legislature's purpose in enacting the laws and the information the legislature considered in doing so. That discovery included the third-party subpoenas at issue here, for communications between the Legislators and members of the public about the challenged laws. *See* App. 39–51.

The Legislators refused to produce any documents in response to LULAC's subpoenas, claiming an absolute legislative privilege from the production of even their external communications in response to lawful discovery demands. *See* App. 52–73. LULAC

therefore moved to compel, and the district court granted LULAC's motion. *See* App. 89–106.

The district court agreed with the Legislators that they have a legislative privilege that will sometimes protect them from discovery requests in litigation, even though Iowa's constitution and statutes say nothing about it. *See* App. 90. And—unlike many courts to consider the question—the district court further agreed with the Legislators that this privilege protects not only internal communications but also external communications with members of the public. App. 93. But the district court held that the privilege is qualified rather than absolute, and that it must yield when the "purposes underlying the legislative privilege are outweighed by a compelling, competing interest." App. 92. After balancing five relevant factors, the district court then held that such a compelling interest was present here, and it ordered the Legislators to respond to the subpoenas in part, subject to a strict protective order that would maintain the confidentiality of the documents in question. App. 94–98.

The Legislators ask this Court to reverse the district court

and impose an absolute legislative privilege that would completely bar discovery from legislators in all litigation, under any circumstances, without exception, including when the only materials sought are communications *with third parties outside of* the legislature. They do so, moreover, despite the fact that there is no mention of such a privilege in Iowa's written law, and no court in Iowa has previously recognized such a broad, unyielding legislative privilege. In the alternative, the Legislators challenge the district court's discretionary determination that the qualified legislative privilege must yield under the circumstances of this case.

The Court should affirm the district court's order. Iowa law, the common law, this Court's own precedent, and precedent from states that similarly lack express constitutional provisions all support the district court's conclusion that any legislative privilege available to Iowa legislators must be qualified. The district court did not abuse its discretion in concluding that the qualified privilege must be overcome in this case. And the district court's order does not violate article I, section 20 of the Iowa Constitution.

STATEMENT OF FACTS

In the underlying case from which the Legislators bring this certiorari petition, LULAC challenges provisions in two Iowa election laws, SF 413 and SF 568. The challenged parts of SF 413 limit when voters may register to vote, shorten the time for sending and requesting absentee ballots, alter ballot receipt deadlines, prohibit voters from having certain individuals return their ballots, and shorten election day poll hours. *See* App. 5, 13–18 ¶¶ 2, 40–63. SF 568, enacted a few months later, expands and clarifies some of SF 413's restrictions. *Id.*

LULAC alleges that the challenged portions of SF 413 and SF 568 violate the Iowa Constitution in four ways: (1) collectively, they impose an unconstitutional burden on the fundamental right to vote under article II, section 1; (2) the restriction on who may return absentee ballots violates the free speech protections of article I, section 7; (3) the provisions establishing different deadlines by which certain voters may return absentee ballots violate equal protection under article I, section 6; and, (4) the bills were enacted to intentionally discriminate against some voters based on their

political views in violation of the guarantees of free speech and equal protection. *See* App. 20–26 ¶¶ 75–106.

The Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, and the Republican Party of Iowa (collectively, "Intervenors") intervened in defense of SF 413 and SF 568. No party moved to dismiss, and the case proceeded to discovery.

LULAC served subpoenas to produce documents on the Legislators under Iowa Rule of Civil Procedure 1.1701. LULAC's subpoenas sought only *external* communications, not communications between legislators or between legislators and their staff, concerning: (1) the consideration, enactment, implementation, or enforcement of the challenged laws; (2) the state interests or other justification for the challenged laws; and (3) the presence or absence of voter fraud in Iowa. *See* App. 39–51.

The Legislators objected to each request, asserting legislative privilege and the purported privacy interests of third parties under article I, section 20 of the Iowa Constitution. *See* App. 52–73.

LULAC moved to compel. In doing so, LULAC argued that the legislative privilege does not apply to its requests for external communications, but that even if it does apply, the privilege is qualified and must yield given the needs of the case and important constitutional rights at stake. App. 31–35.

After a hearing, the district court granted LULAC's motion in part. *See* App. 100. The district court rejected LULAC's argument that external communications are not protected by legislative privilege and the Legislators' argument that the legislative privilege is absolute. Instead, the district court adopted a "more nuanced approach," holding that Iowa law recognizes a qualified legislative privilege even over external communications, but that the privilege must yield when "the purposes underlying the legislative privilege are outweighed by a compelling, competing interest." App. 90, 92–93.

The district court proceeded to carefully weigh the competing interests in this case to determine that here, those interests weighed in favor of production of most, but not all, of the documents that LULAC sought. To reach that conclusion, the district court

applied persuasive federal court precedent addressing questions of legislative privilege, which utilizes a five-factor balancing test that considers "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." App. 91.

The district court found that the first four factors weigh in favor of discovery. App. 95–97. The court found that discovery into legislative intent is "relevant and extremely important as direct evidence" of LULAC's discriminatory intent claim, which is "a claim against the law-making process itself." App. 94–95 (quoting in part *Bethune-Hill v. Va. State Bd. Of Elections*, 114 F. Supp. 3d 323, 339 (E.D. Va. 2015)). The court also reasoned that "Legislator[s'] communications seem likely to be a primary source of determining whether the laws at issue were enacted with discriminatory intent." App. 96. The court further found that the litigation is serious, and that the fact that the case is against state executive-branch officials, not the Legislators themselves, weighs in favor of

discovery. On the fifth factor, the district court recognized a potential burden on the legislative process from allowing discovery, but it determined that—for most of the documents sought—these concerns did not outweigh the other competing interests favoring production and could be appropriately mitigated by an accompanying protective order. App. 99.

Based on that analysis, the district court held that the mitigated burdens on legislative action did not overcome the importance of the discovery of actual communications between the Legislators and third parties that LULAC sought. App. 100. In contrast, the district court denied the portion of LULAC's motion to compel seeking "meeting summaries or notes" from the Legislators' communications with third parties, concluding that this "individual work product" *is* privileged. App. 100–101. LULAC does not challenge that denial.

The district court also held that the discovery sought did not violate article I, section 20 of the Iowa Constitution, which protects Iowans' right to "make known their opinions to their representatives and to petition for a redress of grievances." App.

99–100 (quoting Iowa Const. art. I, § 20). The court explained that third parties' privacy interests would be protected by the protective order, which would maintain the confidentiality of their communications with legislators. App. 100. That protective order permits Intervenors or the Legislators to "designate any documents or information they believe is protected by the Legislative Privilege or First Amendment Privilege as 'Attorneys' Eyes Only (AEO)' or 'Confidential,'" and provides that 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." App. 104.

On March 2, 2022, the Legislators filed their Petition for Writ of Certiorari with this Court. On March 16, 2022, this Court granted certiorari.

ARGUMENT

The Legislators ask this Court to be the first in the country to adopt an absolute legislative privilege from lawful discovery requests in the absence of any constitutional or statutory provision providing for such a privilege. The Court should reject that argument and affirm the district court's ruling that any legislative privilege is qualified. The Court should also affirm the district court's reasonable application of the qualified legislative privilege to this case, and its rejection of the Legislators' unprecedented argument that members of the public have a constitutional right to secrecy in their communications with legislators.

I. IOWA LAW PROVIDES AT MOST A QUALIFIED LEGISLATIVE PRIVILEGE.

The district court correctly rejected the Legislators' primary argument that they enjoy an absolute legislative privilege from responding to lawful discovery requests. App. 90.

A. Preservation of Error.

LULAC agrees error was preserved on this issue because it was raised to and ruled on by the district court. *See* App. 89–106.

B. Standard of Review.

The question of the scope of the legislative privilege available to Iowa legislators is a constitutional one that is reviewed *de novo*. *Klouda v. Sixth Jud. Dist. Dep't of Corr. Servs.*, 642 N.W.2d 255, 260 (Iowa 2002).

C. There is no statutory or constitutional basis for an absolute legislative privilege.

Unlike federal legislators and state legislators in most other states, Iowa legislators have no constitutional or statutory entitlement to an absolute legislative privilege. The Iowa Constitution and Iowa statutes conspicuously do not provide for such an absolute privilege, despite addressing several closely related subjects. And while the Legislators and Intervenors argue that an absolute privilege would be desirable to protect the separation of powers, "[p]olicy arguments to amend statutes must be directed to the legislature," because this Court "decline[s] to add to the statute[s] what the legislature itself declined to enact." *State v. Nicoletto*, 845 N.W.2d 421, 431 (Iowa 2014), *superseded by statute on other grounds*, Iowa Code § 709.15(f)); *see also In re Det. of Geltz*, 840 N.W.2d 273, 276 (Iowa 2013) ("It is our duty to accept the law

as the legislative body enacts it." (quoting *Anderson v. State*, 801 N.W.2d 1, 1 (Iowa 2011))). The Legislators' arguments for an absolute legislative privilege are therefore addressed to the wrong body: if they want such a privilege, they should enact it into law.

Federal legislators derive their legislative privilege from the U.S. Constitution's Speech or Debate Clause, which provides that "for any Speech or Debate in either House," federal legislators "shall not be questioned in any other place." U.S. Const. art. I, § 6, cl. 1. Nearly all state constitutions expressly give their legislators equivalent protections. *See* J. Pierce Lamberson, *Drawing the Line on Legislative Privilege: Interpreting State Speech or Debate Clauses in Redistricting Litigation*, 95 Wash. U.L. Rev. 203 (2017) (noting that 43 state constitutions include a speech or debate clause similar to that in the federal Constitution). In contrast, the Iowa Constitution does not contain a Speech and Debate Clause, or any other clause providing for legislative privilege. App. 91.

Some states, including some that lack a constitutional speech or debate clause, have enacted statutory regimes providing for legislative privilege from discovery requests. *See, e.g.*, 120 N.C.

Stat. Art. 17; Tex. Gov't Code § 306.008. But the Legislators do not cite any Iowa statute establishing an absolute legislative privilege either. Instead, the Legislators and Intervenors cite two statutes that do not apply, which serve only to illustrate that the General Assembly could have but has not adopted an absolute legislative privilege by statute. And the Legislators and Intervenors ignore a third statute that directly undermines their argument for an absolute legislative privilege.

First, in a footnote, the Legislators cite Iowa Code § 2A.3(3), which creates an absolute privilege for *employees of the legislative services agency*. But the Legislators do not argue that legislators themselves fall within that statute's protection. Br. at 19 n.1. Far from supporting the Legislators' argument, Iowa Code § 2A.3(3) therefore contradicts it. It shows that the General Assembly knows how to enact an absolute privilege in the legislative context when it wishes to do so, but that it has not done so for legislators themselves.

The Intervenors argue that it would be anomalous for Iowa Code § 2A.3(3) to absolutely protect legislative staff from discovery

unless there were a pre-existing, absolute legislative privilege for legislators themselves. Intervenors' Br. at 13. Not so. Rather, Iowa Code § 2A.3 serves to ensure that discovery requests for legislative materials are directed to the relevant legislators, not to the legislative services agency, so that the legislators themselves may then decide how to respond. In this way, Iowa Code § 2A.3(3) is analogous to the federal Stored Communications Act, which precludes civil subpoenas to email service providers but allows the same information to be obtained from the individual users themselves and thereby ensures "that the discovery must be directed to the owner of the data, not the bailee to whom it was entrusted." *O'Grady v. Super. Ct.*, 139 Cal. App. 4th 1423, 1447 (2006).

Second, the Intervenors invoke a different statute, Iowa Code § 2.17, which provides that "[a] member of the general assembly shall not be held for slander or libel in any court for words used in any speech or debate in either house or at any session of a standing committee." Iowa Code § 2.17. But—in stark contrast to the broader federal Speech and Debate Clause—Iowa Code § 2.17 protects only

against liability "for slander or libel," which is not at issue here. *See id.* The General Assembly was surely aware of the language of the federal Speech and Debate Clause when it enacted Iowa Code § 2.17's narrower language in 1969. This Court must give full effect to its decision to adopt a narrower provision instead. It "cannot judicially revise the Iowa Code in the guise of interpretation" to create an absolute legislative privilege that the General Assembly has not adopted. *In re Det. of Geltz*, 940 N.W.2d at 280.[1]

Finally, a statute that neither the Legislators nor the Intervenors cite confirms that Iowa law does not provide an absolute legislative privilege. Iowa Code § 622.11 provides that "[a] public officer cannot be examined as to communications made to the public officer in official confidence, when the public interests would suffer by the disclosure." Legislators are "public officers" under the Iowa Code. *See* Iowa Code § 64.1A ("Bonds shall not be required of the following public officers: . . . 3. Members of the general

[1] The Legislators also waived any reliance on Iowa Code § 2.17 because they did not cite that provision in the district court. *See generally* App. 55–73.

assembly."). Iowa Code § 622.11 would therefore seem to directly govern the privilege issue in this case. But the Legislators did not cite it in the district court, and they do not cite it here. That, no doubt, is because Iowa Code § 622.11 creates "not an absolute but rather . . . a qualified privilege, applying only 'when the public interests would suffer by the disclosure.'" *State ex rel. Shanahan v. Iowa Dist. Ct. for Iowa Cnty.*, 356 N.W.2d 523, 527 (Iowa 1984). Iowa Code § 622.11 therefore confirms that the District Court was correct to reject the Legislators' argument for an absolute legislative privilege.[2]

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[2] Beyond confirming Iowa's lack of an absolute legislative privilege, Iowa Code § 622.11 does nothing to help the Legislators. The "official information privilege" that Iowa Code § 622.11 creates "is only triggered by a claim of privilege by the state." *Carter v. Carter*, 957 N.W.2d 623, 634 (Iowa 2021). Where, as here, "[t]he state did not assert the official information privilege . . . , the district court was not required to balance the interests" that the qualified privilege implicates. *Id.* Regardless, "[a]n official claiming the privilege must satisfy a three-part test: (1) a public officer is being examined, (2) the communication was made in official confidence, and (3) the public interest would suffer by disclosure." *Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994). The Legislators do not show that the communications in question were "made in official confidence," and as explained in Part II, below, the district court reasonably concluded that the public interest favors disclosure here.

D. The common law recognizes at most a qualified legislative privilege.

Lacking any Iowa statute or constitutional provision creating an absolute legislative privilege, the Legislators must rely exclusively on the common law. And the district court correctly held that any common law legislative privilege is qualified, not absolute, and must yield in appropriate circumstances.

Federal courts have repeatedly addressed common law legislative privilege when adjudicating privilege claims by state legislators, who are unprotected by the Speech and Debate Clause. They have uniformly concluded that "the legislative privilege for state lawmakers is, at best, one which is qualified." *Jefferson Cmty. Health Care Ctr., Inc. v. Jefferson Par. Gov't*, 849 F.3d 615, 625 (5th Cir. 2017) (quoting *Perez v. Perry*, No. SA-11-CV-360, 2014 WL 106927, at *1 (W.D. Tex. Jan. 8, 2014)); *see also LULAC v. Abbott*, No. 22-50407, 2022 WL 2713263, at *1 n.2 (5th Cir. May 20, 2022) ("Like us and the Supreme Court, the First, Ninth and Eleventh Circuits all recognize that the state legislative privilege is qualified."); *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). Similarly, in Florida—where there is also no express constitutional or statutory legislative privilege—the Florida Supreme Court has held that the legislative privilege is qualified and must yield when "the purposes underlying the [legislative] privilege . . . are outweighed by a compelling, competing interest." *League of Women Voters of Fla. v. Fla. H.R.*, 132 So. 3d 135, 147 (Fla. 2013).

The cases holding that the common law legislative privilege is qualified are unanimous. The Legislators and Intervenors do not cite any case, from any jurisdiction, that has ever applied an absolute legislative privilege under the common law. The Legislators cite a Virginia decision applying absolute legislative privilege, *Edwards v. Vesilind*, 790 S.E.2d 469, 479–80 (Va. 2016), but that case turned entirely on the Virginia Constitution's Speech and Debate Clause. Iowa has no analogous constitutional provision. *Supra* Part I.C. The Legislators also cite *League of Women Voters of Fla. v. Lee*, No. 4:21CV186, 2021 WL 5283949, at *2 (N.D. Fla.

2021), but that case holds that the privilege is qualified, not absolute, and it applies the same five-factor balancing test that the district court applied here. *Id.* at *5–6. The Intervenors, for their part, do not cite *any* common law legislative privilege case.

The Legislators and Intervenors instead rely on cases involving legislative *immunity* from suit. *See* Br. at 19; Intervenors' Br. at 16–17. But the district court correctly recognized that legislative immunity is different from legislative privilege and requires a different analysis. App. 91. Based on 19th century state cases, the U.S. Supreme Court has held that "the common law . . . deemed local legislators to be absolutely immune from suit for their legislative activities" and that 42 U.S.C. § 1983 does not abrogate that immunity. *Bogan v. Scott-Harris*, 523 U.S. 44, 49–50 (1998). Relying on U.S. Supreme Court precedent, this Court has held the same. *Teague v. Mosley*, 552 N.W.2d 646, 649 (Iowa 1996).

But the U.S. Supreme Court and other federal courts have expressly rejected the Legislators' argument that this absolute immunity implies an absolute evidentiary privilege. *See United States v. Gillock*, 445 U.S. 360, 368 (1980) (rejecting argument that

absolute immunity from suit "should lead this Court to recognize a comparable evidentiary privilege for state legislators in federal prosecutions"); *Jefferson Cmty. Health Ctrs.*, 849 F.3d at 624 (5th Cir. 2017) ("While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified." (quoting *Perez*, 2014 WL 106927, at *1)). And Florida, which like Iowa has no speech or debate clause, also recognizes both an absolute legislative immunity and a qualified legislative privilege. *See Penthouse, Inc. v. Saba*, 399 So. 2d 456, 458 (Fla. Dist. Ct. App. 1981) ("If an exercise of legislative or judicial power is involved, the immunity is absolute"); *League of Women Voters of Fla.*, 132 So. 3d at 147 (holding legislative privilege for Florida legislators is qualified).

E. A qualified legislative privilege respects the separation of powers.

Bereft of precedent supporting an absolute common law legislative privilege, the Legislators and Intervenors rely on general separation-of-powers principles, which they say distinguish this case from the federal cases. But those principles only confirm that this Court should not be the first in the country to adopt an

absolute legislative privilege by judicial fiat.

The Legislators' separation of powers argument focuses on possible harms to the General Assembly from allowing civil discovery. But the separation of powers doctrine also protects the judicial branch. *State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021). And the discovery at issue directly implicates the "judiciary's power . . . to review the constitutionality of the laws and acts of the legislature," a power that "does not offend" separation of powers principles. *King v. State*, 818 N.W.2d 1, 17 (Iowa 2012). "Any encroachment upon [the judicial] power is a violation of the separation-of-powers doctrine." *Klouda*, 642 N.W.2d at 261. As it often does, the separation of powers therefore here requires "[a] delicate balance" between competing branches—it does not exclusively support the Legislators. *Rants v. Vilsack*, 684 N.W.2d 193, 200 (Iowa 2004) (quoting *Redmond v. Ray*, 268 N.W.2d 849, 858 (Iowa 1978)). A qualified privilege provides such a balance by avoiding "unnecessary intrusion" into the General Assembly's domain while still allowing discovery that is essential to furthering "a compelling, competing interest." *League of Women Voters of Fla.*,

132 So.3d at 147. An absolute privilege does not.

The need to balance judicial and legislative powers in this case distinguishes it from *Des Moines Reg. & Trib. Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996), on which the Legislators principally rely. *Dwyer* was a public records case—it did not implicate judicial review or civil discovery. *Id.* at 497. The separation of powers issue in *Dwyer* was therefore entirely one-sided: forced disclosure would have interfered with the legislative branch but refusing disclosure did not harm any other branch. And *Dwyer* emphasized just that, explaining that courts must defer to the legislature's rules forbidding disclosure only "*so long as constitutional questions are not implicated*," and that the case did not involve "protecting our judicial independence from legislative incursions" or "the independence of the judiciary in construing and interpreting statutes." *Id.* at 496 (emphasis added). This case, in contrast, involves lawful subpoenas for evidence critical to LULAC's claim that the challenged laws are unconstitutional. Unlike with the public records request in *Dwyer*, adopting an absolute legislative privilege against civil discovery here would therefore undermine

judicial independence and the judiciary's core power of judicial review. *Dwyer* explicitly did not address such a scenario. *Id.*

In fact, far from serving the separation of powers, for this Court to adopt an absolute legislative privilege here would *violate* the separation of powers by invading the legislature's exclusive lawmaking function. The General Assembly has repeatedly addressed questions of evidentiary privilege by enacting statutes on the subject, including Iowa Code § 622.11, which provides a qualified "public officer" privilege that the Legislators could have, but did not, invoke here. *Supra* Part I.C. The Legislators evidently wish that privilege were absolute, but "[i]f changes in the law are desirable from a policy, administrative, or practical standpoint, it is for the legislature to enact them, not for the court to incorporate them by interpretation." *State v. Wedelstedt*, 213 N.W.2d 652, 656–57 (Iowa 1973).

F. Many other privileges recognized by this Court are qualified.

A qualified legislative privilege is also consistent with many other evidentiary privileges under Iowa law. Iowa Code § 622.11's closely related "public officer" privilege is qualified, not absolute,

Shanahan, 356 N.W.2d at 527, as are well-established privileges with a more express constitutional hook like the newsperson's privilege, *Winegard v. Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977) ("Although this court is persuaded there exists a fundamental newsperson privilege we are equally satisfied it is not absolute or unlimited."). Similarly, the work product privilege, which is codified in the Rules of Civil Procedure, is qualified and can be pierced where there is a substantial need for the materials. Iowa R. Civ. P. 1.503(3). There is thus nothing unusual about the district court's holding that the legislative privilege is not absolute—many other important privileges are qualified, too.

II. THE DISTRICT COURT REASONABLY APPLIED THE QUALIFIED LEGISLATIVE PRIVILEGE.

After correctly holding that the legislative privilege is qualified rather than absolute, the district court reasonably concluded that the privilege did not excuse the Legislators from producing narrowing categories of external communications, subject to a strict protective order. District courts are afforded "wide latitude on discovery rulings and [this Court] will not reverse them unless their underlying grounds are clearly unreasonable or

untenable." *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 49 (Iowa 2004). The documents at issue are external communications that are not privileged at all. But even if legislative privilege applied, the district court used an appropriate five-factor balancing test and reached a reasonable conclusion. This Court should affirm.

A. Preservation of Error.

LULAC agrees error was preserved on this issue because it was raised to and ruled on by the district court. *See* App. 89–106.

B. Standard of Review.

The district court's conclusion that the privilege did not excuse the Legislators from producing narrowing categories of external communications is reviewed for abuse of discretion. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009).

C. The subpoenas seek external documents that are not privileged at all.

The simplest reason why the District Court was correct to enforce the subpoenas at issue is that they seek only external communications that are not privileged at all. "As with any privilege, the legislative privilege can be waived when the parties

holding the privilege share their communications with an outsider." *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); *see also, e.g.*, *Perez v. Perry*, No. SA-11-CV-360-OLG-JES-XR, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) ("To the extent . . . that any legislator, legislative aide, or staff member had conversations or communications with any outsider . . . any privilege is waived as to the contents of those specific communications.").

Most courts to consider the question have therefore held that external communications are not protected by the common law, qualified legislative privilege. *See, e.g.*, *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 668 (E.D. Va. 2014); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011); *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10; *Perez*, 2014 WL 106927, at *2. As one court put it, "no one could seriously claim privilege" over "a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation." *Rodriguez*, 280 F. Supp. 2d at 101. These cases are consistent with long-standing Iowa rule 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 district court held otherwise, reasoning that communications with third parties "were generally part of the Legislators' legislative process." App. 93. But that does not change the waiver analysis. Communications with third parties like fact witnesses are also often an important part of legal representation, for example, but the presence of such third parties nevertheless waives the attorney-client privilege. *See, e.g.*, *State v. Romeo*, 542 N.W.2d 543, 548 (Iowa 1996). And the three cases the district court relied on in reaching a contrary conclusion are unpersuasive. *See* App. 93. *Bethune-Hill* held that the legislators at issue in that litigation "must produce any documents or communications shared with, or received from, any individual or organization outside the employ of the legislature." 114 F. Supp. 3d at 343. *Edwards*, as noted above, turned entirely on an analysis of the protections of the Virginia Constitution's Speech and Debate Clause. 790 S.E.2d at

479–80. Finally, *Puente Arizona v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016), wrongly conflates the distinct doctrines of legislative privilege and legislative immunity and is therefore unpersuasive.

D. If privilege applies, the district court applied an appropriate standard.

To assess whether legislative privilege excused the Legislators from complying with the subpoenas, the district court applied a five-factor test that considered: "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." App. 91. Federal courts across the country have used this balancing test to adjudicate claims of common law legislative privilege. *See, e.g.*, *Benisek*, 241 F. Supp. 3d at 574–75; *Bethune-Hill*, 114 F. Supp. 3d at 337–38*; Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7. Aside from arguing for an absolute privilege, the Legislators and Intervenors do not challenge the district court's test: they identify no relevant factor the district court failed to consider, nor any irrelevant consideration that was improperly included. The

Legislators and Intervenors have therefore waived any such argument. *See State v. Short*, 851 N.W.2d 474, 479 (Iowa 2014).

E. The district court appropriately weighed the relevant factors in granting the motion to compel.

The Legislators do challenge the district court's application of its test to the facts of this case, but their arguments do not show an abuse of discretion and should be rejected. Contrary to the Legislators' arguments, the first factor is met because the subpoenas seek evidence directly relevant to the claims in this case, the second factor is met because the evidence sought is unavailable through other means, and under the fifth factor, the district court reasonably concluded that LULAC's interest in obtaining the evidence at issue outweighs any burden on legislative activity from disclosure.

Relevance of the evidence sought. The district court correctly determined that the documents at issue go to the heart of LULAC's claim that the legislature unconstitutionally enacted the challenged laws to intentionally discriminate against voters with certain political views. Because of that claim, the Legislators are wrong to characterize this as a "run-of-the-mill suit challenging the

constitutionality of an Iowa statute." Br. at 20. Rather, as the district court explained, this is a claim "against the law-making process itself." App. 94.[3]

In arguing otherwise, the Legislators rely on cases that refer to legislative intent in the statutory interpretation context. *See* Br. at 21–22. In such cases, courts "must look at what the legislature said" in the statute and "will not consider a legislator's own interpretation of the language or purpose of a statute." *Donnelly v. Bd. of Trs. of Fire Ret. Sys.*, 403 N.W.2d 768, 771 (Iowa 1987); *see also Willis v. City of Des Moines*, 357 N.W.2d 567, 571 (Iowa 1984) (holding that "the motives or purposes of individual legislators . . . are too uncertain to be considered *in the construction of statutes*" (quoting *Tennant v. Kuhlemeier*, 120 N.W. 689, 690 (Iowa 1909)) (emphasis added)).

In contrast, where, as here, a law is challenged as being enacted for an unconstitutional purpose, "the court is not tasked

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[3] The Legislators make atmospheric comments questioning the validity of LULAC's claim, *see, e.g.*, Br. at 19, but that issue is not before this Court and, indeed, it has never been before the district court because no party moved to dismiss LULAC's Petition.

with interpreting [the challenged law]. Rather, the inquiry is one of motivation: whether [the challenged law] would have been enacted in its current form absent" the discriminatory purpose. *Harness v. Watson*, 47 F.4th 296, 310 (5th Cir. 2022). LULAC's claim that the challenged laws were passed for a discriminatory purpose thus requires an assessment not only of the statute's facial terms, but also of the decision-making process itself. The district court therefore reasonably concluded that "[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." App. 99 (quoting *League of Women Voters of Fla*, 132 So.3d at 151).

The Legislators also cite *AFSCME Iowa Council 61 v. State*, 928 N.W.2d 21, 30 (Iowa 2019), but that case too is distinguishable. The *AFSCME* plaintiffs' primary claim was that the statute was "arbitrary" in violation of the equal protection clause. *Id.* at 30. Such a challenge was subject to the highly deferential rational basis test, *id.* at 32, which does not require that legislative purpose be "proven with evidence" and "does not include evidentiary fact-

finding on the motives of individual legislators," *id.* at 36–37. And while the *AFSCME* plaintiffs also brought a freedom of association claim, they "offered no evidence that the [challenged part of the law] was chosen to target" them. *Id.* at 41.

Here, in contrast, LULAC does not allege that the challenged laws are arbitrary, but rather that they were deliberately designed to disfavor voters with certain viewpoints. This claim is subject to strict scrutiny, not rational basis review. *See Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 684–85 (2010) ("because the university singled out [certain viewpoints] for disadvantageous treatment, we subjected the university's regulation to strict scrutiny")*; see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997) ("the Iowa Constitution generally imposes the same restrictions on the regulation of speech as does the federal constitution."). And to support such a claim, LULAC seeks to

develop "evidence that the [challenged part of the law] was chosen to target" particular voters—exactly the sort of evidence this Court found wanting in *AFSCME*. 928 N.W.2d at 41.[4] The district court therefore reasonably concluded that the subpoenas at issue seek

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[4] Intervenors cite *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348–50 (2021), Intervenors' Br. at 25–26, but that case held only that the "unfounded and often far-fetched allegations" of a single legislator and a "'racially-tinged' video created by a private party" were insufficient to *establish* the entire legislature's discriminatory intent in the face of the district court's contrary finding based on "ample support" after a bench trial. 141 S. Ct. at 2349. The *Brnovich* Court's determination that the evidence in that case—produced in discovery and considered at a bench trial—was not *sufficient* to demonstrate the legislature's discriminatory intent does not mean it was not *relevant* or not discoverable. Further, here LULAC directed subpoenas to many legislators involved with the passage of the challenged laws to examine their external communications during the laws' passage. It is purely speculative to assert that this discovery will lead to the same type of evidence found insufficient in *Brnovich*; the subpoenas could, for example, lead to evidence that the legislature received partisan voting breakdowns and enacted the challenged laws specifically to target forms of voting used by Democrats. Such evidence could demonstrate discriminatory intent. *Cf N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (finding discriminatory racial intent based in part on the legislature's receipt of race-based data on the use of voting practices prior to restricting voting and registration in ways that disproportionately affected African Americans). *Brnovich* does not hold that everything LULAC could possibly receive in response to the subpoenas at issue is irrelevant.

evidence that is highly relevant to LULAC's claims. *See, e.g.*, *Nat'l Urb. League v. DeJoy*, No. CV GLR-20-2391, 2020 WL 6363959 (D. Md. Oct. 29, 2020) (finding a likelihood that defendant engaged in "impermissible viewpoint discrimination in violation of the First Amendment" where evidence demonstrated that policy changes "were intended to suppress mail-in voting based on hostility toward the Democratic party").

Availability through other means. The district court correctly held that the evidence sought is not available to LULAC through other means. App. 96. The Legislators argue that "the requested documents *can* be obtained from other sources," by subpoenaing each external counterparty to the communications. Br. at 23. But LULAC does not know, and could not possibly know, everyone the Legislators communicated with about the challenged laws. Only the Legislators know that. And even if LULAC possessed that information, it would be unduly burdensome—and serve little purpose—for LULAC to have to separately subpoena each of those counterparties, rather than directing discovery towards the Legislators who are the common denominator.

Burden on legislative activity. The district court correctly held that any burden on the legislative process from the discovery it ordered was outweighed by the other factors in this case. The Court should affirm for at least five reasons.

First, any possible burden was limited at the outset by the narrow scope of the subpoenas at issue, which seek only external communications and not communications among legislators and their staff. As explained above, *supra* Part II.C, many courts have held that such external communications are not subject to legislative privilege at all. Even assuming the privilege applies, however, the fact that only external communications are at issue significantly limits any burden on the legislative process. Communication with the public is indeed an important part of legislators' duties, Br. at 24, but legislators can have no expectation of privacy in such communications, because members of the public are free to reveal them at any time.

Second, the Legislators raise the specter of "severe negative consequences on the functioning and accessibility of the Legislature" if the district court's order stands. *Id.* But this

argument ignores that a similar qualified-privilege standard is already in place across the country and applies whenever federal courts evaluate claims of state legislative privilege (in Iowa and elsewhere). *Supra* Part I.D. The Legislators identify no evidence that any negative consequences have ensued from those decisions.

Third, any negative effects will be limited by the strict protective order that the district court entered to govern the Legislators' productions. The Legislators rely on this Court's previous analysis of the impact of *public* disclosure of communications in *Dwyer*. Br. at 24. But the protective order permits the Legislators to "designate *any* documents or information" as "Attorneys' Eyes Only" that must be filed, if at all, under seal. App. 104 (emphasis added). Such documents will never become public without a further court order, and—as the Legislators acknowledge, Br. at 30—"members of the public" will never know that their communications with legislators were produced, undermining any claim that production of documents in this context—subject to a strict protective order—would have a chilling effect on future communications with legislators.

Fourth, the Legislators argue that simply complying with civil discovery, on its own, constitutes an unacceptable burden on legislative activity. But responding to the subpoenas will not require the Legislators to personally "remember every communication," or "index all communications through the various channels." Br. at 26. Parties and non-parties respond to discovery requests every day, and nothing in the district court's order suggests the Legislators have been deprived of the protections against undue burden in responding to a subpoena.[5] *See* Iowa R. Civ. P. 1.1701(4)(d). The district court expressly directed the parties to proceed with discovery "through the meet and confer process," in recognition that there may be outstanding issues regarding the timing and scope of responsive productions. App. 104.

Finally, the Court need not address whether the Legislators' communications will be admissible, or what inferences a factfinder

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[5] The Legislators' claim that the "district court implicitly rejected" their overbreadth and undue burden objections is plainly wrong. Br. at 27 n.2. The district court only addressed the threshold issues of privilege because the *Legislators* "ask[ed] for a generalized ruling preventing any discovery." Order to Compel at 2; App. 90.

may draw from those documents; it is simply enough that the subpoenas are "reasonably calculated to lead to the discovery of admissible evidence." App. 102; *see also* Iowa R. Civ. P. 1503(1). Even if the Legislators are correct that the "individual motivations of legislators" do not determine the constitutionality of an Iowa statute, Br. at 21, their communications may reveal relevant information, including the knowledge or justifications the Legislature writ large relied upon in considering the challenged laws.

III. THE DISTRICT COURT'S ORDER COMPELLING PRODUCTION IS CONSISTENT WITH ARTICLE I, SECTION 20, OF THE IOWA CONSTITUTION.

Separate from their claim of legislative privilege, the Legislators also argue that the district court's order violates the privacy rights of unidentified individuals under article I, section 20 of the Iowa Constitution. Nothing in the district court's order impairs that right, and the Court should affirm.

A. Preservation of Error.

LULAC agrees error was preserved on this issue because it was raised to and ruled on by the district court. *See* App. 89–106.

B. Standard of Review.

This is a constitutional claim that is reviewed *de novo*. *Klouda*, 642 N.W.2d at 260.

C. The district court's order is consistent with article I, section 20 of the Iowa Constitution.

Article I, section 20 protects Iowans' right to "make known their opinions to their representatives and to petition for a redress of grievances." The district court's order has no impact on that right: Iowans remain free to communicate their view to their representatives and to petition for redress at will. The Legislators' contrary argument depends entirely on this Court's decision in *Dwyer*, 542 N.W.2d at 491. But *Dwyer* does not even cite article I, section 20, much less hold that it vests members of the public with a right not to have their communications with legislators disclosed in response to lawful discovery requests. *See generally id.* While the opinion in *Dwyer* contains dicta about possible benefits of confidentiality and harms from the public disclosure of detailed legislative call records, it holds only that it was up to the General Assembly, not the courts, to decide which phone records to produce in response to public records requests. *Id.* at 503. That holding has

nothing to do with the issues in this case.

Moreover, *Dwyer*'s dicta about the benefits of confidentiality and the harms from disclosure all came in the context of public records requests. *Id.* at 493. Public records requests necessarily involve making the records *public*. Here, in contrast, the district court's expansive protective order ensures that the documents in question will not become public without a further court order. App. 104. The Legislators cannot establish that the public will be chilled from contacting their legislators when they admit that the public is not "even on notice that this subpoena threatens their rights." Br. at 30. And as explained above, the subpoenas in this case are for evidence that is essential to the courts' core power of judicial review, and therefore implicate an entirely different separation of powers analysis. *Supra* Part I.E.

Finally, the Legislators' reliance on *Dwyer* ignores that civil discovery often trumps otherwise strong privacy interests. Most people no doubt expect that *all* of their private communications will be confidential. But even in civil cases, "the public has a right to every person's evidence" unless some lawful privilege applies.

Winegard, 258 N.W.2d at 850. And the district court's protective order serves to ensure that citizens' communications with legislators are kept as private as possible without depriving LULAC of critical evidence. The district court was therefore correct to reject the Legislators' unprecedented argument under article I, section 20.

CONCLUSION

For the forgoing reasons, the Court should affirm.

REQUEST FOR ORAL SUBMISSION

LULAC requests to be heard in oral argument.

Dated: April 3, 2023

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/ *Shayla McCormally*
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CERTIFICATE OF COMPLIANCE

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 8,224 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I certify that on April 3, 2023, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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