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Toma and President Petersen*

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota,

Plaintiff,

v.

Adrian Fontes, in his official capacity as
Arizona Secretary of State, et al.,

Defendant.

AND CONSOLIDATED CASES

No. 2:22-cv-00509-SRB (Lead)

**INTERVENOR-DEFENDANTS
SPEAKER TOMA AND PRESIDENT
PETERSEN'S REPLY IN SUPPORT
OF MOTION FOR LEAVE TO FILE
RESPONSE TO DNC'S MOTION TO
COMPEL**

1 Consolidated Plaintiffs do not dispute that they did not raise the issue of whether the
2 legislative privilege has been “overcome” using a five-factor balancing test in the weeks
3 leading up to the Motion to Compel – not in their meet-and confer discussions, nor their
4 written communications (Doc. 500-1 at p. 45-48), nor with the Court at the July 25 hearing.
5 [See Response, Doc. 507.]

6 That is the critical issue, not undersigned counsel’s awareness of case law applying
7 the five-factor test or participation in a case involving legislative privilege issues in front of
8 Judge Lanza. The point is that Consolidated Plaintiffs did not indicate in any
9 communication with undersigned counsel that they were raising that issue *in this case* until
10 their Motion to Compel (filed after the Speaker and President’s brief).

11 To deflect from their failure to raise this issue, Consolidated Plaintiffs note that a
12 July 10 letter from counsel for the Speaker and President quoted from a case applying the
13 five-factor test, *League of Women Voters of Florida, Inc. v. Lee*, 340 F.R.D. 446, 458 (N.D.
14 Fla. 2021). [Doc. 500-1, Ex. D, p. 52.] In context, it is clear the quote referred to the purpose
15 behind the legislative privilege, as support for the Speaker and President’s position on
16 implied waiver. [*Id.*] That quote appeared in the section of the letter addressing *Powell v.*
17 *Ridge* and Consolidated Plaintiffs’ implied waiver argument; it was followed by citations
18 to legislative privilege cases that do not use the five-factor balancing test; and the following
19 paragraph stated: “Accordingly, we do not agree that the Speaker and the President have
20 put their individual motives and actions at issue in this case or that their intervention effects
21 a waiver of their legislative privilege.” [*Id.*] A review of the July 10 letter and the July 5
22 letter to which it responded confirms that the five-factor test was not part of the parties’
23 communications. [*Id.* at p. 45-54.] Thus, the Speaker and President reasonably did not brief
24 an issue that the Consolidated Plaintiffs had never raised.

25 The Speaker and President respectfully request five pages to present argument on
26 the Consolidated Plaintiffs’ newly-raised issue if the Court decides to reach it. Consolidated

1 Plaintiffs do not oppose the requested relief if they are given a chance to reply. [Doc. 507
2 at 5.] Although it does not appear necessary for Consolidated Plaintiffs to have five more
3 pages on this specific issue, the Speaker and President leave that to the Court's discretion.

4 RESPECTFULLY SUBMITTED this 11th day of August, 2023.

5 GALLAGHER & KENNEDY, P.A.
6

7 By: /s/ Hannah H. Porter

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13 *Attorneys for Intervenor-Defendants*

14 *Toma and Petersen*

15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on August 11, 2023, I electronically transmitted a PDF version
17 of this document to the Clerk of Court, using the CM/ECF System for filing and for
18 transmittal of a Notice of Electronic Filing.

19 /s/D. Ochoa
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