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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Mi Familia Vota; et al.,  
Plaintiffs,  
and  
DSCC and DCCC,  
Plaintiff-Intervenors,  
v.  
Adrian Fontes, in his official capacity as  
Arizona Secretary of State; et al.,  
Defendants,  
and  
RNC and NRSC,  
Defendant-Intervenors.

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Case No. CV-21-01423-DWL

**PLAINTIFFS' MOTION TO  
COMPEL THE REPUBLICAN  
PARTY OF ARIZONA**

## **INTRODUCTION**

Pursuant to the Court’s August 31, 2023, Order, ECF No. 249, Plaintiffs Mi Familia Vota, Arizona Coalition for Change, Living United for Change in Arizona, and League of Conservation Voters, Inc. d/b/a Chispa AZ respectfully move this Court to compel the Republican Party of Arizona (“RPA”) to produce all withheld documents identified using the Court-ordered search terms.<sup>1</sup>

Nearly 20 months after Plaintiffs’ served their subpoena on the RPA, the RPA continues to fail to comply with its discovery obligations, even after numerous efforts by Plaintiffs and this Court to resolve the dispute. The RPA seeks to hide behind the shield of privilege, but it has refused to substantiate its privilege assertions through the production of a privilege log that complies with the Federal Rules of Civil Procedure. By failing to provide a compliant privilege log even after the Court ordered it to do so on two separate occasions, the RPA has waived any privilege over the withheld documents. Accordingly, the Court should compel the RPA to produce all withheld documents.

## **PROCEDURAL BACKGROUND**

On January 10, 2022, Plaintiffs served a subpoena on the RPA seeking production of responsive documents. *See* ECF No. 161-1. After the RPA asserted a categorical First Amendment privilege, Plaintiffs moved to compel production, which the Court granted in part. *See* ECF No. 184 (Oct. 27, 2022). In so doing, the Court rejected the RPA’s categorical refusal to produce documents based on a blanket assertion of First Amendment privilege. *Id.* at 9. The Court noted that the RPA failed to produce a privilege log or any evidence supporting its assertion. *Id.* at 9-13. Because Plaintiffs did not at that time seek a conclusive determination that the RPA waived any claim to a First Amendment privilege, the Court ordered RPA to produce “a privilege log describing the nature of the withheld

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<sup>1</sup> The RPA has claimed that it has identified 32,619 documents which were non-responsive auto-generated emails regarding donations. *See* ECF No. 244-4. Plaintiffs do not contend that the RPA should be required to produce these documents, but given the RPA’s flouting of the July 17 Order, it should be required to certify what it has done to confirm the documents are non-responsive.

documents or communications ‘in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.’” *Id.* at 9 (quoting *Karnoski v. Trump*, 926 F.3d 1180, 1195 (9th Cir. 2019)).

Although Plaintiffs continued to meet and confer with the RPA after the Court’s first order, the parties ultimately reached an impasse. After another round of briefing and oral argument, the Court gave the RPA 21 days to search for responsive documents and either produce them pursuant to a non-waiver or other agreement, or produce a privilege log of withheld documents. On August 8, 2023, one day after the Court-ordered deadline, the RPA produced two privilege logs which are devoid of information that would allow Plaintiffs to assess any of the RPA’s claims of privilege.

Plaintiffs then sought relief from this Court, including an order that the RPA had waived its privilege. On August 31, 2023, the Court ordered Plaintiffs to brief (1) the sufficiency of the privilege logs and (2), assuming the logs were inadequate, whether that inadequacy constituted waiver. ECF No. 249.

### **ARGUMENT**

The privilege logs the RPA provided to Plaintiffs plainly are inadequate. The barebones information the privilege logs offer falls far short of the information that needs to be furnished in order to assert a privilege. Indeed, by asserting privilege over every document that simply contained a search term, the RPA concedes that it has not conducted the kind of particularized assessment required to satisfy a privilege assertion.

Despite numerous opportunities to provide valid privilege logs, the RPA continues to fail to meet its burden. Under Ninth Circuit precedent, the RPA has now waived its privilege assertion over the withheld documents. The Court should therefore order production of all withheld documents.

#### **I. The Privilege Logs Are Inadequate**

“The purpose of a privilege log is to provide the opposing party and the Court with enough information to evaluate the claim of privilege.” *Baxter Healthcare Corp. v. Fresenius Med. Care Holding, Inc.*, No. C07-1359 PJH (JL), 2008 WL 5214330, at \*3

1 (N.D. Cal. Dec. 12, 2008). “In essence, the party asserting the privilege must make a *prima*  
2 *facie* showing that the privilege protects the information the party intends to withhold.” *In*  
3 *re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992).

4 To make the *prima facie* showing through a privilege log, the party asserting the  
5 privilege must “describe the nature of the documents, communications, or tangible things  
6 not produced or disclosed—and do so in a manner that . . . will enable other parties to  
7 assess the claim.” Fed. R. Civ. P. 26(b)(5)(A)(ii) (emphasis added). At a minimum, the  
8 “privilege log must identify ‘(a) [the individuals] involved, (b) the nature of the document,  
9 (c) all persons or entities shown on the document to have received or sent the document,  
10 (d) all persons or entities known to have been furnished the document or informed of its  
11 substance, and (e) the date the document was generated, prepared, or dated.’” *Apple Inc.*  
12 *v. Samsung Elecs. Co.*, 306 F.R.D. 234, 237 (N.D. Cal. 2015) (quoting *In re Grand Jury*  
13 *Investigation*, 974 F.2d at 1071); see also *MJG Enters., Inc. v. Cloyd*, 2012 WL 12964345,  
14 at \*2 (D. Ariz. Oct. 30, 2012). “[B]oilerplate objections or blanket refusals inserted into a  
15 response to a . . . request for production of documents are insufficient to assert a privilege.”  
16 *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont.*, 408 F.3d 1142, 1149  
17 (9th Cir. 2005). Instead, the privilege must “be raised as to each record sought to allow the  
18 court to rule with specificity.” *Clarke v. Am. Com. Nat. Bank*, 974 F.2d 127, 129 (9th Cir.  
19 1992).

20 Courts have held that these requirements apply similarly in the context of the First  
21 Amendment privilege. For instance, in *La Union Del Pueblo Entero v. Abbott*, the court  
22 ordered production of a privilege log that “must: (i) expressly make the claim; and (ii)  
23 describe the nature of the documents, communications, or tangible things not produced or  
24 disclosed—and do so in a manner that, without revealing information itself privileged or  
25 protected, will enable other parties to assess the claim.” 2022 WL 17574079, at \*10 (W.D.  
26 Tex. Dec. 9, 2022) (internal quotation marks omitted). In so doing, the court noted the  
27  
28

1 “limited” nature of the First Amendment privilege. *Id.* at \*9.<sup>2</sup> Other courts have similarly  
 2 required parties asserting a First Amendment privilege to produce a privilege log that  
 3 complies with Rule 26(b)(5). *E.g., The Ohio Organizing Collaborative v. Husted*, 2015  
 4 WL 7008530, at \*4 (S.D. Ohio Nov. 12, 2015) (rejecting assertion that a privilege log  
 5 compliant with Rule 26(b)(5) would be “tantamount to an infringement on [the party’s]  
 6 First Amendment rights” and holding that a party asserting First Amendment privilege  
 7 must “produce a privilege log that, without divulging the privileged information, refers to  
 8 *each* document withheld . . . and includes sufficient information to justify the invocation  
 9 of the privilege” (emphasis added)); *Point Ruston, LLC v. P. Nw. Reg’l Council of United*  
 10 *Bhd. of Carpenters & Joiners of Am.*, 2009 WL 3190361, at \*1 (W.D. Wash. Sept. 30,  
 11 2009) (ordering production of privilege log within eight days that would “dutifully inform  
 12 [the moving party] as to what documents or other requested materials [the asserting party]  
 13 believes are protected under privilege, whether it be associational or otherwise”).

14 The RPA’s two privilege logs both fail to make a *prima facie* showing that either  
 15 the First-Amendment or the attorney-client privilege applies. Neither privilege log  
 16 contains the information needed for the Court or Plaintiffs to “evaluate the claim of  
 17 privilege” for the individual documents. *Baxter Healthcare Corp.*, 2008 WL 5214330, at  
 18 \*3. The RPA’s First Amendment privilege log lists only (1) a “control number,”  
 19 (2) various date-related fields, (3) the file extension, and (4) the search terms on which the  
 20 documents hit. Similarly, the RPA’s attorney-client privilege log omits the necessary  
 21 information to make a *prima facie* showing of privilege. That log omits email subject lines,  
 22 file names, any description of the documents, and fails to identify the specific privilege  
 23 being asserted. In omitting other information, the privilege logs fail to provide either the  
 24 Court or Plaintiffs any insight into the nature of the document, or enable them to assess the  
 25 merits of the RPA’s privilege claims. The RPA’s First Amendment Privilege log provides

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 27 <sup>2</sup> The court also distinguished circumstances where the First Amendment privilege would  
 28 apply on the face of the request, contrasting “cases involving the disclosure of membership  
 lists.” *La Union Del Pueblo Entero*, 2022 WL 17574079, at \*9. Plaintiffs’ requests plainly  
 do not fall into this category.

1 the Court and Plaintiffs with **no** additional germane information beyond what was available  
2 when the RPA categorically refused to comply with the subpoena. *See La Union Del Pueblo*  
3 *Entero*, 2022 WL 17574079, at \*9.

4 Rather than assess whether either privilege applies to each document, the RPA  
5 claims broadly that it “is asserting attorney-client privilege/work client privilege” and  
6 “First Amendment privilege with respect to all of the documents.” ECF No. 244-1. But  
7 as discussed, the Ninth Circuit has squarely rejected the use of such boilerplate, blanket  
8 objections. *Burlington N. & Santa Fe Ry. Co.*, 408 F.3d at 1149. The RPA does not  
9 identify particular responsive documents for which it is claiming a privilege. It instead  
10 summarily asserts that the privilege applies to over 60,000 documents that the RPA  
11 concedes it has not reviewed. *See* ECF No. 244-1, at 4. That is plainly insufficient to make  
12 a *prima facie* showing of privilege. *See RTC Indus., Inc. v. Fasteners for Retail, Inc.*, No.  
13 17 C 3595, 2019 WL 5003681, at \*17-18 (N.D. Ill. Oct. 8, 2019) (finding “unacceptable”  
14 a privilege log listing “irrelevant, non-responsive documents” and ordering a new privilege  
15 log “containing only entries that correspond to documents and communications that it is  
16 withholding on the basis of a privilege”).

17 RPA’s blanket assertion of privilege unsupported by any actual review of the  
18 documents further calls into question the RPA’s claim that all documents are subject to the  
19 First Amendment privilege. For instance, because it asserts a privilege over documents that  
20 simply contain a search term, the RPA apparently has not determined if emails exist within  
21 the broad set of documents that are between the RPA and individuals who do not  
22 necessarily share the RPA’s mission. Such emails would not be subject to the First  
23 Amendment Privilege, but neither the Court nor Plaintiffs can determine whether such  
24 documents have been withheld through the facially delinquent logs that the RPA has  
25 produced.

26 Courts in this circuit have held similarly threadbare privilege logs to be inadequate  
27 to make a *prima facie* showing of privilege. In *Shakespear v. Wal-Mart Stores, Inc. LLC*,  
28 2012 WL 13055159 (D. Nev. Nov. 5, 2012), for example, the district court rejected the

1 defendant's privilege assertion where it was "unclear whether [the defendant] actually has  
2 information responsive to [the requests for production] . . . or whether [the defendant] is  
3 merely objecting as a formality." *Id.* at \*3. The court overruled the defendant's privilege  
4 assertions, noting that "[w]ithout a privilege log and a developed record about the nature  
5 of the privilege asserted over specific documents, the court cannot make any findings about  
6 the applicability of" the privilege assertions. *Id.*

7 Nor is the RPA correct in suggesting that it does not need to produce a more detailed  
8 privilege log to substantiate its First Amendment privilege claim. As the Ninth Circuit  
9 stated, "some form of a privilege log is required" to assert a First Amendment privilege.  
10 *Perry v. Schwarzenegger*, 591 F.3d 1147, 1154 n.1 (9th Cir. 2010); *see also* ECF No. 184  
11 at 9; ECF No. 249. The defendants there initially refused to produce a privilege log, so the  
12 district court denied their "blanket assertion of privilege." *Perry v. Schwarzenegger*, 2009  
13 WL 3823174, at \*1 (N.D. Cal. Nov. 11, 2009). The defendants then produced a sample of  
14 documents for *in camera* review **and** provided the plaintiffs a "privilege log which  
15 identifies the submitted documents by number and provides a simple description of the  
16 documents." *Id.* The privilege log produced contained detailed information, including the  
17 specific privilege asserted, the type of document, the document's authors and recipients,<sup>3</sup>  
18 and the basis for the privilege asserted.<sup>4</sup> *See Perry v. Schwarzenegger*, Case No. C-09-  
19 2292 VRW, ECF No. 250-1 (N.D. Cal. Nov. 6, 2009). Only after the defendants produced  
20 the documents to the court and provided a privilege log did the district court assess their  
21 privilege claims, and the court based its decision on its *in camera* review of the documents.

22 <sup>3</sup> While the privilege log did protect the identity of *some* document recipients by replacing  
23 their names, it did not categorically omit all names without any analysis of the specific  
24 documents on the log.

25 <sup>4</sup> The privilege log in *Perry* also is illustrative of the detail needed to justify an assertion of  
26 privilege. For instance, the first entry explains that the party withheld the document on  
27 First Amendment grounds because it was a "[n]onpublic document [that] reflects internal  
28 discussion and planning about campaign and fundraising strategy and reveals  
donor/volunteer/member names." *Perry v. Schwarzenegger*, Case No. C-09-2292 VRW,  
ECF No. 250-1, at 1 (N.D. Cal. Nov. 6, 2009). Another entry withheld a "[n]onpublic  
document [that] reflects draft messaging related to Proposition 8, including edits to  
potential message." *Id.*



1 Unsurprisingly then, when the case reached the Ninth Circuit, the court of appeals’ decision  
2 centered on the district court’s review of the *in camera* documents. The RPA is therefore  
3 incorrect to suggest that, under *Perry*, a “First Amendment privilege log was clearly not  
4 prepared or submitted in that case.” ECF No. 244, at 6. Indeed, it is hard to see how the  
5 test in *Perry* could ever be met with a privilege log as devoid of information as the one  
6 produced by the RPA.

7 In sum, the RPA’s privilege logs fall far short of providing the details required for  
8 the Court and Plaintiffs to adequately determine whether the RPA’s privilege claims have  
9 merit.

## 10 **II. The RPA Has Waived Its Privileges**

11 The RPA has had numerous opportunities over the past 20 months to substantiate  
12 its privilege assertions. At every juncture, it has refused to do so. Accordingly, the Court  
13 should conclude that the RPA has waived its privileges over the withheld documents.

14 In determining whether a party has waived its privilege assertions, courts in this  
15 Circuit apply the factors set forth in *Burlington Northern & Santa Fe Railway Co.*, 408  
16 F.3d at 1149. These factors include (1) “the degree to which the objection or assertion of  
17 privilege enables the litigant seeking discovery and the court to evaluate whether each of  
18 the withheld documents is privileged,” (2) “the timeliness of the objection and  
19 accompanying information about the withheld documents,” (3) “the magnitude of the  
20 document production,” and (4) “other particular circumstances of the litigation that make  
21 responding to discovery unusually easy . . . or unusually hard.” *Id.* “These factors should  
22 be applied in the context of a holistic reasonableness analysis, intended to forestall needless  
23 waste of time and resources, as well as tactical manipulation of the rules and the discovery  
24 process.” *Id.* All four factors weigh in favor of a finding of waiver.

25 *First*, as discussed above, the RPA’s assertions of privilege completely deprive both  
26 the Court and Plaintiffs of the ability to determine the validity of the assertions. The RPA  
27 relies on blanket assertions of privilege over tens of thousands of documents without any  
28 specific explanations as to why any document is privileged. Such “boilerplate objections



1 or blanket refusals . . . are insufficient to assert a privilege.” *Id.* Indeed, the RPA has failed  
2 even to provide any information concerning each of the documents listed on its privilege  
3 logs. A cursory look at the privilege log produced in *Perry* underscores how deficient the  
4 RPA’s privilege logs are. As noted above, the defendants there identified the type of  
5 document, the document’s authors, the document’s recipients, and the basis of privilege—  
6 explaining in detail why the privilege applied. *See Perry v. Schwarzenegger*, Case No. C-  
7 09-2292 VRW, ECF No. 250-1 (N.D. Cal. Nov. 6, 2009). Here, by contrast, the sparse  
8 information RPA has provided makes it impossible to tell if documents may be genuinely  
9 subject to the First Amendment Privilege, or if instead the documents may be  
10 communications to the RPA from unaligned citizens. This factor thus weighs in favor of a  
11 finding of waiver.

12 *Second*, the timeliness of the objection and the accompanying information also  
13 weighs in favor of a finding of waiver. Plaintiffs first served the RPA with a subpoena  
14 seeking documents in January 2022—20 months ago. After the RPA wholly refused to  
15 comply with the subpoena based on its assertions of privilege, this Court ordered the RPA  
16 in October 2022 to produce a privilege log. The RPA then conducted plainly inadequate  
17 searches and review of documents, stonewalling Plaintiffs’ requests for adequate searches  
18 to be run. This caused Plaintiffs to seek Court intervention *yet again*, and the Court held  
19 that the RPA’s search and review process was inadequate and ordered a privilege log within  
20 21 days of the order. *See* ECF No. 236. Then, after flouting the Court-imposed deadline,  
21 the RPA produced two woefully deficient privilege logs and presented only boilerplate  
22 assertions of privilege.

23 The RPA has had nearly 20 months to support its assertions of privilege. It has  
24 continually failed to do so, extending this dispute over a 20-month stretch and requiring  
25 repeated judicial intervention. *See Sweet v. Mesa*, 2022 WL 326406, at \*5 (D. Ariz. Feb.  
26 3, 2022) (finding eight-month discovery dispute weighed in favor of waiver). And as  
27 discussed above, the information accompanying the assertion of privilege was woefully  
28 inadequate. This factor thus plainly favors a finding of waiver.

1           *Third*, though unclear on its face, the magnitude of production also weighs in favor  
2 of waiver. The RPA's privilege logs list over 60,000 documents that hit on the Court-  
3 approved search terms. But as the RPA's subsequent representations make clear, the  
4 number of actually responsive documents is likely much lower. First, the RPA has  
5 indicated that 32,619 documents are form donation emails that it has since identified as  
6 non-responsive. ECF No. 244-4, at 5. And as the Court recognized in the July 17, 2023  
7 hearing, the RPA is not required to log non-responsive documents. *See also RTC Indus.,*  
8 *Inc.*, 2019 WL 5003681, at \*17-18. Had the RPA done anything to assess the  
9 responsiveness of the documents prior to providing the logs, the magnitude of the  
10 production would likely be much smaller than the 60,000 documents the RPA has  
11 identified.

12           The RPA cannot use its refusal to identify the responsive documents to argue that  
13 the magnitude of production is too high to justify waiver. And even assuming all of the  
14 documents were responsive, the RPA's delay undermines its position that the magnitude  
15 of production weighs against waiver. *See, e.g., Tatung Co., Ltd. v. Hsu*, 2016 WL 695971,  
16 at \*11 (C.D. Cal. Feb. 19, 2016) (concluding that third factor weighed in favor of waiver  
17 despite hundreds of thousands of documents where the party asserting privilege delayed  
18 disclosure and production of privilege log for over a year). Thus, the third factor also  
19 weighs in Plaintiffs favor. But even if it does not, it is outweighed by the other factors.

20           *Fourth*, the other particular circumstances in this case also favor waiver. As stated  
21 above, the RPA has had 20 months to identify responsive documents and make proper  
22 assertions over privileged documents. It has not done so. *See, e.g., Tatung Co.*, 2016 WL  
23 695971, at \*11; *N.L.R.B. v. Sanders-Clark & Co., Inc.*, 2016 WL 2968014, at \*8 (C.D. Cal.  
24 Apr. 25, 2016) (noting that year-long delay in production of privilege log outweighed "time  
25 and expense required to produce the unprivileged documents"). For its part, the RPA has  
26 failed to point to any unusual factors that would make it unduly burdensome to respond to  
27 Plaintiffs' requests. Moreover, at an earlier stage, Plaintiffs expressed a willingness to  
28 consider an attorneys'-eyes-only arrangement, which would further simplify the discovery

1 process. It was *the RPA's choice* to not pursue this in any manner until 4:30 PM the day  
2 compliance with the Court's July 17, 2023 Order was due. The particular circumstances of  
3 this case therefore make clear that responding to Plaintiffs' requests would have been  
4 straightforward.

5 Taken as a whole, the RPA's refusal to justify its privilege assertions has resulted  
6 in a "needless waste of time and resources" and is emblematic of a "tactical manipulation  
7 of the rules and the discovery process." *Burlington N. & Sante Fe Ry. Co.*, 408 F.3d at  
8 1149. The Court should thus hold that the RPA has waived its privilege assertions.

### 9 CONCLUSION

10 The Court should grant Plaintiffs' motion to compel, find that the RPA has waived  
11 its privilege assertions, and order production of all withheld documents.  
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2 Dated: September 8, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2023, a copy of the foregoing **MOTION TO COMPEL THE REPUBLICAN PARTY OF ARIZONA** was filed electronically with the Arizona District Court Clerk's Office using the CM/ECF System for filing, which will provide a Notice of Electronic Filing to all CM/ECF registrants, and served via e-mail on the following recipients:

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