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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mi Familia Vota; et al.,

Plaintiffs,

and

DSCC and DCCC,

Plaintiff-Intervenors,

v.

Katie Hobbs, in her official capacity as Arizona Secretary of State; et al.,

Defendants,

and

RNC and NRSC,

Defendant-Intervenors.

Case No.: CV-21-01423-DWL

NON-PARTY REPUBLICAN PARTY OF ARIZONA'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL THE REPUBLICAN PARTY OF ARIZONA

(*Oral Argument Requested)*

(Assigned to the Hon. Dominic Lanza)

Non-party Republican Party of Arizona ("**ARP**") submits its Response to Plaintiffs' Motion to Compel The Republican Party of Arizona and asks the Court to deny Plaintiff's Motion to Compel on the basis that ARP—contrary to Plaintiffs' contentions— has already produced

sufficient privilege logs in support of ARP's that they were not waiving the First Amendment privilege and attorney-client privilege. In addition, while ARP has continuously attempted to resolve this dispute, Plaintiffs have failed to act in good faith and have never told ARP why it believes the privilege logs are insufficient, thereby violating Fed. R. Civ. P. 37(a)(1), which requires the party seeking to compel discovery to certify that it "has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." It also destroys their claim that somehow more information is needed to assess the privilege and Rule 26, when Plaintiffs will not identify what information is needed.

It is undisputed that Plaintiffs have proffered only two dubious and speculative rationales for seeking information from ARP in this case:

1. "ARP—especially its Chairwoman—was a vocal, public advocate for SB 1485 and other voting restrictions in the wake of the 2020 election."
2. "[P]ublicly available evidence also suggests that the ARP worked hand in glove with elected officials, including Arizona legislators, in connection with this advocacy."

[Doc. 161 at 4:11-14].

That fact, standing alone, is plainly inadequate to warrant the issuance of subpoenas to non-parties, and it also presents a clear First Amendment problem. Simply put, Plaintiffs are merely making the following false syllogism: "this is a group that supported the legislation, so they must have relevant information – and therefore, you must compel them to produce all of their documents and communications regarding Arizona's voting system and laws."

I. FACTUAL BACKGROUND

In an attempt to infringe on clearly protected activities, on January 10, 2022, Plaintiffs served ARP with a subpoena. On January 24, 2022, ARP's counsel sent a letter to Plaintiffs' counsel informing them of ARP's legitimate objections, including its objection that the information sought was protected under the First Amendment privilege. [*See* Letter, Jan 24, 2022, attached hereto as **Exhibit A**].

After nearly six months of communication, on July 14, 2022, Plaintiffs submitted their Motion to Compel, a noteworthy six (6) months following the alleged service of the subpoena. [Doc. 161]. ARP responded on August 4, 2022, raising various objections and asserting protections under the First Amendment privilege. [Doc. 171]. On October 22, 2023, the Court delivered its decision on the Plaintiff's Motion to Compel, partially granting and partially denying it. Refer to *Mi Familia Vota v. Hobbs*, 343 F.R.D. 71 (D. Ariz. 2022).

Subsequent to the Court's ruling, ARP initiated collaborative discussions with Plaintiffs concerning its document production, and ARP furnished the requisite documents to Plaintiffs. Through this communication, ARP's counsel reiterated that it was not waiving the First Amendment privilege. [*See* Email, Dec. 13, 2022, attached hereto as **Exhibit B**]. ARP made additional productions to Plaintiffs on January 19, 2023, and February 1, 2023. [*See* Email, Jan. 19, 2023, attached hereto as Exhibit C; Email, Feb. 1, 2023, attached hereto as **Exhibit D**]. With each production, ARP asserted its First Amendment privilege. [*See* Exs. B-D].

It was Plaintiffs, not ARP, who then waited over four (4) months before bringing their purported "discovery dispute" before the Court. A hearing concerning the discovery dispute between the involved parties was convened by the Court on July 17, 2023. In accordance with the Court's directive, within a span of 21 days, ARP was mandated to employ search terms delineated in the email from ARP's counsel dated May 10, 2023. [See Doc. 236]. This required the submission of pertinent documents or, alternatively, the disclosure of a privilege log. *Id.* Acting promptly on this order, ARP's representatives reached out to Teris/Repario for assistance.[1] [*See* Email attached hereto as **Exhibit E**]**.** However, the engagement of Repario's services necessitated a $10,000 retainer, which ARP was unable to pay immediately.[2] *Id.* Upon payment of the retainer on or around July 25, 2023, Repario commenced the document collection process. *Id.* However,

[1] Repario is a third-party provider that assists with e-discovery. *See* https://repariodata.com/

[2] ARP was unable to pay the $10,000 retainer and had to negotiate it down to $5,000. Despite the lower retainer, ARP still needed a week to come up with the $5,000 because it did not have the funds to pay for it.

on August 1, 2023, when ARP's counsel sought an update, Repario encountered issues related to two-factor authentication for email acquisition. *See Id.*

Repario's updates on August 2 and 3, 2023, indicated progression in the collection process with minor technical setbacks. *Id.* Notably, on August 4, 2023, there was mention of network disruptions delaying the completion of the processing. *Id.* On August 7, 2023, one day before the Court's deadline, Repario informed ARP that there were over 60,000 documents responsive to the various search terms. This was this first time ARP knew the numbers regarding the search results.

On August 7, 2023, ARP's counsel called Plaintiffs' counsel and left a voicemail to discuss what Plaintiffs would like to see in ARP's First Amendment privilege log. Plaintiffs' counsel never returned the call. The next day, on August 8, 2023, ARP's counsel sent a detailed email to Plaintiffs' counsel, including the reasons why certain information was not included. ARP's counsel expressly stated that it was willing to engage in further conversation and was open to a protective order. [*See* Email, Aug. 8. 2023, attached hereto as **Exhibit F**]. ARP's counsel also highlighted ARP's limitations in reviewing all 61,298 emails/documents due the exuberant cost of $100,000.[3] Initial perusal revealed the presence of sensitive data such as credit card details and residential addresses. The email also re-emphasized ARP's assertion of the First Amendment privilege and introduced two privilege logs. *Id.* To save cost, ARP used artificial intelligence ("**AI**") to drastically cut down the number of responsive documents to approximately 5,000 documents.[4] If the Court intends to grant Plaintiffs' Motion to Compel, it should only order ARP to produce the approximately 5,000 documents.[5] Despite acting in good faith and attempting to work with Plaintiffs, Plaintiffs filed their Motion to Compel.

Now, Plaintiffs are seeking disclosure of over 60,000 documents, which are clearly privileged. The Court should not order the production of any of the documents that are not

[3] Repario stated it would cost $80,000-$100,000 to manually review over 60,000 documents. *Id.*

[4] No attorney client communications were a part of the 5000 emails. Thus, an attorney client privilege log will be required.

[5] 97% of the AI reduced documents are related to the Cyber Ninja's audit, which is not relevant to Plaintiffs' claims.

response, unequivocally privileged, and/or contain confidential or personally identifiable information. Requiring the ARP and its counsel to produce all the documents will undoubtedly leave both parties open to liability and result in lawsuits. To require ARP to go through 61,298 documents is overly burdensome, especially since it is a non-party, and the Court has rejected its request to be reimbursed for the expense. *Whole Woman's Health v. Smith*, 896 F.3d 362, 374 (5th Cir. 2018), *as revised* (July 17, 2018) ("We turn instead to applications of Rule 45(d), which states that a court "must" quash a subpoena to avoid "subject[ing] a person to undue burden.")

II. LEGAL ARGUMENT

A. Plaintiffs' Entire Subpoena Arises from Protected Activities; Thus, Documents Arising Therefrom are Protected

Plaintiffs have admitted that the only reason they issued the subpoena was due to ARP's former Chairwomen was a vocal, public advocate for SB 1485 and other voting restrictions in the wake of the 2020 election. [Doc. 161 at 4:11-14]. That is a protected activity under the First Amendment. The Supreme Court has held that First Amendment privilege applies to "the views expressed and ideas advocated" at gatherings and defendant was entitled to rely on the First Amendment in refusing to disclose such information. *See DeGregory v. Att'y Gen. of State of N. H.*, 383 U.S. 825, 828 (1966). That is exactly what is happening in this case. The former Chairwoman advocated about a new law, and now Plaintiffs are attempting to gather as much information as possible from ARP regarding that protected activity. First Amendment privilege "***turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities***." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010) (emphasis added).[6] Everything that Plaintiffs are requesting is protected under the First Amendment because it all arises from conduct protected under the First Amendment.

[6] ARP already submitted a declaration to the Court and Plaintiffs regarding the deterrent and chilling effect the production of document responsive to the subpoena will have on the ARP and its members. [Doc. 229 at 9].

Federal Rule of Civil Procedure 26(b)(5)(A)(ii) provides that a party must "describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Here, the privilege does not arise from the documents themselves. It is all based on the protected conduct, as described herein. Undoubtedly, requiring ARP to disclose such documents will have a "deterrent effect on the exercise of protected activities." *Perry*, 591 F.3d at 1162. Plaintiffs' claim that the ARP's privilege log is insufficient because there is specific privilege to each document is a farce because the entire subpoena is based on protected activity—The privilege does not arise out of the nature of the documents withheld. Since the subpoena arises from protected activity, everything it seeks is protected under the First Amendment and ARP should not have to produce protected documents.

B. Under *Perry*, a Privilege Log is Not Necessary to Assess the First Amendment Privilege Claim. However, ARP's Privilege Log is Sufficient.

In *Perry v. Schwarzenegger*, the Ninth Circuit recognized "that Proponents had failed to produce a privilege log required by the Federal Rule of Civil Procedure 26(b)(5)(A)(ii)." 591 F.3d at 1153, n.1 (The Court agreed with the district court that "some form of a privilege log is required." *Id.* However, the Ninth Circuit stopped short of describing what needed to be in the privilege log. Ironically, in *Perry*, the party failed to produce a privilege log, and the Ninth Circuit still determined that the information was privileged under the First Amendment without requiring the party to produce any sort of log.

Here, there is no dispute that ARP produced privilege logs. Instead, Plaintiffs are apparently dissatisfied with the contents of the privilege log without telling ARP why. Even considering *La Union Del Pueblo Entero v. Abbott*, 2022 WL 17574079, at *10 (W.D. Tex. Dec. 9, 2022), which Plaintiffs relied upon, ARP's privilege log is sufficient. It must be noted that in *La Union Del Pueblo Entero*, the party did not produce a privilege log at all, nor did the court find that the party waived any privilege by failing to do so.

First, the ARP expressly stated that the documents were subject to the First Amendment privilege. Second, ARP described the type of document by including the file extension. ARP also

included the internal control number so the document could be easily identified in ARP's e-discovery platform, the date of the document, and the search term(s) the documents were associated with. Any additional information would reveal information that is protected under the First Amendment. For example, stating the to and from would reveal the members associated with the ARP. The subject line or file name will also reveal protected information because it describes the nature and the topic of the communication, which is protected under the First Amendment. Moreover, even if ARP gave a description of the contents of the communication, it would reveal privileged or protected information. This is unlike the attorney-client privilege, where a general description such as "providing legal advice to client" describes the contents of the communication. However, if the ARP stated, for example, "discussion about new law" it would infringe its right to associate to advance shared political beliefs, including the right to privately exchange ideas and formulate strategy and messages, *Perry*, 591 F.3d at 1142. It would further infringe the First Amendment rights if the ARP provided the names of the individuals who were parties to such communication. Undoubtedly, requiring such disclosure of political affiliations and activities that have a "deterrent effect on the exercise of First Amendment rights[.]" *Id.*, 591 F.3d at 1140 (quoting *Buckley,* 424 U.S. at 64–65, 96 S.Ct. 612).

After ARP produced its First Amendment Privilege log, ARP's counsel attempted to engage in conversation with Plaintiffs, and specifically tried to discuss what, if anything, it believed was insufficient about the privilege log. No one on the call stated anything. Instead of engaging in a good faith conversation regarding any purported deficiencies, Plaintiffs ran to this Court seeking relief regarding some kind of "gotcha." *See Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351, 207 L. Ed. 2d 784 (2020) ("Constitutional litigation is not a game of gotcha[.]") *Chabrowski v. Litwin*, 2017 WL 3530373, at *1 (D. Ariz. June 19, 2017) ("Plaintiff must understand that civil litigation in federal court "is not a game of 'gotcha.'" (Citation omitted)).

If Plaintiffs believed the ARP's logs were deficient, they had a continuing duty to meet and confer with the ARP regarding the alleged deficiencies. *Markson v. CRST Int'l, Inc.*, 2021 WL 4027515, at *2 (C.D. Cal. June 30, 2021) ("While the parties met and conferred about defendant's

original privilege log in January 2021, that does not excuse plaintiffs of their continuing obligation to attempt to further meet and confer with defendant to resolve any additional disputes regarding defendant's amended privilege log.") Again, Plaintiffs refused to communicate with ARP regarding its alleged deficiencies, despite ARP's attempts to discuss any such issues. Instead, Plaintiffs filed their Motion to Compel when Plaintiffs knew that ARP was willing to discuss any issues that it may have had with the privilege logs. And Plaintiffs have still not stated what information is needed to assess the privilege claim. However, Plaintiffs already know that privilege claims arise from protected activity that resulted in Plaintiffs issuing a subpoena.

C. Disclosure Would Infringe on Plaintiffs' First Amendment Rights

The "'right of individuals to associate for the advancement of political beliefs' is fundamental." *S.F. Cnty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir. 1987) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, No. 75 Civ. 5388 (MJL), 1985 WL 315, at *8 (S.D.N.Y. Feb. 28, 1985) ("[T]he right of associational privacy [applies to] compelled disclosure of the identity of an association's members or sympathizers...."). "Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Perry*, 591 F.3d at 1142. "The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 175–76 (D.C. Cir. 2003). Accordingly, the "First Amendment protects political association as well as political expression …" *Perry*, 591 F.3d at 1139.

Americans must be free to exercise their important right to speak out in support of proposed legislation without fear of being hauled into Court under threat of subpoena (or having to pay for attorneys to review and rebut lengthy briefs) because of the content of their speech. It is obvious that this is chilling to free speech; and there is absolutely no compelling reason for the Court to endorse it here. Plaintiffs' subpoena was occasioned solely by the content of the speech of the AZGOP/its Chair, namely their public support for the legislation at issue in this action, and nothing more. To compel the AZGOP to respond would be to endorse the idea that Plaintiffs can

subpoena any person or organization simply because they expressed support for the laws at issue, which is not only chilling to free speech but abusive. *See DeGregory v. Att'y Gen. of State of N. H.*, 383 U.S. 825, 828 (1966) (applying First Amendment privilege to "the views expressed and ideas advocated" at political party meetings); *Perry v*, 591 F.3d at 1162 (applying the First Amendment privilege to internal campaign communications because of the "self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request"); *Dole v. Serv. Emps. Union, AFL-CIO, Loc. 280*, 950 F.2d 1456, 1459 (9th Cir. 1991) (applying First Amendment privilege to statements "of a highly sensitive and political character" made at union membership meetings); *In re Motor Fuel Temperature Sales Practices Litig*., 258 F.R.D. 407, 414 (D.Kan.2009) (applying First Amendment privilege to the disclosure of "trade associations' internal communications and evaluations about advocacy of their members' positions on contested political issues"); *see also generally San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir.1987) ("'the right of individuals to associate for the advancement of political beliefs' is fundamental").

Given the concerns that give rise to the First Amendment privilege—protecting the right to associate to advance shared political beliefs, including the right to privately exchange ideas and formulate strategy and messages, *Perry*, 591 F.3d at 1142—it would seriously undermine constitutional protections if a political organization engaging in protected activity risked compelled disclosure of protected information by advancing a highly curated portion of its message to the public outside the context of litigation. In such a case, a broad finding of waiver would be clearly inappropriate. *Cf. In re von Bulow*, 828 F.2d 94, 103 (2d Cir. 1987) ("But where, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed.").

D. Plaintiffs easily satisfy a *prima facie* showing that the information sought is Protected Under the First Amendment

"In this [Ninth] circuit, a claim of First Amendment privilege is subject to a two-part framework. The party asserting the privilege must demonstrate a *prima facie* showing of arguable First Amendment infringement." *Perry*, 591 F.3d at 1160. "…[T]he evidentiary burden will then shift to the [party seeking discovery] ... [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest ... [and] the 'least restrictive means' of obtaining the desired information." *Id.*, 591 F.3d at 1161. "Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." *Id.* Whether a First Amendment privilege applies "turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities." *Id.*, 591 F.3d at 1162. Here, the burden of demonstrating an "arguable" First Amendment infringement is easily met.

Federal courts have consistently held that disclosure of internal associational activities (i.e., membership lists, volunteer lists, financial contributor lists, and past political activities of members) satisfies this *prima facie* showing because disclosure of these associational activities chills freedom of association. *NAACP v. Alabama,* 357 U.S. at 462, 78 S.Ct. 1163. Consequently, "if a discovery request seeks disclosure of ***internal associational activity***, ***federal courts assume, sometimes implicitly, that the party seeking protection has made his prima facie showing; only then do courts shift the burden to the party seeking disclosure to demonstrate a compelling need for the information*** (i.e. apply the balancing test)." *Wyoming v. USDA*, 239 F. Supp. 2d 1219, 1237, n. 14 (D. Wyo. 2002), *vacated as moot*, 414 F. 3d 1207, 1237 (10th Cir. 2005) (emphasis added" (citing *Grandbouche v. Clancy,* 825 F.2d 1463, 1465–67 (discovery request sought,

among other things, membership lists, therefore, the court applied the balancing test)). In other words, "…courts have taken judicial notice of the fact that disclosure of these internal associational activities — membership lists, volunteer lists, financial contributor lists, and political activities of the organization's members — will lead to threats, harassment, or reprisal, thereby chilling freedom of association." *Wyoming,* 239 F. Supp. 2d at 1237, n. 14. Such is the case here.

As described in ARP's Executive Director, Nick Ivory's declaration, having to produce the requested document would have a chilling effect if "ARP's ability to formulate and execute strategy concerning matters such as fundraising, voter turnout, and public messaging, if – as the direct result of it (s former Chair) speaking out in support of legislation[.]" [*See* Ivory Decl. attached hereto as **Exhibit G**.][7] There would also be a chilling effect on the ARP's public messaging if internal emails and documents are required to be produced to public scrutiny, including by politically-hostile parties (like the Plaintiffs in this case) or even the government. *Id.* Also, such a requirement to produce the requested documents would have a chilling effect on the ARP's staff to freely discuss matters such as "fundraising and voter turnour [sic], both with persons inside and outside of the ARP, when any mention of any demographic group of voters in our communications will result in them becoming public." *Id.* It would also be chilling and harmful to the ARP's ability to operate if communication with its members is publicly exposed. Undoubtedly, members would not want to participate if they knew their communication with the ARP would be made publicly available. *Id.* ARP has met its burden that the requested documents are subject to the First Amendment privilege.

E. <u>ARP Did Not Waive Any of its Asserted Privileges</u>

The Supreme Court has defined waiver as "the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (internal quotation marks omitted). There is nothing in the record that ARP has

[7] This Declaration was also attached to ARP's joint statement filed with the Court. [Doc. 229 at 9].

intentionally relinquished its rights or privileges in this case. Time and time again, ARP has asserted the First Amendment privilege. It has never intentionally relinquished its First Amendment rights. Plaintiffs rely on *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Dist. of Mont*., 408 F.3d 1142, 1149 (9th Cir. 2005) to support its contention that ARP somehow waived its First Amendment privilege. However, *Burlington N. & Santa Fe Ry. Co.* does not discuss the First Amendment privilege—it only discusses the attorney-client privilege. Plaintiffs did not cite a single case in which a court had determined that the First Amendment privilege was waived based on an insufficient privilege log. Each case Plaintiffs cite regarding a First Amendment privilege log only provides that a privilege log is required. As described herein, ARP did produce privilege logs for both the First Amendment and attorney-client privileges. Thus, there is no basis for the Court to order ARP to produce any documents based on a purported waiver.

F. The Court has Failed to Protect ARP from Significant Costs in Responding to Plaintiff's Subpoena

Additionally, ARP requests that it be reimbursed for its fees and costs associated with Plaintiff's subpoena. Fed. R. Civ. P. 45(d)(2)(B)(ii). Under Rule 45(d)(2)(B)(ii), when a court orders compliance with a subpoena over an objection, "the order ***must*** protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." *Mi Familia Vota v. Hobbs,* 343 F.R.D. 71, 100 (D. Ariz. 2022*)* (emphasis added). Courts have held that fees of $9,000 are sufficiently significant to justify cost-shifting. *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001); *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1185 (9th Cir. 2013) ("we have no trouble concluding that $20,000 is 'significant.'"). ARP has been charged at least $26,153.76 to respond to Plaintiffs' subpoena, which is well over $9,000. [*See* Invoice attached hereto as **Exhibit H]**. Accordingly, the Court has unequivocally failed to protect ARP, as it is required to do, by refusing to have Plaintiffs pay for ARP's costs associated with responding to the subpoena.

III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion to Compel and find that ARP produced sufficient privilege logs and has established that the requested documents are

protected by the First Amendment and attorney-client privileges. Accordingly, the Court should require Plaintiffs to reimburse ARP for its costs for having to respond to the Plaintiffs' subpoena. ARP also requests its fees and costs for having to respond to the Motion to Compel due to Plaintiffs failing to meet their requirements under Fed. R. Civ. P. 26 and 37.

RESPECTFULLY SUBMITTED this 22nd day of September 2023.

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