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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and INDIGENOUS IDAHO ALLIANCE,

Plaintiffs,

v.

RAÚL LABRADOR, in his official capacity as the Attorney General of the State of Idaho,

Defendant.

Case No. 1:23-cv-00323-DKG

REPLY IN SUPPORT OF NON-PARTY IDAHO STATE REPRESENTATIVE BARBARA EHARDT'S MOTION TO QUASH THIRD PARTY SUBPOENA DUCES TECUM, FOR PROTECTIVE ORDER, AND FOR EXPENSES [DKT. 98]

If legislative privilege can be bypassed here, then the privilege provides little protection at all. Consider how Plaintiffs apply their proposed five-part test—they believe immunity does not protect legislators from being compelled to produce documents and testify if a plaintiff's claim has something to do with legislative intent, if nobody else can testify about the "personal knowledge" of the legislator, and if the claim involves "federal constitutional interests" and a law passed by "legislators." Dkt. 101 at 9-15. But that's true of *every* Equal Protection claim—Plaintiffs provide nothing by way of peculiar need or unique relevance that would set this case apart from any other case involving any number of constitutional challenges turning on legislative intent.

The Court should not accept Plaintiffs' toothless version of legislative privilege. Indeed, Ninth Circuit precedent compels the opposite result: there must be more than extraordinary circumstances to overcome legislative privilege. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187–88 (9th Cir. 2018); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984). Cases from other circuits agree, and Plaintiffs are wrong to suggest that the Court can (or should) disregard these cases in favor of a handful of unpublished and mostly out of circuit district court decisions. In any event, Plaintiffs don't even satisfy the flawed and inapplicable five-factor test they proffer.

ARGUMENT

I. Legislative immunity and legislative privilege apply to all documents and areas of testimony sought by Plaintiffs.

Plaintiffs fundamentally misapprehend the nature of legislative immunity and legislative privilege. "Legislative immunity's practical import is difficult to overstate," given its role in protecting legislators who "bear significant responsibility for many of our toughest decisions" and need "the breathing room necessary to make these choices in the public's interest." *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). The doctrine does so by

"shield[ing] [legislators] from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *Id.* "Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes." *Id.* Legislative privilege is a corollary, as immunity "not only protects state legislators from civil liability, [but] also functions as an evidentiary and testimonial privilege." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992). Legislators are "protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

Holdings by the Ninth Circuit on this privilege are unequivocal: legislative privilege requires more than "extraordinary circumstances" to overcome. *Foley*, 747 F.2d at 1298; *Lee*, 908 F.3d at 1187-88. The mere fact that legislative motivation bears on a plaintiff's constitutional claim—which isn't the case here, where Plaintiffs have cited no case in their response saying that legislative motivations bear on a right-to-travel claim, *see* Dkt. 101 at 9–10 (citing *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), an Equal Protection case)—is not good enough. This is because "[t]he relevant governmental interest is determined by objective indicators as taken from the face of the statute, the effect of the statute, comparison to prior law, facts surrounding enactment of the statute, the stated purpose, and the record of proceedings." *Foley*, 747 F.2d at 1297. A "categorical exception" to legislative privilege "whenever a constitutional claim directly implicates the government's intent . . . would render the privilege 'of little value.'" *Lee*, 908 F.3d at 1188.

This privilege is especially important in three respects here. First, it covers anything related to legitimate legislative activity—thus, documents or communications relied on in legislative fact finding and communications from constituents or lobbyists—and "potential or conceptual

legislation" is included. *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 670 (D. Ariz. 2016) (collecting cases). Second, the privilege is personal to the legislator, not dependent on the information covered by the privilege (as it is meant to protect the legislator from the burden of civil process) and thus *is not waived* by sharing the information. *Mi Familia Vota v. Hobbs*, 682 F. Supp. 3d 769, 777–78 (D. Ariz. 2023); *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 237–38 (5th Cir. 2023); *In re North Dakota Legislative Assembly*, 70 F.4th 460, 464 (8th Cir. 2023) (cert. granted, vacated as moot, 144 S. Ct. 2709 (mem.)). Third, the better reading of appellate cases is that the evidentiary privilege is absolute,[1] overcome only in more than extraordinary circumstances. *Abbott*, 68 F.4th at 238–40; *North Dakota*, 70 F.4th at 464; *see also Lee*, 908 F.3d at 1187–88.[2]

Here, all of the sought documents, on the face of the subpoena requests, seek material held by Representative Ehardt pertaining to her bona fide legislative activity. Dkt. 98-3 at 9–10. Every request relates to "potential or conceptual" legislation or "Abortion Trafficking Legislation." *Id.* A subpoena seeking documents and information going to the formation of legislation, including "obtaining information pertinent to potential legislation or investigation" strikes at the heart of legislative privilege. *Puente Arizona*, 314 F.R.D. at 670 (quoting *Miller v. Transamerican Press,*

[1] Plaintiffs cite *United States v. Gillock*, 445 U.S. 360, 374 (1980) for the proposition that it is not absolute, Dkt. 101 at 6, but omit the relevant context: criminal prosecution of a state senator, not merely generic "federal interests." As the Eighth Circuit noted, "the Supreme Court otherwise has generally equated the legislative immunity to which state legislators are entitled to that accorded Members of Congress under the Constitution." *North Dakota*, 70 F.4th at 463 (citing *Sup. Ct. of Va. v. Consumers Union*, 446 U.S. 719, 733 (1980)). Plaintiffs also strangely argue that the Idaho Constitution's Speech and Debate clause is narrow. Dkt. 101 at 6 (citing Idaho Const. art. III, § 7). That's false—the Idaho Constitution's "temporal" bar on civil process is *broader* than the Federal Constitution's limit with its *addition* of 10 days' grace. *Compare* U.S. Const. art. I, § 6, c. 3.

[2] The District of Arizona reads *Lee* as consistent with the five-factor test, *Hobbs*, 682 F. Supp. 3d at 782 n.7, but in *Hobbs*, both parties agreed that the five-factor test applied. Here, Representative Ehardt urges the Court to read *Lee* consistent with the Fifth and Eighth Circuit decisions on this issue, as well as the earlier Ninth Circuit *Foley* decision (which would control over later panel decisions anyway) rather than district courts cited by Plaintiffs.

Inc., 709 F.2d 524, 530 (9th Cir. 1983)); *accord* Dkt. 101 at 12 (claiming subpoena is "tailored to communications concerning a single piece of legislation.").

Next, while Plaintiffs argue that the privilege was waived to the extent that the materials were shared, their only support for this argument comes from unpublished district court cases—including *two* where Plaintiffs fail to disclose that the district court decision was reversed on the relevant point. In *Turtle Mountain*, the district court order, before being vacated as moot by the Supreme Court, was reversed by the Eighth Circuit on the precise question of waiver. Dkt. 101 at 15 (citing *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-cv-22, 2023 WL 2697372, at *2 (D.N.D. Mar. 14, 2023) (rev'd *sub nom. North Dakota*, 70 F.4th at 464–65). As the Eighth Circuit put it in reversing Plaintiffs' cited authority:

> The privilege is not designed merely to protect the confidentiality of deliberations within a legislative body; it protects the functioning of the legislature more broadly. Communications with constituents, advocacy groups, and others outside the legislature are a legitimate aspect of legislative activity. The use of compulsory evidentiary process against legislators and their aides to gather evidence about this legislative activity is thus barred by the legislative privilege.

North Dakota, 70 F.4th at 464 (citing *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007); *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)). Plaintiffs make the same mistake in citing *Jackson Mun. Airport Auth. v. Bryant*, No. 3:16-cv-246-CWR-FKB, 2017 WL 6520967 (S.D. Miss. Dec. 19, 2017), which was *also* reversed directly as to waiver (and ultimately also mooted out[3]). *Jackson Mun. Airport Auth. v. Harkins*, 67 F.4th 678, 687 (5th Cir. 2023) (op. withdrawn and superseded by 2023 WL 5522213, at *5) (rehr'g en banc granted and vacated by 78 F.4th 844 (5th Cir. 2023)).

The most recent application of the test by the District of Arizona in the *Mi Familia Vota*

[3] 98 F.4th 144 (5th Cir. 2024) (en banc).

saga applied the privilege to deny a motion to compel production as to a third-party subpoena issued *to lobbyists* when that subpoena sought their communications with legislators. *Mi Familia Vota v. Noble*, No. CV-21-01423-PHX-DWL, 2024 WL 4371943 (D. Ariz. Oct. 2, 2024). Plaintiffs have no persuasive argument (and certainly no good authority) supporting waiver. Because the privilege protects the legislator from the burden of process, it protects the information she has, even if it's been shared.

Lastly, Plaintiffs fail to distinguish *Lee*'s demand for extraordinary circumstances. The factual record in *Lee* wasn't lacking any key facts; it was lacking a reason to depart from the general rule protecting legislators from civil process. 908 F.3d at 1188 ("Without sufficient grounds to distinguish those circumstances [in *Vill. of Arlington Hts.*], from the case at hand, we conclude that the district court properly denied discovery on the ground of legislative privilege."). Nor can the principle in *Lee* be discounted as confined to cases lacking an important public interest—three decades earlier, the Ninth Circuit in *Foley* also demanded extraordinary circumstances before permitting discovery into legislator motives on a First Amendment challenge. 747 F.2d at 1298.

Plaintiffs provide no justification for ignoring the Ninth Circuit's demand for extraordinary circumstances, above and beyond mere relevance, in favor of the *Bethune-Hill* test, other than that they prefer the latter. Plaintiffs cite a divided three judge district court opinion from Wisconsin, *Whitford v. Gill*, 331 F.R.D. 375 (2019), and a District of Nevada unpublished case discussing *Lee* in obiter dicta. *Gypsum Res., LLC v. Clark County*, No. 2:19-cv-00850-GMN-EJY, 2022 WL 16951250, at *7 n.13 (D. Nev. Nov. 15, 2022) ("[T]he discussion in *Lee* is not germane to the Court's decision."). Plaintiffs also greatly overstate the use of the qualified privilege test, as applied to legislative privilege, among the district courts in this Circuit: they cite *one* such case applying the test, Dkt. 101 at 6, 7, and that case (like others not cited) resulted in upholding legislative

privilege, including as to material exchanged with non-legislators. *Puente Ariz.*, 314 F.R.D. at 670; *see also Hobbs*, 682 F. Supp. 3d at 789 (case not cited by Plaintiffs, applying test but upholding privilege).[4]

The bottom line is that Plaintiffs cite no Ninth Circuit case allowing discovery of information subject to un-waived legislative privilege, five-factor test or not.[5] "If . . . legislative motives are properly discoverable, then legislators could be deposed in every case where the governmental interest in a regulation is challenged. Such a practice would be contrary to the Supreme Court's longstanding rejection of the use of legislative motives." *Foley*, 747 F.2d at 1296–97 (citing *Fletcher v. Peck*, 10 U.S. 87, 130–31 (1810)). Even the relevance of motive to litigation is not good enough. *Lee*, 908 F.3d at 1187–88. The Court, in keeping with this longstanding precedent, should demand extraordinary circumstances to depose Representative Ehardt or obtain document discovery. None are present, nothing has been waived, and the subpoena obviously seeks protected material. The motion to quash should be granted.

[4] In two other District of Arizona cases, the court has discussed but not applied the *Bethune-Hill* test. *Doe v. Horne*, 737 F. Supp. 3d 758 (D. Ariz. 2024) (test not applied because privilege had been waived); *Tohono O'Odham Nation v. Ducey*, No. CV-15-01135-PHX-DGC, 2016 WL 3402391 (D. Ariz. June 21, 2016) (test not applied as court would examine requested documents in camera). Plaintiffs wrongly cite *Gypsum Resources* as a case applying the test—it does not. Dkt. 101 at 9 (citing 2022 WL 16951250 at *7 n. 13).

[5] Cases in the Ninth Circuit allowing discovery of information otherwise protected by the legislative privilege involve instances where legislators waived the privilege by complying with the discovery order in question, *Mi Familia Vota v. Fontes*, 129 F.4th 691, 731–32 (9th Cir. 2025), or mooted the privilege by voluntarily intervening in the case and putting their intent at issue. *Doe*, 737 F. Supp. 3d at 764–65. Equally importantly, the District of Arizona has recognized and applied the requirement for extraordinary circumstances even alongside the five-factor test; thus, there's no confining *Lee* and *Foley*'s principle to their facts.

II. Even under the *Bethune-Hill* test, legislative privilege prevails over discovery pertaining directly to Representative Ehardt's legislative duties.

Even if the Court applies the *Bethune-Hill* test for overcoming legislative privilege, all but one of the factors weighs against disclosure, and that remaining factor is neutral.

Relevance. The inclusion of relevance as a factor in the balancing analysis results in double-counting, because relevance is a threshold issue—there is no privilege analysis if the requested information isn't relevant. The practical result is that the relevance factor unevenly favors the discovering party for reasons unrelated to the privilege analysis and is of no help.

Nevertheless, Representative Ehardt's legislative activity is not relevant to the legitimate issues in this case, just as such activity is rarely, if ever, relevant in other cases where plaintiffs seek to examine legislative intent, as the Supreme Court and the Ninth Circuit have held.

> The Supreme Court has held that an otherwise constitutional statute will not be invalidated on the basis of an "alleged illicit legislative motive," *United States v. O'Brien*, 391 U.S. [367,] 383 [(1968)], and has refused to inquire into legislative motives. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).
>
> The Court prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task. Individual legislators may vote for a particular statute for a variety of reasons. *O'Brien*, 391 U.S. at 384. "The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U.S. 703, 710–11 (1885).

Foley, 747 F.2d at 1297–98 (cleaned up; some citations omitted). Instead, "[t]he relevant governmental interest is determined by objective indicators." *Id*. at 1297 (citations omitted). The only conceivably relevant evidence is the text of the statute and (at most) public legislative history. Plaintiffs have made no showing that they are likely to find anything else in this burdensome fishing expedition. This factor weighs against disclosure.

Availability by Other Means. Plaintiffs significantly overstate their diligence in seeking the requested information by other means. Of the *seven* outside entities whose communications

Plaintiffs seek in their subpoena to Representative Ehardt, they have issued subpoenas to only two. Unless they have served third-party subpoenas duces tecum without giving notice to the Attorney General, they have made no effort to subpoena information from Idaho Chooses Life/David Ripley, Alliance Defending Freedom, Bopp Law Firm, or Cooper & Kirk. The two subpoenas Plaintiffs did issue, they issued belatedly. As of March 24, 2025, Scheduling Order, Dkt. 64 ¶ 7, the fact discovery cutoff was set for October 23, 2025. Nevertheless, Plaintiffs waited until early September 2025 to serve subpoenas to Right to Life Idaho and National Right to Life, with an October 10 return date. Dkt. 72-3. Then, after the discovery deadline was extended to January 8, 2026 (Dkt. 69), Plaintiffs waited more than two months—from September 17, 2025, to November 30, 2025—to serve their subpoena to Representative Ehardt. Thus: a return date less than one month before the start of the legislative session, when legislators' preparation is at its peak.

Moreover, even Plaintiffs' partial efforts at other means of discovery are still pending. It is an abuse of this factor to claim that "Plaintiffs have been unable to obtain this information from any other source despite diligent efforts" (Dkt. 101 at 5, 12) when the other two subpoenas remain pending and may yet result in document production and/or depositions. Plaintiffs' speculation about what the other discovery targets may or may not have and what Representative Ehardt may or may not have, Dkt. 101 at 11, do not support breaching the legislative privilege. Likewise, Plaintiffs' apparent dissatisfaction with Defendant's discovery responses does not support breaching privilege—Plaintiffs should instead use the informal discovery dispute process and file a motion to compel if they truly believe they have been shortchanged by Defendant.

Plaintiffs' document production requests are far from "narrowly tailored," and they are explicitly *not* limited to "communications concerning a single piece of legislation." Dkt. 101 at 12. Among other things, they seek "all documents sent to and received [by anyone] from any lawmaker

[anywhere]" (Request 1), "all documents [from or to anyone]" (Request 2), and so forth. And the subject matter of every request is *not* just H.B. 242 and H.B. 98, but also any other "potential or conceptual state-level legislation [in Idaho or any other state] relating to interstate 'abortion trafficking.'" Dkt. 101 at 3–4. This factor weighs against disclosure.

Seriousness. Seriousness is unlikely ever to favor either side in a constitutional case—both sides have will often have serious interests at stake. While Plaintiffs assert an interest in the right to travel, Defendant asserts an interest in upholding a law designed to preserve unborn life. This case is serious for both sides of the conflict, as well as for non-party legislators.[6] Plaintiffs' citation to *Gillock*, 445 U.S. 360, is off point. *Gillock* involved the assertion of legislative privilege by a legislator who was being criminally prosecuted for bribery, a privilege that never existed and that the Court declined to create. *Id.* at 366, 368 ("Gillock urges that we *construct* an evidentiary privilege"; "the claimed privilege was not thought to be either indelibly ensconced in our common law or an imperative of federalism") (emphasis added). This factor is neutral regarding disclosure.

Government's Role. Even under Plaintiffs' formulation, with less strong interests if the discovery target is the legislature as a whole and stronger interests if the discovery target is an individual legislator, Representative Ehardt has the stronger interests. It is her legislative privilege that is under threat. *Bethune-Hill*, 114 F. Supp. 3d at 341. This factor weighs against disclosure.

Purpose of the Privilege. Plaintiffs concede that the "distraction" purpose of the privilege militates against disclosure. Dkt. 101 at 14. That interest is sufficient to end the inquiry. *Lee*, 908 F.3d at 1187 ("Like their federal counterparts, state and local officials undoubtedly share an interest

[6] The proper test requires upholding legislative privilege specifically where the plaintiff's case is serious. That is why the Ninth Circuit in *Lee* fully "recogniz[ed] that claims of racial gerrymandering involve serious allegations" and that "Defendants have been accused of violating that important constitutional right," and still affirmed application of the privilege. 908 F.3d at 1188.

in minimizing the "distraction" of "divert[ing] their time, energy, and attention from their legislative tasks to defend the litigation.").

Plaintiffs' attempt to "distinguish between the effects of various discovery requests upon legislative functions," Dkt. 101 at 14, is unavailing. Plaintiffs' sweeping document requests and unrestricted (and unspecified) deposition topics very much do intrude upon the legitimate legislative activities of Representative Ehardt, which should be understood to include every action and communication in connection with her "bona fide attempt to enact legislation." *See Puente Ariz.*, 314 F.R.D. at 669 n.3.[7] And Plaintiffs' bald assertion that they "seek non-legislative facts and external communications" so that "the requests do not undermine the purpose of the privilege" is frivolous based on the plain text of the subpoena. Dkt. 101 at 15; *cf. Lee*, 908 F.3d at 1187.

Finally, there is no authority for Plaintiffs' proposition that the legislative privilege arbitrarily does not apply to documents shared with third parties but only applies to documents shared with employees of the Idaho Legislature. *Id.* In fact, nearly all persuasive authority is to the contrary—as noted above, Legislators must communicate with and seek and receive information from third parties to do their jobs effectively. This factor weighs against disclosure.

In sum, even if the Court applies the five-factor test from mostly out of circuit district courts, four of the factors weigh against disclosure while one is neutral.

CONCLUSION

For the foregoing reasons, Representative Ehardt's motion to quash, for protective order, and for her expenses in opposing Plaintiffs' subpoena should be granted.

[7] Plaintiffs' sole citation on this point, the unpublished *Comm. for a Fair and Balanced Map v. Ill. St. Bd. of Elec.*, No. 11 C 5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) does not determine for the Ninth Circuit the scope of the legislative privilege. *See Hobbs*, 682 F. Supp. 3d at 788 (collecting cases).

DATED: December 15, 2025

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on December 15, 2025, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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