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UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTHWEST ABORTION ACCESS FUND, and **INDIGENOUS IDAHO ALLIANCE,** *Plaintiffs*, v. **RAÚL LABRADOR**, in his official capacity as in his capacity as the Attorney General for the State of Idaho, *Defendant*.	Case No.: 1:23-cv-00323-DKG **Reply in Support of of Non-Party Right to Life of Idaho, Inc.'s, Motion for Stay Pending Disposition of Petition for Writ of Mandamus**

Non-party Right to Life of Idaho, Inc., ("**RLI**") has moved for a stay of this Court's Order, D. 108 ("**Order**"), denying in part RLI's motion to quash the subpoena served on RLI by Plaintiffs Northwest Abortion Access Fund, Lourdes Matsumoto, and Indigenous Idaho Alliance (collectively, "**Challengers**"), D. 72 ("**Quash Motion**"), pending resolution of the Petition for Writ of Mandamus ("**Petition**"), *see* D. 118, filed by RLI on Friday, January 16, 2026, in the Ninth Circuit Court of Appeals. D. 119 ("**Stay Motion**"). Challengers have filed their response to such a stay. D. 121 ("**Opposition**"). Because the Opposition *concedes* many of RLI's points, and makes only thin, unpersuasive arguments on others,[1] the Stay Motion should be granted.

I. Challengers concede RLI's likelihood of success on the merits.

RLI has shown that it has a high likelihood of success on the merits of its Petition, easily satisfying all five factors that the Ninth Circuit considers when deciding whether to grant a petition for writ of mandamus. Challengers decline to oppose key aspects of that showing and miss the mark on the others. Accordingly, the Merits Factor[2] weighs heavily in RLI's favor.

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[1]Challengers allege a failure to "demonstrat[e] a substantial likelihood of success on the merits" in a motion for stay pending appeal may be "fatal." Opp'n, D. 121, 4 (quoting *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2024 WL 3640623, at *1 (D. Ariz. July 12, 2024)). *Horne*, however, does not change the importance of how the Ninth Circuit has defined that standard using the sliding-scale/serious questions approach explained in RLI's memorandum, D. 119-1, 3–4 ("**Stay Memorandum**"), which this Court has recently recognized. *Courthouse News Serv. v. Omundson*, No. 1:21-cv-00305-DCN, 2024 U.S. Dist. LEXIS 229171, at *5 (D. Idaho Dec. 17, 2024). That test has recently been referenced in the appellate court as well: deciding a "motion for a stay pending appeal" requires "'consider[ing] whether the government raise[s] serious questions . . . .'" *AFGE v. United States OPM*, No. 25-1677, 2025 U.S. App. LEXIS 7158, at *6 (9th Cir. 2025) (Bade, Cir. J., dissenting on other grounds) (quoting *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 661 (9th Cir. 2021) (citing *Leiva-Perez v. Holder*, 640 F.3d 962, 965-66 (9th Cir. 2011))). *Holder* noted that the "flexible [sliding scale] approach is even more appropriate in the stay context" than the preliminary injunction context. 640 F.3d at 966. Accordingly, a showing that success on the merits "is more likely than not" is not required, but only serious questions and necessary degree of weight of the remaining factors. *Id.*

[2]RLI maintains terminology established in its Stay Memorandum to reference the factors considered in a motion to stay pending resolution of a petition for mandamus. *See* D. 119-1, 3.

A. RLI has demonstrated numerous clear errors.

First, RLI showed that it has demonstrated numerous clear errors in the Order, D. 119-1, 5–6, satisfying the essential factor for mandamus, *see Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010). Because of the ease with which this Court may conclude that RLI has shown a clear likelihood of success on this factor based solely on Challengers' concession of the total lack of relevance of the documents at issue, RLI begins there. Challengers do not present any argument *at all* against RLI's claim concerning relevance. RLI explained that it has shown

> that the subjective motivations of individual legislators generally are not relevant and may not be discovered; that only in cases concerning invidious discrimination may they *potentially* be discovered; and that Challengers have made no attempt to show why that bar on discovery and relevance should be lifted in this right to travel case, in which no invidious discrimination has been alleged, nor any claim raised that might make charges of invidious discrimination relevant.

Stay Mem., D. 119-1, 6 (citing Petition, D. 118, 23–26 (explaining that discovery of legislative motives is generally prohibited and is only relevant in cases alleging *invidious* legislative motives)). Challengers do not dispute RLI's likelihood of success on this issue.

Indeed, the only statement Challengers make addressing this issue is their claim that "the Order's reliance on *Soto-Lopez*" to find the documents relevant "was correct." Opp'n, D. 121, 9 n.2. Simply stating a legal conclusion—especially one so nonspecific as the claim that a given proposition "was correct"—does not constitute argument.[3] Underlying this lack of argument on Challengers' part is the fact that RLI explained in the cited portion of the Petition that *Soto-Lopez* was only a plurality opinion, and even then, it was based on equal protection grounds—*not* on the

[3]While Challengers purport to address the relevance of the documents under the Opposition's heading, "Plaintiff's Subpoena, as Narrowed by the Court, Seeks Discovery That Is Relevant . . . ," D. 121, 8, that section of the Opposition is even *more* conclusory, simply noting that this Court *said* it had narrowed the demands to encompass only "'discovery that is directly relevant,'" *id.* (quoting D. 108, 14–15). Simply repeating a court's characterization is not argument, particularly when the rationale for that characterization is wholly omitted.

right to travel claim; and that Challengers have not made such a claim or any other claim that would make invidious intent relevant. Petition, D. 118, 25 n.13. Their decision not to offer *any* argument on this point means they concede the point, which demonstrates error under both Rule 26 and the First Amendment privilege analysis. Accordingly, on that ground alone—a rather large ground since it demonstrates that *none* of the documents sought are at all relevant—there is no question that RLI has demonstrated a substantial likelihood of success on the merits.[4]

The arguments Challengers *do* make get them no further. In focusing on the fact that this Court permitted discovery only of RLI's communications with "legislators or legislative staff," Challengers misapprehend the nature of First Amendment privilege. While they claim that external communications fall outside of the privilege, Opp'n, D. 121, 5–6, neither the Supreme Court nor the Ninth Circuit have ever held that internality is required. As a court within this circuit has recognized in a case much like this one, an entity's communications with a senator concerning legislation *are* privileged where an affidavit shows First Amendment chill. *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 672–73 (D. Ariz. 2016). And as RLI has explained, numerous other courts (including district courts within the Ninth Circuit and other circuit courts) have also recognized explicitly that "external" documents may be protected by First Amendment privilege.[5] That is because of Supreme Court's clarity on the test: all that is required for the privilege to apply is a "*possible* deterrent effect"—i.e., chill—of First Amendment rights as a result of compelled disclosure. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 602, 616 (2021)

[4]Defendant Raúl Labrador, in his official capacity as the Attorney General of the State of Idaho, has submitted a response in support of granting the stay, which further explains why the documents at issue are not relevant. D. 122, 2–3. RLI agrees with those arguments.

[5]*See* D. 72-1 (citing *Toering v. Ean Holdings LLC*, No. C15-2016-JCC, 2016 U.S. Dist. LEXIS 197116, at *3 (W.D. Wash. July 22, 2016); *LeGrand v. Abbott Labs.*, No. 22-cv-05815-TSH, 2024 U.S. Dist. LEXIS 184790, at *2–3 (N.D. Cal. Oct. 9, 2024); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388, 396–97 (D.C. Cir. 1981)).

(quoted source omitted); *see also* D. 72-1, 6–8. *Perry* recognized this, stating, "[a] *prima facie* showing requires appellants to demonstrate that enforcement . . . will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest . . . 'chilling' of [] associational rights." 591 F.3d at 1160 (cleaned up).

Challengers' attempt to argue that external documents are, *per se*, excluded from First Amendment privilege is therefore an impossible task. Nor does their attempt to bolster that argument by highlighting the fact that *Perry*'s most central holding was about internal documents, Opp'n, D. 121, 6 (citing various cases), gain them any ground. The *Perry* court was not asked to *address* anything other than internal documents. 591 F.3d at 1153, 1155 (noting that the appellants had "argued that their internal campaign communications . . . were privileged" and "[t]he district court concluded that [First Amendment] privilege does not extend to internal campaign communications"). It is therefore no surprise that the cases cited by Challengers recognized that limitation. Even so, *Perry* still provides ample guidance on factors that might be relevant: are the communications at issue private? 591 F.3d at 1165 n.12. Are they strategic? *Id.* The communications at issue here satisfy both of those considerations. Decl. of E. Naugle, D. 93-1, ¶¶ 7–8 ("**Naugle Decl.**"); *see also* Petition, D. 118, 18–21. To the extent *Perry* explained that certain external messages that had been considered in that case were not privileged, it emphasized that that was because those messages *were not strategic*. 591 F.3d at 1165 n.12. Because the communications at issue here *are* strategic, *Perry*'s considerations demonstrate only that First Amendment privilege *does* apply here. Challengers' contention to the contrary cannot overcome the actual test announced by the Supreme Court and recognized in *Perry*.[6]

[6] In addition to RLI's showing that the documents at issue are private, Challengers have stated explicitly that a public records request would not suffice to obtain them, conceding that they are not public. D. 87, 11. Accordingly, even setting aside the fact that First Amendment chill, not pure internality, is what is required for First Amendment privilege, Challengers'

Challengers' remaining arguments are easily refuted. While they contend that "precedent requir[es] a privilege log in addition to" a declaration, Opp'n, D. 121, 7, this simply repeats one of the very errors at issue, while offering no further defense of same. Under *Perry*, precisely the opposite is true: *Perry* found an un-rebutted case of First Amendment privilege where *only* a declaration had been submitted, no privilege log. 591 F.3d at 1165.[7]

Similarly, they offer no defense for the notion that a statement that is *not* conclusory under the binding precedent of *Orsini v. O/S Seabrooke*, 247 F.3d 953, 960 n.4 (9th Cir. 2001), should still be considered conclusory anyway. *See* Opp'n, D. 121, 7; *see also* Stay Mem., D. 119-1, 5 (citing *Orsini*). Challengers' observation that *Orsini* concerned a Rule 56 motion changes nothing. Under Rule 56, affidavits setting forth "conclusory facts" are insufficient. 10B C. Wright et al., Fed. Practice and P. § 2738 (3d ed. 1998) (cited in *Orsini*, 247 F.3d at 960 n.4). Challengers set forth no rationale in law or logic for the notion that "conclusory" is defined in some particular way for Rule 56 purposes, nor does *Orsini* make any suggestion that its definition was confined to Rule 56 analysis. It is not. Thus, Challengers have not rebutted the fact that this Court's dismissal of the Naugle Declaration (including its statements that the documents at issue are private and strategic) as conclusory was erroneous. *See* Stay Mem., D. 119-1, 5.

Importantly, regardless of *Orsini*, Challengers actually concede the overarching point: the Naugle Declaration established a prima facie case and it was error for this Court to dismiss it as

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contention that it "would make little sense" to "find a First Amendment interest in public materials related to a public concern" is not relevant. *See* Opp'n, D. 121, 6. Of course, if Challengers believe that they can obtain *some* of those documents via public records request, they must do so. Petition, D. 118, 26–28. The fact that a demand for private documents might, at its fringes, encompass *some* discoverable documents cannot prevent a prima facie case. *Id.* at 16–17.

[7] The Petition explains why *Perry* stated that a privilege log would be required: it was necessary *there* because a *protective order* was sought over certain documents, not the whole trove; it was not a motion to quash case. D. 118, 21. But it goes without saying that that privilege log would not be produced until *after Perry* had already found First Amendment privilege.

overly broad or general. *See* Stay Mem., D. 119-1, 5. RLI showed that *Perry* demonstrates that point. Under *Perry*, the Naugle Declaration "was clearly sufficient to establish a prima facie case of First Amendment privilege, and that the Court clearly erred in holding that it was not, a holding on which the denial of the Motion was based." *Id.* (citing Petition, D. 118, 17–18). In the cited portion of the Petition, RLI explained that *Perry* found a declaration much like the Naugle Declaration, but *less* specific, sufficient for a prima facie case. Challengers do not even address RLI's contention that *Perry* thus required this Court to find the declaration sufficient for a prima facie case and that it was clear error for this Court not to. *See generally* Opp'n, D. 121. They thus concede the point. Notably, as this clear error remains undisputed, this alone is sufficient to demonstrate that RLI has a very high likelihood of success on the merits of its Petition.

Because "misinterpret[ing] the law" constitutes clear error, *Walsh v. United States Dist. Court (In re Walsh)*, 15 F.4th 1005, 1009 (9th Cir. 2021), RLI has shown that this factor warrants granting mandamus based on these clear errors of law. As explained above, RLI has, in numerous ways, demonstrated a high likelihood of success on this factor. However, even if this Court finds otherwise despite Challengers' multiple significant concessions, it is still clear that RLI has, at the very least, demonstrated "serious questions going into the merits." *See* D. 119-1, 4 (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011)).[8]

[8]Challengers' argument to the contrary is perplexing. They claim that a question that "concerns constitutionality" is "serious." D. 121, 8 (citation omitted). While they dispute the *applicability* of the First Amendment privilege, it is plain that the *question* concerns constitutionality. Indeed, whether First Amendment privilege is implicated here—the chief question at hand—is not attenuated in any sense from concerns regarding constitutionality. This seems, then, to be yet another concession that RLI has raised serious questions, rather than an argument to the contrary. Furthermore, Challengers claim that a question that "raises genuine matters of first impression" is "serious." *Id.* (citation omitted). Challengers nowhere dispute RLI's statement that "*Perry* did not address the application of First Amendment privilege to documents that, though private and strategic, are not strictly internal, nor its application to motions to quash." Stay Mem., D. 119-1, 6 (citing Petition, D. 118, 35–36); *see generally* Opp'n, D. 121 (nowhere addressing same). Because that demonstrates two matters of first impression,

B. Challengers do not dispute RLI's likelihood of success on the remaining factors.

RLI also showed that it clearly satisfied the remaining mandamus factors: whether it has any other means of relief; whether, absent mandamus, it "will be damaged . . . in a way not correctable on appeal"; and whether the errors present new issues likely to be repeated. Stay Mem., D. 119-1, 6 (citing *Perry*, 591 F.3d at 1156; Petition, D. 118, 30–36). RLI noted that this showed a high likelihood of success on the merits. Challengers have not disputed this contention and have thus conceded RLI's likelihood of success concerning these remaining factors.[9]

In sum, RLI has shown a high likelihood of success on the merits of all factors relevant to its Petition. Challengers, far from adequately disputing that showing, have conceded it in several ways. Accordingly, this Court should find that the Merits Factor weighs heavily in RLI's favor. However, even if it does not find a high likelihood of success, it should, at the very least, find that RLI has demonstrated serious questions going into the merits.

II. RLI will be irreparably harmed absent a stay.

RLI has shown that it easily satisfies the Irreparable Harm Factor. RLI explained that compliance with the Order would result in it being unable to seek meaningful review to protect the very rights that the Order implicates. D. 119-1, 7 (citing *Canchola v. Allstate Ins. Co.*, No. 8:23-cv-00734-FWS-ADS, 2025 U.S. Dist. LEXIS 91483, at *8 (C.D. Cal. Apr. 17, 2025)). As the Ninth Circuit has noted, complying with compelled "discovery [] against [a] claim of privilege destroys [the] right sought to be protected." *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) (citing *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987)).

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this too seems to be a concession that RLI has raised serious questions.

[9]RLI notes, in an abundance of caution, that Challengers' contentions concerning whether RLI would be harmed as a result of not being granted a stay, D. 121, 10–11, cannot be construed as arguments concerning RLI's harm absent a grant of mandamus. Those are, of course, distinct questions; an answer to one cannot substitute as an answer to the other.

The Order compels RLI to engage in discovery proceedings that it has objected to on First Amendment grounds. Effectively depriving it of mandamus review by denying a stay at this juncture would therefore clearly impose an irreparable injury, since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020). Although RLI explained this in its brief, D. 119-1, 7–8, Challengers rely only on their *other* arguments, that is, they claim that none of this matters since, so they say, Challengers do "not identify a First Amendment violation." D. 121, 10. But in light of Challengers' concessions concerning the likelihood of RLI's success on the merits (and, in any event, RLI's showing of likely success on the merits despite the arguments Challengers *did* make), *supra* Part I, this contention is weightless.[10]

For much the same reason, Challengers' observation that "compl[iance] with legitimate discovery requests is not irreparable harm," Opp'n, D. 121, 11, also fails to support their position. This matter is not about legitimate discovery requests, but is about the preservation of the most precious constitutional rights protected by the First Amendment.[11]

III. The equities favor a stay.

Challengers have not explained how the requested stay would harm them at all, much less "substantially." *Contra* Opp'n, D. 121, 9. While they allege that "granting a stay may leave

[10]Challengers also discuss RLI's alleged public involvement with the abortion trafficking law, D. 121, 10–11, but that is of course not relevant to private documents, especially where Challengers have conceded their private nature. *See supra* n.6.

[11]While *Perry* is clear that compelled compliance with *production* of First Amendment-privileged documents is an irreparable injury, 591 F.3d at 1157–58, it is also true that compelled compliance with discovery proceedings requiring a privilege log for a demand that infringes on the First Amendment is itself an irreparable injury under *Roman Catholic Diocese*. And even if *Roman Catholic Diocese* is not so construed, the fact remains that this Court has already overruled RLI's First Amendment objections relating to private communications with legislators, Order, D. 108, 8–9, such that production of same is required regardless of what a privilege log says. *Contra* Opp'n, D. 121, 11 n.3. The irreparable injury is therefore plain in either analysis.

Plaintiffs in the position of proceeding without information critical to proving their right to interstate travel claim, or seeking a significant delay in the litigation to the detriment of both Plaintiffs and the public interest," *id.*, they do not explain how mere delay in litigation constitutes a meaningful injury. That is, "plaintiffs point out that discovery will be delayed[,] [b]ut this will often be true when a pre-trial stay is granted. And plaintiffs have not articulated any more specific harm that will result from delayed discovery." *Doe v. BSA*, No. 1:13-cv-00275-BLW, 2014 U.S. Dist. LEXIS 77368, at *27 (D. Idaho June 4, 2014).

True, they say they may have to "proceed[] without" "critical" information, Opp'n, D. 121, 9, but their omission of a prepositional object is telling: "proceed" to what? They deny neither that the discovery deadline may be changed nor that such a change would be easy to procure. *See* Stay Mem., D. 119-1, 8–9 (noting willingness of parties to agree to such amendments). And while they assert the Ninth Circuit "is under no deadline," *id.* at 8, the fact is that not only must such petitions be given priority, Fed. R. App. P. 21(b)(6), but the Ninth Circuit *is*, as one would expect, well aware of discovery scheduling needs and encourages amendments when granting mandamus. *E.g.*, *Williams v. United States Dist. Court for the S. Dist. of Cal. (In re Williams)*, No. 19-72056, 2019 U.S. App. LEXIS 24818, at *1 n.1 (9th Cir. Aug. 20, 2019).

Additionally, the dispositive motion deadline is still months away and it appears that no trial date has been scheduled. *Compare* D. 92 (setting dispositive motion deadline as April 16, 2026) *with* Scheduling Order, D. 64, 5 (trial setting conference occurs only after dispositive motion deadline). Compare that with the Ninth Circuit's demonstrated prompt scheduling for mandamus petitions. It acts quickly to determine whether briefing is necessary and frequently requires an answer within 14 days and a reply within five or seven days. *E.g.*, *Williams v. United States Dist. Court for the S. Dist. of Cal. (In re Williams)*, No. 19-72056, 2019 U.S. App. LEXIS

24818, at *1 (9th Cir. Aug. 20, 2019) (petition filed Aug. 14, 2019). It sometimes requires briefing even more expeditiously. *E.g., Williams-Sonoma, Inc. v. United States Dist. Court*, No. 19-70522, 2019 U.S. App. LEXIS 10157, at *1 (9th Cir. Apr. 5, 2019) (ordering an answer within seven days of order; five days for any reply).

Therefore, the only thing Challengers might need to "proceed" to, if a stay is granted, is an amendment to the fact discovery deadline. Compared to the irreparable harm RLI would suffer without a stay, that minor change is insignificant. Importantly, Defendant A.G. Labrador has also noted he "is not harmed" by a stay. D. 122, 3. Accordingly, the Equities Factor favors RLI.

IV. The public interest favors a stay.

Finally, Challengers assert that the Public Interest Factor favors them because their claims concern constitutional rights. Opp'n, D. 121, But that misses the point. First, Challengers have already shown likelihood of success on the merits as a result of the total irrelevance of the documents at issue, a point that Challengers conceded. *Supra* Part I. So a stay concerning discovery of those documents could not possibly affect those rights. Second, even if that were not the case, Challengers assert that the public interest stemming from the constitutional rights at issue in their claims is the interest in prompt resolution. Because RLI has shown that a stay would not likely have a meaningful effect on the timing of this litigation's ultimate conclusion, *supra* Part III, the "prompt resolution" contention does not help Challengers, either. Finally, RLI has shown various reasons why the public interest *favors* granting a stay, D. 119-1, 9–10, but Challengers do not even attempt to address that showing and thus do not rebut it. So Challengers have cast no doubt on the fact that the Public Interest Factor heavily favors granting a stay.

V. Conclusion

For all of the foregoing reasons, the Stay Motion should be granted.

Dated: January 23, 2026

Respectfully submitted,

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