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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 Motion of Non-Party Right to Life of Idaho, Inc., to Quash Subpoena**

Right to Life of Idaho, Inc. ("**RLI**"), a stranger to this case, asks this Court to quash a subpoena ("**RLI Subpoena**") served on it by its policy opponent, who seeks a trove of irrelevant documents protected by the First Amendment. Mot. to Quash Subpoena, D. 72 ("**Motion**"); Mem. Supp. Mot., D. 72-1 ("**Memorandum**"). Plaintiffs' ("**Challengers**") response, D. 87 ("**Opp'n**"), further confirms the fishing expedition at play, expecting the Court to overlook demands for internal documents and to find irrelevant demands relevant. Moreover, stunningly, they claim everything sought in their requests ("**Narrowed Requests**") is available via public records request. A non-party cannot be burdened to dig up what they could so easily acquire. The burden of litigation already endured is enough. Nor can the Constitutional gravity of the demands be obscured. *Infra* Parts I, II.A. The precious freedoms protected by the First Amendment require a more stringent standard than the ordinary standard cited by Challengers, *contra* Opp'n, D. 87, 4. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1161 (9th Cir. 2010) ("the information sought [must be] highly relevant[,] . . . a more demanding standard of relevance than . . . [Rule] 26(b)(1)."). This Court should give effect to the Constitution's protections by quashing the RLI Subpoena.

I. The First Amendment is plainly at issue.

Challengers resist RLI's First Amendment privilege on the basis that they seek external communications, Opp'n, D. 87, 6 (citing *Sol v. Whiting*, No. CV-10-01061-PHX-SRB, 2013 WL 12098752, at *23 (D. Ariz. Dec. 11, 2013)), but that fails for two reasons. Most fundamentally, the Ninth Circuit has been clear: a court must conduct First Amendment balancing ("**Balancing Test**") if "disclosure of the information will have a deterrent effect[.]" *Perry*, 591 F.3d at 1162 (citing *NAACP v. Alabama*, 357 U.S. 449, 460–61 (1958)). *Sol* skipped that analysis, saying it was "unaware of[] any law that protects" communications with public officials. 2013 U.S. Dist. LEXIS 191133, at *39. First Amendment privilege is just such a protection. RLI has shown that

it is not limited to internal communications. D. 72-1, 9–11.[1] Thus, RLI has a *prima facie* case, *infra*; the Balancing Test applies. Indeed, even *Sol* engaged in Balancing Test analysis when it considered whether disclosure would cause harm. 2013 U.S. Dist. LEXIS 191133, at *41. Rather than adopting *Sol*'s inverted approach, which found lack of such harm meant First Amendment privilege did not exist, this Court should follow binding precedent and apply the Balancing Test.[2]

The second problem with Challengers' assertion is that it ignores the demand for internal documents, rendering the conclusions flowing from its false premise weightless. *Supra* n.2.

In sum, First Amendment privilege plainly applies. The Balancing Test must be reached.

II. The Balancing Test heavily favors RLI.

A. RLI has shown First Amendment chill.

Every Balancing Test factor favors RLI. The claim that RLI has not shown First Amendment chill holds no weight. *See* Opp'n, D. 87, 5. First, the First Amendment is plainly at issue. Beyond Challengers' fruitless arguments discussed above, *supra* Part I, they do not substantively deny that "compelled disclosure of [RLI's] political associations" and "activities" *implicates* the First Amendment, Mem., D. 72-1, 7–8 (quoting *Perry*, 591 F.3d at 1160), which "is at its zenith" concerning speech like RLI's, *id.* at 6 (citations omitted). *See generally* D. 87. So there is no question that compelled disclosure thereof risks First Amendment chill.[3]

[1] Notably, *Perry* was clear that First Amendment privilege is very different from attorney-client privilege. 591 F.3d at 1155–56. One key difference is that the purpose of First Amendment privilege is not limited to protecting confidentiality, but protects against First Amendment chill.

[2] The Balancing Test favors RLI even though *some* communications at issue are with public officials. *Infra* Part II.B–C. Nor is it true that Challengers "do not seek internal communications," D. 87, 8, or that RLI claimed *everything* sought would be available via public records request, *id.* Internal documents clearly *are* sought. D. 72-1, 19. If Challengers wished to further narrow the requests, they needed to say so in the Opposition at least. They instead ignore the problem. Their arguments relying on this incorrect premise, *e.g.*, D. 87, 6, 8, are thus weightless.

[3] This Court should reject the claim that this case is unlike "membership list" cases and that those cases cited by RLI are inapposite. Opp'n, D. 87, 7. *Perry* held otherwise. 591 F.3d at 1162 ("First Amendment privilege . . . has never been limited to the disclosure of . . . members").

Second, RLI has shown the requisite chill. RLI cited numerous cases demonstrating the "self-evident," "common sense" nature of First Amendment chill that arises through compelled disclosure of core political speech. Mem., D. 72-1, 12–13 (quoting *Perry*, 591 F.3d at 1163; additional citations omitted). RLI also showed that, per the Supreme Court's recent instruction, the mere "possibility" of such deterrence is all that is required for First Amendment protection to engage. *Id.* at 7–8 (citation omitted). Accordingly, RLI has met its burden to demonstrate chill and does not concede that further elucidation is needed. Nonetheless, in order to further rebut Challengers' contention, RLI provides the Declaration of Emily Naugle ("**Naugle Decl.**"),[4] showing unequivocally that enforcement of the RLI Subpoena would produce First Amendment chill. Naugle Decl. ¶ 9 (chill on communication with legislators), ¶ 10 (chill on donor association), ¶ 11 (chill on participation), ¶ 12 (increased public hostility would increase these harms), ¶ 13 (the decrease in RLI's effectiveness resulting from disclosure would increase these harms), ¶ 14 (internal discussions have already begun, and will continue, addressing how RLI would need to change its communications if required to comply with the RLI Subpoena).

Accordingly, this Court should find that RLI clearly showed First Amendment chill in its Memorandum. However, if it finds that Challengers' contention to the contrary has any merit, it should find that the Naugle Declaration soundly rebuts that contention, resolving the issue.

B. Challengers have not shown any interest in the discovery sought.

Because RLI would plainly be chilled by enforcement of the RLI Subpoena, Challengers must show a compelling interest in the Narrowed Requests. D. 72-1, 11–12. They have not.

[4] A court has broad discretion to consider arguments raised in a reply brief. *Lane v. DOI*, 523 F.3d 1128, 1140 (9th Cir. 2008). *A fortiori*, it should consider evidence submitted with a reply that relates to the opposing party's arguments, as this Court recognizes. *E.g.*, *Mintun v. Peterson*, No. CV06-447-S-BLW, 2010 U.S. Dist. LEXIS 31598, at *74 (D. Idaho Mar. 30, 2010) (where a response brief had addressed "each of the[] issues," "Defendants were entitled to submit evidence" in rebuttal). This is especially true when the evidence shows protection of a non-party is "necessary." *See Dart Indus. v. Westwood Chem.*, 649 F.2d 646, 649 (9th Cir. 1980).

Most importantly, they cannot even show that what they seek is relevant, much less "highly relevant." *See Perry*, 591 F.3d at 1161. They note that the "primary objective" of certain laws can be relevant, Opp'n, D. 87, 9, but that falls flat since legislative objectives cannot be discerned from legislators' individual communications, D. 72-1, 13–15. In other words, they ignore the question of what *evidence* is relevant—i.e., what evidence is capable of demonstrating such an objective. Failing to address that critical question, they tacitly concede that individual legislators' communications are *not* capable of doing so (much less RLI's) and thus not relevant.

The Memorandum clearly established the impermissibility of discovery of individual legislators' personal opinions to prove illicit legislative motives. D. 72-1, 13–15. The Ninth Circuit's exceeding clarity on this point resolves any remaining question. In *Las Vegas v. Foley*, discovery was sought to support First and Fourteenth Amendment claims, and the court noted the importance of the issue, observing that "the proposition that legislative motives are properly discoverable" would too broadly open the door to discovery against legislators. 747 F.2d 1294, 1296 (9th Cir. 1984). Moreover, it "would be contrary to the Supreme Court's long-standing" practice. *Id.* at 1296–97 (citing *Fletcher v. Peck*, 10 U.S. 87, 130–31 (1810)).

In the First Amendment context, the court explained that relevance of motivating factors "is not sufficient to shift the focus [] from the *objective manifestations of legislative purpose* to the *subjective motivations of individual legislators*." 747 F.2d at 1297, 1299 (emphases added). It also addressed the Fourteenth Amendment: "Even where a plaintiff must prove invidious purpose [], as in racial discrimination cases, . . . only in extraordinary circumstances might members of the legislature be called to testify, and even [then] . . . the testimony may be barred by privilege." *Id.* at 1298 (citing *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977)). Therefore, even if the present case were about *invidious* intent (and it is not), the

motives of individual legislators still would not be relevant since Challengers have not hinted at any extraordinary circumstances. To the contrary, they have clearly alleged that the information they seek is quite ordinary, focusing on their allegations that they only wish to acquire the public communications of a pro-life organization concerning pro-life laws. Opp'n, D. 87, 7–8, 10.

The argument considered in *Foley* was the same that Challengers make: because courts sometimes consider the "motivating factor[s]" of legislation, there is "an exception to the" prohibition against discovery concerning individual lawmakers. 747 F.2d at 1298. *Foley* rejected that claim: "We do not approve [the] contention that [this] allows [] discover[y of] . . . subjective motivations, which would be a major departure from" precedent. *Id.* Discovering "motivating purpose[s]" is Challengers' stated goal in seeking communications with individual legislators, D. 87, 13 n.4, so this Court may easily conclude that *Foley* requires that the Motion be granted.[5]

Foley is still very much alive, *see*, *e.g.*, *Lee v. City of L.A.*, 908 F.3d 1175, 1187–88 (9th Cir. 2018) (quoting *Foley*, 747 F.2d at 1298), so Challengers' reference to two cases that do not even address it is fruitless, *see* D. 87, 9–10 (citing *Mi Familia Vota v. Hobbs*, 343 F.R.D. 71, 90 (D. Ariz. 2022); additional citation omitted). Nor can Challengers claim that *Foley* is limited to depositions. *Foley*'s rule is clear: "*discovery* of legislative motives" is barred by precedent and "basic" First and Fourteenth Amendment analysis. *See* 747 F.2d at 1298 (emphasis added).[6]

Because Challengers present no substantive argument concerning the relevant questions, they fail to dispute the plain conclusion that the private communications of legislators and the internal communications of a private entity are not relevant. Indeed, they simply ignore the fact

[5] Nor can the claim that RLI might "have had a role in the Abortion [Trafficking] Ban's passage," *id.* at 10–11, support an attempt to comb through RLI's internal documents. That claim does not negate the fact that "[a] private entity's understanding of a law" is irrelevant, Mem., D. 72-1, 13 (citing *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 253–54 (2022)).

[6] There is no tipping point where the communications of *multiple* legislators magically become relevant. The discovery in *Foley* concerned multiple lawmakers. 747 F.2d at 1297.

that their demands seek RLI's internal documents. *See* Opp'n, D. 87, 9–14 (arguments regarding relevance, containing no support for the notion that a private entity's internal communications are relevant). Accordingly, the discovery sought is not even marginally relevant, much less "highly relevant" or "central." *Perry*, 591 F.3d at 1161.[7] Challengers have no interest in information that is irrelevant, certainly not a compelling interest, as required. *Id.* This Court should therefore find that the Balancing Test's heightened relevance standard heavily favors RLI.

C. Challengers improperly seek to impose an unnecessary burden on a non-party.

Nor have Challengers satisfied the requirement to use the least restrictive means of obtaining the information. *See id.* at 1161. They purport to seek only public information ("the requests do not seek internal communications" but those with "public officials," Opp'n, D. 87, 8), which they must "obtain . . . from other sources, without intruding on protected activities." *Perry*, 591 F.3d at 1164. They did not. "[B]earing in mind other sources . . . they have not shown a sufficient need for the information." *Id.* at 1165. Their attempt to excuse this omission by claiming a public records request would burden "105 [] non-parties rather than one," D. 87, 11, conflates *judicial compulsion* of a non-party with requiring (*without* litigation) non-parties to perform existing, *voluntary* duties—a woeful misunderstanding of the type of burden that a litigant must avoid imposing. Responding to a public records request requires nothing more than performance of an existing duty, which imposes no burden whatsoever on the legislature.

Challengers' claim that Idaho's Public Records Act, Idaho Code §§ 74-101—74-127 ("**PRA**"), would require 105 requests is also incorrect. *See* D. 87, 11. Challengers cite the PRA, *id.* (citing Idaho Code § 74-126(3)), but *omit* that it permits requests to the whole legislature,

[7] Defendant Raúl Labrador, in his capacity as the Attorney General of the State of Idaho, has explained additional compelling reasons why this discovery is not relevant. D. 88. RLI agrees with these arguments and hereby incorporates them by reference.

Idaho Code § 74-126(1), which encompass "every [] officer," *id.* at § 74-101(15), so *one* public records request would be sufficient. It appears Challengers have not even taken *preliminary steps* to use alternative sources, much less actually done so, as required. Even ignoring this, the irony here is unmistakable. It would be far less burdensome and more "cost effective," D. 87, 11, for Challengers to copy and paste the *exact same request* 105 times than for a nonprofit to comb through *five years* of records based on overbroad demands. The minuscule burden on Challengers cannot outweigh RLI's privilege—nor do they adduce any cases saying the Balancing Test even *considers* a minor burden on the discovery *proponent* arising from using alternative sources.

Challengers also suggest it is important that the PRA "is not coextensive" with Rule 26, D. 87, 11, but there is no meaningful substance behind that suggestion—in fact, it cuts against them. They claim merely that a public records request *might* be denied or *might* result in delay, but pure speculation surely cannot excuse duties imposed by binding precedent.[8] In any case, this argument ultimately backfires. To the extent any communications with the legislature would *not* be obtainable via public records request, those documents have not been "made . . . public." *Contra* Opp'n, D. 87, 8. This puts Challengers back at square one, negating their contention that First Amendment privilege does not apply since the documents are already public.

In sum, Challengers present no substantive reason for this Court to find they have used the least restrictive means to obtain the information they seek. The requirements of this duty are enhanced under the First Amendment privilege Balancing Test, but even under the general rule that burdens against a non-party should be minimized, *see* D. 72-1, 15–16, Challengers have failed to meet the bar. Under either rule, then, this Court should grant the Motion.

[8] This "delay" argument fails for the additional reason that Challengers do not explain how "three (3) working days" would be an insurmountable delay. *See* Idaho Code § 74-103(2). Nor do they posit that they have even attempted a public records request, despite the nearly two-and-a-half years they have had to do so since initiating this case. So any delay is their own.

D. All additional factors favor RLI.

The "importance of the litigation" factor, *Perry*, 591 F.3d at 1161 (quoting *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1461 (9th Cir. 1991)), also favors RLI. *Contra* Opp'n, D. 87, 12. Challengers' suggestion that, because litigation about abortion is important, this factor favors them is overly simplistic. *Dole* shows plainly what the factor considers: whether "the information sought . . . is rationally related to a compelling [] interest." 950 F.2d at 1461 (quoted source omitted). In other words, the question is not whether the litigation *as a whole* is important, but instead is the precise question of whether the litigation concerning the discovery demands is important. Challengers have no interest in information that is not relevant, so they cannot claim their demands are important. This factor favors RLI.

Challengers' claim that RLI's First Amendment interests are insubstantial, D. 87, 12, is also woefully misguided. As noted above, they have not disputed that the First Amendment's strongest protections apply to RLI's speech. *Supra* Part II.A. They cannot credibly claim that an interest at the height of the First Amendment's protections is not substantial.

III. Challengers fail to show Rule 26 relevance.

RLI has shown that the information sought by the Narrowed Requests has no relevance. Challengers, relying on the breadth of discovery under Rule 26, claim that it has a "'conceivable bearing on the case'" because it concerns the objective of legislation. Opp'n, D. 87, 12–13 (quoted source omitted). But as discussed above, the Ninth Circuit has explicitly rejected the argument that it is appropriate to consider individual legislators' opinions to determine legislative motivations. *Supra* Part II.B. So Challengers' argument for relevance is in direct contradiction to Ninth Circuit precedent, including *Foley*'s clear application to cases about invidious intent. They thus gain no ground by arguing that enforcement of the RLI Subpoena is necessary for them "to

prove that the 'primary objective' of the Abortion [Trafficking] Ban" was based on "invidious [] purpose." Opp'n, D. 87, 13 (quoting *Arlington Heights*, 429 U.S. at 266). Their reliance on *Arlington Heights* only proves the point. As explained, *Foley* extended its ruling to *Arlington Heights*—and Challengers have clearly stated they seek the discovery in order to prove individual legislators' motivations, but have made no showing that the general rule prohibiting same should be lifted. *Supra* Part II.B. In short, they fail to show any relevance and, by pressing precisely the argument that *Foley* rejected, have only affirmed the *irrelevance* of the discovery they pursue.

Liberally construing relevance does not mean that anything that has any connection whatsoever to the general subject matter of a case is relevant. Mem., D. 72-1, 17–18. Yet that is precisely what Challengers suggest. The Court should reject Challengers' contention.

IV. The Narrowed Requests are overbroad and unduly burdensome.

Finally, Challengers fail to rebut RLI's showing that the Narrowed Requests are overbroad and unduly burdensome. See Mem., D. 72-1, 18–20. They raise certain cherry-picked factors, D. 87, 14–16, but, tellingly, largely decline to dispute RLI's contention that their "request[s] for all 'documents' and 'communications' concerning a topic even *more broad* than a generalized claim or defense, even if limited by intended recipient, [are] certainly overbroad," D. 72-1, 18 (citation omitted). The closest they come is the conclusory assertion that the Narrowed "[R]equests are . . . limited [] as to subject matter" because they relate to "a specific piece of legislation." D. 87, 15. Yet that is not only incorrect,[9] but also ignores that discovery must be tailored to the *claims or issues* of a case, not simply the general subject matter underlying the

[9] As noted in the Memorandum, the Narrowed Requests broadly seek documents "created for the purpose of communicating with legislators about those 'abortion trafficking' bills *like* H.B. 242 and H.B. 98." Narrowing Letter, D. 72-4 (Ex. 2), 1 (emphasis added). The use of H.B. 242 and H.B. 98 as examples does not change the fact that this demand covers communications relating to any "abortion trafficking bills," a very broadly defined term. Mem., D. 72-1, 18 n.6.

case. Mem., D. 72-1, 18–19. And, again, Challengers simply gloss over the fact that the Narrowed Requests seek RLI's purely internal documents. Their refusal to defend these problems is fatal, constituting a tacit admission that these demands are overbroad in at least these ways.

Challengers suggest further evidence is needed to show overbreadth, D. 87, 14, but that misapprehends the doctrine. When a subpoena sweeps in irrelevant documents or "requests *all* documents . . . related to *any*" subject matter broadly construed, "the subpoena is overbroad *on its face*[.]" *Oyenik v. Corizon Health*, CV-13-01597-PHX-SPL(BSB), 2014 U.S. Dist. LEXIS 204433, at *5 (D. Ariz. 2014) (emphasis added). The RLI Subpoena does just that. It seeks *only* irrelevant information. And even if certain documents concerning the abortion trafficking law *were* relevant, it also seeks documents concerning legislation "*like*" that law, *supra* n.8, without explaining the relevance thereof. These facts render the RLI Subpoena overbroad.

The additional arguments Challengers raise fare no better. For example, they claim that "the discovery sought is not . . . duplicative." Opp'n, D. 87, 14. But it would be if Challengers sought the information from other sources, as required. They claim that the temporal scope of the Narrowed Requests is actually "not overbroad" on the basis that NRLC (not RLI) proposed draft legislation similar to the abortion trafficking law in June 2022—a whole year and a half later than the Narrowed Requests' opening date of January 1, 2021. *Id.* at 15–16. Yet they decline to explain how adding a year and a half beyond the earliest date they identify as having any relation to the abortion trafficking law does not render the RLI Subpoena overbroad. *See id.*

In short, Challengers have little to offer in their attempt to defend the Narrowed Requests' breadth. They are overbroad, constituting another reason for this Court to grant the Motion.

V. Conclusion.

For these reasons and those in the Memorandum, this Court should grant the Motion.

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Respectfully submitted,

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