John C. Keenan
Keenan Law Firm, P.C.
Marcus Law Bldg.
733 North 7th Street
Boise, Idaho 83702
Tel: (208) 375-2532
Email: law@keenan.org
Idaho State Bar No.: 3873
Designated Local Counsel

James Bopp, Jr.*
Joseph D. Maughon*
THE BOPP LAW FIRM, P.C.
The National Building
1 South Sixth Street
Terre Haute, IN 47807-3510
Tel: (812) 232-2434
Fax: (812) 235-3685
Email: jboppjr@aol.com
jmaughon@bopplaw.com

Attorneys for Non-Party Right to Life of Idaho, Inc.
*Admitted *pro hac vice*

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

LOURDES MATSUMOTO, NORTH-WEST 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 Second Motion of Non-Party Right to Life of Idaho, Inc., to Quash Subpoena**

RLI[1] has shown the test for First Amendment privilege is simple: whether forced disclosure of speech would "'*possibl[y]* deter[]'" First Amendment rights. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 616 (2021) (citation omitted). It "turns not on the type of information sought, but on whether" chill "'arguabl[y]'" will occur. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1161–62 (9th Cir. 2010) (citation omitted). Challengers' wish that the test denied privilege over external documents does not make it so. Because RLI has shown the *actual* test is satisfied and Challengers have not overcome RLI's privilege, this Court should grant the Motion.

I. First Amendment privilege does not require privacy.

As an overarching matter, Challengers misapprehend the nature of First Amendment privilege. They contend it does not protect material over which there is no "expectation of privacy." D. 130 ("**Opp'n**"), 10. But this privilege differs "not insubstantial[ly]" from privileges that may be so waived. *See Perry* 591 F.3d at 1156. While *Perry* did not focus on waiver, a review of the test for a prima facie case shows there is no rule that external documents are exempt. Nor do Challengers dispute that RLI would be chilled by disclosure even if the materials "could [] be obtained elsewhere," as *RLI* would be harmed by "the fact that . . . *RLI* would be the [disclosing] entity." D. 129-2, ¶ 20. This statement is relevant to the actual test, which asks whether the *disclosing entity* would be chilled by being forced to disclose its own documents. Privacy may support the objective nature of the chill, but is not required to invoke the privilege.

II. The Privilege Log and declaration are more than sufficient to show RLI's privilege.

A. The Second Naugle Declaration is not conclusory or overly broad.

RLI provided the subject matter of each document. D. 129-3. RLI explained specifically the strategic nature of each category that the documents comprise. D. 129-2, ¶¶ 9–12. *Contra* D.

[1]RLI submits this reply in support of its Motion, D. 129, employing terminology established in its principal memorandum, D. 129-1 ("**Mem.**").

130, 6 (alleging no "explanation"). Those categories align with the categories Challengers identify, but are even more comprehensive. *Compare* D. 129-2, ¶¶ 9–12, *with* D. 130, 7.[2] So it is surprising that they call RLI's explanations "conclusory." *Id.* at 6. In light of RLI's specific recitation of the documents' strategic nature and the chills that would result from disclosure, D. 129-2, ¶¶ 14–19, Challengers' claims simply misstate facts. The problem is compounded by their failure explain *why* they find these statements conclusory. *See* Opp'n, D. 130, 6. A statement based on firsthand knowledge that is neither a legal conclusion nor speculative is not conclusory. *Orsini v. O/S Seabrooke O.N.*, 247 F.3d 953, 960 n.4 (9th Cir. 2001); *United States v. $223,178.00*, 333 F. App'x 337, 338 (9th Cir. 2009); D. 123, 6. The Second Naugle Declaration posits no legal conclusions and is based on firsthand knowledge, not speculation. So Challengers' reference to the effect of mere conclusory statements is inapposite. *See* Opp'n, D. 130, 6.

Nor did RLI employ mere "broad allegations and conclusions" to show the chill, *contra* D. 130, 6 (citing Order, D. 108, 8). Instead, RLI describes six *factual circumstances* that evince chill. 2d Naugle Decl., D. 129-2, ¶¶ 14–19. A prima facie case requires a showing that, *arguably*, chill *will* occur, *supra* p.1, so RLI need not recite past events—but even still, RLI did so, 2d Naugle Decl., D. 129-2, ¶ 19. RLI's president is the person most knowledgeable about the likely effect of disclosure,[3] and that person's statements about which *specific* persons would be affected in *specific* ways by forced disclosure is not broad or conclusory. Those specifics include:

[2] Challengers' "scheduling communications" category, D. 130, 7, is analogous to RLI's category of communications "plann[ing] [] meet[ings]," D. 129-2, ¶ 11. Challengers' categories of communications on the "need for . . . the legislation" and "pure facts," D. 130, 7, are analogous to RLI's category of "communications . . . show[ing] that legislation is needed, as demonstrated by facts," D. 129-2, ¶ 10. Challengers' category of "communications regarding feedback from the public and other legislators," D. 130, 7, is analogous to RLI's category of communications "follow[ing] up with legislators," D. 129-2, ¶ 12. RLI's categorization is more comprehensive as it includes communications about how to draft proposed legislation. *Id.* at ¶ 9.

[3] RLI's president has knowledge both of RLI's activities and of "RLI's donors and other entities and individuals RLI works with to achieve its goals." *Id.* at ¶¶ 4–5.

(1) *Legislators* being less willing to *communicate* with RLI. *Id.* at ¶ 14.
(2) *Donors* being more hesitant to *associate* with RLI. *Id.* at ¶ 15.
(3) *Other individuals* who may wish to affiliate with RLI being less inclined to "*participat[e] in an event, volunteer[], or otherwise [affiliate]*." *Id.* at ¶ 16.
(4) Increase to the foregoing by *increased hostility* by *those who disagree*. *Id.* at ¶ 17.
(5) Increase to the foregoing by *unfair advantage* given to *RLI's opponents*. *Id.* at ¶ 18.
(6) *Stifled communications* and *need to change communications* by *RLI itself*. *Id.* at ¶ 19.

Showing six specific chills is more than sufficient. *Perry* found a less comprehensive, less specific declaration sufficient. 591 F.3d at 1163 (considering only a brief, general snippet). That declarant said disclosure would chill his communications, *id.*, just as RLI did, D. 129-2, ¶ 19. Accordingly, even this one paragraph of RLI's declaration is sufficient to show the requisite chill. Other courts have found declarations positing the effect of disclosure on others about whom the declarant has knowledge (like those posited in the Second Naugle Declaration, D. 129-2, ¶ 14–18) to be sufficient. *E.g.*, *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 672 (D. Ariz. 2016). RLI's declaration does not have some shortcoming that those produced in these cases did not.

B. The Second Naugle Declaration establishes the private nature of the documents at issue.

At base, Challengers' argument fails to address the actual issue. Without a privilege log, the Court found there was no prima facie case as to "external communications[.]" Order, D. 108, 9. So rather than finding the first declaration's statement of the *results* of disclosure conclusory, the Court's finding concerned whether chill would result from disclosure of *external* documents, finding "general references to 'private'" materials insufficient. *Id.* at 8. The question is whether external documents are private such that, despite their external nature, they are privileged or, in *Perry*'s words, whether there is an "objective[] suggest[ion]" of chill. 591 F.3d at 1160; *infra* Part I. Now, the Privilege Log shows the materials were private, shared with limited individuals, *see generally* D. 129-3. The Second Naugle Declaration confirms same: "[t]he communications . . . are private," D. 129-2, ¶ 7, i.e., the participants did not intend for them to be shared.

Despite the importance of the question of privacy, Challengers dedicate only one, four-sentence paragraph to it. Opp'n, D. 130, 10–11. That argument fails. First, Challengers posit that because RLI noted they must submit a public records request to satisfy *Perry*, 591 F.3d at 1161 ("the information *must* be otherwise unavailable" (emphasis added)), RLI conceded the documents are public. Opp'n, D. 130, 10–11. But Challengers admitted a public records request would procure only *some* of the documents. *Id.* at 16–17. They ignore the consequences of that admission: it is their duty, under binding precedent, to obtain information that is available from other sources and then, if anything is outstanding, to propound "a carefully tailored request for . . . information *that is [otherwise] unavailable."* 591 F.3d at 1161, 1165 n.13 (emphasis added). *Perry* does not permit one to decline this duty, then claim *his own delay* justifies infringing the Constitution. *See* D. 93, 7–8 (noting prompt response time for public records requests).

Second, Challengers posit "communications with public officials about" public matters are not privileged. Opp'n, D. 130, 9, 11 (citing *La Union v. Abbott*, 2022 WL 17574079, at *8 (W.D. Texas Dec. 9, 2022); *Sol v. Whiting*, No. CV-10-01061-PHX-SRB, 2013 WL 12098752, at *3 (D.Ariz. Dec. 11, 2013)). But the test is about chill, not "the type of information sought," *Perry*, 591 F.3d at 1162. Two district courts' analysis is far too thin a reed on which to rest a request to topple Supreme Court precedent existing for over 50 years. *See NAACP v. Alabama*, 357 U. S. 449 (1958). Meanwhile, many cases *have* found external materials privileged. D. 129-1, 5–6, 14–16. Nor do Challengers' cases even stand for the rule they propose. *Sol* found "all" materials in *that* case were available to the public. *Sol*, 2013 U.S. Dist. LEXIS 191133, at *39. *Challengers* say a public records request would *not* suffice. Nor does RLI ask this Court to "presume" anything, as in *La Union*, 2022 U.S. Dist. LEXIS 222064, at *34; instead, it has shown the objective chill that would result from the disclosure of its documents.

C. The Privilege Log goes above and beyond what is required.

Challengers also misapprehend what a privilege log requires. A privilege log need only "enable other parties to assess the claim" of privilege. Fed. R. Civ. P. 26(b)(5)(A)(ii). It must *not* "reveal[] information itself privileged," *id.*, yet that is what Challengers demand. They plainly understand the nature of the documents: they organize them into specific categories and give clear examples of their general subject matter, yet they demand more. Opp'n, D. 130, 7–8. That is not required: while "[d]etails concerning . . . *general* subject matter . . . *may* be appropriate" at times, that is not so when privilege is claimed over "voluminous[4] documents." Advisory Comm. Notes to 1993 Amendments of Fed. R. Civ. P. 26 (emphases added). So RLI was not required to describe subject matter *at all*, much less with great specificity. In a case like this—in which the demand, by its nature, seeks documents at the heart of the First Amendment—more specificity is plainly not needed. Notably, in such a case, any remaining need "can be met . . . [by] *in camera* review," *In re Subpoena Duces Tecum*, 439 F.3d 740, 751 (D.C. Cir. 2006), which this Court may use to conduct its "anticipated . . . evaluati[on]" of "certain materials," Order, D. 124, 9. Meanwhile, Challengers *ignore* the Privilege Log's most pertinent fields, the senders and recipients, which show privacy, demonstrating the objective nature of the chill. *Supra* Part II.B.

Challengers' additional arguments here may be summarily addressed. For example, they say that because they do not seek "membership lists or . . . identities," the First Amendment is not implicated. Opp'n, D. 130, 9–10. That defies *Perry.* 591 F.3d at 1162 (privilege is not "limited to the disclosure of identities of rank-and-file members"). Challengers also call RLI's reference to its communications as "strategic," as explained in a declaration and privilege log, "breathtaking[.]" Opp'n, D. 130, 10. They seek to justify that curious claim by turning again to whether

[4]The 600-plus pages of privileged documents were certainly voluminous, yet RLI nonetheless exceeded the Rule's requirements to ensure that the nature of its claim was clear.

the materials are private (addressed above) and with the bogeyman of "a blanket rule" whereby any party could prevail with one magic word. *Id.* But RLI has clearly demonstrated the strategic nature of the documents, not simply said the word "strategic." *Supra*. And RLI has ceaselessly argued for application of *Perry*'s multifaceted test, which is the opposite of a blanket rule.

In short, Challengers have cast no doubt on RLI's prima facie case.

III. The Balancing Test strongly favors granting the Motion.

Challengers cannot satisfy the Balancing Test so as to overcome RLI's privilege.

A. Challengers concede that they have little interest in the documents.

The Court may easily conclude that Challengers cannot overcome RLI's privilege because they *concede* that their "interest in any [] insight" the materials at issue might reveal "is minimal as a result of how ineffective it would be in furthering their claims." Mem., D. 129-1, 12. RLI pointed out that this is so because RLI communicated with very few legislators and, under ample precedent, the motives of a handful of legislators are minimally probative of the motives of the whole legislature, and courts must "eschew" the guesswork required in such a case. *Id.* at 11–13. While Challengers address relevance, they do not even hint at a discussion of the minimal probative value of the materials, a wholly separate issue. *See generally* Opp'n, D. 130. Thus, they concede that the materials have minimal probative value, which cannot outweigh the extreme risk to RLI's First Amendment rights. On this ground alone, the Court should grant the Motion.

B. The documents at issue are not highly relevant.

Nor can Challengers satisfy the Balancing Test's relevance threshold. First, the Limited Demand is not relevant. *Infra* Part IV. Second, any *in camera* review will show that the documents shed no meaningful light on the issue—certainly not enough to be "highly relevant," *Perry*, 591 F.3d at 1161. Third, the cases Challengers cite concern alleged racial animus and

discrimination. Opp'n, D. 130, 13 (citing cases about "animus" relating to "racial groups" and acts of "intentional discrimination"). But they have not hinted at a like allegation of hidden motives. Quite the opposite: they allege a "desire to impede travel," *id.* at 18, a purpose that is *facially plain*, in the circumstances addressed by the law, e.g., transporting "within [Idaho]," whether to a provider in Idaho or "in another state." Compl., D. 1, ¶ 16 (quoting Idaho Code § 18-623). This explicit motive differs categorically from the highly limited category of motives that can justify inquiry into the subjective thoughts of individual legislators. *Infra* Part IV.

Nor does this Court's previous finding that "evidence relating to legislators may be relevant," change that. *See* Opp'n, D. 130, 14 (citing *Matsumoto v. Labrador*, 701 F. Supp. 3d 1069, 1077 (D. Idaho 2023)). Those materials were not individual legislators' private communications, *see* Mem., D. 129-1, 12–13; they were the official legislative record and statements by the governor. 701 F. Supp. 3d at 1077 (citing Compl, D. 1, ¶¶ 12, 13, 75).

C. The information is available elsewhere.

Concerning the "least restrictive means" requirement, *see* Mem., D. 129-1, 13–14, Challengers simply repeat refuted arguments. They do not rebut (and have not) the fact that only one public records request would be needed (and that even *if* more were necessary, that would still be required by *Perry*). *Id.* at 13 (citing D. 72-1, 16; D. 93, 7–8[5]). They thereby concede it. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 694 (9th Cir. 2023). Similarly, they have never explained how their own delay in submitting such a request could possibly justify punishing RLI. *See* D. 93, 7–8. They concede, then, that it cannot. They *must* seek any "information . . . [that is] otherwise []available" from "sources that do not implicate [the] First Amendment[.]" 591 F.3d at 1161, 1165 n.13. *Perry* means what it says. The

[5]RLI explains here that under Idaho's Public Records Act, Idaho Code §§ 74-126(1), 74-101(15), a single request can encompass every legislator.

mere claim that dragging RLI through litigation and forcing it to hand over constitutionally protected material is *easier* for *Challengers* is far from sufficient to set aside binding precedent.[6]

And while Challengers speculate that "no other source [] can provide the" information that RLI can, mere speculation cannot remove the duty to *seek* the information in a less intrusive manner from an available source, which is the only way to determine the speculation's accuracy. And it is not accurate: far more comprehensive information about *legislators'* motives will be in *legislators'* possession than RLI's. Only after submitting a public records request would it even theoretically be proper for Challengers to pursue RLI's documents. Because they fail to show that submission of a single records request is impossible—because it isn't—and provide no reason why they should be relieved from this requirement, they fail to meet their burden here, as well.[7]

D. RLI's First Amendment protection is at its zenith; Challengers' interest is insubstantial.

The factors concerning the litigation's importance and "the substantiality of the First Amendment interests," *Perry*, 591 F.3d at 1161, favor RLI. Challengers conceded that at least some of the materials at issue are not public (and RLI has shown the requisite chill), so their contention that RLI's "First Amendment interests . . . are insubstantial" as to "communications with public officials" falls flat. *See* Opp'n, D. 130, 17. Because RLI has also made a strong showing of the chill that would result from disclosure, the First Amendment interests at stake are

[6]Challengers also seek to justify their failure to submit a single public records request by reference to Idaho Code § 74-115(3), which states, "Nothing contained in this chapter shall limit . . . discovery in the normal course of judicial . . . proceedings, *subject to the law and rules of evidence and discovery governing such proceedings*" (emphasis added). Opp'n, D. 130, 17. But the "law . . . governing [this] proceeding[]" is the requirements set forth in *Perry*, so this section shows explicitly that Challengers are *not* relieved of those requirements.

[7] Challengers allege that the Court previously rejected these arguments. D. 130, 16 (citing Order, D. 108 at 13–14). But the Order cites Challengers' general arguments and their efforts to subpoena *Rep. Ehardt*. D. 108, 14 (citing D. 87; D. 98–104). It does *not* address whether Challengers must seek the information via public records request. In light of *Perry*'s requirement of using "sources that do not implicate [the] First Amendment," it is clear that they must.

weighty—indeed, "First Amendment protection . . . is at its zenith" here. D. 72-1, 6 (quoting *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186–87 (1999)). Meanwhile, because the legislature's purpose in enacting the parts of the abortion trafficking ban that relate to inter-state travel are plain on the law's face, *supra* Part III.B, and the motives of individual legislators are not relevant at all here, *infra* Part IV, litigation concerning same is not highly important.[8]

IV. The Limited Demand is not relevant.

Whether the subjective motives of individual legislators are relevant in a right to travel claim has been well-briefed. *E.g.* D. 93, 5–6 (citing *Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) ("an otherwise constitutional statute will not be invalidated on the basis of an 'alleged illicit legislative motive,' [] *O'Brien*, 391 U.S. at 383, and [the Supreme Court] refuse[s] to inquire into legislative motives.")). But the Supreme Court's clarity on this point makes it worth repeating. Examining legislative motives is something the Court "avoid[s]" except in "the '*very limited and well-defined* class of cases where the very nature of the constitutional question requires [that] inquiry.'" *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 377 and n.6 (quoting *United States v. O'Brien*, 391 U.S. 367, 383, n.30 (1968); citing *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268, n.18 (1977)) (emphasis added).

One need not dig deeply to see that right to travel cases are not a part of that "very limited and well-defined class of cases." *See id.* First, *Omni* makes clear that the only two such categories are bill of attainder cases (as in *O'Brien*) and racial discrimination cases (as in *Arlington Heights*, an Equal Protection case). *Id.* Second, Challengers have tacitly conceded their claim is

[8]Challengers also posit that *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310 (5th Cir. 2024), does not apply to "advocacy organization[s]," so this Court should not preserve the privilege found in Rep. Ehardt's communications. D. 130, 15. Precisely the opposite is true. 93 F.4th at 321–22 ("communications outside the legislature *such as private communications with advocacy groups* . . . occur within the sphere of legitimate legislative activity" (cleaned up; citations omitted) (emphasis added)).

not part of that class of cases. Since the class is "well defined," *id.*, Challengers should have been able to cite at least *one* case in which legislators' individual, subjective motives were found relevant to such a claim. They have not. The closest they come is citing *Att'y Gen. of New York v. Soto-Lopez*. Opp'n, D. 130, 12 (citing 476 U.S. 898, 902 (1986) (plurality)). But even if that were not a non-binding plurality decision, it was decided on equal protection grounds. D. 88, 2 (citing 476 U.S. at 903, 912, 916). Even ignoring those problems, Challengers encounter another roadblock: *Soto-Lopez* found only that the law's "primary objective" could be relevant, 476 U.S. at 903—but individual, subjective motives do not represent the *primary* objective of legislation.

In short, the Supreme Court has been remarkably clear that inquiry into "[w]hat motivates one legislator," *O'Brien*, 391 U.S. at 384, is permissible in only in a very specific, limited, and well-established category of cases, *City of Columbia*, 499 U.S. at 377 n.6. Challengers provide *nothing* to demonstrate that this is one of those cases. The documents at issue are not relevant.

V. The Limited Demand is overbroad and unduly burdensome.

Finally, Challengers submit no reason for this Court not to find the Limited Demand fatally overbroad. While they contend that it is not *temporally* overbroad, they provide no support for the conclusory statement that the Court's "narrowing" and so-called "careful[] tailoring" of the demand means it is not overbroad. *See* Opp'n, D. 130, 19. This leaves RLI's showing of subject-matter overbreadth unrebutted. *See* Mem., D. 129-1, 17. The demand not only is *not* tailored to the actual issue raised—whether the abortion trafficking law was intended to prevent interstate travel—but is not even tailored *generally* to the intent behind the law. That renders it fatally overbroad. Because Challengers made no attempt to substantively contend that the Limited Demand is not overbroad as to subject matter, they concede that it is.

For all of the foregoing reasons, this Court should grant the Motion.

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Respectfully submitted,

/s/ Joseph D. Maughon

John C. Keenan
Keenan Law Firm, P.C.
Marcus Law Bldg.
733 North 7th Street
Boise, Idaho 83702
Tel: (208) 375-2532
Email: law@keenan.org
Idaho State Bar No.: 3873
Designated Local Counsel

James Bopp, Jr.*
Joseph D. Maughon*
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807-3510
Tel: (812) 232-2434
Fax: (812) 235-3685
Email: jboppjr@aol.com
jmaughon@bopplaw.com

Attorneys for Non-Party Right to Life of Idaho, Inc.
*Admitted *pro hac vice*