IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Valle Del Sol, et al., Plaintiffs, v. Michael B. Whiting, et al., Defendants.	No. CV-10-01061-PHX-SRB **ORDER**

The Court now considers Joint Motion of Nonparties IRLI and FAIR to Untimely File Their Joint Amended Motion to Quash Plaintiff Valle Del Sol's Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Doc. 884)[1] and Joint Amended Motion to Quash Plaintiff Valle Del Sol's Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action ("MTQ") (Doc. 884-2).

I. BACKGROUND

The Court has summarized the facts of this case in a previous Order, which is fully incorporated herein. (*See* Doc. 447, Oct. 8, 2010 Order at 1-4.) Plaintiffs are challenging the constitutionality of the Arizona law commonly known as "S.B. 1070." (*See* Doc. 511, First Am. Compl. for Declaratory & Injunctive Relief ("FAC").) The case is now in the discovery stage and Plaintiffs have issued subpoenas to two non-parties, the Federation

[1] The Court grants Movants leave to file their Motion and will consider its merits herein because there is no evidence that Plaintiffs were prejudiced by the fact that the Motions were filed a few days after the agreed deadline.

for American Immigration Reform ("FAIR") and the Immigration Reform Law Institute ("IRLI"). (MTQ at 1.) The two subpoenas contain six document requests:

> DOCUMENT REQUEST NO 1:
>
> All DOCUMENTS, including but not limited to any COMMUNICATIONS, between you and any ARIZONA STATE OFFICIAL since January 1, 2005 RELATING TO proposed, needed, or enacted legislation REGARDING immigration or immigrants, including but not limited to the following introduced Bills and Resolutions:

Legislative Session	**Bill or Resolution #:**
48th Legislature—Second Regular Session (2008)	S.B. 1052 H.C.R. 2039
49th Legislature—First Regular Session (2009)	S.B. 1162 S.B. 1175
49th Legislature—Second Regular Session (2010)	S.B. 1027 S.B. 1070 H.B. 2162 H.B. 2384

> DOCUMENT REQUEST NO 2:
>
> All DOCUMENTS, including but not limited to any COMMUNICATIONS, between you and any ARIZONA STATE OFFICIAL since January 1, 2005 RELATING TO the relationship between CRIME and immigration, including UNAUTHORIZED IMMIGRATION
>
> DOCUMENT REQUEST NO 3:
>
> All DOCUMENTS, including but not limited to any COMMUNICATIONS, between you and any ARIZONA STATE OFFICIAL since January 1, 2005 containing the terms "immigrant" or "alien" and CRIME.
>
> DOCUMENT REQUEST NO 4:
>
> All DOCUMENTS, including but not limited to any COMMUNICATIONS, between you and any ARIZONA STATE OFFICIAL since January 1, 2005 RELATING TO day laborers, day labor solicitation, or work solicitation in a public place.
>
> DOCUMENT REQUEST NO 5:
>
> All DOCUMENTS, including but not limited to any COMMUNICATIONS, between you and any ARIZONA STATE OFFICIAL since January 1, 2005 RELATING TO the consideration of an individual's race, ethnicity, color, or country of origin as a factor in determining whether or not he or she is "unlawfully present" for purposes of S.B. 1070

> enforcement.
>
> DOCUMENT REQUEST NO 6:
>
> All DOCUMENTS, including but not limited to any COMMUNICATIONS, between you and any ARIZONA STATE OFFICIAL since January 1, 2005 which contain any of the following terms: "alien," "consular," "day labor," "day laborer," "Hispanic," "illegals," "immigrant," "immigration," "invasion," "Kobach," "Latin America," "latino," "matricula," "Mexican," "mexico," "Oriental," "profiling," "Reconquista," "sanctuary," "Spanish," "undocumented," "wetback," or "SB 1070."

(Docs. 884-6 (copy of subpoena issued to FAIR) at 6-7; 884-7 (copy of subpoena issued to IRLI) at 6-7.) Plaintiffs have since limited their requests to communications between FAIR and IRLI ("Movants") and Arizona legislators and their staff. (*See* Pls.' Resp. at 12.) Movants seek to quash the subpoenas as overbroad and for seeking information that is irrelevant, protected by the First Amendment, or protected by the attorney-client privilege. (MTQ at 11-23.)

II. LEGAL STANDARDS AND ANALYSIS

Federal Rule of Civil Procedure 34(c) grants parties the ability to seek the production of documents and other tangible things via a subpoena issued in accordance with Federal Rule of Civil Procedure 45. Rule 45(d) states the requirements for challenging the scope of a subpoena. The relevant provisions of Rule 45(d) allow a subpoenaed party to object to the subpoena on the grounds that it "requires disclosure of privileged or other protected matter, if no exception or waiver applies," or "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iii)-(iv). The party moving to quash a subpoena carries the burden of persuasion. *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005).

A. First Amendment

Movants' first argument is that the subpoenas infringe on their First Amendment rights to freedom of speech and freedom of association. (MTQ at 9-13.) The parties agree that *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2009), controls the issue. (*See id.* at 10; Doc. 911, Pls.' Opp'n to MTQ ("Pls.' Resp.") at 14.) The *Perry* court noted that

"[a] party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege*." *Perry*, 591 F.3d at 1160. That privilege protects against a forced "[d]isclosure[] of political affiliations and activities" that would have a deterrent effect on the exercise of free speech or freedom of association rights. *Id.* The party asserting the privilege must show "that enforcement of the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* (internal quotation marks omitted and alteration incorporated).

Movants argue that they "have a protected . . . right to communicate with Arizona officials on a matter of public concern without having to fear forced disclosure from their records of communications sent on behalf of themselves and their members." (MTQ at 12.) They are only partially correct. The First Amendment undeniably protects Movants' "right to communicate with Arizona officials on a matter of public concern." However, Movants do not cite, and the Court is unaware of, any law that protects from public view communications with public officials in their official capacity about a matter of public concern. Indeed, Arizona law makes all such communications available to the public under its freedom of information law. *See* A.R.S. § 39-121 (guaranteeing public access to "[p]ublic records and other matters in the custody of [public officials]").[2]

Perry and its progeny have all dealt with the disclosure of either the identity of association members or internal communications—not communications with third parties, let alone public officials. *See, e.g.*, *Perry*, 591 F.3d at 1160 ("Disclosure of *political affiliations and activities* that have a deterrent effect on the on the exercise of First Amendment rights are therefore subject to this same exacting scrutiny." (emphasis added) (internal quotation marks omitted); *In re Anonymous Online Speakers*, 661 F.3d

[2] The fact that those communications may no longer be "in the custody of" public officials does not change the effect that disclosing information to a public official has on the privacy of that information. *See Griffith v. Davis*, 161 F.R.D. 687, 698 (C.D. Cal. 1995) ("Voluntary disclosure of a privileged communication to a third person destroys confidentiality and constitutes a waiver of the privilege.").

1168, 1174 (9th Cir. 2011) (stating that the holding in *Perry* "was limited to *private internal* campaign communications concerning the *formulation of campaign strategies and messages*" (internal quotation marks omitted)); *Dunnet Bay Constr. Co. v. Hannig*, No. 10-CV-3051, 2011 WL 5417123, at *3 (C.D. Ill. Nov. 9, 2011) (interpreting *Perry*'s holding as "protect[ing] against the disclosure of the identity of members and the content of internal communications between members, employees, and agents of political campaigns"). Movants, through their own actions, have already disclosed the contents of their communications to the public. As a result, upholding the subpoenas would not force Movants to disclose information that is otherwise secret. Furthermore, the communications Plaintiffs seek are not internal communications, but rather communications between Movants and public officials. The Court finds that the First Amendment privilege, as described in *Perry*, does not apply to the information Plaintiffs seek through discovery.

B. Scope

Movants' next argument is that Plaintiffs' request seeks information concerning legislative intent that is not relevant to their remaining causes of action. (*See* MTQ at 13-21.) Plaintiffs argue that they must prove the existence of animus in the legislature's intent in enacting Sections 2(B), 2(D), 5(A), and 5(B) of S.B. 1070 to succeed on their First, Fourth, and Fourteenth Amendment claims, as well as their preemption claims. (Pls.' Resp. at 5-7.)[3]

To succeed on their Equal Protection challenge, Plaintiffs will have to show, among other things, "[p]roof of racially discriminatory intent or purpose" in the enactment of S.B. 1070. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "Determining whether invidious discriminatory purpose was a motivating

[3] While Movants are correct that the Court would not entertain any further pre-enforcement challenges to Section 2(B), the Court and the Supreme Court each made clear that Section 2(B) could still be challenged after it went into effect, which it now has. (*See* Doc. 757, Sept. 5, 2012 Order at 4-6); *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) ("This opinion does not foreclose other preemption and constitutional challenges to the law *as interpreted and applied after it goes into effect*." (emphasis added)).

factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. Furthermore, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268. The Supreme Court emphasized that its explanation of the necessary evidence "identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed." *Id.*

Plaintiffs' subpoenas seek communications between Arizona legislators and the people advising them through the process of drafting the legislation that eventually became S.B. 1070. The Court finds that those communications are likely to contain admissible evidence or lead to the discovery of admissible evidence of those legislators' intent in drafting and supporting S.B. 1070 as "contemporary statements by members of the decisionmaking body." *See id.* at 268. *Arlington Heights* makes clear that Plaintiffs will need to present such evidence to succeed on their Equal Protection claims. The subpoenas therefore seek evidence that is relevant.

C. Objections to Specific Terms

Movants also object to certain terms in the subpoenas, arguing that they are too vague or are overly broad. (MTQ at 18-19.) The allegedly objectionable terms include "communications," "Latin America," "Spanish," "Mexican," "Mexico," "immigration," "alien," and "crime." (*Id.*)[4] "Latin America," "Spanish," Mexican," "Mexico," "immigration," and "alien" are all plainly relevant to this case involving an immigration statute that was allegedly discriminatorily targeted at minority groups from Latin America, particularly Mexico, the majority of whose members speak Spanish. (*See* FAC ¶¶ 60-72.) Furthermore, those terms are not vague.

[4] Movants' argument that "Arizona public officials" is too broad is moot now that Plaintiffs have limited their request to communications with Arizona legislators and their staff. (*See* Pls.' Resp. at 12 n.10.)

The subpoenas define "communication" to mean "any oral or written transmittal and/or receipt of words or information, whether by chance, pre-arranged, formal or informal, and specifically includes, without limitation, notices of conversations in person, telephone conversations, faxes, telegrams, electronic mail, text messages, letters, reports or memoranda, formal statements or press releases and media publications." (Docs. 884-6 (copy of subpoena issued to FAIR) at 4; 884-7 (copy of subpoena issued to IRLI) at 4.) There is nothing vague about this definition and it is not overly broad. All of the types of communication described could include information that would be relevant to establishing the legislators' intent in drafting and supporting S.B. 1070, which is necessary information in this case, as discussed above.

The subpoenas define "crime" as "any and all actions or omissions that constitute offenses that may be prosecuted by the state and are punishable by law, or any and all actions or activities that, although not illegal, are considered to be evil, shameful, or wrong." (Docs. 884-6 (copy of subpoena issued to FAIR) at 5; 884-7 (copy of subpoena issued to IRLI) at 5.) Movants specifically argue that the second phrase is too vague. The Court agrees. There is no way for any party to determine with any certainty that something is "considered to be evil, shameful, or wrong" due to the near inevitability that reasonable people will have different opinions. The Court therefore quashes the portion of the definition of crime beginning after the phrase "punishable by law."

D. Temporal Scope

Movants also argue that the temporal scope of the subpoenas is unnecessarily broad because it extends from five years before the enactment of S.B. 1070 to seven months after. (MTQ at 20-21.) The Court disagrees. As Plaintiffs argue, S.B. 1070 was one of a series of bills that certain Arizona state legislators sought to enact to address immigration in Arizona. (*See* Pl.'s Resp. at 10 n.8 (noting that State Representative Russell Pearce introduced legislation in January 2006 that was similar to S.B. 1070).) It is reasonable to conclude that the intentions behind those bills were similar, if not identical, to the intentions behind S.B. 1070. Stated differently, they are part of the "historical

background" of the enactment of S.B. 1070 and are therefore relevant to establishing whether S.B. 1070 violates the Equal Protection Clause. *See Arlington Heights*, 429 U.S. at 267. Since those bills were under consideration at least as far back as 2005, that aspect of the subpoenas' temporal scope is not improper. Statements made after the law's enactment can also be evidence of the legislators' intentions in drafting and supporting the bill to the extent that they may reveal past thoughts and feelings. The Court finds that the temporal scope of the subpoenas is not overly broad.

E. Other Sources

Movants' next argument is that Plaintiffs have not shown that the documents they seek are unavailable from other sources such that they are justified in seeking discovery from non-parties. (MTQ at 21-23.)[5] Courts must limit discovery requests that seek information that "can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i). Having already determined that the scope of the subpoenas is appropriate, there is no reason to believe that another person would face less of a burden or a less expensive undertaking in producing the documents because the scope would be the same. Thus, the only question is whether it would be more convenient to seek the information from another person.

Movants argue that Plaintiffs should seek the communications from the legislators on the other end of the communication. (*See* MTQ at 22.) This argument is unpersuasive for two reasons. First, as Movants admit, Plaintiffs sought and received some communications from state legislators, but learned in the process that most communications no longer existed because there is a policy that all legislators' e-mails are deleted after ninety days. (*Id.*) Thus, not only have Plaintiffs already sought discovery from what Movants describe as a more convenient source, but they have also been told that those sources' copies of the communications have been deleted, making discovery from those sources impossible. Accordingly, there is no reason for Plaintiffs to seek

[5] The Court notes that the state legislators and their staff are not parties to this lawsuit and that Movants have not suggested that any party to the case is in possession of the communications at issue.

further discovery from the legislators. The second reason that Movants' argument is unpersuasive is that the state legislators are also non-parties to this suit, so seeking discovery from them would do nothing more than shift the burden of discovery from one non-party to another, which does nothing to address the issue of burdening a non-party with discovery obligations. With these considerations in mind, the Court finds that Plaintiffs have requested discovery from the least inconvenient source.

F. Attorney-Client Privilege

Movants' final argument is that the communications Plaintiffs seek are protected by the attorney-client privilege and the work-product doctrine. (MTQ at 23.) The Court rejects this argument because there is no evidence that Movants had formed an attorney-client relationship with the state legislators with whom they were communicating. *See Alexander v. Superior Court In & For Maricopa Cnty.*, 685 P.2d 1309, 1314 (Ariz. 1984) ("An attorney-client relationship is said to exist when the party divulging confidences and secrets to an attorney believes that he is approaching the attorney in a professional capacity with the intent to secure legal advice." (internal quotation marks omitted)). Movants were offering policy—not legal—advice. Since the parties did not form an attorney-client relationship, there is no basis for Movants to assert the attorney-client privilege or the work product doctrine. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981) (noting that the work product doctrine protects from discovery "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel *in the course of his legal duties*" (emphasis added)); *Alexander*, 685 P.2d at 1314 ("A communication between a client and his attorney is considered confidential, and therefore privileged, if the communication was made in the context of the attorney-client relationship and was maintained in confidence." (internal quotation marks omitted and alteration incorporated)).

III. CONCLUSION

The Court denies most of Movants' Motion to Quash because Movants have not shown that the subpoenas at issue seek privileged information, are overly broad, or create

an undue burden on them as non-parties. The Court finds that the subpoenas are reasonably tailored to elicit relevant information that will either be admissible at trial or is reasonably likely to lead to the discovery of admissible evidence. The Court does quash a portion of the definition of "crime," as discussed above, for being unduly vague.

IT IS ORDERED granting Joint Motion of Nonparties IRLI and FAIR to Untimely File Their Joint Amended Motion to Quash Plaintiff Valle Del Sol's Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Doc. 884).

IT IS ORDERED granting in part and denying in part Joint Amended Motion to Quash Plaintiff Valle Del Sol's Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Doc. 884-2).

Dated this 11th day of December, 2013.

Susan R. Bolton
United States District Judge