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**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
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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.

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

3 DOCUMENT REQUEST NO 1:

4 All DOCUMENTS, including but not limited to any
5 COMMUNICATIONS, between you and any ARIZONA
6 STATE OFFICIAL since January 1, 2005 RELATING TO
7 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

13 DOCUMENT REQUEST NO 2:

14 All DOCUMENTS, including but not limited to any
15 COMMUNICATIONS, between you and any ARIZONA
16 STATE OFFICIAL since January 1, 2005 RELATING TO
the relationship between CRIME and immigration, including
UNAUTHORIZED IMMIGRATION

17 DOCUMENT REQUEST NO 3:

18 All DOCUMENTS, including but not limited to any
19 COMMUNICATIONS, between you and any ARIZONA
20 STATE OFFICIAL since January 1, 2005 containing the
terms “immigrant” or “alien” and CRIME.

21 DOCUMENT REQUEST NO 4:

22 All DOCUMENTS, including but not limited to any
23 COMMUNICATIONS, between you and any ARIZONA
24 STATE OFFICIAL since January 1, 2005 RELATING TO
day laborers, day labor solicitation, or work solicitation in a
public place.

25 DOCUMENT REQUEST NO 5:

26 All DOCUMENTS, including but not limited to any
27 COMMUNICATIONS, between you and any ARIZONA
28 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

1 enforcement.

2 DOCUMENT REQUEST NO 6:

3 All DOCUMENTS, including but not limited to any
4 COMMUNICATIONS, between you and any ARIZONA
5 STATE OFFICIAL since January 1, 2005 which contain any
6 of the following terms: “alien,” “consular,” “day labor,” “day
7 laborer,” “Hispanic,” “illegals,” “immigrant,” “immigration,”
8 “invasion,” “Kobach,” “Latin America,” “latino,”
9 “matricula,” “Mexican,” “mexico,” “Oriental,” “profiling,”
10 “Reconquista,” “sanctuary,” “Spanish,” “undocumented,”
11 “wetback,” or “SB 1070.”

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

18 **II. LEGAL STANDARDS AND ANALYSIS**

19 Federal Rule of Civil Procedure 34(c) grants parties the ability to seek the
20 production of documents and other tangible things via a subpoena issued in accordance
21 with Federal Rule of Civil Procedure 45. Rule 45(d) states the requirements for
22 challenging the scope of a subpoena. The relevant provisions of Rule 45(d) allow a
23 subpoenaed party to object to the subpoena on the grounds that it “requires disclosure of
24 privileged or other protected matter, if no exception or waiver applies,” or “subjects a
25 person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A)(iii)-(iv). The party moving to quash
26 a subpoena carries the burden of persuasion. *Moon v. SCP Pool Corp.*, 232 F.R.D. 633,
27 637 (C.D. Cal. 2005).

28 **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

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

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

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

26
27 ² The fact that those communications may no longer be “in the custody of” public
28 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.”).

1 1168, 1174 (9th Cir. 2011) (stating that the holding in *Perry* “was limited to *private*
2 *internal* campaign communications concerning the *formulation of campaign strategies*
3 *and messages*” (internal quotation marks omitted)); *Dunnet Bay Constr. Co. v. Hannig*,
4 No. 10-CV-3051, 2011 WL 5417123, at *3 (C.D. Ill. Nov. 9, 2011) (interpreting *Perry*’s
5 holding as “protect[ing] against the disclosure of the identity of members and the content
6 of internal communications between members, employees, and agents of political
7 campaigns”). Movants, through their own actions, have already disclosed the contents of
8 their communications to the public. As a result, upholding the subpoenas would not force
9 Movants to disclose information that is otherwise secret. Furthermore, the
10 communications Plaintiffs seek are not internal communications, but rather
11 communications between Movants and public officials. The Court finds that the First
12 Amendment privilege, as described in *Perry*, does not apply to the information Plaintiffs
13 seek through discovery.

14 **B. Scope**

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

21 To succeed on their Equal Protection challenge, Plaintiffs will have to show,
22 among other things, “[p]roof of racially discriminatory intent or purpose” in the
23 enactment of S.B. 1070. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252,
24 265 (1977). “Determining whether invidious discriminatory purpose was a motivating

25
26 ³ While Movants are correct that the Court would not entertain any further pre-
27 enforcement challenges to Section 2(B), the Court and the Supreme Court each made
28 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)).

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

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

18 C. Objections to Specific Terms

19 Movants also object to certain terms in the subpoenas, arguing that they are too
20 vague or are overly broad. (MTQ at 18-19.) The allegedly objectionable terms include
21 “communications,” “Latin America,” “Spanish,” “Mexican,” “Mexico,” “immigration,”
22 “alien,” and “crime.” (*Id.*)⁴ “Latin America,” “Spanish,” Mexican,” “Mexico,”
23 “immigration,” and “alien” are all plainly relevant to this case involving an immigration
24 statute that was allegedly discriminatorily targeted at minority groups from Latin
25 America, particularly Mexico, the majority of whose members speak Spanish. (*See* FAC
26 ¶¶ 60-72.) Furthermore, those terms are not vague.

27
28 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.)

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

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

20 **D. Temporal Scope**

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

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

8 **E. Other Sources**

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

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

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28 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.

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

7 **F. Attorney-Client Privilege**

8 Movants' final argument is that the communications Plaintiffs seek are protected
9 by the attorney-client privilege and the work-product doctrine. (MTQ at 23.) The Court
10 rejects this argument because there is no evidence that Movants had formed an attorney-
11 client relationship with the state legislators with whom they were communicating. *See*
12 *Alexander v. Superior Court In & For Maricopa Cnty.*, 685 P.2d 1309, 1314 (Ariz. 1984)
13 (“An attorney-client relationship is said to exist when the party divulging confidences and
14 secrets to an attorney believes that he is approaching the attorney in a professional
15 capacity with the intent to secure legal advice.” (internal quotation marks omitted)).
16 Movants were offering policy—not legal—advice. Since the parties did not form an
17 attorney-client relationship, there is no basis for Movants to assert the attorney-client
18 privilege or the work product doctrine. *Upjohn Co. v. United States*, 449 U.S. 383, 397
19 (1981) (noting that the work product doctrine protects from discovery “written
20 statements, private memoranda and personal recollections prepared or formed by an
21 adverse party’s counsel *in the course of his legal duties*” (emphasis added)); *Alexander*,
22 685 P.2d at 1314 (“A communication between a client and his attorney is considered
23 confidential, and therefore privileged, if the communication was made in the context of
24 the attorney-client relationship and was maintained in confidence.” (internal quotation
25 marks omitted and alteration incorporated)).

26 **III. CONCLUSION**


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

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

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

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

12 Dated this 11th day of December, 2013.

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17 _____
18 Susan R. Bolton
19 United States District Judge
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