IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM A. LINK, et al.,

***Plaintiffs*,**

v. **Case No.: 4:21cv271-MW/MAF**

RICHARD CORCORAN, et al.,

Defendants,
_____/

ORDER DENYING MOTION TO COMPEL

This case involves a constitutional challenge to recently enacted legislation—HB 233—related to viewpoint diversity in Florida's public colleges and universities. Pending before this Court is Defendants' motion to compel discovery and overrule Plaintiffs' First Amendment privilege objections, ECF No. 133. Defendants seek to compel production of certain documents responsive to several requests for production directed at Plaintiffs March for Our Lives Action Fund (MFOL) and United Faculty of Florida (UFF). In response, Plaintiffs assert they have produced thousands of documents responsive to Defendants' requests, but they are entitled to protection under the First Amendment privilege for those documents identified in their corresponding privilege logs. *See* ECF No. 138. For the reasons set out below, Defendant's motion, ECF No. 133, is **DENIED**.

Generally, courts take a permissive view of discovery. Likewise, "[t]he Federal Rules of Civil Procedure strongly favor full discovery whenever possible." *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). This is because "[r]ules favoring broad discovery help 'make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.' " *Odom v. Roberts*, 337 F.R.D. 359, 362 (N.D. Fla. 2020) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)).

But discovery has limits. Rule 26(b) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). Defendants have requested production of several categories of information and communications that arguably implicate the First Amendment associational privilege. For example, Defendants request production of (1) "all documents concerning and/or pertaining to communications with or statements made by any persons with knowledge of any of the allegations and/or claims made in the Complaint," ECF No. 133-1 at 10, (2) "all communications your post-secondary institution members have received concerning the impact of HB 233 on their teaching and/or researching responsibilities," *id*. at 18, (3) "all documents concerning your post-secondary institution members' performance as a teacher or researcher, whether formal or informal, from Spring 2016 to present," *id*. at 25, and (4) "all documents or

communications distributed in connection with the mission-oriented speaking events and rallies on public colleges and campuses as referenced in Paragraph 21 of the Complaint," ECF No. 133-2 at 39.

Here, Plaintiffs have withheld over 1,000 documents from Defendants, asserting they are privileged under the First Amendment. Defendants ask this Court to overrule Plaintiffs' privilege objections in toto and compel production of these documents. In resolving Defendants' motion, this Court must first determine whether Plaintiffs are entitled to invoke the First Amendment associational privilege. If so, this Court must determine whether they have met their burden to invoke the privilege and whether Defendants have demonstrated a compelling need for the discovery at issue that outweighs Plaintiffs' interest in keeping it private.

A

Defendants assert "Plaintiffs' objections stretch the First Amendment associational privilege far beyond its proper scope." ECF No. 133 at 4. According to Defendants, "the First Amendment privilege [is] narrowly designed to protect personal member and donor information under defined circumstances[.]" *Id*. Defendants assert the First Amendment privilege does not apply in this case because none of their requests "seek member lists or donor lists, nor do they demand private information about any individual members or supporters, nor are the requests directed to disinterested non-parties." *Id*. at 13.

In response, Plaintiffs argue that Defendants advance an overly narrow interpretation of the First Amendment associational privilege that is not borne out by persuasive authority. This Court agrees. "The Supreme Court has not limited the First Amendment privilege to membership lists." *In re Motor Fuel Temp. Sales Pracs. Litigation*, 641 F.3d 470, 480 (10th Cir. 2011). Indeed, courts have held that the First Amendment privilege could extend to a district court's discovery order that required "trade groups and members to disclose to a private party their communications regarding strategy for lobbying against the implementation of [automatic temperature compensation] in the United States," *id*. at 481, and to broad requests for production of financial information, strategic plans, and internal and external communications in connection with the litigation, *see The Ohio Organizing Collaborative v. Husted*, Case No. 2:15-cv-01802, 2015 WL 7008530, *4 (S.D. Ohio Nov. 12, 2015).

To be clear, Defendants rely upon several cases standing for the general proposition that the First Amendment privilege has traditionally applied when challenging compelled disclosure of identifying information and membership lists. *See Fla. Stat. Conf. of Branches and Youth Units of the NAACP v. Lee*, 568 F. Supp. 3d 1301, 1307 (S.D. Fla. Oct. 19, 2021) (noting that "[t]he privilege is primarily invoked when a party seeks disclosure of an association's member or donor list"); *NIACCF, Inc. v. Cold Stone Creamery, Inc.*, No. 12-CV-20756, 2014 WL 4545918,

*3 (S.D. Fla. Sept. 12, 2014) ("The First Amendment's associational privilege arises when a discovery request results in disclosure of a group's anonymous members, or requests similar information that goes to the heart of an organization's associational activities."); *Christ Covenant Church v. Town of Sw. Ranches*, No. 07-60516CIV, 2008 WL 2686860, *5–6 (S.D. Fla. June 29, 2008) (noting that "a qualified First Amendment associational privilege exists in the discovery context, potentially exempting a party from having to respond to infringing discovery requests," and analyzing claim of privilege with respect to discovery request seeking identities of all members of the Plaintiff Church). But *none* of these cases stand for the proposition that the First Amendment privilege is *only* applicable to discovery requests for membership lists, donor lists, or members' identifying information. Accordingly, this Court disagrees with Defendants' narrow construction of the First Amendment privilege. Plaintiffs may raise this privilege with respect to Defendants' requested information. However, that is not the end of the inquiry.

B

Defendants also assert Plaintiffs have essentially waived their First Amendment associational privilege by virtue of the claims they are pursuing in this litigation. ECF No. 133 at 12. According to Defendants, Plaintiffs cannot use the

First Amendment as both a sword in raising freedom-of-association claims[1] and a shield to prevent disclosure of discoverable information.

Defendants rely on distinguishable cases for this point—all of which concern the "at-issue" or "sword and shield" doctrine and addressing whether a party has waived attorney-client privilege under Florida law by affirmatively injecting a privileged communication directly into the litigation. *See* ECF No. 133 at 12 (citing *GAB Business Servs., Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987); *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 446 (S.D. Fa. 1980); *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 614–15 (S.D. Fla. 2014); *Cox v. Admin. U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994)); *See also* Fed. R. Civ. P. 501 (providing that "state law governs privilege regarding a claim or

[1] Plaintiff MFOL alleges that HB 233 threatens students associated with the organization's movement "with budget cuts to their institutions, thereby violating their right to free speech and free association." ECF No. 101 ¶ 27. In addition, MFOL alleges that HB 233 "harms MFOL directly because the law was designed to (and will, absent relief) chill students' involvement in the issues that MFOL supports," "suppress[es] MFOL's recruitment efforts by chilling students' willingness to be associated with its organization," and "will cause the organization to divert resources from on-campus to off-campus activities, forcing it to spend more money on less effective means of recruiting members[.]" *Id*.

Likewise, Plaintiff UFF alleges that HB 233 harms the organization and its bargaining unit members and constituents "by chilling their speech, including in instruction and research, creating an inhospitable environment for the best and brightest researchers within its ranks and making Florida's institutions of higher education unattractive to faculty and researchers who might have come to Florida but for HB 233's oppressive provisions." *Id*. ¶ 24. In addition, UFF alleges that HB 233 "chills its bargaining unit members and constituents' freedom of association, including their association with UFF itself," "harms UFF's mission of ensuring that its bargaining unit members and constituents are treated fairly and equitably," and has required UFF to "divert limited resources to combat the discriminatory and chilling effects of the law, particularly as codified in HB 233's Survey, Anti-Shielding, and Recording Provisions." *Id*. ¶ 25.

defense for which state law supplies the rule of decision"); *Allstate Ins. Co. v. Levesque*, 263 F.R.D. 663, 667 (M.D. Fla. 2010) ("If a client is required to call his attorney to testify on the issues necessary to establish his claim, the client waives the right to insist that the matter is privileged in pretrial discovery proceedings.").

This Court is not persuaded that simply because these organizations are pursuing freedom-of-association claims, this necessarily opens them up to unrestricted discovery of information that would otherwise be privileged under the First Amendment associational privilege. Indeed, Defendants cite no case involving First Amendment claims where a court has held that by virtue of injecting freedom-of-association claims into the litigation, a plaintiff necessarily waives any right to assert the First Amendment associational privilege. Indeed, the contrary appears to be the case. *See, e.g.*, *Minter v. City of Aurora, Co.*, No. 20-cv-02172-RMR-NYW, 2021 WL 5067593, *10–11 (D. Col. Sep. 29, 2021) (analyzing application of First Amendment associational privilege in § 1983 case involving First Amendment claims and waiver only where Plaintiffs had exposed allegedly privileged information in responding to interrogatory). Accordingly, Plaintiffs have not waived their right to assert this privilege merely by bringing freedom-of-association claims in this case.

C

To invoke the First Amendment associational privilege, Plaintiffs bear "the burden of making a *prima facie* showing of infringement on the right by the requested discovery." *Fla. Stat. Conf. of Branches and Youth Units of the*, 568 F. Supp. 3d at 1307. "To do so, [Plaintiffs] must demonstrate a 'reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties.' " *Id*. (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)). Plaintiffs must provide evidence, not just argument, to meet their burden. *See Edmondson v. Velvet Lifestyles, LLC*, Case No. 15-24442-CIV-LENARD/GOODMAN,2016 WL7048363, *10 (S.D. Fla. Dec. 5, 2016) (noting that party asserting privilege to shield discovery of email distribution list for "profit-oriented, 'clothing optional' swingers' parties" did not provide any evidence in support of motion, but instead submitted only attorney argument).

Additional factors are relevant in deciding whether a party asserting the privilege is entitled to protection. For example, courts have considered, among other factors, whether the party requesting the discovery is "police, law enforcement, or any other type of Government entity" as opposed to "purely private parties," *id*., and whether the party asserting the privilege asserts it or its members "ever took a public stance . . . on any issues of public political, social, or cultural importance," *id*. (quoting *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 444

(3d Cir. 2000)). This Court first turns to Plaintiffs' evidence to determine whether they've met their burden to make a *prima facie* showing to invoke the First Amendment associational privilege.

1

Here, in addition to other evidence to support its opposition to Defendants' motion, Plaintiffs have submitted a declaration from UFF's president, Andrew Gothard, and MFOL's transition director, Tej Gokhale. This Court will address UFF's declaration first.

UFF points to its president's declaration as evidence establishing its *prima facie* showing to invoke the First Amendment associational privilege. *See* ECF No. 138 at 23–24. Mr. Gothard asserts that UFF "is a statewide union representing more than 25,000 faculty members and academic professionals at Florida's public colleges and universities." ECF No. 137-1 ¶ 2. He says he personally reviewed Defendants' discovery requests and helped identify 1,961 responsive documents, of which UFF produced 258 documents that included communications with legislators and reporters, as well as publicly available budgets. *Id*. ¶ 3. He also reviewed every privilege log entry, including custodian, document type, date, recipient, etc. *Id*. ¶ 4. According to Mr. Gothard, approximately 1,200 documents have been logged as privileged. If they were subject to disclosure, Mr. Gothard says, "[i]t would substantially discourage [Mr. Gothard] and others from communicating within UFF

and would impede [their] ability to effectively organize and work together to achieve the political goals of [the] organization." *Id*. Mr. Gothard is "concerned that producing those documents will chill communications within UFF and frustrate UFF's ability to serve its functions because disclosure would cause strategic disadvantage in [their] bargaining efforts," and it would "deter members from engaging within UFF or seeking out [their] help out of fear of retaliation from the state." *Id*. ¶ 5.

In addition, Mr. Gothard asserts the UFF is also "an advocacy organization on behalf of the interests of its members," and "[t]his advocacy includes engagement with school administrators, the press, legislators, other organizations, government agencies, and the public generally." *Id*. ¶ 7. But "[i]f the coordination and planning discussions around those advocacy efforts were subject to discovery," Mr. Gothard "would forego some and substantially censor other internal communications relating to its advocacy efforts," which would make it "more difficult for UFF to act as an advocate for its members, and one of [its] core purposes as an organization would be frustrated." *Id*. In addition, Mr. Gothard says UFF "provides guidance to faculty regarding relevant changes to Florida law, including . . . HB 233," but "[i]f these internal communications were subject to discovery, [Mr. Gothard] would forego some and substantially censor other internal guidance or advising provided to UFF's members." *Id*. ¶ 8.

Mr. Gothard also notes that UFF's communications with its leadership and members "would be especially discouraged by the discovery sought by the Defendants in this case," who are "UFF's primary counterpart[s]." *Id*. ¶ 9. "Producing internal documents to UFF's primary counterparty would have maximal risks of retaliation or strategic disadvantage in bargaining, grievance procedures, and other forms of advocacy that are vital to [UFF's] work as a higher education faculty union." *Id*.

Mr. Gothard points to instances of perceived retaliation at the hands of one of the Defendants. Specifically, he cites Richard Corcoran's statements referring to UFF as "downright evil" and being "crazy people" who are "fixated on halting innovation and competition." *Id*. ¶ 11. Mr. Gothard notes that Defendant Corcoran "has also worked to have school administrators' salaries withheld for requiring masks in their schools." *Id*. Finally, he notes that UFF "has repeatedly offered to make its leadership available to Defendants for deposition and is prepared to answer questions related to its basis for standing and its claims in ways that would avoid chilling their First Amendment activity." *Id*. ¶ 13. However, as of August 9, 2022, no corporate representative deposition was scheduled. *Id*.

Turning to MFOL's evidence, it points to its transition director's declaration as evidence establishing its *prima facie* showing to invoke the First Amendment associational privilege. *See* ECF No. 138 at 25–26. Mr. Gokhale asserts that MFOL

is a nonprofit organization founded in Florida in 2018, after the school shooting at Marjory Stoneman Douglas High School. ECF No. 137-2 ¶ 3. It "runs advocacy and mobilization programs nationwide, including on some of Florida's public post-secondary school campuses." *Id*. "MFOL's mission . . . is to harness the power of young people to fight for sensible gun violence prevention policies that save lives." *Id*. Mr. Gokhale asserts the organization "depends on its ability to engage people . . . in its work and to maintain a visible presence in communities where young people live, including on Florida's public college and university campuses." *Id*.

Like Mr. Gothard, Mr. Gokhale has reviewed Defendants' discovery requests and MFOL's privilege log and asserts that MFOL "identified 142 responsive documents, and produced 105 documents spanning 349 pages, including documents distributed to the public and to legislators and reporters." *Id*. ¶ 5. Of the 35 documents marked as privileged, Mr. Gokhale asserts "32 are internal documents regarding MFOL's organizing or political strategy, two are internal documents relating to logistics and plans for MFOL's mission-oriented activities, and one is an internal document about MFOL's outreach to strategic partners." *Id*. ¶ 6.

Mr. Gokhale asserts he is concerned about producing internal strategic documents and that such disclosure will chill MFOL's protected speech and advocacy activity. *Id*. ¶ 7. He cites examples of past harassment of MFOL members "due to their views on the harms caused by gun violence, including threats against

their safety, and accusations that the original members of MFOL . . . were 'crisis actors.' " *Id*. In addition, he reiterates that MFOL has previously had to hire personal security for some of its members in the face of threats or violent speech." *Id*.

Likewise, Mr. Gokhale fears retaliation from the state for MFOL's advocacy, and he says he "know[s] that many MFOL members share this fear." *Id*. ¶ 8. As an example of retaliation, he cites Governor DeSantis's decision to block funding for the Tampa Bay Rays training facility "after the team tweeted out a statement in support of gun safety legislation and made a donation to another organization committed to stopping gun violence." *Id*.

Mr. Gokhale asserts that if MFOL's internal strategic communications were subject to discovery, "it would change how MFOL staff, members, supporters, and constituents communicate in the future." *Id*. ¶ 9. In addition, Mr. Gokhale notes that "MFOL's planning and logistics documents include identifying information for its members, volunteers, and supporters," and that "[d]isclosing such information would subject those people to the very government scrutiny that MFOL is challenging, solely because of their affiliation with MFOL." *Id*. ¶ 10. Mr. Gokhale asserts this disclosure would pose "significant risk that other potential supporters would be deterred from attending and helping with MFOL's activities in the future, for fear of their identity being disclosed to the State." *Id*.

Mr. Gokhale "voluntarily sat for a 30(b)(6) deposition on behalf of MFOL on July 14, 2022." *Id.* ¶ 13. Mr. Gokhale asserts that, at his deposition, Defendants "had the opportunity to ask [him] questions related to MFOL's basis for standing and its claim that HB 233 would chill its First Amendment activity." *Id*. And he says he "did not refuse to answer any questions based on the First Amendment privilege." *Id*.

Upon review of their agents' depositions, both Plaintiffs have met their *prima facie* burden when invoking the First Amendment associational privilege. Both organizations engage in protected expression and provide a way for their members to engage as well. They advocate issues of public political and social importance on behalf of faculty and students in Florida's colleges and universities. And the parties seeking to compel disclosure of their internal documents and communications concerning their members, strategy, and advocacy are, in many instances, their "public policy opponents." *See Whole Woman's Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018). Moreover, in every instance, the parties seeking disclosure in this case are not private individuals, but instead they represent the State and the governing authorities for the institutions where UFF's members teach and where MFOL's members attend school. The evidence before this Court satisfies Plaintiffs' "light" burden to demonstrate "a reasonable probability that the discovery at issue would subject [Plaintiffs' members] to threats, harassment, or reprisals from either

Government officials or private parties." *Christ Covenant Church*, 2008 WL 2686860, at *6 (noting that proof "may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself . . . ."). Next, this Court considers whether Defendants have met their burden to overcome Plaintiffs' asserted privilege.

2

"Once a party invoking the associational privilege makes the required *prima facie* showing of infringement, the Court must determine whether the party seeking discovery has demonstrated a 'compelling need' for the information sought, such that disclosure of the requested information warrants the infringement of the disclosing party's First Amendment rights." *Id*. at *7. To determine if Defendants have demonstrated a "compelling need" to warrant infringing Plaintiffs' First Amendment rights in compelling disclosure, this Court considers several factors. Namely, whether Defendants have shown this information "is so relevant that it goes to the heart of the matter," *id*. at *8 (internal citation and quotation marks omitted), "the availability of the information from alternative sources," *id*., "the nature of the information sought, including the likelihood of injury to the association or its members, if the desired information is released," *id*., "the requesting party's role in the litigation," *id*., and "whether the disclosure sought constitutes the least restrictive

means for accomplishing [Defendants'] objectives, and will not unnecessarily sweep constitutional rights aside," *id*. (internal citations and quotation marks omitted).

Defendants assert that they have established a compelling need considering their role, as Defendants, in this litigation and that the requested information is highly relevant to test Plaintiffs' contentions—particularly with respect to Plaintiffs' standing to sue. ECF No. 133 at 14. But, contrary to Defendants' assertion, the balance of factors does not "weigh decidedly in Defendants' favor." *Id*. at 18.

This Court is not persuaded that Defendants have demonstrated the information they seek is "*highly* relevant" to Plaintiffs' claims or standing arguments. *See, e.g.*, *The Ohio Org. Collaborative*, 2015 WL 7008530, at *2 ("Even assuming that the requested discovery is relevant to the issue of standing, an issue that requires only a minimal showing of injury, the breadth of the discovery requests and the burden on plaintiffs in responding to those requests outweigh the likely benefit, considering the needs of the case." (internal citation and quotation marks omitted)); *id*. at *7. Defendants' broad requests seek much more sweeping discovery than the narrow discovery requests that were at issue in the cases Defendants cite to support their motion. *See* ECF No. 138 at 28–29. In addition, this Court agrees that Defendants' requested relief is not narrowly tailored to avoid interference with Plaintiffs' or Plaintiffs' members' protected activities. *Id*. at 29–30. Accordingly,

because the balance of factors weighs in Plaintiffs' favor, Defendants' motion to compel, ECF No. 133, is **DENIED**.[2]

SO ORDERED on December 13, 2022.

s/Mark E. Walker
Chief United States District Judge

[2] Defendants also assert that Plaintiffs' privilege logs "improperly repeat[] over one thousand boilerplate privilege objections." *See* ECF No. 133 at 20. This Court disagrees. Contrary to Defendants' assertion, Plaintiffs' logs do not contain "baldfaced" assertions of privilege. Upon review, both of Plaintiffs' privilege logs include entries for the bates number, custodian, type of document, date, subject or title of the document, the document's recipient[s], the document's sender[s], document "participants," the claimed privilege, and a description of the document's contents. Plaintiffs' privilege logs are sufficient to make the claimed privilege and describe the nature of the withheld documents in a way that enables the parties to assess the claim without revealing information that is itself privileged.