IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF VERMONT

JANET JENKINS, ET AL., Plaintiffs, v. KENNETH L. MILLER, ET AL., Defendants.	Docket No. 2:12-cv-00184

DEFENDANTS LIBERTY COUNSEL, INC. AND RENA M. LINDEVALDSEN'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

Pursuant to Local Rules 7 and 26, Defendants Liberty Counsel, Inc. and Rena M. Lindevaldsen ("Liberty Counsel Defendants"), by and through the undersigned counsel, hereby file their response in opposition to Plaintiff's Motion to Compel. (Dkt. 361, "MTC").

INTRODUCTION

In her sweeping Complaint, Plaintiff Janet Jenkins ("Jenkins") alleges a vast conspiracy against a host of defendants, including the Liberty Counsel Defendants who served as attorneys for Jenkins' former adversary in numerous and protracted multi-jurisdictional custody proceedings. As to Jenkins' initial claims, which failed to name Liberty Counsel or Lindevaldsen, this Court found that "[t]here is no factual support for the assertion that the [Liberty Counsel] attorneys committed a tortious act—or conspired to commit a tortious act [and] there is no suggestion that the attorneys committed a tort by representing their client or publicly voicing their opinion concerning the issues." (Dkt. 116). Unhappy with that finding, Jenkins pressed forward with her claims against Liberty Counsel and secured new counsel to aid her. (Dkt. 218).

Jenkins' new counsel is none other than the Southern "Poverty" Law Center ("SPLC"), an ideological opponent of Liberty Counsel with a $450 million war chest. (*See, Southern Poverty Law Center Fires Morris Dees, Its Co-Founder*, available at https://www.npr.org/2019/03/14/703526235/southern-poverty-law-center-fires-morris-dees-its-co-founder (last visited August 27, 2019)). The SPLC has publicly and proudly proclaimed that its "**aim is to destroy these groups [including Liberty Counsel], to completely destroy them**." (Declaration of Horatio G. Mihet, Esq. in Opposition to Plaintiff's Motion to Compel ("Mihet Decl."), dkt. 375, ¶22; Speech of Mark Potok, Senior Fellow at Southern Poverty Law Center, *Mark Potok Speech 1*, YOUTUBE (Sept. 11, 2007), https://www.youtube.com/watch?v=fnTz2ylJo_8&feature=reImfu (discussing SPLC's purpose behind attaching the "hate group" label to certain organizations, including Liberty Counsel, with which it disagrees (emphasis added)). Thus, nine and a half years after the SPLC embarked on its journey to "completely destroy" Liberty Counsel for its public policy work and advocacy, the SPLC found the perfect vehicle and joined this lawsuit intended to do precisely that. (*See* dkt. 218, 218-1, Motion for Admission Pro Hac Vice of David Dinielli of the SPLC).

As part of the seek-and-destroy mission, Jenkins – through her SPLC counsel – seeks to throw open the records of Liberty Counsel for a vast – and admitted – fishing exploration that would bog Liberty Counsel down for literally **weeks** of document review, and thus cripple their First Amendment pro bono work and advocacy. When asked to cabin such overly broad and unconscionably burdensome requests, Jenkins refused to do so and instead asks this Court to likewise facilitate the SPLC's mission to destroy Liberty Counsel in this action.

Jenkins' Motion to Compel should be denied for four reasons: (I) Jenkins is not entitled to embark on what she admits is a fishing expedition with nothing more than speculation and

conjecture that something (anything) might somehow show up to aid her efforts; (II) Jenkins' request for a document-by-document privilege log is itself unconscionable and unduly burdensome when Jenkins is asking Liberty Counsel to spend 15 weeks+ of attorney time to catalogue every piece of paper in its 42,500+ page paper litigation file and 15-gigabyte+ electronic litigation file; (III) Jenkins is not entitled to abuse the discovery process in aid of her counsel's efforts to "completely destroy" Liberty Counsel; and (IV) the First Amendment privilege protects the Liberty Counsel Defendants from disclosure of documents violative of their fundamental right of free association.

LEGAL ARGUMENT

I. JENKINS IS NOT ENTITLED TO FASHION DISCOVERY AS AN UNRESTAINED FISHING EXPEDITION BASED MERELY ON SPECULATION OR CONJECTURE, WHICH SHE HAS ADMITTED IS HER GOAL.

A. Binding Precedent Forbids Jenkins From Fashioning Discovery Requests Uncabined By Any Restrictions Or Limitations.

Even though this litigation is purportedly about the kidnapping of Isabella Miller, Jenkins and the SPLC are not content to ask Liberty Counsel only about **that**. Instead, they have intentionally fashioned breathtakingly broad discovery requests that purposefully subsume every single piece of paper and every single document in Liberty Counsel's litigation file. For example, Jenkins has defined as "**the Dispute**" **eleven separate cases** where Liberty Counsel represented Lisa Miller before her disappearance in custody litigation for over five years in two separate jurisdictions, and has asked Liberty Counsel to produce **every single piece of paper** "concerning" "the Dispute." (Mihet Decl. ¶¶ 4, 13-15). Jenkins doesn't merely want documents from Liberty Counsel related to the alleged kidnapping (because they don't exist) – she wants instead **everything**: (a) "**all documents and communications concerning the Dispute**," (Jenkins' RFP to Lindevaldsen, dkt. 361-1, p. 9 ¶17; Jenkins' RFP to Liberty Counsel, dkt. 361-2, p. 9 ¶17); (b)

"**all communications with Defendant Lisa Miller**" (Jenkins' RFP to Lindevaldsen, dkt. 361-1, p. 8 ¶8; Jenkins' RFP to Liberty Counsel, dkt. 361-2, p. 8 ¶8); (c) "**all documents and communications concerning Defendant Lisa Miller**" (Jenkins' RFP to Lindevaldsen, dkt. 361-1, p. 8 ¶6; Jenkins' RFP to Liberty Counsel, dkt. 361-2, p. 8 ¶6); (d) "**all documents and communications concerning Plaintiff Janet Jenkins**" (Jenkins' RFP to Lindevaldsen, dkt. 361-1, p. 8 ¶4; Jenkins' RFP to Liberty Counsel, dkt. 361-2, p. 8 ¶4).

Jenkins' requests are breathtakingly broad because the massive, multi-jurisdictional custody litigation generated a gigantic paper and electronic litigation file, all of which Jenkins wants Liberty Counsel to review, catalogue and produce. (Mihet Decl., ¶¶ 3-10). Among other things, Jenkins wants Liberty Counsel to review every piece of paper in **17 bankers' boxes** of paper files, comprising **over 42,500 pages**:

(Mihet Decl., ¶ 5). And Jenkins also demands that Liberty Counsel review, catalogue and produce every document in its 15+ gigabyte electronic file, comprising **tens of thousands of documents**. (Mihet Decl., ¶ 8).

Because these are indisputably **litigation files**, generated by attorneys while lawfully representing their client, they contain either publicly filed pleadings (available to the public, including Jenkins), or an overwhelming amount of attorney notes, research memoranda, non-public document drafts, client communications, and attorney communications, all or virtually all of which are work-product or attorney-client privileged, as can be expected of any typical attorney litigation file. (Mihet Decl. ¶¶ 6, 8). It would take a Liberty Counsel attorney over **15 work-weeks** (**625 hours**) of full-time document review to review and catalogue these massive files, only to then tell Jenkins that most of the documents are privileged and that the remainder can be accessed from the Courts in which they were publicly filed. (Mihet Decl. ¶¶ 7, 9). As likely intended, this would essentially cripple Liberty Counsel's public interest, pro bono work defending the First Amendment rights of its clients. (Mihet Decl. ¶ 10).

This Court must not countenance this stated attempt by the SPLC to "destroy" Liberty Counsel with unconscionable discovery burdens that serve no purpose other than to impair its public interest, First Amendment work, which the SPLC loathes. "A district court may refuse to allow additional discovery if it deems the request to be based on speculation as to what potentially could be discovered—that is merely a fishing expedition." *Seneca Beverage Corp. v. Healthnow N.Y., Inc.*, 200 F. App'x 25, 27 (2d Cir. 2006); *Nat'l Union Fire Ins. Co. of Pitts. v. Strooh Cos., Inc.*, 265 F.3d 97, 117 (2d Cir. 2001) (same). Indeed, where – as here – a plaintiff seeks "virtually the entire business history of defendants for a period of several years" based on threadbare allegations of unlawful conduct, a court should refuse such discovery requests because that

constitutes a textbook example of "a fishing expedition of large proportions." *Segan v. Dreyfus Corp.*, 513 F.2d 695, 697 (2d Cir. 1975).

Specifically, in the motion to compel context, courts have held that compliance with unrestrained requests should not be ordered absent specific instances showing **objective support** for the need for such burdensome requests. *Tottenham v. Trans World Gaming Corp.*, No. 00 Civ. 7697(WK), 2002 WL 1967023, *2 (S.D.N.Y. June 21, 2002) ("Discovery requests cannot be based on pure speculation or conjecture and "[w]e will not condone such a fishing expedition on the mere speculation that [discovery will yield evidence] . . . where the [party] has not offered any **objective support** for such a contention" (emphasis added)); *United States v.. Consolidated Edison Co. of N.Y.*, No. CV-88-0049(RJD), 1988 WL 138275, *1 (E.D.N.Y. Dec. 15, 1988) ("**Discovery rules are not a hunting license to conjure up a claim**." (emphasis added)); *Samuels v. Eleonora Beheer, B.V.*, 500 F. Supp. 1357, 1362 (S.D.N.Y. 1980) (same).

Jenkins is impermissibly attempting to shift her burden to demonstrate with objective support that all-encompassing and unrestrained discovery requests should be permitted. As discussed in the next section, Jenkins admits that she has no intention of limiting any of her overbroad requests, because she does not know what she seeks and she purposefully seeks "everything." Jenkins' expansive search for everything having anything whatsoever to do with the custody litigation between Jenkins and Miller (and not Isabella's kidnapping) is a "mere stab in the dark," as Jenkins herself puts it. (MTC at 5).

One need look no further than Jenkins' reference to a hypothetical personal note from Lindevaldsen to her daughter on a refrigerator to see the extraordinary breadth of the fishing expedition upon which Jenkins hopes to embark. (MTC at 12-13 ("Defendants' counsel asked, 'What about a note that Ms. Lindevaldsen left on the refrigerator to her daughter that said, "See

you at your ballet recital tonight, sweetie!"? **Plaintiffs' counsel responded that such a note actually could be relevant**." (emphasis added)). If Jenkins truly believes, as her counsel flatly admits, that Liberty Counsel and Lindevaldsen are required to expend the amount of resources required to search for every document – including notes to their children – that might have been written almost a decade ago and then produce them to Jenkins, what reasonable limit would they ever be prepared to accept? The answer is simple: there are no limits to their hoped-for fishing excursion. This Court should not let their boat out of the harbor.

B. Jenkins Has Admitted That She Does Not Know That Which She Seeks, And Thus Admits To Embarking On A Fishing Expedition.

The overbreadth of Jenkins' "give me everything" approach is not accidental. During meet-and-confer sessions with Jenkins' counsel, counsel for the Liberty Counsel Defendants informed them that several of Jenkins' document requests were too broad, encompassed Liberty Counsel's entire paper and electronic litigation file comprising of tens of thousands of documents, and could not reasonably be searched without undue burden. (Mihet Decl. ¶ 16). Liberty Counsel asked Jenkins to narrow her requests and to ask for specific things, as she did with other requests. (*Id.*) Liberty Counsel indicated to Jenkins that it was ready, willing and able to search for specific documents on narrow, targeted and specifics topics, **as Liberty Counsel had already done**, if Jenkins were willing to provide more such requests. (*Id.*)

Nevertheless, Jenkins steadfastly refused. (Mihet Decl. ¶ 17). On both occasions, attorney Tyler Clemmons of the SPLC indicated that Jenkins' requests were purposefully overbroad, and that they were not willing to narrow the broad requests, for various reasons, including because "we don't know what we are looking for," "we don't know what you have," "we don't know what to request," "we don't want to miss certain things by asking only for others," and "we want

everything." (*Id*.)

This is a classic fishing expedition, if there ever was one. As the authorities above plainly indicate, Jenkins may not ask for "everything" in the hopes of finding "something."

C. Where Jenkins Has Appropriately Limited Her Requests To A Reasonable Parameter, Defendants Have Conducted Extensive Searches And Produced Responsive Documents.

Critically, among her 69 separate and sweeping document requests to each of Lindevaldsen and Liberty Counsel (not including numerous subparts), Jenkins included numerous specific and targeted requests, such as (a) communications with one "Matthew Cullinan Hoffman"; (b) communications with "the Beachy Amish Mennonite Church in Nicaragua"; (c) documents concerning "aid directly or indirectly given to Defendant Lisa Miller or Plaintiff Isabella Miller-Jenkins concerning their departure from … Virginia … travel to Canada, departure from the United States, travel to Nicaragua, living in Nicaragua, or remaining in Nicaragua"; and (d) communications with numerous other **specific** individuals and **specific** email addresses. (Jenkins RFP to Lindevaldsen, dkt. 361-1, ## 29, 39, 41, 42, 43, 44, 45, 49, 55, 56, 57, 58, 59, 60, 61, 62, 63; Jenkins RFP to Liberty Counsel, dkt. 361-2, ## 29, 39, 41, 42, 43, 44, 45, 49, 55, 56, 57, 58, 59, 60, 61, 62, 63). (Mihet Decl. ¶ 11).

Liberty Counsel attorneys and staff expended **over 65 hours** devising **over 28 search terms**, running separate searches on individual email databases of all personnel and on the electronic litigation file, reviewing results and providing responses and responsive documents to Jenkins. (Mihet Decl. ¶ 12). In other words, where Jenkins reasonably limited her requests to ask about Liberty Counsel's purported involvement in the alleged kidnapping, or Liberty Counsel's purported communications with specific individuals (other than their own client), Liberty Counsel was able to conduct reasonable searches and reasonable investigation, and to produce responsive

documents or confirm that none exist.

Jenkins does not and cannot challenge Liberty Counsel's search and response to her specific requests. She only takes issue with Liberty Counsel's inability to deliver the same on Jenkins' "give me everything" requests, as to which Liberty Counsel cannot conduct focused searches but must instead spend weeks upon weeks of attorney time to review and catalogue every document in its litigation files.

Jenkins knows how to ask for specific things that may actually bear upon this case, and she has done so – with numerous requests. Just because those requests did not yield anything of use to Jenkins (because nothing of use exists to support her made-up claims against Liberty Counsel) does not give Jenkins license to demand "everything" under the sun.

II. JENKINS' INSISTENCE ON A DOCUMENT-BY-DOCUMENT PRIVILEGE LOG THAT WOULD UNQUESTIONABLY COVER THOUSANDS OF DOCUMENTS INDISPUTABLY PROTECTED BY THE ATTORNEY CLIENT PRIVILEGE AND WOULD TAKE WEEKS OF ATTORNEY TIME TO GENERATE IS NOT REASONABLE NOR PROPORTIONAL.

Jenkins contends that the Liberty Counsel Defendants have "manifestly failed to comply" with a purported requirement that they provide a detailed, document-by-document privilege log for all communications ranging almost two decades arising entirely from their lawful representation of a client. (MTC at 7). Such is not the law. As the Advisory Committee Notes acknowledge, sometimes requests such as Jenkins' far-reaching and burdensome requests here do not require a privilege log, because that exercise itself is unduly burdensome:

> Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but **may be unduly burdensome when voluminous documents are claimed to be privileged or protected.**

Fed. R. Civ. P. 26, Advisory Cmt. Notes 1993 Amendment (emphasis added).

Many courts have likewise held that a party should not be required to produce a privilege log absent some limiting criteria. *See, e.g., Edmondson v. RCI Hospitality Holdings, Inc.*, No. 16-CV-2242(VEC), 2018 WL 4112816 (S.D.N.Y. Aug. 29, 2018) (holding that where "[p]laintiff has filed to show that the requested documents are relevant **and proportional** . . . Defendant is not obligated to create a privilege log in response to the request" (emphasis added)); *id.* ("where, as here, **providing a privilege log would be unduly burdensome, courts have discretion to limit a party's obligation to provide one**" (emphasis added)); *American Broad. Cos., Inc.. v. Aereo, Inc.*, No. 12 Civ. 1540(AJN), 2013 WL 139560, *2 (S.D.N.Y. Jan. 11, 2013) (privilege log not mandated where it would require "immensely burdensome efforts of likely privileged communications); *id.* (holding that where, as is true of Jenkins' requests, "there is a strong likelihood the [the requested documents] are subject to legitimate claims of privilege, requiring Plaintiffs to undertake such endeavor **without further limitations** should not be ordered, particularly where it requires "**review of substantial portions of the litigation files and internal law firm emails of numerous cases**" (emphasis added)); *SEC v. Thrasher*, No. 92 Civ. 6987(JFK), 1996 WL 125661 (S.D.N.Y. Mar. 20, 1996) (where party's only argument for document-by-document privilege log is that "it is entitled to such a log," and fails to offer reasonable limitations upon a request, a court should not order a detailed privilege log); *Cedant Corp. v. Sheldon*, No. 3:06CV00854(AWT), 2007 WL 2460701, *1 (D. Conn. Aug. 24, 2007) (denying motion to compel production or require a privilege log where discovery request sought broad range of documents clearly implicating attorney client privilege because it requested all communications between the attorneys and their clients concerning the case); *Benson v. Rosenthal*, No. 15-782, 2016 WL 1046126, *10 (E.D. La. Mar. 16, 2016) (document-by-document privilege log not required if preparation of one would be "unduly burdensome").

Here, Jenkins seeks every piece of paper in Liberty Counsel's Jenkins-Miller litigation files, which, by their very nature, contain privileged work product and attorney-client communications. As detailed above and in the accompanying Mihet Declaration, these files span tens of thousands of paper and electronic documents, and would take weeks upon weeks of attorney time to review and catalogue. (Mihet Decl. ¶¶ 3-10). And this would be an exercise in futility that would serve no purpose other than to harass and incapacitate Liberty Counsel attorneys.

Unless and until Jenkins sufficiently narrows her overbroad requests, this Court should not require Liberty Counsel attorneys to spend hundreds of hours to review and catalogue every piece of paper in their litigation files. *See American Broad. Cos.*, 2013 WL 139560, at *2 (rejecting party's request for privilege log until discovery requests are narrowed, because otherwise it would "require review of substantial portions of the litigation files and internal law firm emails in numerous cases").

Jenkins' request is also not proportional to the needs of this case. It is unreasonable for Jenkins to purport to require the Liberty Counsel Defendants to search for and produce every document or communication they have ever had with any person in the entire world about anything having to do with Janet, Lisa or Isabella over the course of 18 years, when in fact Liberty Counsel has spent numerous years lawfully advocating for Lisa and Isabella in multiple venues.

III. JENKINS' ASSERTION THAT DEFENDANTS HAVE SOMEHOW WAIVED THE ATTORNEY-CLIENT PRIVILGE IS NEITHER RIPE NOR MERITED.

Jenkins also baldly asserts – in passing – that Lindevaldsen's use of email servers at Liberty University School of Law, where she is employed, somehow waived all claims the Liberty Counsel Defendants have to attorney-client privilege. (MTC at 9). This contention is wholly meritless.

Initially, however, any dispute about privilege and waiver is premature at this point, because no specific privileged documents have been identified. Jenkins should be required to

narrow her requests, and if the narrow requests still subsume privileged documents, a debate can be had with specific documents in mind rather than in the abstract, as Jenkins attempts to do now.

Nevertheless, Jenkins relies upon *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (S.D.N.Y. 2005) for the contention that transmission of email over an employer's server can waive the attorney-client privilege. (MTD at 9). The seminal fact that Jenkins seems to miss with her reliance of *Asia Global* is that the **employer** and the **employee** were adversaries in the litigation. 322 B.R. at 251. And, more importantly, the employee litigant had used the adversary employer's email server to communicate with his personal attorney and **had copied the employer's in-house counsel** on the communications upon which the court found wiaver. *Id.* at 260-62. Under such circumstances, the court held that no person could have maintained any expectation of privacy in such emails.

In fact, contrary to Jenkins' assertions here, *Asia Global* explicitly notes that "[a]ssuming a communication is otherwise privileged, **the use of the company's email system does not, without more, destroy the privilege**." *Id.* at 251 (emphasis added). Jenkins plainly ignores this unequivocal statement in her own authorities. Here, Lindevaldsen's use of her **law school employer's** email to discuss lawful representation of a client and **clinical litigation assistance** arising from her employment with a law school cannot destroy the attorney-client privilege. Lindevaldsen had a reasonable expectation that her use of email to discuss litigation with clients and law students assisting with litigation matters would remain confidential. Binding precedent reveals that her expectation of privacy maintained the privilege. *See, e.g.*, *Leventhaul v. Knapek*, 266 F.3d 64, 73-74 (2d Cir. 2001) (holding that employee had reasonable expectation of privacy in emails and documents on a computer the employee did not share with others, in an office that remained locked while she was absent, and where the employer did not have a practice of regularly

reviewing the contents of employee's computers); *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 564-65 (S.D.N.Y. 2008) (employee could assert attorney-client privilege over emails transmitted over employer's email, even where employer accessed his email account and viewed privileged emails); *Green v. Beer*, No. 06 Civ. 4156(KMW)(JCF), 2010 WL 3422723, *4 (S.D.N.Y. Aug. 24, 2010) (same). Jenkins' bald and fact-free contention that Defendants waived all claims of attorney-client privilege by virtue of Lindevaldsen's mere use of Liberty University's email server – without more – is simply without merit.

More importantly, countenancing Jenkins' waiver argument would have broad negative implications for legal education and practical, clinical experience across the country. There is no debate that law schools throughout the country offer clinical programs that involve students actually representing clients under the direction of law professors. *See, e.g.*, Harvard Law School, *In-House Clinics, available at* https://hls.harvard.edu/dept/clinical/clinics/in-house-clinics/ (last visited August 26, 2019); Yale Law School, *Our Clinics, available at* https://law.yale.edu/clinics/our-clinics (last visited August 26, 2019); University of Virginia School of Law, *Academics: Clinical Training, available at* https://www.law.virginia.edu/academics/clinical-training (last visited August 26, 2019). Indeed, the American Bar Association now mandates clinical programs at law schools.[1] In each of these instances, like Lindevaldsen's work at Liberty University, students work directly under clinical faculty to represent actual clients and presumably use university servers to transmit emails

[1] American Bar Association, *2019-2020 Standards and Rules of Procedure for Approved Law Schools: Standard 304 Experiential Courses: Simulation Courses, Law Clinics, available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-chapter3.pdf (requiring that law schools provide experiential and clinical programs to students, and that students complete certain credit hours in such courses) (last visited August 26, 2019).

concerning such litigation and representation. Surely the American Bar Association, every law school in the country, and the experienced faculty of each such institution would not embark on a course of education and legal representation that would automatically waive attorney-client privilege and potentially subject them to liability or discipline for ethical violations. Yet Jenkins appears to argue that each of those attorneys, faculty, students, and clients can have no expectation of privacy and thus no attorney-client privilege in the emails they exchange. This Court should reject this absurdity.

IV. JENKINS' OWN AUTHORITIES DEMONSTRATE THE APPLICABILITY OF THE FIRST AMENDMENT PRIVILEGE TO LIBERTY COUNSEL'S PUBLIC ADVOCACY.

A. The First Amendment Privilege Is Well-Established In Law And Protects The Liberty Counsel Defendants From Compelled Disclosure Of Their Associational And Advocacy Activities To An Ideological Adversary Bent On "Destroying" Them.

Jenkins claims that the Liberty Counsel Defendants have no authority upon which to base a claim of First Amendment privilege against her Requests 64-69, and that she can find no authority for an assertion that her discovery requests are subject to any such privilege. (MTC at 13-14). But, Jenkins' own cited authorities and discussion demonstrate the basis for the privilege she claims does not exist. Indeed, a host of Supreme Court precedent (and in this Circuit where Jenkins claims to have searched to no avail) establishes the First Amendment's protection from disclosure in discovery. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 459-60 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."); *id.* (holding that party is protected by the First Amendment from compelled disclosure of associational ties and advocacy); *Gibson v. Florida Legislative Invest. Comm.*, 372 U.S. 539,

543-44 (1963) ("Validation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands" because the First Amendment protects compelled disclosure of advocacy and associational interests); *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (same).

Binding precedent from the Second Circuit likewise recognizes such a privilege. *See, e.g.*, *N.Y. State Nat'l Organization For Women v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989) (noting that the First Amendment protects compelled disclosures of advocacy and associational interests during discovery where there is a threat of "economic reprisal, loss of employment, threat of physical coercion, or other manifestations of public hostility" and "harassment and threats of bodily harm").

Indeed, contrary to Jenkins' contentions that no such First Amendment privilege exists in this matter (or at all),

> [i]t is **well-settled law that the First Amendment creates a qualified associational privilege from disclosure of certain information**. If the discovery request adversely affects an organization's and/or its members' mission of advocacy and **chills their ability to freely speak** or to associate, the associational privilege may attach. **Should the be any showing of reasonable probability that compelling disclosure will lead to some form or specter of harassment, threat, or reprisal of the organization and/or its members, such commanded disclosure runs afoul of the First Amendment**

Shermin-Williams Co. v. Spitzer, No 1:04CV185(DNH/RFT), 2005 WL 2128938, *4 (N.D.N.Y. Aug. 24, 2005) (emphasis added).

Here, too, the privilege certainly applies. This Court need look no further than Jenkins' own counsel to determine that compelled disclosure of Liberty Counsel's and Lindevaldsen's First Amendment protected activities and advocacy could subject them to public hostility or harassment. Indeed, **Jenkins' counsel has admitted that destruction of Liberty Counsel is its *raison d'etre***. As mentioned *supra*, the SPLC, which came late to this lawsuit to represent Jenkins, admitted as

much:

> **Sometimes the press will describe [SPLC] as monitoring hate groups and so on. I want to say plainly that our aim is to destroy these groups, to completely destroy them**."

Speech of Mark Potok, Senior Fellow at Southern Poverty Law Center, *Mark Potok Speech 1*, YOUTUBE (Sept. 11, 2007), https://www.youtube.com/watch?v=fnTz2ylJo_8&feature=reImfu (discussing SPLC's purpose behind attaching the "hate group" label to certain organizations with which it disagrees (emphasis added)). The SPLC continued that:

> We see this as a political struggle, right . . . We're trying to wreck these groups, and **we are very clear in our head, this – we are trying to destroy them . . . as a political matter, to destroy them**.

Id. (emphasis added).

As part of that fight, nine and a half years after the SPLC began its journey to "wreck" and "completely destroy" Liberty Counsel, it joined this matter to further its "very clear" mission. If Jenkins' counsel's own statements concerning Liberty Counsel and Lindevaldsen do not satisfy the requisite political hostility, harassment, and threats, then nothing ever could. The First Amendment privilege plainly protects Defendants from compelled disclosure of the information Jenkins seeks, and by her counsel's own admission.

Jenkins' only retort to the First Amendment privilege is to say that Liberty Counsel's positions on certain matters are well-known. First, Jenkins' contention that "everyone knows" undermines her desired compulsion and proves that her requests are unnecessary, harassing, and vexatious. If Defendants' positions on these matters are well known, then why does Jenkins need anything from Liberty Counsel? The only answer would seem to further advance her counsel's goal of completely destroying Liberty Counsel.

Second, Jenkins' attempts to circumscribe the First Amendment privilege to mere

association with a group is meritless. As binding precedent recognizes, the First Amendment privilege protects against compelled disclosure of discovery materials that would chill both the right to association **and the speech/advocacy** of those organizations. *N.Y. State Nat'l Organization For Women v. Terry*, 886 F.3d at 1355.

B. Compelling Disclosure of Protected Speech and Advocacy on Matters of Public Interest Would Have Broad Chilling Effect On All Speech Activities, Particularly Controversial Or Minority Views.

Countenancing Jenkins' proposition that she needs all of Liberty Counsel's internal documentation, communications, and other materials (that she alleges are broad public knowledge) to establish her claim of "animus" would have a far-reaching public policy impact on the speech of all individuals and groups. At base, Jenkins' claim is that Liberty Counsel and Lindevaldsen's protected expression and advocacy on issues of marriage, family, adoption and similar topics can – **alone and without more** – suffice to demonstrate the "animus" element of her claim. Indeed, Jenkins argues that Liberty Counsel's and Lindevaldsen's position on same-sex marriage or adoption are sufficient to establish animus regardless of whether they did or did not do anything to aid Lisa Miller in her alleged kidnapping. Such is not the law.

As the Supreme Court said,

> it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. **The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.** In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view **in an open and searching debate**.

Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (emphasis added).

If, in the same opinion finding a right to same-sex marriage, the Supreme Court noted that

robust debate on issues pertaining to religion and sexuality must continue and the Constitution indisputably protects those who publicly oppose same-sex marriage, how could such advocacy serve as a basis for Jenkins' claim? It cannot. And who would ever engage in such debate if their public advocacy could fulfill the legal requirements of "animus" for Section 1985 conspiracy claims? No one. The proposition advanced by Jenkins and the SPLC is bone-chilling cold for the hot debates envisioned by the *Obergefell* Court.

"**A conspiracy to exercise free speech is an obvious oxymoron** [and] cannot reasonably be punishable under 1985(3)." *Afro-American Police League v. Fraternal Order of Police*, 553 F. Supp. 664, 674 (N.D. Ill. 1982) (emphasis added). Were it otherwise, the cherished liberties enshrined in the First Amendment would be in peril. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963) (holding that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."); *Dombrowski v. Pfister*, 386 U.S. 479, 487 (1965) (same). Moreover, countenancing Jenkins' contentions concerning Liberty Counsel and Lindevaldsen's First Amendment privilege claims would not only threaten and chill First Amendment activity, but "free expression—of transcendent value to all society, and not merely those exercising their rights—might be the loser." *Id.*

CONCLUSION

For the foregoing reasons, Jenkins' motion to compel should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2019, I caused a true and correct copy of the foregoing to be electronically filed with this Court. Service will be effectuated on all counsel of record via this Court's ECF/electronic notice system.

/s/ Horatio G. Mihet
Horatio G. Mihet