UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

PLAINTIFFS' MOTION TO COMPEL DEFENDANTS LIBERTY COUNSEL, INC. AND RENA LINDEVALDSEN TO PRODUCE AT&T RECORDS AND REQUEST FOR APPROPRIATELY EXPEDITED CONSIDERATION

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[*] Cited portions bookmarked and highlighted.

Plaintiffs Janet Jenkins and Isabella Miller-Jenkins move to compel Defendants Liberty Counsel, Inc. and Rena Lindevaldsen to produce telephone records AT&T gave them in response to Plaintiffs' subpoena. The records disclose only the date, time, and duration of calls and text messages between certain phone numbers one year before and after the kidnapping at issue in this case; they do not disclose the substance of any call or text or the relationship between the callers or texters. Defendants are withholding the records because "the overwhelming majority" purportedly are irrelevant, disproportional to the needs of the case, and protected from disclosure by privacy and privilege. They will not propose specific redactions because of infeasibility. The Court should compel Defendants to produce the entire records. The records are relevant and proportional to Plaintiffs' case, and they do not implicate any privilege or privacy. Given the March 15, 2021 discovery deadline and the possibility that Defendants would avail themselves of all interlocutory appeals should the Court grant this motion, Plaintiffs respectfully request appropriately expedited consideration of this motion after briefing concludes.[1]

STATEMENT OF THE CASE

On August 14, 2020, Plaintiffs subpoenaed AT&T for, as relevant here, all call and text-message logs for all of Defendants' phone numbers a year before and after the September 2009 kidnapping. *See* Ex. 2: AT&T Response Cover Sheet 12–14. Plaintiffs had earlier obtained, through a Freedom of Information Act request, a portion of Lindevaldsen's AT&T call logs, from August 30, 2009, through December 4, 2009, that had been introduced into evidence at Defendant Philip Zodhiates's criminal trial as Exhibit 72C, *see* Ex. 3: Lindevaldsen AT&T Logs, but Defendants refused to admit or deny the authenticity of those logs. *See* Soto Decl. ¶ 2.

[1] Defendants oppose this request, despite earlier saying they would "avail [them]selves of all immediate/interlocutory appeal remedies that may be necessary to protect [their] privileged information." Ex. 1: Soto–Mihet Emails 8. *Compare id. with id.* at 1.

After Defendants noticed that they would move to quash the subpoena "on grounds of attorney-client, work product and First Amendment privileges," Soto–Mihet Emails 21–22, Plaintiffs proposed that AT&T produce responsive records only to Defendants, *see id.* at 18. Defendants would propose redactions, and if the parties disagreed about any redactions, Defendants would file a motion for protective order, *see id.*[2] Defendants agreed, except to extend the time they would have to file the motion for protective order and to leave open the possibility of extending the time they would have to review the records for privilege. *See id.* at 16.

Defendants received responsive records from AT&T, *see id.* at 13, comprising a response cover sheet, a records key, Defendants' AT&T wireless subscriber information, and 7,508 pages of call and text-message logs for two Liberty Counsel phone numbers (one used by attorney Horatio Mihet[3] and the other by attorney Mathew Staver) and two Lindevaldsen phone numbers (one used by Lindevaldsen and the other by her husband, Karl), *see id.* at 12. The logs do not reveal the substance of calls or text messages. *See id.* at 10.

Defendants produced everything but the logs and objected to making specific redactions to the logs because of their volume; instead, Defendants asked for a list of phone numbers that Plaintiffs "believe have a reasonable connection with this case (e.g., alleged 'co-conspirators')," so that Defendants could produce only the portions of the logs with those numbers. *Id.* at 12. Defendants "remain[ed] firm in [their] belief that the overwhelming majority of this information is not relevant or proportional to this case, and is protected from disclosure by privacy and privilege. The information can be used to identify Liberty Counsel clients and protected/privileged representation and advocacy that have nothing whatsoever to do with this

[2] The records also are responsive at least to Jenkins's request for all documents Defendants received from nonparties concerning this case.

[3] Mr. Mihet represented Lisa Miller in the custody dispute, and the records pre-date this case.

case." *Id.* "[T]he records … reveal (or can be used to ascertain) the identity of clients, donors, constituents and others, which are privileged from disclosures, as well as the constitutionally protected activities of [Defendants] which have nothing to do with this case." *Id.* at 10.

Plaintiffs initially agreed "to provide a list of known phone numbers and persons *to narrow* [*Defendants'*] *review of the remainder for potential privilege*" but clarified that the records "are not necessarily privileged, even if the client's identity can be discovered." *Id.* at 11 (emphasis added). Plaintiffs offered to "consider including certain material under the operative protective order" to address Defendants' privacy concerns. *Id.*; *see also* Protective Order, ECF 410.

After a week of reviewing potential names and numbers to list, Plaintiffs realized a list would not narrow the legal dispute over the records. *See* Soto–Mihet Emails 8–10. Plaintiffs gave Defendants four reasons: *First*, Defendants' list proposal appeared aimed at eliminating their obligation and agreement to review the records for privilege rather than, as Plaintiffs initially intended, to decrease the volume of records needing a privilege review. *Id.* at 5, 8–9. *Second*, Defendants' insistence on confirming that Plaintiffs' list have a "broad connection with this case" left open the real possibility that they would object if Plaintiffs unknowingly listed a client, donor, "constituent," or other contact who wishes to remain anonymous. *Id.* at 5, 9. That would require Defendants to do exactly what they aim to avoid: reveal the identities of clients, donors, "constituents," and other contacts. *Id.* at 10; *see also* Soto Decl. ¶ 10(e). *Third*, Plaintiffs inevitably would want to compare other names and numbers with the records, but involving Defendants at every step of Plaintiffs' review and development of the evidence would be inappropriate, inefficient, and unduly burdensome for everyone. *See* Soto–Mihet Emails 5; Soto Decl. ¶ 10(c). *Fourth*, it appeared unlikely that even an agreed-upon list would sufficiently

reduce the volume of the remaining records requiring a privilege review, as Plaintiffs initially intended, leaving Defendants still objecting to reviewing the remainder. *See* Soto–Mihet Emails 5, 10. Plaintiffs therefore proposed that the parties ask the Court to resolve the threshold legal question of whether any portion of the records could be privileged. *See id.* at 5, 10.

Defendants stood by their list proposal, refusing even to search the records for nonprivileged communications with obviously relevant individuals—or even *Lisa Miller*—unless Plaintiffs listed those individuals' numbers, which Defendants already have. Soto Decl. ¶¶ 10(c), (g). They are "withholding these records on the basis of all applicable privileges, including attorney-client, work product, First Amendment (ours and our clients/constituents/donors, etc.), and privacy," and because the records "are neither relevant nor proportional to the needs of this case," Soto–Mihet Emails 4, but they refused to provide an exhaustive list of grounds for withholding, Soto Decl. ¶ 10(i), or case law supporting their position, *id.* ¶ 10(b).[4] According to Defendants, they have "grave concerns about turning over[,] to an ideological opponent that has promised to destroy [them,] a roadmap to all of [their] protected client and advocacy work and contacts during a two-year period." Soto–Mihet Emails 7. They believe even "[a] protective order limiting disclosure to attorneys only would not remedy [their] concerns … because it is the attorneys themselves that are the ideological adversaries." *Id.* Until today, Defendants said they would seek all necessary appellate remedies to prevent disclosure of the records. *Compare id.* at 8, *and* Soto Decl. ¶ 10(j), *with* Soto–Mihet Emails 1.[5]

[4] Defendants are withholding records belonging to Mr. Lindevaldsen, who is not an attorney, based on relevance, proportionality to the needs of the case, privacy, and perhaps other bases. *See* Soto Decl. ¶ 10(i).

[5] After the Court denied Defendants' motion to dismiss, they sought a certificate of appealability, a writ of mandamus, and even en banc reconsideration of the denial of the writ. *See, e.g.*, Defs.' Mot. to Certify Interlocutory Appeal, ECF 280; *In re Liberty Counsel, Inc. et al.*,

SUMMARY OF ARGUMENT

Defendants must produce the AT&T records unredacted.

First, the records are relevant and proportional to the needs of the case. Defendants' communications one year before and after the kidnapping are relevant to Plaintiffs' claims that Defendants aided and participated in a conspiracy to kidnap Isabella and keep her out of reach. Criminal prosecutions of Zodhiates and Kenneth Miller revealed that Lisa's coconspirators communicated by telephone and used intermediaries to plan and carry out the kidnapping. Thus, Defendants' communications with coconspirators and similar intermediaries would tend to make their involvement in the kidnapping conspiracy more probable.

The records are proportional to the needs of the case. They are important to help prove Defendants' participation in the kidnapping by showing they communicated with coconspirators, such as through intermediaries. They are exclusively within Defendants' control. The benefit to Plaintiffs outweighs the zero burden and expense to Defendants to produce them. They are limited in scope to the year before and after the kidnapping, which encompasses key dates in the conspiracy, and do not reveal what was said or texted.

Second, these nonsubstantive, third-party records are not protected from disclosure by the attorney–client privilege, the work-product doctrine, the First Amendment right to freedom of association, or any privacy right because they reveal nothing about what was said or texted and nothing about the relationship between the callers and texters. Even if the records somehow disclose the relationship between Defendants and the caller or texter, Defendants fail to show that the limited information the records supply are protected from disclosure. The attorney–client

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No. 18-876 (2d Cir. filed Apr. 2, 2018). The Court did not receive the Second Circuit's mandate until nearly a year later. *See* Mandate, ECF 332.

privilege does not protect client identities from disclosure. Defendants do not articulate how producing decade-old, nonsubstantive call and text logs would encroach on their First Amendment rights, even if incorporated into the operative protective order, except to invoke wishes to remain anonymous and grave concerns about giving the records to an ideological opponent. Nor do they explain how the operative protective order, which limits the disclosure and use of confidential information to this case and the individuals involved in it, would inadequately protect any privacy interests.

ARGUMENT

I. The AT&T Records Are Relevant to Plaintiffs' Claims and Proportional to the Needs of the Case

Nonsubstantive records of Defendants' telephone communications one year before and after the kidnapping are relevant and proportional to the needs of this case. Plaintiffs are entitled to "discovery regarding any nonprivileged matter that is relevant to [their] claim[s] … and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required…." Fed. R. Civ. P. 26(b)(1) advisory committee's note to the 1970 amendment. The Court has "broad discretion" to "mak[e] these determinations." *Jenkins v. Miller*, No. 2:12-cv-184, 2020 WL 5105183, at *2 (D. Vt. Aug. 31, 2020) (Sessions, J.), ECF 554 (citing *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)).

Defendants' communications one year before and after the kidnapping are relevant to Plaintiffs' claims that Defendants aided and participated in a conspiracy to kidnap Isabella in

September 2009 and keep her out of the reach of state and federal authorities. Criminal prosecutions of Zodhiates and Kenneth Miller revealed that Lisa's coconspirators communicated by telephone and used intermediaries to plan and carry out the kidnapping. For example, Lisa used her friend Janet Stasulli's phone to call her father to have him call Zodhiates, so that Zodhiates could retrieve her and Isabella from a Walmart parking lot the day before they departed for Canada. *See, e.g.*, Ex. 4: *Zodhiates* Trial Tr. Excerpts 513:17–514:5 (JENKINS08593–JENKINS08594) (testimony of Janet Stasulli that, although her phone records show two calls made to Terry Miller on September 20, 2009, she did not make those calls and would have let Lisa Miller borrow her phone); *id.* at 464:20–465:12, 473:2–14 (JENKINS08544–JENKINS08545, JENKINS08553) (testimony of Terry Miller that, on September 20, 2009, Lisa called asking him to call Zodhiates to let him know she was at a different Walmart). On Zodhiates's drive back from the United States–Canada border, he called Staver's Liberty Counsel mobile phone—records for which are among those at issue in this motion—and the main line at Liberty University School of Law, where Defendants worked. *See, e.g.*, *id.* at 864:5–865:3 (JENKINS08947–JENKINS08948) (testimony of Special Agent Jennie Emmons that Zodhiates's cell phone made calls to a Liberty Counsel number and a Liberty University School of Law number the afternoon of September 22, 2009). Later from Nicaragua, Lisa sent requests for belongings to Lindevaldsen through Timothy Miller, Kenneth Miller, Zodhiates, and Victoria Hyden. *See* Ex. 5: *Zodhiates* Exs. 41 & 44 (emails from Zodhiates to Hyden with attached lists of items for "Sarah" and "Lydia" to give to Rena); *Zodhiates* Trial Tr. Excerpts 205:12–13 (JENKINS08283) (testimony of Jessica Fehr that Lisa and Isabella were introduced to her in Nicaragua as Sarah and Lydia). Then, Zodhiates, Kenneth, and Timothy used Kenneth's family business and Timothy's acquaintance Andrew Yoder to surreptitiously

transfer $500 in cash from the United States to Nicaragua. *See, e.g.*, *Zodhiates* Trial Tr. Excerpts 688:22–692:14 (JENKINS08769–JENKINS08773) (testimony of Andrew Yoder that, at Timothy's request in May 2010, he cashed a $500 check he received from Milmont Greenhouses and gave Timothy the cash); *id.* at 808:2–820:11 (JENKINS08891–JENKINS08903) (testimony of Duane Weaver of Milmont Greenhouses that he did not sign the May 10, 2010 $500 check payable to Yoder with his signature and that the check was not accounted properly). Thus, records of Defendants' communications are relevant because their communications with coconspirators and similar intermediaries (known or currently unknown) would tend to make their involvement in the kidnapping conspiracy more probable. *See* Fed. R. Evid. 401.

The records are proportional to the needs of this case. The records are important to help prove Plaintiffs' allegations that Defendants knew of, participated in, and tried to cover up the kidnapping by showing Defendants communicated with persons involved in the kidnapping. The records would allow Plaintiffs to compare Defendants' communications with those of other individuals, for whom Plaintiffs already have call logs, to identify potential intermediaries between them. The records are exclusively within Defendants' control; AT&T produced the records to them after Defendants indicated they would move to prevent AT&T from producing the records to Plaintiffs. Given that Plaintiffs did all the work to request the records from AT&T and that the records are not privileged, the benefit to Plaintiffs clearly outweighs the zero burden and expense to Defendants to produce them.

The records also are limited in scope; they cover only the year before and after the September 2009 kidnapping and reveal nothing about what was said or texted. The two-year scope from September 2008 to September 2010 is appropriate. In late 2008 to early 2009, Vermont and Virginia courts ordered Lisa Miller to allow Jenkins visitation with Isabella, and

the U.S. Supreme Court declined review. *See, e.g.*, Ex. 6: Order, *Miller-Jenkins v. Miller-Jenkins*, No. CH04-280 (Va. Cir. Ct. Frederick Cty. Sept. 3, 2008); *see also Miller-Jenkins v. Miller-Jenkins*, 555 U.S. 888 (2008), *denying cert to.* No. 2007-271, 2008 WL 2811218 (Vt. 2008); *Miller v. Jenkins*, No. 0705-09-4, 2010 WL 605737 (Va. Ct. App. Feb. 23, 2010) (affirming January 14, 2009 order to enforce). In January 2009, after a Virginia court ordered Lisa to allow Jenkins visitation with Isabella, Zodhiates emailed Sidebottom of Liberty Counsel asking for Lisa's contact information to suggest some personal options. *See* Revised Second Am. Compl. ¶ 29, ECF 223. Jenkins then filed another motion to transfer custody of Isabella to her. *See* Ex. 7: Docket Sheet 18, *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03 Rddm (Vt. Super. Ct.). After the kidnapping, in May 2010, Zodhiates, Kenneth Miller, and Timothy Miller surreptitiously transferred $500 in cash from the United States to Nicaragua. *See* Revised Second Am. Compl. ¶ 56, ECF 223. Jenkins did not learn of Lisa's and Isabella's whereabouts until June 2010. *Id.* ¶ 43. On October 29, 2010, just outside the end of the two-year period, the Vermont Supreme Court affirmed the order giving Jenkins sole physical and legal custody of Isabella. *See Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768 (Vt. 2010). The first arrest related to the kidnapping was not made until Timothy Miller's in April 2011. *See* Revised Second Am. Compl. ¶ 34, ECF 223.

II. The AT&T Records Are Not Protected from Disclosure by the Attorney–Client Privilege, Work-Product Doctrine, First Amendment, or Privacy

Decade-old, nonsubstantive records of Defendants' telephone communications are not protected from disclosure by the attorney–client privilege, the work-product doctrine, the First Amendment, or privacy. The records implicate no privilege or privacy concern because, as Defendants concede, they reveal nothing about what was said or texted and therefore nothing about the relationship between the callers and texters. They do not disclose that a caller sought

Defendants' legal advice, to donate to Liberty Counsel, or to simply offer support or even condemnation. At most, the records merely reveal that Defendants' phone numbers were in communication with phone numbers assigned to certain entities or individuals.

A. The Attorney–Client Privilege Does Not Justify Defendants' Withholding

The attorney–client privilege does not protect the records from disclosure. The Second Circuit has squarely held that the privilege does not protect telephone bills because they were "created by the telephone company" and do not contain "confidential disclosures." *Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, & Nov. 1, 1991*, 959 F.2d 1158, 1165–66 (2d Cir. 1992); *accord United States v. Alexander*, 37 F.3d 1501 (7th Cir. 1994); *Global HTM Promotional Grp., Inc. v. Angel Music Grp. LLC*, No. 06-20441CIV/BROWN, 2007 WL 221423, at *2–3 (S.D. Fla. Jan. 26, 2007); *cf. United States v. Kendrick*, 331 F.2d 110, 113 (4th Cir. 1964) (holding attorney's testimony about extent of contacts with client did not violate attorney–client privilege because "[i]t is the substance of the communications which is protected…, not the fact that there have been communications"); *United States v. Jackson*, No. 07-35, 2007 WL 4225403, at *2 (D.D.C. Nov. 30, 2007) (holding log showing e-mail traffic between client and her attorney is not protected by attorney–client privilege); *Parker v. Kitzhaber*, No. 88-1089, 1989 WL 69960, at *1 (D. Or. June 8, 1989) (holding attorney–client privilege does not prevent disclosure of names, telephone numbers, and dates of contact with client representatives).

The Second Circuit also has consistently held that the attorney–client privilege does not protect client identities from disclosure. *See, e.g.*, *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 247 (2d Cir. 1986) (en banc); *Vingelli v. U.S. Drug Enf't Agency*, 992 F.2d 449, 453 (2d Cir. 1993) (holding disclosure of client's name would not necessarily reveal client's purpose in consulting attorney and fear of "guilt by association" is insufficient to show a

disclosure of confidential communications); *Lefcourt v. United States*, 125 F.3d 79, 86 (2d Cir. 1997) (holding possible or even likely client incrimination does not constitute special circumstance justifying nondisclosure of client-identifying information). In *In re Shargel*, 742 F.2d 61 (2d Cir. 1984), for example, the Second Circuit held that the privilege did not protect from disclosure records of clients' fee payments to a criminal defense attorney shortly after events underlying their RICO indictment because the "[t]he identification of individuals as clients … neither discloses nor implies a confidential communication," and the "connection between his consultation with these six clients and the subsequent RICO proceeding … could not have been inferred from the disclosure of client identity and fee information." 742 F.2d at 64. If a person's fee arrangements with a criminal attorney are not privileged, then certainly nonsubstantive records of a person's communications with Defendants are not privileged.

B. The Work-Product Doctrine Does Not Justify Defendants' Withholding

The work-product doctrine also does not protect the records from disclosure. That doctrine generally protects from disclosure documents "prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). A document is "prepared in anticipation of litigation" if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (quoting Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994)). The doctrine does not protect "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id.*; *accord Burwell v. Peyton*, No. 5:12-cv-166, 2014 WL 12717390 (D. Vt. Apr. 17, 2014) (Reiss, C.J.) (holding doctrine did not protect from disclosure

doctor's notes of call with patient and patient's uncle and attorney because doctor was not attorney's agent and created summary in ordinary course of business). A "narrow exception" is made where there is a showing "of a real, rather than speculative, concern that the thought processes of the client's counsel in relation to pending or anticipated litigation would be exposed." *Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, & Nov. 1, 1991*, 959 F.2d at 1167 (quoting *Gould Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 680 (2d Cir. 1987)); *accord In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379 (2d Cir. 2003) (holding firm failed to show real concern that production of bank records would reveal thought processes and strategies).

In *Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, & Nov. 1, 1991*, 959 F.2d at 1161, the Second Circuit held that the work-product doctrine did not protect telephone records from disclosure for three reasons: *first*, the "document demand [was] not designed to glean what telephone calls [the firm] deem[ed] relevant; the demand [was] for all telephone company records for the targeted phone lines for a five year period"; *second*, the records would "be sufficiently voluminous to minimize disclosure of the attorney's identification of some occasional wheat among the chaff"; and *third*, "[a]bsent production by [the firm], it appear[ed] that most of the records would not be available to the government." *Id.* at 1167.

The records here likewise were prepared in the ordinary course of business, irrespective of litigation, and Defendants do not show a real concern that the records would expose their thought processes about *any* litigation. Again, the records reveal nothing about what was said or texted and nothing about Defendants' relationships with the other numbers listed. The records are voluminous enough to minimize disclosure "of some occasional wheat among the chaff."

And absent production by Defendants, who received the records from AT&T because of Plaintiffs' document subpoena, the records would not be available to Plaintiffs.

C. The First Amendment Does Not Justify Defendants' Withholding

Disclosure of the records would not abridge anyone's First Amendment right to freedom of association. *Cf. N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 173–74 (2d Cir. 2006) (holding First Amendment does not prevent phone company from disclosing journalists' phone records that could identify sources). Because these third-party records do not identify any person's relationship with Defendants, such as donor, "constituent," *or even opponent*, they are materially unlike the membership lists, donation records, and member records at issue in the cases Defendants cited the first time they invoked the First Amendment to avoid producing documents—*NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (member names); *Gibson v. Fla. Legis. Invest. Comm.*, 372 U.S. 539 (1963) (same); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (same); *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1345, 1354–55 (2d Cir. 1989) (holding organization failed to articulate encroachment of First Amendment liberties from compelled production of members' canceled checks); *Shermin-Williams Co. v. Spitzer*, No. 1:04CV185, 2005 WL 2128938, at *3–5 (N.D.N.Y. Aug. 24, 2005) (holding organization failed to show reasonable probability of chill or threat to organization's First Amendment liberties from disclosure of members' records).[6]

Defendants do not articulate how producing decade-old, nonsubstantive call and text logs would encroach on their First Amendment rights, even if incorporated into the operative protective order. The Court already instructed Defendants that they "must at least articulate some

[6] Defendants declined to provide case law supporting their withholding of the AT&T records. *See* Soto Decl. ¶ 10(b).

resulting encroachment on their liberties" to justify withholding discovery based on the First Amendment. Op. & Order 16, ECF 395 (quoting *N.Y. State Nat'l Org. for Women*, 886 F.2d at 1355). Defendants, however, merely invoke the "wish" of their clients, constituents, donors, and contacts "to remain anonymous" and their "grave concerns" about giving the Southern Poverty Law Center "a roadmap to all of [their] protected client and advocacy work and contacts during a two-year period." Soto–Mihet Emails 7; *see also id.* Op. & Order 17, ECF 395 (holding Defendants failed to adequately explain how their First Amendment liberties would be encroached by merely raising concerns about their ideological opposition to the SPLC). Rhetoric aside, Defendants do not explain how producing nonsubstantive records of three individuals' calls and text messages for a two-year period ten years ago would actually encroach on their First Amendment liberties, especially if the Court orders that the records may be used only for this case.

D. Privacy Concerns Do Not Justify Defendants' Withholding

Nor would disclosure of phone records invade privacy because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," including phone numbers dialed. *Global HTM Promotional Grp., Inc.*, 2007 WL 221423, at *2 (quoting *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979)). In any event, the operative protective order could adequately protect any privacy interests. "[C]ourts in this Circuit have held that protective orders are sufficient to protect the privacy interests implicated in … personal records." *Lewis v. City of N.Y.*, No. 11 CV 5044, 2014 WL 12829437, at *8 (E.D.N.Y. Jan. 2, 2014); *accord Jenkins v. Miller*, No. 2:12-cv-184, 2017 WL 1052582, at *4 (D. Vt. Mar. 20, 2017) (Sessions, J.) (suggesting Zodhiates's phone records could be produced subject to protective order to prevent harm in a retrial); *Roth v. PTGMB LLC*, No. 1:20-cv-231, 2020 WL 5820611, at *4 (E.D. Cal. Sept. 30, 2020) (rejecting privacy objection to producing unredacted call logs

because "disclosure of names and phone numbers does not constitute a serious invasion of privacy" and an operative protective order would "adequately address any privacy concerns regarding the disclosure of the phone numbers" on the logs); *Ademiluyi v. Phillip*, No. 2:14-cv-507, 2015 WL 1413390, at *2–3 (D. Nev. Mar. 26, 2015) (affirming protective order for phone records with possibility of modifying to make relevant portions public); *Molfese v. Fairfaxx Corp.*, No. 3:05 CV 317, 2006 WL 8446684, at *4 (D. Conn. June 27, 2006) (ordering production of phone records subject to protective order). The operative protective order limits the disclosure and use of confidential information to this case and the individuals involved in it. *See* Protective Order ¶¶ 8, 10. Plaintiffs and their counsel, including the Southern Poverty Law Center, would be prohibited from using the records for any other purposes. *See id.* ¶ 10. Plaintiffs have produced hundreds of their own confidential documents, including tax, business, and medical records and personal photos and emails, trusting that Defendants will abide by the terms of the protective order. Defendants fail to articulate with specificity how that order would nonetheless insufficiently protect the limited information contained in their records.

CONCLUSION

Plaintiffs' motion to compel should be granted and Defendants should be ordered to produce the AT&T records, unredacted, forthwith.

Respectfully submitted.

October 28, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, the foregoing document was served on the following counsel of record through the Court's CM/ECF system:

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October 28, 2020

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