THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC., et al,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

v.

JAY INSLEE, et al.,

Defendants,

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,

Intervenors.

NO. 3:18-cv-05005-RJB

RESPONSE IN OPPOSITION TO DEFENDANT-INTERVENOR'S MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

In their motion, the Defendant-Intervenors blandly describe themselves as "a coalition of public interest organizations opposed to [Lighthouse's coal export] terminal due to its

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

adverse impacts to human health and the environment." That description shades the truth. Their "coalition"—which calls itself "Power Past Coal"—is "working to stop coal export off the West Coast."[1] To that end, they have frequently met, communicated, and strategized with Washington State officials. Those same state officials have regularly praised the Intervenors and acknowledged coordinating with them. The Intervenors' anti-coal export lobbying efforts and influence in this case are thus directly relevant to the Defendants' discriminatory purposes under the Commerce Clause. And the Intervenors' internal documents are the only unvarnished source of information about their interactions with the Defendants.

II. BACKGROUND

During their campaign to thwart coal export from the West Coast, the Intervenors repeatedly pitched to the Defendants "defensible" ways to undermine the Project—including during numerous face-to-face meetings.[2] If the Defendants embraced their anti-coal blueprints, the Intervenors offered "to defend [the Defendants'] decision, and [] bring substantial litigation resources to th[e] process."[3] And so they have, voluntarily intervening in this litigation to defend the decisions that in large part grew out of their strategies.[4]

Recognizing this connection between the Intervenors' advocacy and the Defendants' actions, Lighthouse served discovery on the Intervenors, seeking more information about their

---

[1] *About Power Past Coal*, Power Past Coal, http://www.powerpastcoal.org/about/ (last visited July 12, 2018). *See* Decl. of Cesia Kearns in Supp. of Mot. for Protective Order (Kearns Decl.) ¶ 3, ECF No. 123-1 ("[W]e organized ourselves as an informal coalition that eventually came together as the 'Power Past Coal' campaign.").

[2] *See* Letter from B. Jones, Gordon Thomas Honeywell, to J. Hasselman, EarthJustice, Ex. C (June 27, 2018), ECF No. 123-5 (Intervenors thanking Defendants for giving them "the opportunity to weigh in . . . and hear our concerns" while assessing shared "litigation risks").

[3] *See id.*, Ex. B at 6.

[4] *See* WEC *et al.* Mot. to Intervene at 2, ECF No. 24 (WEC "has a particular interest in defending the State's permitting decisions . . . [and] ability to make decisions" because of its "active role in opposing" the Project).

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

role. That information may include, among other things, documents reflecting the Intervenors' strategies to block the Project and their efforts to influence the Defendants, as well as facts about their dialogues with the Defendants. Just as important, the Intervenors' internal documents are likely the only source of substantive information about their calls and meetings with the Defendants, who in many cases scrupulously avoided creating written records that would have been subject to public disclosure laws.[5]

On June 20, 2018, counsel for the Intervenors sent Lighthouse's counsel a letter objecting to its discovery requests on a litany of grounds, including timing, relevance, undue burden, and First Amendment privilege.[6] Lighthouse's counsel responded by explaining its view of the requests' relevance, agreeing to modify some of the requests, and suggesting a negotiated protective order to shield sensitive materials.[7] Within hours, the Intervenors' counsel wrote back, agreeing to disclose materials transmitted externally, but promising to file the present motion if Lighthouse continued to seek any internal documents.[8]

Counsel conferred by telephone on June 28 in an effort to resolve their disagreement.[9] During that call, Lighthouse withdrew its requests for membership and donor information and committed to reducing any burden posed by the requests, including by using the parties' Electronically Stored Information (ESI) Agreement. Lighthouse also renewed its offer to

---

[5] *See* Email from S. Peck, Dir. of Commc'ns, Wash. Dep't of Ecology, to K. Phillips, Exec. Dir. of Policy, Wash. Governor's Office, and D. Postman, Chief of Staff, Wash. Governor's Office (July 23, 2014), Ex. 1; Email from B. Kelley, President, WEC, to T. North, Assistant to the Dir., Wash. Dep't of Ecology (May 16, 2016) (sending a "Memo to M. Bellon re: Project DEIS Transparency" for "our 2pm call"), Ex. 2; Email from J. Hasselman, EarthJustice, to M. Duffy, DNR (Jan. 25, 2016) (referencing their earlier "conversation" about the sublease and asking DNR "to call if [they] would like to discuss"), Ex. 3.

[6] *See* Letter from J. Hasselman, EarthJustice, to B. Jones, Gordon Thomas (June 20, 2018), ECF No. 123-4.

[7] *See* Letter from B. Jones, Gordon Thomas, to J. Hasselman, EarthJustice (June 27, 2018), ECF No. 123-5.

[8] *See* Letter from J. Hasselman, EarthJustice, to B. Jones, Gordon Thomas (June 27, 2018), ECF No. 123-6.

[9] *See* Email from J. Johnson, Venable LLP, to J. Hasselman, EarthJustice (June 28, 2018), Ex. 4.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

negotiate a protective order.[10] Despite narrowing the scope of their dispute, the parties continued to disagree about the Intervenors' obligation to produce internal communications and strategy documents concerning their attempts to influence the Defendants' opposition to Lighthouse's proposed coal export terminal.[11]

III. ARGUMENT

As the party opposing discovery, the Intervenors bear the "heavy burden of showing why discovery was denied"[12] and "of clarifying, explaining, and supporting [their] objections with competent evidence."[13] They must show "good cause" for a protective order, which requires proving a "specific prejudice or harm."[14] "Broad allegations of harm, unsubstantiated by specified examples or articulated reasoning" do not justify a protective order.[15]

A. Because the Intervenors' internal documents are key to shedding light on the Defendants' discriminatory purpose, they are highly relevant.

1. Courts in Commerce Clause cases have held that outside lobbying activities can indicate a discriminatory purpose.

The lynchpin of the Intervenors' argument for a protective order is their assertion that their internal documents "are not even remotely relevant" to Lighthouse's claims.[16] The law indicates otherwise.

---

[10] *Id.*; *see also* ESI Agreement (May 21, 2018), Ex. 5.
[11] Email from J. Johnson, Venable LLP, to J. Hasselman, EarthJustice (June 28, 2018), Ex. 4.
[12] *Rosario v. Starbucks Corp.*, No. 2:16-cv-01951-RAJ, 2017 WL 4122569, at *2 (W.D. Wash. Sept. 18, 2017)(quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)).
[13] *Nat'l Union Fire Ins. Co. v. Coinstar, Inc.*, No. C13-1014-JCC, 2014 WL 3396124, at *8 (W.D. Wash. July 10, 2014) (quoting *Blankenship*, 519 F.2d at 429).
[14] *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002).
[15] *Beckman Indus. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (quoting *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)).
[16] Mot. for Protective Order (MPO), at 2, ECF No. 123.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

To begin with, the Intervenors claim to be "unaware of any case in which a court held that [the] defendants' *mens rea* was deemed pertinent to a Commerce Clause or federal preemption challenge."[17] In fact, the cases show that the Defendants' "*mens rea*" can be central to the Commerce Clause analysis. According to the U.S. Supreme Court, state actions may violate the Commerce Clause if they evince "***either*** discriminatory purpose ***or*** discriminatory effect."[18] Other courts agree. "Discriminatory purpose is at the heart of the dormant Commerce Clause analysis" and goes to "both first-tier analysis and second-tier *Pike* balancing analysis."[19] Evidence of intent is "precisely the kind of evidence the Supreme Court has looked to in [its] Commerce Clause cases."[20] Courts in the Ninth Circuit and this district also use state decisionmakers' intent as evidence of discriminatory purpose.[21] Any evidence of the Defendants' animus towards coal that may appear in the Intervenors' internal documents is therefore highly relevant to the Court's merits inquiry.

The Intervenors further contend that their internal documents cannot show the Defendants' discriminatory purposes.[22] Again, the cases disagree. Evidence that single-issue lobbyists have influenced decisionmakers can be highly probative of discriminatory intent.[23] Lobbying activity often "reflect[s] upon the purpose as to why [a discriminatory] law was

---

[17] *Id.* at 4.

[18] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (emphasis added) (citing *Hunt v. Wash. Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

[19] *S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 596 (8th Cir. 2003) (citing *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330 (1996)).

[20] *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 7 n.4 (1st Cir. 2010).

[21] *See Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown* 567 F.3d 521, 525 (9th Cir. 2009); *Int'l Franchise Ass'n v. City of Seattle*, 97 F. Supp. 3d 1256, 1267-72 (W.D. Wash. 2015).

[22] MPO at 3-4.

[23] *E. Kentucky Res. v. Fiscal Court of Magoffin Cty.*, 127 F.3d 532, 542 (6th Cir. 1997) (holding that if "other sources, other than the state's own self-serving statement of its [] intent, indicate the presence of actual and discriminatory purposes, a state's discriminatory intent can be ascertained from [those] sources").

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

introduced and passed."[24] Indeed, the U.S. Supreme Court has considered the effects of "powerful" groups "exerting their influence" on "a State's political processes" when finding that a state discriminated against interstate commerce.[25]

2. The Intervenors' close ties to the Defendants and past efforts to influence similar decisions make their internal documents particularly relevant.

The holdings in the cases discussed above make the Intervenors' internal communications and strategy documents highly relevant to this case. There can be no doubt that the Intervenors enjoy deep political, financial, and ideological connections to the Defendants. For instance, during Defendant Bellon's 2013 speech at WEC's annual fundraising gala, she described WEC as her "left flank" and "***[u]nbelievably coordinated*** with [the] Governor's Office and Ecology."[26] She further acknowledged that Ecology's and WEC's "***strategic initiatives are linked***."[27] The extent to which the Intervenors wielded their influence to persuade the Defendants to discriminate against Lighthouse's coal export facility is highly relevant to the Commerce Clause discriminatory purpose inquiry in this case.

Despite their extensive ties to the Defendants, the Intervenors assure the Court that Lighthouse's allegations of strategic coordination are "simply and flatly false."[28] But

---

[24] *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1010 n.4 (W.D. Mo. 1998).
[25] *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200-01 (1994).
[26] *See* Maia Bellon, Remarks at WEC Gala (Nov. 16, 2013), Ex. 6. Defendant Inslee and Franz's ties are just as significant, if not more so. Governor Inslee, a "member" of Climate Solutions, regularly speaks at fundraisers for Defendant-Intervenor Climate Solutions. *See Gov. Inslee*, Climate Solutions https://www.climatesolutions.org/member/gov-jay-inslee (last visited July 12, 2018) (listing Inslee as a "member" of Climate Solutions); *Climate Solutions 19th Annual Reception*, Climate Solutions https://www.climatesolutions.org/events/climate-solutions-19th-annual-reception (last visited July 12, 2018) (Inslee speaking at Climate Solutions 2017 Annual Reception). And Commissioner Franz sat on Defendant-Intervenor WEC's Board of Directors *during WEC's anti-Project advocacy efforts*. *See About Hilary*, Hilary Franz, *http://www.hilaryfranz.com/abouthilary/* (last visited July 12, 2018).
[27] Maia Bellon, Remarks at WEC Gala (Nov. 16, 2013), Ex. 6 at 3.
[28] MPO at 5.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

Lighthouse already possesses strong evidence suggesting such coordination. For example, an email from the Intervenors to the Governor's staff thanks them for "supporting the meeting with the Governor" and providing information "requested" by Defendant Inslee about blocking Lighthouse's proposed coal export terminal.[29] A memo from the Intervenors to the Department of Natural Resources (DNR)—which later served as the blueprint for DNR's sublease denial—offers "to defend DNR's decision, and [] bring substantial litigation resources to that process."[30] And an email from the Intervenors to DNR staff establishes the Intervenors' persistent, behind-closed-doors lobbying at DNR.[31]

Lighthouse believes that this evidence is just the tip of the iceberg. The Defendants, aware of their obligations under Washington's Public Records Act, are unlikely to have memorialized the substance of their calls and meetings with members of the "Power Past Coal" coalition. The Intervenors' internal documents, by contrast, likely contain frank discussions of their lobbying efforts, including whether the Defendants shared their goal of stopping West Coast coal exports—regardless of what the Commerce Clause requires.

Lighthouse's confidence that its discovery will bear fruit stems in part from the fact that this is not the first time that the Intervenors have leveraged personal connections to achieve their preferred policy outcomes. Several years ago, Brett VandenHeuvel of Intervenor Columbia Riverkeeper lobbied then-Oregon First Lady Cylvia Hayes,[32] asking her to pressure

---

[29] *See* Letter from B. Jones to J. Hasselman, EarthJustice Ex. A (June 27, 2018), ECF No. 123-5.
[30] *Id.*, Ex. B at 6.
[31] *Id.*, Ex. C.
[32] Hayes's then-fiancée, Governor John Kitzhaber, later resigned amidst an "influence-peddling scandal." *See* Rob Davis, *Oregon Governor John Kitzhaber Resigns Amid Criminal Investigation, Growing Scandal*, OregonLive (Feb. 13, 2015) https://www.oregonlive.com/politics/index.ssf/2015/02/gov_john_kitzhaber_resigns_ami.html. Kitzhaber and

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

state civil servants to use their Clean Water Act § 401 certification authority to obstruct coal export projects.[33] That, of course, is precisely what Defendant Bellon did here. Not coincidentally, VandenHeuvel personally lobbied all three Defendants in this case. Whether the Defendants acted on the Intervenors' instructions, guidance, or suggestions, and what they said to each other behind closed doors, are highly relevant to this case.

B. Lighthouse's requests are not unduly burdensome.

The Intervenors' undue burden claims are premature at best. As the Intervenors acknowledge in a footnote, Lighthouse is committed to reducing any such burden.[34] Lighthouse is interested only in documents and communications reflecting the Intervenors' strategies to block the Project, efforts to influence the Defendants, and dialogues with or about the Defendants. Stated differently, Lighthouse's requests already exclude the most burdensome information: the daily back-and-forth between "dozens" of Power Past Coal campaign staffers unconnected to the Defendants. Just as important, the parties already have an ESI Agreement in place, which contains numerous provisions designed to reduce the precise burdens that the Intervenors complain about.[35]

Hayes "resign[ed] in disgrace" because Hayes took private funds from Defendant-Intervenor linked groups like the Energy Foundation while advancing those groups' policies in office. *See* Laura Gunderson, *Cylvia Hayes Scandal: Top Questions John Kitzhaber Hasn't Answered*, OregonLive (Jan 30, 2015) https://www.oregonlive.com/politics/index.ssf/2015/01/cylvia_hayes_scandal_top_quest.html; *see also* Climate Solutions, 2017 Annual Report at 18, *available at* https://www.climatesolutions.org/about-us/annual-reports (Energy Foundation is one of the top three sources of funding for Defendant-Intervenor Climate Solutions).

[33] *See* Email from C. Hayes to B. VandenHeuvel, Columbia Riverkeeper (Dec. 20, 2012), Ex. 7.

[34] MPO at 6 n.2.

[35] *See* ESI Agreement, Ex. 5. Those provisions include search term exchange, data over-broadness limits, and proportionality requirements

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

In any event, the Intervenors' undue burden claims are facially insufficient under Rule 26(c). To establish undue burden, the Intervenors "must provide sufficient detail regarding the time, money, and procedures required to produce the requested documents."[36] Here, the Intervenors offer only general complaints that "production of documents will be time consuming and expensive," which is "not ordinarily a sufficient reason to grant a protective order."[37] That is especially so in light of Lighthouse's commitment to reduce any undue burden and the ESI Agreement's provisions that address the Intervenors' concerns.

C. The narrow First Amendment privilege articulated in *Perry* does not justify a blanket prohibition on discovery of internal documents.

In an effort to raise the relevance bar, the Intervenors argue that all of their internal documents are protected by the First Amendment privilege described by the Ninth Circuit in *Perry v. Schwarzenegger*.[38] The Court of Appeals in that case applied First Amendment privilege to shield an advocacy group from overbroad, irrelevant discovery.[39] At the same time, the court cautioned against applying First Amendment privilege too broadly. *Perry*'s two-step First Amendment analysis is strictly limited to "*private internal* campaign communications concerning the *formulation of campaign strategies and messages*."[40]

---

[36] *Pham v. Wal-Mart Stores, Inc.*, No. 2:11-cv-01148-KJD-GWF, 2011 WL 5508832, at *3 (D. Nev. Nov. 9, 2011) (citing *Cory v. Aztec Steel Bldg., Inc.*, 225 F.R.D. 667, 672 (D. Kan. 2005)).

[37] *Id.*

[38] MPO at 7-8.

[39] *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1145 n.13 (9th Cir. 2009) ("express[ing] no opinion as to whether any particular request would override the First Amendment interests at stake").

[40] *In re Anonymous Online Speakers*, 661 F.3d 1168, 1174 (9th Cir. 2011) (emphasis in original) (quoting *Perry*, 591 F.3d at 1165 n.12).

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

1. The Intervenors cannot establish that Lighthouse's narrowly tailored request will chill their First Amendment rights.

The first step in the *Perry* analysis requires a group to show, *prima facie*, that enforcement of discovery will chill members' associational rights.[41] This showing demands "objective and articulable facts, which go beyond broad allegations or subjective fears."[42]

The Intervenors cannot make the threshold *Perry* showing. Their concerns, reflected in the Kearns Declaration, are either resolvable through a negotiated protective order or fall well short of the "objective and articulable fact" standard. To the extent the Intervenors worry about public exposure of membership information, Lighthouse is willing to safeguard individuals' privacy though use of a stipulated protective order.[43] Kearns' other concern, that turning over internal documents "would have a deeply chilling effect on our ability to function as a campaign," is simply her unsubstantiated opinion.[44] Because her affidavit does not even superficially explain why or how disclosure would "inhibit [their] ability to work together . . . [or] to associate with one another," it does not satisfy the *Perry* standard.[45] Courts facing similarly "broad allegations or subjective fears" unhesitatingly reject them.[46]

---

[41] *Perry*, 591 F.3d at 1160.

[42] *Dole v. Serv. Emps. Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1460-61 (9th Cir. 1991) (citing *McLaughlin v. Serv. Emps. Union, AFL-CIO, Local 280*, 880 F.2d 170, 175 (9th Cir. 1989)).

[43] That is, a protective order that limits the use of "confidential" information to prosecution, defense, and settlement of this litigation. *See Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 236, 241 (D. Me. 2010) ("Confidentiality Order" prevented "chilling effect" described by affiants). Lighthouse is preparing a variation of the District's Model Protective Order that grants this same level of protection to its confidential information.

[44] Kearns Decl., ¶ 8.

[45] *Id.*

[46] *See McKee*, 723 F. Supp. 2d at 242 (Affidavits that are "speculative and contain general allegations" fail under *Perry* step one.).

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

2. Lighthouse's need for the Intervenors' highly relevant information outweighs any harm posed by disclosure.

The second step in the *Perry* analysis requires courts to "balance the burdens imposed on individuals and associations against the significance of the [] interest in disclosure."[47] At this stage, courts evaluate importance of the litigation, the centrality of the information to the case, the less intrusive means of obtaining the information, and the substantiality of the First Amendment rights at issue.[48] The balance in this case weighs in favor of discovery.

As an initial matter, beyond *Perry* itself, nearly every case and principle cited by the Intervenors comes from a non-Ninth Circuit case. As a result, they apply tests from other circuits (e.g., the "heart of the lawsuit" and "crucial relevance"), while largely ignoring most of the *Perry* balancing analysis (e.g., the importance of the litigation, the centrality of the information to the case, careful tailoring). They also fail to mention precedent from within this Circuit indicating that cases like this one, which ask important constitutional questions and implicate "broad sweeping . . . relief" tilt "in favor of disclosure."[49] Indeed, privilege claims are "typically denied" in section 1983 actions where "strong interests in truth-seeking support discovery . . . [which] may shed light on government misconduct."[50]

In any event, for reasons explained above, Lighthouse's requests are not just highly relevant, but potentially central to this case.[51] The Intervenors counter by pointing to *Muslim*

---

[47] *Perry*, 591 F.3d at 1161 (quoting *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 176 (D.C. Cir. 2003)).
[48] *Id.*
[49] *Montanans for Cmty. Dev. v. Motl*, No. CV-14-55-H-DLC, 2015 WL 13716091, at *2 (D. Mont. Aug. 7, 2015).
[50] *Agresta v. Goode*, No. 91-6396, 1993 WL 40306, at *2 (E.D. Pa. Feb. 16, 1993); *see also Thomas v. Cate*, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010) ("[T]he fact that the decision making process is at issue in th[e] case weighs heavily against [the] assertion of privilege.").
[51] *See supra* Part III.A.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

Community Association of Ann Arbor v. Pittsfield Township, in which a district court prohibited discovery against a citizen whose advocacy was "at least twice removed from the ultimate decisionmakers."[52] But this case is doubly distinguishable because the Intervenors are deeply connected to the decisionmakers and far more influential than any individual community member.

Nor are the Intervenors' First Amendment interests compelling. Indeed, *Perry* offers no protection at all to the extent Lighthouse is requesting materials that do not qualify as "campaign strategy": ***factual*** recollections of meetings with the Defendants, ***application*** of the Intervenors' strategies and messages, and the ***fruits*** of their strategy and messaging efforts.[53] What is more, the Intervenors asked to participate in this litigation, thereby voluntarily subjecting themselves to discovery.[54] In these circumstances, whatever the actual impact of disclosure might be, it will not be substantial.[55]

Lighthouse's requests are also carefully tailored. For example, even though the Intervenor-Defendants have been involved in opposing a number of different coal export projects (including the Oregon project mentioned above), Lighthouse asked only for documents related to its Millennium Bulk Terminal project. That stands in contrast to the *Perry* plaintiffs' requests, which sought communications with "any third party, including,

---

[52] MPO at 11 (citing *Muslim Cmty. Ass'n of Ann Arbor v. Pittsfield Twp.*, No. 12-cv-10803, 2014 WL 10319321, at *1-2 (E.D. Mich. July 2, 2014)).

[53] *In re Anonymous Online Speakers*, 661 F.3d 1168, 1174 (9th Cir. 2011) (First Amendment privilege is limited "to "*private internal* campaign communications concerning the *formulation of campaign strategies and messages*") (quoting *Perry*, 591 F.3d at 1165 n.12).

[54] *See Fujikura Ltd. v. Finisar Corp*, No. 15-MC-80110-HRL, 2015 WL 5782351, at *4 (N.D. Cal. Oct. 5, 2015) ("Once a party has intervened, it is subject to discovery obligations under Rules 30 and 34.").

[55] *See Planned Parenthood v. Ctr. for Med. Progress*, No. 16-cv-00236-WHO, 2018 WL 2441518, at *12 (N.D. Cal. May 31, 2018).

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

without limitation, members of the public."[56] And, as already discussed, Lighthouse remains willing to work with the Intervenors to reduce any unnecessary burden.

Finally, there are no alternative means of accessing information in the Intervenors' internal documents. Again, this is at least in part because the Defendants—perhaps recognizing their obligations under the Public Records Act or anticipating future discovery—took pains to discuss sensitive topics "offline,"[57] meaning over the phone or in person.[58]

Lighthouse remains willing to negotiate a protective order that will shield the Intervenors' confidential information from public disclosure. The Ninth Circuit has long recognized that this sort of "protective order is just one of the tools available to the district court to oversee discovery of sensitive matters that implicate First Amendment rights."[59] As a result, nearly every post-*Perry* case ultimately concludes that protective orders solve most First Amendment concerns.[60] This case should be no different.

IV. CONCLUSION

Before production of a single document in this case, the Intervenors are asking the Court to permanently shut down discovery of materials directly relevant to the Defendants' intent to discriminate against foreign and interstate commerce. This could deprive Lighthouse

---

[56] *Perry*, 591 F.3d at 1153; *see Nat'l Abortion Fed. v. Ctr. for Med. Progress*, No. 15-cv-03522-WHO, 2015 WL 13333328, at *3 (N.D. Cal. Nov. 20, 2015) ("much narrower disclosure" than *Perry* satisfied step two).

[57] *See* Email from S. Peck, Director of Commc'ns, Wash. Dept. of Ecology, to K. Phillips, Executive Director of Policy, Wash. Gov.'s Office, and D. Postman, Chief of Staff, Wash. Gov.'s Office (July 23, 2014), Ex. 1.

[58] *See, e.g.*, Email from B. Kelley, President, WEC, to T. North, Assistant to the Dir., Wash. Dep't of Ecology (May 16, 2016) (sending a "Memo to M. Bellon re: Project DEIS Transparency" for "our 2pm call"), Ex. 2; Email from J. Hasselman, EarthJustice, to M. Duffy, DNR (Jan. 25, 2016) (referencing their earlier "conversation" about the sublease and asking DNR "to call if [they] would like to discuss"), Ex. 3.

[59] *In re Anonymous Online Speakers*, 661 F.3d 1168, 1178 (9th Cir. 2011).

[60] *See, e.g., id.* at 1177-78; *Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 236, 240-41 (D. Me. 2010); *Planned Parenthood*, 2018 WL 2441518, at *12-*13; *Nat'l Abortion Fed'n*, 2015 WL 13333328, at *3. In each of these cases, too, groups like the Intervenors turned their documents over to their opponents.

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

of potentially case-proving information that it cannot get from any other source. Especially at this stage in the case, with the prospect of protecting sensitive information in a stipulated protective order, the Intervenors' motion should be denied.

Dated this 16th day of July, 2018.

VENABLE LLP

By: *s/ Jay C. Johnson*
Kathryn K. Floyd, DC Bar No. 411027
(Admitted *pro hac vice*)
kkfloyd@venable.com
Jay C. Johnson, VA Bar No. 47009
jcjohnson@venable.com
(Admitted *pro hac vice*)
Kyle W. Robisch, DC Bar No. 1046856
KWRobisch@Venable.com
(Admited *pro hac vice*)
600 Massachusetts Ave NW
Washington DC 20001
202-344-4000

GORDON THOMAS HONEYWELL, LLP

By: *s/Bradley B. Jones*
Bradley B. Jones, WSBA No. 17197
bjones@gth-law.com
1201 Pacific Ave, Ste 2100
Tacoma, WA 98402
(253) 620-6500

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

By: s/ *Savanna L. Stevens*
Savanna L. Stevens, Legal Assistant
sstevens@gth-law.com

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565