UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES,

Plaintiff,

-versus- 09-Civ.-0849

ERIE COUNTY, NEW YORK, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTIES' MOTION TO QUASH SUBPOENAS

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INTRODUCTION

In the context of a lawsuit brought by the United States Department of Justice challenging Erie County's failure to administer its jails in compliance with minimum constitutional standards, the County has subpoenaed a wide range of correspondence and documents from three local political organizations that advocate on behalf of incarcerated people – the League of Women Voters of Buffalo/Niagara, the Erie County Prisoners' Rights Coalition, and the Partnership for the Public Good. These organizations, which are not parties to the litigation, move to quash the subpoenas on two grounds.

First, the First Amendment privilege protects advocacy organizations from government agencies' misuse of the civil discovery process to carry out fishing expeditions that risk chilling First Amendment activity. Erie County's subpoenas are precisely such an endeavor. Responding to them would expose these organizations' advocacy strategies to the County government whose policies are often the object of such strategies, deter open communications with investigative components of the federal government, and reveal the identities of members, associates, and contributors to the organizations. The County cannot explain how the documents it has demanded are needed for its defense in this case, nor why it cannot obtain the information through party discovery or searches of its own records.

Second, the subpoenas are unduly burdensome for these small, non-profit, volunteer-based organizations. The subpoenas contain no time limitation, extend to the organizations' "members, directors, chairs, and/or agents," demand every communication with any part of the United States Department of Justice as well as every document received by the organizations pertaining to the Erie County jails, and require the technically and financially burdensome production of stored electronic communications. In light of this burden, the County's weak

countervailing interest in these documents, and the organizations' status as strangers to this litigation, the subpoenas should be quashed.

FACTS

On November 10, 2010, Erie County served identical subpoenas on three non-party prisoner-rights organizations: the League of Women Voters of Buffalo/Niagara, the Erie County Prisoners' Rights Coalition, and the Partnership for the Public Good (hereinafter "the Recipients"). All three are non-profit, volunteer-based advocacy organizations that work in whole or in part on issues pertaining to the rights of people who are incarcerated. *See* Affidavit of Karima Amin (July 25, 2011) ("Amin Aff.") at ¶¶ 1-6; Affidavit of Therese Warden (July 25, 2011) ("Warden Aff.") at ¶¶ 1-7; Affirmation of Sam Magavern (July 20, 2011) ("Magavern Aff.") at ¶¶ 1-5.

Erie County's subpoenas demanded the following documents from these non-profit political organizations:

> 1. All correspondence, including, but not limited to written letters, and electronic mail between [the recipient organization], its members, directors, chairs, and/or agents, and the United States Department of Justice, its attorneys, employees and/or agents.
>
> 2. All documents provided to the United States Department of Justice, its attorneys, employees and/or agents by the [recipient organization], its members, directors, chairs, and/or agents.
>
> 3. All documents provided to the [recipient organization], its members, directors, chairs, and agents by third parties, including, but not limited to former and/or current Erie County and/or Erie County Sheriff's employees, and current and/or former inmates at the Erie County Holding Center ("ECHC") and/or Erie County Correctional Facility ("ECCF") regarding the conditions at the ECHC and/or the ECCF.

See Exs. A-C to Stoughton Affirmation in Support of Motion to Quash (July 27, 2011) (hereinafter "Stoughton Aff."). Because the County has asserted that the Recipients waived their

objections to the subpoenas by failing to respond appropriately, a detailed recitation of the communication between the County and the Recipients following receipt of the subpoenas is warranted.

The return date of the subpoena was listed as November 30, 2010. *Id.* Because of the Thanksgiving holiday and the need of these nonprofit organizations to locate representation, the Recipients contacted the County prior to the return date to obtain an extension of time to respond. The County agreed to an extension so that counsel could be secured and agreed to discuss the subpoenas during the first week in December. Stoughton Aff. ¶ 3.

On December 1 and 2, 2010, counsel for the Recipients left telephone messages for the County but was unable to reach an attorney. *Id.* ¶ 4. On December 3, counsel for the Recipients and for the County discussed the Recipients' objections via telephone. *Id.* ¶ 5. The Recipients requested that the County withdraw the subpoenas based on the chilling effect of the subpoenas on their First Amendment rights, the County's inability to explain its need for the information in light of the heightened standard imposed by the First Amendment, and the overbreadth and burdensomeness of the requests. *Id.* The County and the Recipients exchanged letters on December 6, 2010, memorializing this conversation. *See* Ex. D-E to Stoughton Aff. The Recipients' letter laid out their objections to the subpoena in detail and urged the County to narrow the subpoena and to explain what documents it felt were required from the Recipients for its defense in the underlying action and could not be obtained through party discovery. *Id.*

The County did not respond to the Recipients' letter until nearly two months later, on January 26, 2011. *See* Ex. F to Stoughton Aff. In its letter of that date, the County agreed to limit the scope of the subpoena in certain respects but did not address all of the Recipients' objections and, most importantly, did not address the Recipients' First Amendment concerns or

explain why the documents sought were necessary to the County's defense and could not be obtained through party discovery. *Id.* The County demanded a response from the Recipients before 4:00 pm on January 28, two days later. *Id.*

On January 28, the Recipients responded to the County's letter by explaining their remaining objections to the subpoena and reiterating their First Amendment concerns. *See* Ex. G. to Stoughton Aff. The Recipients expressed a willingness to continue to work with the County to come to an agreement on the subpoena but also indicated that they would file a motion to quash if the County felt that further good faith negotiations would be futile. *Id.*

Three months passed without response from the County. During this time, the Recipients believed that the County was considering its request to withdraw or further narrow the subpoena and, therefore, did not move to quash. Stoughton Aff. ¶ 9. On April 20, 2011, however, the County broke its silence in a letter suggesting the Recipients had waived any objection to the subpoena by failing to formally respond to it. *See* Ex. H to Stoughton Aff. Despite this threat, the letter also invited further good-faith discussion by laying out the County's position with regard to the Recipients' remaining objections to the subpoena, agreeing to further narrow the scope of the subpoena, and requesting that the Recipients provide the County with legal authority to support their First Amendment claims. *Id.*

On April 25, 2011, the Recipients provided the legal authority requested by the County and engaged the County's opposition to the Recipients' remaining objections to the subpoenas. Ex. I to Stoughton Aff. The Recipients' letter also urged the County to call counsel for the Recipients in the hope of having a productive conversation about the subpoenas and avoiding motion practice, whether a motion to compel or a motion to quash. *Id.*

On May 31, 2011, counsel for the County called counsel for the Recipients. Stoughton Aff. ¶ 12. In an email memorializing that conversation, counsel for the County, Jeremy Colby, noted that the Recipients and the County "agree[d] to disagree" with regard to the substance of the Recipients' objections but also stated that the County would not seek to enforce the subpoenas until it had exhausted attempts to obtain the discovery it needed from the United States. Ex. J to Stoughton Aff. Nonetheless, the County demanded that the Recipients formally respond to the subpoenas. *Id.*

On June 1, 2011, the Recipients explained that their "formal response" to the subpoenas would be a motion to quash, which would defeat the purpose of holding motions practice in abeyance pending the County's attempt to satisfy its needs through party discovery. *Id* Moreover, the Recipients disputed the utility of producing a formal response to the original subpoenas given that the County had agreed to narrow the scope of the subpoenas substantially in subsequent discussions. *Id.* The Recipients asked the County to withdraw the original subpoena and issue one that comported with those subsequent discussions, if it still felt one was necessary after seeking that information through party discovery. *Id.*

On June 14, 2011, the County replied in a terse email stating that it intended to enforce the full scope of the original subpoena notwithstanding any subsequent communications, that the Recipients had waived any objections, and they invited the Recipients to file a motion to quash. *Id*. Nonetheless, the County added that "[i]f the DOJ reconsiders their refusal to produce documents (other than one chart) that they received from your clients, then that should obviate the need for this motions practice." *Id.* On June 29, the Recipients asked the County to clarify whether it wished to proceed with motions practice or not. *Id.* On June 30, the County asked the Recipients to "hold off" on their motion to quash pending a scheduled status conference in the

underlying litigation and a pending visit to Erie County by the DOJ, in the hopes that the County could "resolve [this matter] in the interim." *Id.*

Not having heard back from the County, the Recipients emailed Mr. Colby on July 19, 2011, explaining that they believed that good-faith negotiations had been exhausted and again asking the County to withdraw the subpoenas. *Id.* The County refused to withdraw the subpoenas. *Id.*

ARGUMENT

I. The Subpoenas Should Be Quashed Because the Chilling Effect on the Recipients' First Amendment Rights Outweighs the County's Need for the Requested Documents.

The County cannot meet the extraordinary standard for justifying subpoenas served on non-parties to litigation that implicate core First Amendment rights. The First Amendment protects "a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. Jaycees*, 468 U.S. 609, 618 (1984). In *NAACP v. Alabama*, the Supreme Court quashed subpoenas issued to the NAACP on First Amendment grounds, holding that the "abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action," especially where such action "would have the practical effect of discouraging the exercise of constitutionally protected political rights." 357 U.S. 449, 461 (1958). As the Ninth Circuit noted last year, there is a long-standing "First Amendment *privilege*" against discovery requests that implicate such constitutional rights. *Perry v.*

Schwarzenegger, 591 F.3d 1147, 1160 (9th Cir. 2010), *cert. dismissed*, 130 S.Ct. 2431 (2010) (emphasis in the original).[1]

To assess whether the First Amendment privilege bars a subpoena, the court must balance the Recipients' First Amendment rights, informed by their status as non-parties, against the County's need for the requested documents. *Perry*, 591 F.3d at 1152 ("Where, as here, discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking such discovery must demonstrate a need for the information sufficient to outweigh the impact on those rights."); *Snedigar v. Hodderson*, 114 Wash.2d 153, 164 (1990) (holding that there is a "balancing test involved in assessing a discovery request for associational information"); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure."); *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981) (applying a "balancing inquiry . . . to determine whether a claim of [First Amendment] privilege should be upheld," in which the "First Amendment claim should be measured against the defendant's need for the information sought"), *vacated as moot*, 458 U.S. 1118 (1982);[2] *In re Heartland Institute*, --- F.R.D. ---, No. 11 C 2240, 2011 WL 1839482 at *3 (N.D. Ill. May 13, 2011) (applying a

[1] With respect to the First Amendment privilege, the Recipients have been unable to identify any relevant Second Circuit or other controlling case law, other than the seminal case of *NAACP v. Alabama*. Only a few appellate and state high-court decisions have considered these issues in the decades since the Supreme Court's decision in that case, in particular, the D.C. Circuit, the Ninth Circuit, and Tenth Circuits, as well as the State Supreme Courts of Washington and California. As the Ninth Circuit recently noted, "the paucity of appellate precedent is not surprising because discovery disputes are not generally appealable on an interlocutory basis and mandamus review is very limited." *In re Anonymous Online Speaker*, --- F.3d ---, No. 09-71265, 2011 WL 61635 (9th Cir. Jan. 7, 2011).

[2] Despite being vacated as moot, *Black Panther Party* remains good law in the D.C. Circuit. *See Int'l Action Center v. U.S.*, 207 F.R.D. 1, 3 n.6 (D.D.C. 2002).

"heightened scrutiny balancing test" to assess the applicability of the First Amendment privilege).

In a case indistinguishable from this one, the District Court of the District of Columbia applied this balancing test to quash a non-party subpoena on First Amendment grounds. In *Wyoming v. U.S. Dep't of Agriculture*, 208 F.R.D. 449 (D.D.C. 2002), the State of Wyoming had alleged that the United States violated federal law in the promulgation of certain forest regulations. Wyoming issued subpoenas to three advocacy organizations demanding copies of all documents exchanged between the organizations and the defendant USDA, as well as other documents related to the organizations' advocacy and activities related to the USDA's forest management practices. *Id.* at 452. The court quashed the subpoena in its entirety, noting that the organizations' First Amendment interest in keeping information about their advocacy and efforts to petition government out of the hands of the State of Wyoming was more important than Wyoming's need for any such information, which was marginal to its claims in the underlying litigation.

Applying the balancing test of the First Amendment privilege to the facts of this dispute demonstrates that this Court should follow the example set by the court in the *Wyoming* case and quash Erie County's subpoenas to these advocacy organizations.

A. The Recipients' First Amendment Interests in Quashing the Subpoenas Are Strong.

The Recipients' advocacy efforts on behalf of inmates in the Erie County jails, including their efforts to influence the Department of Justice regarding to these public facilities, are quintessential First Amendment activities accorded the highest constitutional protection. *NAACP v. Alabama*, 357 U.S. at 461. Correspondence and documents exchanged between the Recipients and the Department of Justice, as demanded by Parts 1 and 2 of the subpoenas, are

precisely the kind of political activity that courts have insulated from disclosure under the First Amendment privilege. *See Britt v. Superior County of San Diego County*, 20 Cal.3d 844, 852 (1978). (striking party discovery that would have forced plaintiffs to reveal "peaceful and lawful associational activity" about groups that "have protested operations at the San Diego airport and have attempted through traditional political efforts to influence the future conduct of such operations").[3] The broader range of documents sought in Part 3 of the subpoenas – including every document ever provided to these prisoner-rights organization regarding Erie County's jails – would, as a practical matter, disclose their every activity and investigation regarding the jails to the scrutiny of the County.

The Recipients' (as well as their members') status as non-parties to the underlying litigation accords additional weight to their First Amendment interests. "[I]t is clear that the party seeking disclosure must clear a higher hurdle where the [object of discovery] is a non-party." *McVicker v. King*, 266 F.R.D. 92, 95 (W.D. Pa. 2010); *see also North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) (holding that "non-party status is relevant in considering the burden" on First Amendment rights posed by discovery requests); *Wyoming*, 208 F.R.D. at 452-53 ("Non-party status is one of the factors the court uses in weighing the burden of imposing discovery."). Non-party disclosure where First Amendment interests are implicated "is

[3] Although some of the information and documents sought in Erie County's subpoenas does not pertain to strictly private associational activity, in that it consists of documents and correspondence exchanged with the Department of Justice, the Recipients retain a privacy interests in this material because they reasonably expect it to be protected by the "informant" or "confidential source" privilege. *See, e.g.,, Rovario v. United States*, 353 U.S. 53, 59 (1957); *United States v. Tucker*, 380 F.2d 206, 213 (2d Cir. 1967); *In re United States Attorney General*, 565 F.2d 19, 22 (2d Cir. 1977). The Recipients understand that the Department of Justice has asserted this privilege with regard to certain documents in the underlying litigation.

only appropriate in the exceptional case." *Doe v. 2TheMart.com*, 140 F. Supp.2d 1088, 1095 (W.D. Wash. 2001).

As the affidavits accompanying this motion demonstrate, the Recipients have a genuine and well-founded fear that compelled disclosure of these documents will chill their First Amendment rights. The Recipients' leaders have provided testimony to this Court indicating that they fear that disclosing their advocacy strategies would substantively harm their work (Amin Aff. ¶ 10, Warden Aff. ¶¶ 9, 12; Magavern Aff. ¶ 8); chill the participation of coalition members, allies and members in their work (Amin Aff. ¶ 11, Warden Aff. ¶¶ 12, 14; Magavern Aff. ¶¶ 9-11); cause them to lose members (Amin Aff. ¶ 10-11, Warden Aff. ¶ 12; Magavern Aff. ¶ 9); and chill their willingness to petition the federal government for redress. (Amin Aff. ¶ 12, Warden Aff. ¶ 15; Magavern Aff. ¶ 11).

The Recipients' First Amendment concerns are heightened insofar as the documents sought by Erie County were created and used for advocacy that the County perceives to be contrary to its interests. "[Associational] privacy is important where the government itself is being criticized, for in this circumstance it has a special incentive to suppress opposition." *Black Panther Party*, 661 F.2d at 1265. As the affidavits indicate, some of the Recipients have had difficult and antagonistic encounters with the County in the past. *See, e.g.*, Amin Aff. ¶ 9.

Not only the Recipient-organizations' First Amendment rights are at stake. In seeking documents pertaining to the activities of the Recipient organizations' "members, directors, chairs, and/or agents," the County's subpoenas implicate the First Amendment rights of many dozens – perhaps hundreds[4] – of individuals with little or no connection to the litigation. The

[4] The County has declined to define what it means by the vague term "agents." Such a term could be interpreted to include non-member supporters of the Recipients, fellow coalition

First Amendment "extends not only to the organization itself, but to its staff, members, contributors, and others who affiliate with it." *Wyoming*, 208 F.R.D. at 454 (quoting *Int'l Union v. Nat'l Right to Work Legal Defense & Ed. Found., Inc.*, 590 F.2d 1139, 1147 (D.C. Cir. 1978)). Indeed, to the extent that disclosing communications and documents pertaining to the Recipients' members is required, the subpoena amounts to compelled disclosure of the organizations' membership lists, a quintessential violation of the First Amendment condemned in *NAACP v. Alabama*.

For all of these reasons, the testimony contained in the Recipients' affidavits establishes the Recipients' strong First Amendment interests in quashing Erie County's subpoenas. "[T]he litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure." *Black Panther Party*, 661 F.2d at 1267-68; *see also Snedigar v. Hodderson*, 114 Wash.2d 153, 158 (1990) ("[T]he Court of Appeals was not correct when it required an initial showing of *actual* infringement on First Amendment rights. The party asserting the First Amendment associational privilege is only required to show *some probability* that the requested disclosure will harm its First Amendment rights.") (emphasis in the original). The Recipients have shown much more than "some probability" that Erie County's subpoenas will chill their First Amendment rights.

B. <u>The County Has Not Met Its Burden to Show That The Documents Sought Are Necessary to Their Defense and That It Has Exhausted Alternative Sources of the Information.</u>

In light of the Recipients' strong First Amendment interest in quashing the subpoenas, the County cannot meet its burden to demonstrate that the documents sought are necessary to establish any defense in the underlying action. Nor can the County demonstrate that it has

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members, and even donors, thus implicating a broad range of individuals' First Amendment interests.

exhausted alternative avenues for obtaining this information – in particular, party discovery and searches of its own records.

The standard the County must meet is far more than simple relevance. In assessing a claim of First Amendment privilege, "the party seeking discovery must show that the information sought is highly relevant to the claims or defenses in the litigation – a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1)" – in other words, the Court must consider "the *centrality* of the information sought to the issues of the case." *Perry*, 591 F.3d at 1161. *See also Black Panther Party*, 661 F.2d at 1286 ("The interest in disclosure will be relatively weak unless the information goes to 'the heart of the matter,' that is, unless it is crucial to the party's case."); *Snedigar*, 114 Wash.2d at 165 (information sought must go to the "heart of the matter" to overcome the First Amendment privilege); *Grandbouche*, 825 F.2d at 1466 (holding that courts must consider "the necessity of receiving the information sought" in determining whether to overcome the First Amendment privilege).[5] As one court noted, courts must "demand a heightened showing of 'relevancy,' once a constitutional challenge for withholding the information has been lodged. This enhanced scrutiny is appropriate since civil lawsuits could be misused as coercive devices to cripple, or subdue, vocal opponents." *Coors Co. v. Wallace*, 570 F. Supp. 202, 208-09 (N.D. Cal. 1983).

[5]District courts applying the First Amendment privileged have also followed this "heightened relevance" rule. *See In re Heartland Institute*, 2011 WL 1839482 (granting a motion to quash a subpoena on First Amendment grounds where the party seeking discovery could not show "that the information sought from Third Parties is crucial to [the party]'s case"); *McVicker v. King*, 266 F.R.D. 92, 95 (W.D. Pa. 2010) (denying a motion to compel responses to a subpoena on First Amendment grounds where the party seeking the discovery could only establish that the information "potentially may relate to impeachment"); *Anderson v. Hale*, No. 00 C 2021, 2001 WL 503045 (N.D. Ill. May 10, 2001) (holding that "mere showings of relevance and admissibility no longer suffice" once a First Amendment privilege has been asserted).

The County has not met this heightened relevance standard. The only ground the County has offered to justify its need for the subpoenas is the statement that "[t]he Subpoenas were the result of the United States identifying the [Recipients] as having discoverable information . . . pursuant to Rule 26 of the Federal Rules of Civil Procedure." *See* Ex. D to Stoughton Aff . The fact that the United States, as part of its initial disclosures, listed these organizations as "likely to have discoverable information," *see* Fed. R. Civ. P. 26(a)(1)(A)(i), does not come close to meeting the County's burden to justify these subpoenas. The County has never explained how the information sought in the subpoenas is central to any issue at the heart of the underlying litigation. "Even though the [First Amendment] right may not be absolute, such a constitutional right cannot be trumped by fishing expeditions or untenable assertions that the information sought is highly relevant to the litigation." *In re Heartland Institute*, --- F.R.D. ---, No. 11 C 2240, 2011 WL 1839482 at *5 (N.D. Ill. May 13, 2011).

Even if the County were to produce a more robust justification in response to this motion, it cannot do so by simply asserting that the documents sought could be useful in some manner. "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity." *Black Panther Party*, 661 F.2d at 1286; *Britt*, 20 Cal.3d at 860 n.4 (denying a party defendant's motion to compel discovery of associational activity where the defendant's contentions regarding the relevance of the discovery was "purely speculative"); *In re Heartland Institute*, 2011 WL 1839482 at *3 (N.D. Ill. May 13, 2011) (quashing a subpoena where the party seeking discovery was "merely speculating as to the evidence or type of evidence that might be [relevant] in the underlying litigation" and the party's "use of the information to be gleaned through their discovery requests is purely hypothetical and

tangential"); *Coors Co.*, 570 F. Supp. at 209 (requiring the party seeking discovery over a First Amendment objection "to explain precisely what information is sought, to which specific issues in the case the evidence is relevant, and whether these issues are likely to be determinative of the case.").

Given the nature of the underlying litigation, it is highly unlikely that the County could demonstrate that the documents it seeks from the Recipients are "determinative" of any defense it might assert. The Recipients' understanding is that the United States has alleged that Erie County is violating federal law by failing to comport with constitutional standards in its administration of the Erie County jails. The manner in which the County administers its own jails, and its justification (or lack thereof) for doing so, is information within the purview of the County itself. No defense to the United States' allegations turns on documents in the possession of prisoner rights' advocacy organizations. Nor has the County given the Recipients or the Court any reason to believe that information or documents in the possession of the Recipients would be anything more than duplicative or cumulative of what has been or will be obtained through party discovery.

Finally, even if the County could establish the centrality or determinative nature of the information it has demanded from the Recipients, it cannot overcome the First Amendment privilege because the County has not shown that it has no other means of obtaining that information. "Even when the information sought is crucial to a litigant's case, disclosure should be compelled only after the litigant has shown that he has exhausted every reasonable alternative source of information." *Black Panther Party*, 661 F.2d at 1286; *see also Perry*, 591 F.3d at 1164 (applying the First Amendment privilege where the party seeking discovery could "obtain much of the information they seek from other sources"); *Snedigar*, 114 Wash.2d at 158 ("[O]nce an

association resisting discovery has shown that disclosure of associational materials would infringe on its First Amendment rights, the party seeking discovery must establish . . . that there are no reasonable alternative sources for the information."); *Grandbouche*, 825 F.2d at 1466 (holding that among the factors to be considered in applying the First Amendment privilege is "whether the information is available from other sources"); *Anderson v. Hale*, No. 00 C 2021, 2001 WL 503045 at *4 (N.D. Ill. May 10, 2001) ("Failure to exhaust all reasonable alternative sources precludes disclosure even if the information sought is deemed crucial to the party's case.").

In this case, the County has failed to exhaust its attempts to obtain the information through party discovery and through searches of its own records. As counsel for the County admitted in recent email correspondence, the County has not moved to compel the information sought in the subpoenas from the United States, despite the fact that Parts 1 and 2 of their subpoena pertain exclusively to documents that should be in the possession of this party. *See* Ex. J to Stoughton Aff. It is not clear whether or not the County searched its own records for the documents given to the Recipients by "former and/or current Erie County and/or Erie County Sheriff's employees," but the law makes clear that the County should have done so before serving the subpoenas on the Recipients. On this basis alone, therefore, the Court should quash the subpoena.

II. The Subpoenas Should Be Quashed Because They Are Overbroad and Impose an Undue Burden on the Recipients.

Apart from the matter of the First Amendment privilege, Erie County's subpoenas should be quashed because the pose an undue burden on the Recipients. "Whether a subpoena poses upon a witness an 'undue burden' depends upon 'such factors as relevance, the need of the party

for the documents, the breadth of document request, the time period covered by it, the particularity with which the documents are described and the burden imposed." *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49 (S.D.N.Y. 1996) (quoting *United States v. Int'l Bus. Mach. Corp. ("IBM")*, 83 F.R.D. 97, 104 (S.D.N.Y. 1979)).

The subpoenas demand every communication and document exchanged between the Recipients and any part of the United States Department of Justice, without time limitation or subject matter limitation. Ex. A-C to Stoughton Aff (Parts 1 & 2 of the subpoenas). They also demand every document given to the Recipients by any person or party regarding the Erie County jails, without time limitation. *Id.* (Part 3 of the subpoenas). These demands are not limited to the Recipient organizations proper but extend to all documents and correspondence exchanged or received by their "members, directors, chairs, and/or agents." *Id.*

For the reasons stated in Part I.B, *supra*, the County cannot establish any real need for the documents it has demanded in the subpoenas. The sheer overbreadth of the demands further illustrates this point. For example, the lack of a limitation to the subject matter of the underlying litigation in Parts 1 and 2 of the subpoena and the demand for documents and correspondence from every part of the United States Department of Justice suggests that these subpoenas are a clumsy fishing expedition, not a legitimate demand for specific records needed for Erie County's defense. What interest has Erie County in the League of Women Voters' correspondence with the Voting Rights Section of DOJ from the past several decades, for example? "To the extent that the subpoena sweepingly pursues material with little apparent or likely relevance to the subject matter it runs the great risk of being found overbroad and unreasonable." *IBM*, 83 F.R.D. at 106-07.

Balanced against the County's weak claim of need is the enormous burden responding to these subpoenas would impose upon the Recipients, who are not parties to the underlying litigation. "[T]he status of a witness as a nonparty to the underlying litigation 'entitles [the witness] to consideration regarding expense and inconvenience.'" *Concord Boat*, 169 F.R.D. at 49 (quoting Fed. R. Civ. P. 45(c)(2)(B)(ii), alteration in the original). Even if the information is relevant, the Court must weigh "the volume of material requested, the ease of searching for the requested documents in the form presented, and whether compliance threatens the normal operations of the responding [nonparties]." *Linder v. Calero-Portcarrero*, 180 F.R.D. 168, 175 (D.D.C. 1998).

A search for responsive documents would be time-consuming and difficult. The subpoenas contain no time limitation. They demand correspondence and documents exchanged between the Recipients and any part of one of the Executive Branch's largest departments, on any subject matter. They demand every document received by the Recipients pertaining to the Erie County jails, the subject matter at the heart of the advocacy work done by these organizations, and thus likely encompassing the bulk of any records maintained by them. The requirement to search not only the records of the Recipient organizations but all the records of their "members, directors, chairs, and/or agents" would entail a vast effort to coordinate a search of many dozens if not hundreds of individuals' records. And the demand in the subpoena to search "electronic mail" poses an enormous technological and financial burden in light of these organizations' limited capacity to search electronic devices and records for potentially responsive documents and correspondence.

The Recipients are small, local, non-profit organizations, none of whom have any more than one (or half of one) paid staff member. Amin Aff. ¶¶ 5-6, Warden Aff. ¶ 4; Magavern Aff.

¶ 5. They rely primarily on volunteers from the community who donate their spare time to their cause. *Id*. Their budgets are miniscule even by non-profit standards. Amin Aff. ¶ 6, Warden Aff. ¶5; Magavern Aff. ¶ 6. They do not have document retention policies or practices that would streamline the process of searching for electronic discovery. Amin Aff. ¶ 5-6, Warden Aff. ¶ 4; Magavern Aff. ¶ 5. Searching for large volumes of documents, going back through the entire history of the organization, extending to all members and "agents" of the organization, including electronic communications potentially stored in scattered hard drives requiring IT assistance to locate, would create a heavy burden for any organization and an untenable one for these groups. For this reason, the subpoenas should be quashed. *See North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005) (granting a motion to quash subpoena seeking an non-party organization's communications with other agencies, where the recipient was "a nonprofit organization with only two staff members").

III. The Recipients Have Not Waived Their Objections to the Subpoenas.

In its recent correspondence with the Recipients, the County asserted that the Recipients waived their objections by failing to formally respond to the subpoenas. *See* Ex. J to Stoughton Aff. Typically, failure to respond to a subpoena within the time specified in Rule 45(c)(2)(B) constitutes a waiver of objections; however, courts routinely find that "good cause" exists for an exception where "(1) the subpoena is overbroad on its face and exceeds the bounds of fair discovery, (2) the subpoenaed witness is a non-party acting in good faith, and (3) counsel for witness and counsel for subpoenaing party were in contact concerning the witness' compliance prior to the time the witness challenged the legal basis for the subpoena." *Concord Boat*, 169 F.R.D. at 48 (internal quotations and citations omitted). *See also Brown v. Hendler*, No. 09 Civ. 4486, 2011 WL 321139 at * 2 (S.D.N.Y. Jan. 31, 2011) ("District courts, however, have broad

discretion over the decision to quash or modify a subpoena, and a number of courts in this Circuit have exercised their discretion to consider motions to quash that were not 'timely' filed within the meaning of Rule 45 and applicable case law"); *In re Rule 45 Subpoena Issued to Cablevision Sys. Corp.*, No. MISC 08-347, 2010 WL 2219343 at *6 (E.D.N.Y. Feb. 5, 2010) (finding good cause where subpoena recipient "assert[ed] a significant constitutional interest" and "acted in good faith in seeking to resolve this dispute").

All of these factors are present here. For the reasons stated in Part II, *supra*, the subpoena is overbroad on its face. The Recipients are non-parties and have acted in good faith throughout this process by informing the County of their objections and concerns, engaging the County in good faith negotiations regarding the subpoena, and diligently and promptly responding to the County's communications. *See generally* Fact Section, *supra*. Counsel for the Recipients and for the County have been in continuous contact since the subpoena was issued, interrupted only by occasional months-long delays on the part of the County. *Id.* The "good cause" exception to Rule 45's time limitation for formal responses to subpoenas exists to encourage the cooperative resolution of disputes and, where possible, avoid the need for litigation. Both parties were engaged precisely such an attempt until recent weeks when it became clear that progress toward cooperative resolution had ceased.

CONCLUSION

For the foregoing reasons the Court should quash the subpoenas served by Erie County on the League of Women Voters of Buffalo/Niagara, the Erie County Prisoners' Rights Coalition, and the Partnership for the Public Good.

Dated: July ___, 2011
New York, NY

Respectfully submitted by,

/s/ Corey Stoughton

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