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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Democratic National Committee, DSCC, and Arizona Democratic Party,

Plaintiffs,

v.

Arizona Secretary of State's Office, Michele Reagan, and Mark Brnovich,

Defendants.

No. CV-16-01065-PHX-DLR

ORDER

Defendants Arizona Secretary of State Michele Reagan and Arizona Attorney General Mark Brnovich ("State Defendants") have moved to compel disclosure of numerous documents described by Plaintiffs Democratic National Committee (DNC), Democratic Senatorial Campaign Committee (DSCC), and Arizona Democratic Party (ADP) in their privilege logs, over which they have asserted a First Amendment privilege.[1] (Doc. 317.) The motion is fully briefed and the Court heard oral arguments from the parties during a July 14, 2017 telephonic conference. For the following reasons,

[1] The State Defendants also moved to compel Plaintiffs to produce a new Rule 30(b)(6) witness. The Court ruled on this aspect of the motion to compel during the July 14, 2017 telephonic conference. Specifically, the Court ordered the parties to confer on the issue, the State Defendants to identify for Plaintiffs the specific questions for which they seek answers, and Plaintiffs to answer those questions through an affidavit or interrogatory, if possible, or otherwise to produce another Rule 30(b)(6) witness to be deposed. The Court directed the parties to contact the Court to schedule another hearing if the issue is not resolved by the week of July 24, 2017. Accordingly, this order does not address the Rule 30(b)(6) issue raised in the motion to compel.

the State Defendants' motion to compel is denied.

I. Legal Standard

The First Amendment protects political association and expression from government infringement, including actions that have a chilling effect on the exercise of these rights. *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2009). "A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment privilege." *Id.* at 1140 (emphasis omitted).

First Amendment privilege claims are evaluated under a two-part framework. The party asserting the privilege first must make "a prima facie showing of arguable first amendment infringement." *U.S. v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam). This prima facie showing requires the party asserting the privilege to demonstrate that compelled disclosure "will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988). If the party makes this prima facie showing, the burden shifts and the question becomes "whether the party seeking the discovery has demonstrated an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association." *Perry*, 591 F.3d at 1140 (internal quotations and citation omitted).

At this second step, the court must "balance the burdens imposed on individuals and associations against the significance of the . . . interest in disclosure[.]" *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003). In doing so, the court considers factors such as "the importance of the litigation; the centrality of the information sought to the issues in the case; the existence of less intrusive means of obtaining the information; and the substantiality of the First Amendment interest at stake[.]" *Perry*, 591 F.3d at 1141 (internal citations omitted). "Importantly, the party seeking the 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 under Federal Rule of Civil Procedure 26(b)(1)." *Id.*

II. Discussion

A. Prima Facie Showing of Arguable First Amendment Privilege

The State Defendants seek compelled disclosure of the documents identified in Plaintiffs' privilege logs as: (1) "CD 7 Hispanic Crosstab;" (2) "RE: 2012 demographics;" (3) "Fwd: Data on Native Vote in Arizona;" (4) "RE: Precinct by precinct voter analysis;" (5) "Fwd: Latino vote plan update;" (6) "2012 Demographic Canvass Report;" (7) "2014 Post Election Analysis;" (8) "2012 Voted Report – Arizona;" (9) "Congressional District Voted Report 2012 (and 2014);" (10) "County Voted Report 2012 (and 2014);" (11) "Legislative District Voted Report 2012 (and 2014);" (12) "AZ Early Ballot Report;" (13) "HB 2305 Walk List;" (14) all documents identified as "Incident Data;" (15) "General 2012 Voting Incidents;" (16) "Copy of General Voting Incidents;" (17) "LBJ Data;" (18) "State Incident Data 2012." They also seek "any additional documents not otherwise noted that include voter demographic information." (Doc. 317 at 4 n.3.) The Court has no trouble concluding that Plaintiffs have established a prima facie case of arguable First Amendment privilege with respect to these requests.[2]

Plaintiffs offer the sworn declaration of Alexis Tameron, Chair of the ADP, who explains that most of the requested documents contain "estimates of demographic characteristics and likely voting behavior of the electorate," and "set forth the ADP's strategies and targets for conducting outreach to voters to communicate ADP's message, and for encouraging voters who associate with ADP and support ADP's values to turn out to vote." (Doc. 321-1 ¶ 5.) Further, the documents entitled "Incident Data," as well as "General 2012 Voting Incidents," "LBJ Data," and "State Incident Data 2012" contain

> information generated though the ADP's election monitoring program and election incident hotline. Such information

[2] Indeed, the State Defendants do not argue that the First Amendment privilege is inapplicable. They argue instead that the privilege has been waived or overcome.

> includes the mental impressions of ADP election observers regarding polling place incidents, which were intended to be communicated to ADP's voter protection team and voter protection legal counsel. It also includes information about individual voters, including voters' contacts with ADP. It also includes how incidents were categorized, providing insight as to what was being tracked. It also includes communications between members of ADP's voter protection team regarding how to respond to reports and questions. As a result, these documents provide a detailed account of ADP's election monitoring activities, including the location of precincts that it was targeting, the types of issues that it found most concerning, and its strategies in responding to incidents reported, including legal strategies.

(¶ 6.) Finally, the documents identified as "Data on Native Vote in Arizona" and "RE: Precinct by precinct voter analysis" contain "communications with strategic partners regarding strategy and analysis of voter demographics and likely voting behavior." (¶ 7.)

Tameron explains that "[d]isclosure of such communication risks revealing the viewpoints, political associations, and strategy of such partners," and might chill such partners from associating with the ADP in the future. (*Id.*) Moreover:

> ADP would suffer significant prejudice if these internal planning materials were disclosed to its political opponents. The information would reveal to ADP's political opponents where and when it is likely to focus its activities in future elections, thereby severely impeding its ability to advocate successfully for its candidates and causes. This category of documents contains proprietary information about ADP's voter-tracking technology and information about ADP's use of modeling to locate and target Democratic voters. Such information is at the core of ADP's ability to organize and advance its mission by formulating strategy and messages in private. If ADP were forced to reveal such information, it would require ADP to change the way that it operates and communicates going forward, and would inhibit the free exchange of ideas that is necessary for it to pursue its goals. Such a change would make it impossible to ADP to succeed in effectively advancing its mission and accomplishing its goals.

(¶ 4.) The Court credits Tameron's affidavit and concludes that compelled disclosure of the documents at issue likely will chill the ADP and its members' associational rights. The burden, therefore, shifts to the State Defendants to demonstrate that its interest in disclosure outweighs the First Amendment rights at stake.

B. Balancing the Competing Interests

The Court finds that the State Defendants have not carried their burden to overcome Plaintiffs' First Amendment privilege. Other than a bare assertion that "[a]mong those documents withheld on the basis of a broad First Amendment privilege are those that may include highly relevant demographic information," (Doc. 317 at 4) the State Defendants' motion is devoid of analysis of the relevant factors enumerated in *Perry*. Having nonetheless considered the factors, the Court finds that they weigh against disclosure.

Although the documents over which Plaintiffs have asserted the First Amendment privilege might be relevant to this litigation under Rule 26(b)(1)'s more liberal standards, the State Defendants have not shown that they are "highly relevant" under the more demanding standard applicable to materials protected by the First Amendment. Indeed, Plaintiffs bear the burden of proof on their claims, and they have not relied and do not plan to rely on any privileged materials to do so. (Doc. 321-2 ¶¶ 4, 7.)

Plaintiffs also explain that many of the requested documents contain publicly available voter information "overlaid with internal predictive modeling of voter characteristics and likely voting behavior," and that the modeled data is "highly confidential," "created at considerable expense," and is used "to develop [the ADP's message, plan their outreach activities, and evaluate whether they have reached their goals." (Doc. 321 at 11; Doc. 321-1 ¶ 5.) The State Defendants have not demonstrated a need for the ADP's proprietary modeling and analyses, as opposed to the publicly available voter data upon which the ADP bases its predictive models.

On the other hand, Plaintiffs' attorney, Joshua Kaul, explained in his sworn declaration that in his experience litigating voting rights cases:

> proprietary modeling by political parties, strategic discussions, internal party gathering of demographic information, and the like are not the type of comprehensive data typically used by experts to assess the impact of challenged voting laws. Voter data that is obtained from the State or counties will often be the most up to date and accurate data and, presumably, will be free from any potential manipulation or bias. Internal party data, in contrast, will

> have modeling information appended to it. This is done through a proprietary process and, unlike expert analysis, which answers questions at issue in this litigation, party data is used to form the basis of political strategy and decision-making.

(Doc. 321-2 ¶ 7.) It therefore seems unlikely that Plaintiffs could separate the proprietary aspects of their modeling from the underlying raw data. Moreover, the data upon which these documents are based evidently is drawn from publicly available sources, meaning there are other, less intrusive ways for the State Defendants to obtain it.

Finally, in assessing the substantiality of the First Amendment interest at stake, the Court is mindful that the Arizona Republican Party (ARP) is participating in this litigation as an Intervenor-Defendant. Compelling Plaintiffs to produce the privileged documents therefore would require the ADP to disclose its internal strategic communications to its political rival. Without a more substantial showing that the privileged information is highly relevant to the issues presented in this case and unavailable from less intrusive or publicly available sources, the Court cannot conclude that the State Defendants' interest in disclosure justifies the substantial infringement on Plaintiffs' associational rights.

C. Implied Waiver

The State Defendants alternatively contend that Plaintiffs have implicitly waived the First Amendment privilege for three reasons, none of which are persuasive. (Doc. 317 at 5-8.)

First, the State Defendants argue that, by claiming aspects of Arizona's election regime disparately impact minority voters, Plaintiffs have placed their internal demographic studies, analyses, and data directly at issue and therefore have waived their First Amendment privilege. The State Defendants contend that Plaintiffs are attempting to use the First Amended as both a sword and a shield by relying on privileged information to support their claims—for example, by disclosing such information for use in their expert reports—but refusing to disclose it to others. (Doc. 317 at 5-6.)

As an initial matter, the Court cannot agree that Plaintiffs have implicitly waived

their First Amendment privilege simply by bringing this lawsuit. Political parties and other civic organizations often are plaintiffs in constitutional and Voting Rights Act (VRA) litigation challenging state election laws and procedures. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); *One Wis. Inst., Inc., v. Nichol*, 186 F. Supp. 3d 958 (W.D. Wis. 2016); *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577 (E.D. Va. 2016). Requiring these types of organizations to forfeit their First Amendment associational rights in order to challenge suspect voting practices could have a chilling effect on such litigation and on the vindication of voting rights.

More to the point, however, Plaintiffs assure the Court that they have not relied upon any of the privileged information, nor do they intend to do so. (Doc. 321 at 12-13.) Mr. Kaul explained that "Plaintiffs have not relied upon the documents listed in their First Amendment privilege logs to support their claims," nor have they provided this information to their experts. (Doc. 321-2 ¶¶ 4, 7.) "Instead, Plaintiffs hired experts who have relied upon publicly available information, such as state and county data provided to them by the State or counties through discovery. In addition, Plaintiffs' experts have relied on census data and publicly reported exit polls to analyze the effect of the challenged laws." (¶ 4.) Further, the voter files relied upon by Plaintiffs' experts during the preliminary injunction phase of this litigation were supplied to the ADP by Arizona's counties pursuant to Arizona law "and did not include any of the additional privileged proprietary info that the State [Defendants] now seek[.]" (*Id.*)

That the privileged documents have in no way factored into Plaintiffs' case-in-chief distinguishes this matter from others cited by the State Defendants in which courts have found implied waivers of privilege. For example, in *Chevron Corporation v. Pennzoil Company*, the 9th Circuit found that Pennzoil had waived its attorney-client

privilege by raising its reasonable reliance on the advice of tax counsel as an affirmative defense. 974 F.2d 1156, 1162 (9th Cir. 1992). The Court concluded that Pennzoil could not use the shield of the attorney-client privilege as a sword to undermine Chevron's case. *Id.* Similarly, in *Driscoll v. Morris*, the court found that the plaintiff had waived his newsperson's privilege "[b]y claiming that the defendant's wrongful conduct affected his relationship with and his ability to utilize past, present, and future confidential sources, which in turn has had a negative impact on his ability to function as an investigative reporter[.]" 111 F.R.D. 459, 463 (D. Conn. 1986). Under those circumstances, the identity of the plaintiff's sources was "not merely relevant" but instead went "to the heart of the defense." *Id.*

The same is not true here. The voter data upon which Plaintiffs' claims are based is publicly available. The privileged information that the State Defendants' seek evidently includes a substantial amount of proprietary predictive modeling and strategic communications, none of which go to the heart of the case or to the State Defendants' defense. Moreover, Mr. Kaul explains that the partisan nature of these internal documents largely render them unhelpful to experts seeking to analyze objective data. If Plaintiffs truly were relying on privileged information to support their claims, the Court might agree that the First Amendment privilege has been impliedly waived. But because Plaintiffs have not relied upon the privileged information to support their claims, the State Defendants' cases are distinguishable and their argument is unpersuasive.

Next, the State Defendants contend that Plaintiffs waived the First Amendment privilege "by disclosing the same or similar information noted in their privilege logs to the news media." (Doc. 317 at 7.) Specifically, the State Defendants cite to a November 2, 2016 article titled "What we know about Arizona early voting in 5 charts" published in the Arizona Republic, which purports to rely on data originating for the ADP. (Doc. 317-1 at 220-24.) For example, the article includes information on the racial demographics of voters. The State Defendants' argument is unpersuasive for two reasons. First, the ADP's 30(b)(6) witness, Spencer Scharff, could not confirm whether the ADP had, in

fact, provided this information to the Arizona Republic, and there has been no showing that the documents identified in Plaintiffs' privilege logs contain or were the source of the information purportedly provided to the media. (Doc. 317-1 at 208-09.) Second, as Plaintiffs correctly note, communications with journalists are also protected by the First Amendment. *See Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th Cir. 1993). The Court is not convinced that Plaintiffs have waived their own First Amendment privilege by disclosing information to a journalist when communications between a journalist and her source are likewise protected.

Third, the State Defendants argue that the Court should require Plaintiffs to disclose the subject documents because it previously required disclosure of this type of information in this case. Specifically, the Court denied the ARP's request to limit the scope of Rule 30(b)(6) testimony to exclude "research analysis, reports, studies, documents, communications, strategies, and information relating to voting patterns of Latinos and other minority populations in Arizona." (Doc. 317-1 at 242-43.) Plaintiffs objected, arguing that this type of evidence is central to the case. (*Id.* at 243-44.) The Court agreed and declined to impose such limitations on the Rule 30(b)(6) depositions. (*Id.* at 244.) Notably, however, the ARP nonetheless asserted the First Amendment privilege both during the deposition of Robert Graham and in response to ADP's requests for production. (*See, e.g.*, Doc. 321-4 at 13-14 (objecting that questions going "to strategy as well as other activities of the internal workings of the Republican Party" are "privileged under First Amendment"), 18-19 ("[A]ny information that is collected in regard to strategy or other type of techniques or data about voter trends, et cetera, is protected by the First Amendment."), 22-39 (lodging First Amendment privilege objects to document production requests).) The Court is unpersuaded that Plaintiffs' lack First Amendment protection when the ARP as Intervenor-Defendant continues to assert the same in response to similar discovery requests.

III. Conclusion

For these reasons, the Court concludes that Plaintiffs have made a prima facie

showing of arguable First Amendment privilege, and the State Defendants have demonstrated neither that their interest in disclosure outweighs the First Amendment interests at stake, nor that Plaintiffs have implicitly waived their privilege. Accordingly,

IT IS ORDERED that the State Defendants' Motion to Compel Plaintiffs to Produce Relevant Documents (Doc. 317) is **DENIED**.

Dated this 24th day of July, 2017.

Douglas L. Rayes
United States District Judge