

1 Daniel C. Barr (# 010149)
Sarah R. Gonski (# 032567)
2 PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
3 Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
4 Facsimile: (602) 648-7000
DBarr@perkinscoie.com
5 SGonski@perkinscoie.com

6 Marc E. Elias (WDC# 442007)*
Bruce V. Spiva (WDC# 443754)*
7 Elisabeth C. Frost (WDC# 1007632)*
Amanda R. Callais (WDC# 1021944)*
8 Alexander G. Tischenko (CA# 304743)*†
PERKINS COIE LLP
9 700 Thirteenth Street NW, Suite 600
Washington, D.C. 20005-3960
10 Telephone: (202) 654-6200
Facsimile: (202) 654-6211
11 MElias@perkinscoie.com
BSpiva@perkinscoie.com
12 EFrost@perkinscoie.com
ACallais@perkinscoie.com
13 ATischenko@perkinscoie.com

14 Joshua L. Kaul (WI# 1067529)*
PERKINS COIE LLP
15 One East Main Street, Suite 201
Madison, Wisconsin 53703
16 Telephone: (608) 663-7460
Facsimile: (608) 663-7499
17 JKaul@perkinscoie.com

18 *Attorneys for Plaintiffs*

19 **Admitted pro hac vice*
20 *† Not yet admitted in Washington, D.C.*

21 UNITED STATES DISTRICT COURT
22 DISTRICT OF ARIZONA

23 Arizona Democratic Party, et al.,
24 Plaintiffs,
25 v.
26 Michele Reagan, et al.,
27 Defendants.

No. CV-16-01065-PHX-DLR

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION TO COMPEL**

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Federal Rule of Civil Procedure 37(a)(1) 1

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1 Defendants the Arizona Attorney General and Secretary of State (together, “the
2 State”) seek to compel production of 1,776 internal strategic political documents and the
3 testimony of a *third* Arizona Democratic Party (“ADP”) 30(b)(6) witness, but their motion
4 to compel is not supported by either the facts or well-established, governing case law. Its
5 request for compelled production fails because the documents it seeks are privileged
6 pursuant to the First Amendment and the State has not and cannot meet the standard for
7 compelled disclosure required by the Ninth Circuit. *See Perry v. Schwarzenegger*, 591
8 F.3d 1126 (9th Cir. 2009). Further, the vast majority of the documents were not the
9 subject of any meet and confer. The State’s demand to compel additional 30(b)(6)
10 testimony fails, because the record flatly refutes the its claim that the two designated
11 witnesses who already testified left 30(b)(6) topics “unaddressed,” and the State has been
12 unable to identify with specificity where in the record the alleged defects lie. The motion
13 should be denied in its entirety.

14 **I. THE FIRST AMENDMENT PROTECTS THE DOCUMENTS FROM
15 COMPELLED DISCLOSURE.**

16 The State seeks to compel production of 1,776 internal, confidential documents,
17 central to Plaintiffs’ strategic interests. In a ten-line footnote, the State lists *nineteen*
18 separate categories of documents plus a catch-all request for “any additional documents
19 not otherwise noted that include voter demographic information.” Doc. 317 at 4 n.3; Ex. 1
20 (Chart of Challenged Documents). As a threshold matter, the State has failed to satisfy its
21 obligation to meet and confer as to all but sixteen of the documents it now seeks;¹ its

22 ¹ Under Fed. R. Civ. P. 37(a)(1), a movant must have “in good faith conferred or
23 attempted to confer with the person or party failing to make disclosure or discovery in an
24 effort to obtain it without court action.” *See also* LRCiv. 7.2(j) (requiring “personal
25 consultation and sincere efforts to ... satisfactorily resolve the matter” before a discovery
26 motion is filed). Until filing the motion, Defendants had only challenged Plaintiffs’
27 assertion of privilege over sixteen documents labeled “Incident Data” contained in ADP’s
28 June 5 privilege logs. *See* Doc. 317-1 at 5:7-17 (at June 6 status conference, counsel for
ARP challenged privilege with respect to “incident data” documents logged in privilege
logs disclosed “yesterday”); Declaration of Joshua Kaul (“Kaul Decl.”) ¶¶ 8-9 (meet-and-
confer pertained only to sixteen Incident Data documents); Doc. 317-1 at 328 (during June
12 status conference, State did not identify any additional categories of documents they
would be challenging in motion to compel). In none of the parties’ discussions did any of
the Defendants raise the wide-ranging discovery the State now seeks.

1 request for the remaining is raised for the first time in its motion and should be denied on
2 that basis alone. *See, e.g., Miller v. York Risk Servs. Grp.*, No. CV-13-01419-PHX-JWS,
3 2014 WL 11514555, at *2 (D. Ariz. July 7, 2014) (summarily denying motion to compel
4 where party failed to satisfy meet-and-confer requirement).

5 In any event, Plaintiffs brought this lawsuit to vindicate their constitutional rights.
6 The law does not require that, in vindicating those rights, Plaintiffs must forfeit *other*
7 constitutional rights. Here, the State² seeks information that goes to the core of the First
8 Amendment’s protections. Indeed, the State implicitly concedes that the First Amendment
9 protects these documents in the first instance, arguing only that Plaintiffs have waived the
10 privilege. *See* Doc. 317 at 4-8 (no challenge to initial application of the privilege). At the
11 same time, the State has not shown, and cannot show, that the documents at issue are
12 likely to play an important, much less *highly relevant*, role in the claims or defenses
13 asserted in this case. *See Perry*, 591 F.3d at 1139. Plaintiffs have not used the documents
14 the State seeks in *any way* in this litigation, and the State does not claim otherwise. On the
15 other hand, compelled disclosure of this sensitive information—particularly to Plaintiffs’
16 direct political opponents, including Republican elected officials—would undeniably chill
17 Plaintiffs’ ability to exercise their First Amendment rights by disclosing internal strategy,
18 communications, and the identity of their supporters.

19 **A. Disclosure would infringe on Plaintiffs’ First Amendment rights.**

20 The “right of individuals to associate for the advancement of political beliefs’ is
21 fundamental.” *S.F. Cnty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir.
22 1987) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)); *see also Int’l Soc’y for*
23 *Krishna Consciousness, Inc. v. Lee*, No. 75 Civ. 5388 (MJL), 1985 WL 315, at *8
24 (S.D.N.Y. Feb. 28, 1985) (“[T]he right of associational privacy [applies to] compelled

25 _____
26 ² While the State filed this motion, it was Intervenor-Defendant Arizona
27 Republican Party (“ARP”) that first challenged Plaintiffs’ assertion of the privilege with
28 respect to the Incident Data. Doc. 317-1 at 6. ARP, however, has asserted the First
Amendment privilege far more broadly than Plaintiffs, *see infra* Section I(D), and despite
raising a challenge to the privilege initially, now declines to participate in the briefing,
Doc. 317 at 2 n.1.

1 disclosure of the identity of an association’s members or sympathizers ...”). “Implicit in
2 the right to associate with others to advance one’s shared political beliefs is the right to
3 exchange ideas and formulate strategy and messages, and to do so in private.” *Perry*, 591
4 F.3d at 1142. “The Supreme Court has long recognized that compelled disclosure of
5 political affiliations and activities can impose just as substantial a burden on First
6 Amendment rights as can direct regulation.” *AFL-CIO v. Fed. Election Comm’n*, 333 F.3d
7 168, 175–76 (D.C. Cir. 2003). Accordingly, the “First Amendment protects political
8 association as well as political expression ...” *Perry*, 591 F.3d at 1139.

9 An assertion of the First Amendment privilege is analyzed under a two-part
10 framework. *Id.* at 1140. First, the party asserting the privilege must make a prima facie
11 showing of “arguable first amendment infringement”—i.e., that compelled discovery will
12 result in “consequences which objectively suggest an impact on, or ‘chilling’ of, the
13 members’ associational rights.” *Id.* (quoting *Brock v. Local 375, Plumbers Int’l Union of*
14 *Am.*, 860 F.2d 346, 349–50 (9th Cir. 1988)). Once this showing is made, the burden shifts
15 and the question becomes “whether the party seeking the discovery has demonstrated an
16 interest in [that discovery] ... sufficient to justify the deterrent effect on the free exercise
17 of the constitutionally protected right of association.” *Id.* at 1141 (quotation marks and
18 alterations omitted). The Court balances these interests, taking into account the
19 importance of the litigation, how important the information sought is to the case, whether
20 there are less obtrusive ways to obtain the information, and the “substantiality of the First
21 Amendment interests at stake[.]” *Id.* The Ninth Circuit has stressed: “Importantly, the
22 party seeking the discovery *must* show that the information sought is *highly relevant* to the
23 claims or defenses in the litigation—a more demanding standard of relevance than that
24 under Federal Rule of Civil Procedure 26(b)(1).” *Id.* (emphases added).

25 Here, the State’s sweeping request for compelled disclosure includes 1,776
26 documents containing highly sensitive internal information that has little—if any—
27 relevance to this case. The twenty categories of documents at issue include precinct-by-
28 precinct voter analyses, Latino vote plans, post-election analyses, call logs from voters

1 facing issues in prior elections, and the vague catch-all “any additional documents not
2 otherwise noted that include voter demographic information.” Doc. 317 at 4 n.3
3 (emphasis added); *see also* Ex. 1 (containing full descriptions and privilege basis
4 explanations for each of the twenty identified categories).

5 The sixteen documents from ADP’s second and third privilege logs categorized as
6 “Incident Data”—the only documents subject to a meet and confer and thus properly at
7 issue in the motion, *see supra* 1 n.1—as well as 399 similar documents listed in the
8 DNC’s privilege log addendum, Doc. 317 at 4 n.3, provide a case study on the types of
9 documents the First Amendment protects from compelled disclosure. These documents
10 are a series of call logs created by party volunteers and staffers to keep records of voters
11 and election observers who called the party to report various issues on Election Day. The
12 documents in the DNC’s privilege log date as far back as 2008, and overwhelmingly
13 detail events outside Arizona that have no relation to this case. While largely irrelevant to
14 this litigation, these documents are highly critical to Plaintiffs’ internal political
15 operations. They contain information that was called in from election observers, revealing
16 the location of precincts that Democrats strategically targeted, Declaration of Alexis
17 Tameron (“Tameron Decl.”) ¶ 7; internal discussions between volunteers regarding
18 application of confidential training materials; and information about individual voters,
19 including sensitive information such as names, addresses, contact history with Plaintiffs,
20 and the preferred candidates of the voters. *Id.* ¶ 6. This information is at the heart of the
21 First Amendment privilege. *See AFL-CIO*, 333 F.3d at 177 (D.C. Cir. 2003) (compelling
22 disclosure of political organization’s internal planning materials would have chilling
23 effect on First Amendment rights); *Ohio Org. Collaborative v. Husted*, No. 2:15-CV-
24 01802, 2015 WL 7008530, at *3-4 (S.D. Ohio Nov. 12, 2015) (First Amendment privilege
25 prevented compelled disclosure of strategic information); *Int’l Soc’y for Krishna*
26 *Consciousness, Inc.*, 1985 WL 315, at *8 (First Amendment protects against “compelled
27 disclosure of the identity of an association’s members or sympathizers”).

28 Other documents the State seeks likewise contain information that, while unhelpful

1 to the litigation, are highly sensitive and strategic political materials. The categories of
2 documents labeled 2012 Demographic Canvass Report, 2014 Post Election Analysis, 2012
3 Voted Report—Arizona, both the 2012 and 2014 Congressional District Voted Reports,
4 2012 and 2014 Legislative District Voted Reports, and AZ Early Ballot Report all contain
5 proprietary assessments of demographic characteristics and likely voting behavior,
6 strategies and targets for voter outreach, and internal assessments regarding the success of
7 such efforts. Tameron Decl. ¶ 6. Others—such as documents labeled RE: 2012
8 demographics, Fwd: Data on Native Vote in Arizona, RE: Precinct by precinct voter
9 analysis, and Fwd: Latino vote plan update—contain communications with strategic
10 partners regarding political and messaging strategies and confidential analysis of voting
11 behavior. *Id.* ¶ 5. Documents labeled HB 2305 Walk List contain names and addresses of
12 voters whom ADP targeted for outreach in the 2013 referendum campaign, revealing how
13 ADP models voter behavior and allocates volunteer resources to target strategic locations.
14 *Id.* For all the above, compelled disclosure would inhibit Plaintiffs’ ability to effectively
15 communicate and organize internally and would chill strategic partners’ and voters’
16 willingness to communicate or associate with Plaintiffs to further their goals. *See id.* ¶ 3–9
17 (describing information sought and impact and chilling effect of disclosure).

18 Plaintiffs therefore have established the prima facie case for First Amendment
19 protection. *See Perry*, 591 F.3d at 1143 (prima facie case met when declaration “creates a
20 reasonable inference that disclosure would have the practical effects of discouraging
21 political association and inhibiting internal campaign communications that are essential to
22 effective association and expression”); *Sierra Club v. BNSF Ry. Co.*, No. 75 Civ. 5388
23 (MJL), 2016 WL 4528452, at *2 (W.D. Wash. Aug. 30, 2016) (prima facie showing was
24 made that information subpoenaed infringed on First Amendment right of free association
25 by encompassing a wide range of internal strategies and affairs).

26 **B. The State has not met the heightened relevancy showing required to**
27 **compel disclosure of First Amendment-protected documents.**

28 The State cannot make the crucial showing that the documents it seeks are “highly

1 relevant” to the litigation. *Perry*, 591 F.3d at 1141. It appears to acknowledge this
2 standard, but offers no more than conclusory statements that the documents “may include
3 highly relevant demographic information” and, broadly, that “[a]ny information reflecting
4 the impact of the challenged laws is relevant, if not crucial, to the outcome of the case.”
5 Doc. 317 at 4, 6. The State’s failure to explain how the information in the privileged
6 documents is relevant, much less *highly* relevant, to litigation in which it has played no
7 role whatsoever,³ precludes it from obtaining this sensitive material.

8 Even assuming that the State had met its burden to show that the documents were
9 highly relevant, and acknowledging the unquestioned importance of the litigation, the
10 remaining *Perry* factors tip the scale against compelled disclosure. *See Perry*, 591 F.3d at
11 1141. Any demographic information that the State apparently hopes to obtain is widely
12 available from other public sources, including from the State itself—in fact, the publicly
13 available information is what *Plaintiffs themselves*, and their experts, used to make their
14 case. *See Kaul Decl.* ¶¶ 3-4. Many of the documents the State requests contain public
15 voter information overlaid with internal predictive modeling of voter characteristics and
16 likely voting behavior. Plaintiffs use such modeled data—which is highly confidential and
17 created at considerable expense—to develop their message, plan their outreach activities,
18 and evaluate whether they have reached their goals. *See Tameron Decl.* ¶ 5. The State
19 now asks to see both the data generated by Plaintiffs’ internal modeling, as well as the
20 political plans and strategy that Plaintiffs have developed using such data. But Plaintiffs
21 have not relied on data generated through such modeling in this case. The State has no
22 legitimate need to see Plaintiffs’ internal documents, particularly where any information
23 relevant to this litigation is obtainable through other, less constitutionally troubling,

24
25 ³ Plaintiffs have not relied on the challenged documents to make their case, nor
26 have they attempted to introduce them in any way. *Kaul Decl.* ¶ 3. Plaintiffs’ experts
27 likewise relied on publicly available information, all of which was promptly and timely
28 disclosed to the State. *Id.* at ¶¶ 4-6. Plaintiffs did not provide any privileged internal data
to their experts, both because that type of information is not typically used by experts
assessing the impact of challenged voting laws and because Plaintiffs did not want to
place any of their First Amendment-protected information at issue. *Id.* ¶ 6.

1 means. Upholding the privilege in this case comports with *Perry*, where the Ninth
2 Circuit—despite finding that the information sought there was undeniably relevant to
3 plaintiffs’ constitutional claims—recognized the significance of the First Amendment
4 interests at stake and upheld the privilege. 591 F.3d at 1164-65. As in *Perry*, the State
5 simply cannot meet the heightened showing required to overcome Plaintiffs’ core First
6 Amendment right to keep their internal documents private and confidential.

7 **C. Plaintiffs have not waived the applicable First Amendment protections.**

8 The State’s argument that Plaintiffs have waived their First Amendment privilege
9 by attempting to use it as “both a sword and a shield,” Mot. to Compel at 5, is also ill-
10 founded. Boiled down, the State’s position is that, for Plaintiffs to vindicate their rights
11 through litigation, they must sacrifice other constitutional rights. That cannot be—and
12 isn’t—the law. *See, e.g., Int’l Action Ctr. v. United States*, 207 F.R.D. 1 (D.D.C. 2002)
13 (upholding First Amendment privilege asserted by plaintiffs alleging violations of their
14 constitutional rights); *Ohio Org. Collaborative*, 2015 WL 7008530, at *1, 4 (upholding
15 First Amendment privilege asserted by plaintiffs bringing suit challenging voting laws);
16 *Indep. Inst. v. Gessles*, No. 10-CV-00609-PAB-MEH, 2011 WL 809781, at *1-2 (D. Colo.
17 Mar. 2, 2011) (upholding First Amendment privilege of plaintiff challenging
18 constitutionality of statute);); *cf. Perry*, 591 F.3d at 1152, 1165 (proponents of
19 proposition intervened in suit to defend it, yet retained their First Amendment privilege).

20 The State’s “sword and shield” argument omits a vital distinction: unlike the
21 majority of the cases that the State cites, Plaintiffs have not relied upon any of the
22 privileged information to which the State seeks access.⁴ *See* Kaul Decl. ¶¶ 3–6. Had

23 ⁴ *See Bittaker v. Woodford*, 331 F.3d 715, 722 (9th Cir. 2003) (adopting “narrow
24 waiver rule” with respect to privilege when petitioner asserted ineffective assistance of
25 counsel claims); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162–63 (9th Cir. 1992)
26 (finding privilege waived as to topic on which party asserted advice of counsel defense);
27 *Anderson v. Nixon*, 444 F. Supp. 1195, 1199 (D.D.C. 1978) (holding that journalist’s
28 claim of conspiracy that sought to retaliate against his sources required journalist to
disclose identity of sources); *Driscoll v. Morris*, 111 F.R.D. 459, 463 (D. Conn. 1986)
(holding that journalist’s claim that defendant’s wrongful conduct affected his ability to
use confidential sources required journalist to disclose identity of sources). Nor do the
other cases cited by the State support their argument. *See Salazar v. Basic*, No. CV 05-
283-TUC-FRZ, 2006 WL 3802094, at *3 (D. Ariz. Dec. 22, 2006) (finding California

1 Plaintiffs sought to use some documents reflecting their internal modeling but selectively
2 denied access to other such documents, legitimate questions could potentially be raised
3 regarding waiver of the privilege. But as set forth *supra* at 6 n.3, Plaintiffs have not used
4 the documents in this litigation, and the State has not explained how any of the documents
5 it seeks are necessary to its defense—indeed, they were not necessary to make Plaintiffs’
6 claims in the first place. In other words, Plaintiffs are not using privileged information as
7 a sword; they are not using it *at all*, and the State fails to establish otherwise.

8 The State also argues that ADP waived its privilege over high-level demographic
9 data when it disclosed certain conclusions and graphs to a reporter for inclusion in an
10 *Arizona Republic* article. Importantly, as with the challenged documents above, Plaintiffs
11 have not relied upon any of the information provided in the article to support any claims
12 in this litigation. Plaintiffs do not seek to shield information that was included in the
13 article, but the State’s broad assertion that Plaintiffs have waived *all* documents that may
14 have informed the limited conclusions relayed to the reporter—whether or not those
15 documents themselves were actually disclosed to the reporter—goes far beyond what the
16 law permits. Moreover, communications with a reporter are also protected under the First
17 Amendment pursuant to the reporter’s privilege. *See, e.g., Goldberg v. Amgen, Inc.*, 123 F.
18 Supp. 3d 9, 15 (D.D.C. 2015) (“The Court of Appeals has long recognized that, in civil
19 cases, journalists enjoy a qualified privilege against compelled disclosure of their First
20 Amendment activities.”).

21 The State’s reliance on *Valle del Sol v. Whiting*, No. CV-10-01061-PHX-SRB,
22 2013 WL 12098752 (D. Ariz. Dec. 11, 2013), is not well founded. In *Valle del Sol*, the
23 party seeking discovery sought *communications with public officials*, not internal
24 modeling and strategy that merely informed communications with private individuals. *Id.*
25 at *2 (“Movants do not cite, and the Court is unaware of, any law that protects from

26 privilege against disclosing tax returns waived when it was “utterly inconsistent with the
27 gravamen of [plaintiffs’] claim”); *Indep. Prods. Corp. v. Loew’s, Inc.*, 22 F.R.D. 266, 276
28 (S.D.N.Y. 1958) (applying standard inconsistent with *Perry*).

1 public view communications with public officials in their official capacity about a matter
2 of public concern.”). In finding the privilege did not apply to those facts, the Court
3 observed: “*Perry* and its progeny have all dealt with the disclosure of either the identity of
4 association members or internal communications—not communications with third parties,
5 let alone public officials.” *Id.* at *3.

6 Given the concerns that give rise to the First Amendment privilege—protecting the
7 right to associate to advance shared political beliefs, including the right to privately
8 exchange ideas and formulate strategy and messages, *Perry*, 591 F.3d at 1142—it would
9 seriously undermine constitutional protections if a political organization engaging in
10 protected activity risked compelled disclosure of protected information by advancing a
11 highly curated portion of its message to the public outside the context of litigation. In such
12 a case, a broad finding of waiver would be clearly inappropriate. *Cf. In re von Bulow*, 828
13 F.2d 94, 103 (2d Cir. 1987) (“But where, as here, disclosures of privileged information are
14 made extrajudicially and without prejudice to the opposing party, there exists no reason in
15 logic or equity to broaden the waiver beyond those matters actually revealed.”).

16 **D. Fairness requires strict application of the privilege to protect ADP’s**
17 **confidential materials.**

18 The showing above is more than enough to demonstrate that the First Amendment
19 privilege applies to the documents at issue. But two factors make the case for the
20 applicability of the privilege particularly forceful here. First, both the current Secretary of
21 the State and the Attorney General—the State Defendants—are Republicans and they
22 have been extensively aided and assisted in this litigation by the ARP, which voluntarily
23 inserted itself into this litigation as an intervenor-defendant. The Republican Party is,
24 obviously, ADP’s direct political competitor. That the State and ARP could benefit
25 competitively from disclosure of the information means that the harm to ADP from
26 disclosure would be exacerbated. None of the cases the State cites involved an analogous
27 situation, where political rivals are demanding the disclosure of highly sensitive political
28 information from their opponents. Compelled disclosure of the proprietary data at issue

1 here would inflict a First Amendment injury far out of proportion to the needs of this case.

2 Second, ARP, *in this case*, has asserted the First Amendment privilege far more
3 broadly than ADP has.⁵ *See, e.g.*, Ex.2 (Deposition Transcript of Robert Graham) at
4 20:18–21:6 (asserting privilege in response to question regarding activities engaged in to
5 get out the vote), 22:13–24:17 (asserting privilege and instructing witness not to answer
6 question asking “Did any of the people that you were working with on the precinct
7 committee engage in ballot collection activities?”), 61:23–62:1 (ARP: “any information
8 that is collected in regard to strategy or other type of techniques or data about voter trends,
9 et cetera, is protected by the First Amendment.”); *see also* Ex. 3 (Response of ARP to
10 Requests for Production) at 3 (ARP made detailed First Amendment objection to various
11 basic information). ARP even refused to allow a former Chair to answer basic questions
12 on the party’s outward facing engagements with the general public—an application of the
13 privilege with no clear legal basis at all. Ex. 2 (Deposition Transcript of Robert Graham)
14 at 20:18-21:6 (PLAINTIFFS: ...[W]hat kind of activities did you engage in in order to try
15 to get out the vote? ARP: I am going to object based off of First Amendment privilege and
16 direct him not to answer the question. PLAINTIFFS: Well, I just asked him what kind of
17 activities he engaged in. I didn’t ask him about conversations or anything like that. ARP:
18 True. I think that goes to strategy as well as other activities of the internal workings of the
19 Republican Party, and I think that is privileged under the First Amendment.)

20 This inequity of position—ARP broadly invoking the privilege for itself while
21 challenging Plaintiffs’ more limited assertion of the privilege—is accentuated by ARP’s
22 last-minute decision to foist responsibility for this motion on the State, despite having
23 previously led the charge on challenging Plaintiffs’ First Amendment assertions. *See* Ex. 4
24 (Transcript of June 6 Telephonic Status Conference) 4:12-16 (ARP: We expect to have
25 some areas of challenge to that privilege [assertion], and we expect to need to brief those
26

27 ⁵ That ARP, unlike ADP, does not bear the burden of proof in this case is not a
28 distinguishing factor, because ADP is not trying to use the privileged information to meet
its burden. The privilege discussion is thus the same regardless of the party’s posture.

1 issues before the Court.); *id.* 5:4-17. Plaintiffs’ objection to this disingenuousness is not
 2 just tiresome squabbling between litigating parties. Fundamental fairness provides that the
 3 First Amendment protections should apply equally to all parties participating in the case.

4 **II. ADP HAS SATISFIED ITS OBLIGATIONS UNDER RULE 30(B)(6).**

5 Rule 30(b)(6) provides that an entity may designate one or more individuals to
 6 testify on its behalf “as to the matters known or reasonably available to the organization.”
 7 There is “a duty to make a conscientious, good-faith effort to designate knowledgeable
 8 persons for Rule 30(b)(6) depositions and to prepare them to fully and unequivocally answer
 9 questions about the designated subject matter.” *Starlight Int’l, Inc. v. Herlihy*, 186 F.R.D.
 10 626, 639 (D. Kan. 1999). Plaintiffs have more than complied with these requirements.

11 During discovery, the State noticed a 30(b)(6) deposition for ADP and provided a
 12 list of nine general categories of topics, each containing multiple subtopics. Def’s. Ex. M.
 13 In response, ADP designated two individuals: Spencer Scharff, the 2016 Voter Protection
 14 Director, who testified as to topics covering ADP’s voter-centric activities during the
 15 2016 general election, Ex. 5 (Deposition Transcript of Alexis Tameron) at 57:14-60:15,
 16 and Alexis Tameron, the Chair of ADP, who testified to the remainder of the topics. *Id.*
 17 Contrary to the State’s assertion, the record reflects that both were knowledgeable
 18 30(b)(6) witnesses who were fully prepared to answer—and *did* answer—all questions
 19 posed to them within their designated topics. The State’s request to compel further
 20 30(b)(6) deposition testimony should be wholly denied.

21 **A. The transcripts flatly refute the State’s contention that four of the
 22 30(b)(6) topics were not addressed.**

23 The State’s claim that four of the nine 30(b)(6) topics “remain unaddressed” after
 24 the two 30(b)(6) depositions, Mot. to Compel at 13, is clearly refuted by the transcripts,
 25 which establish that both witnesses offered extensive testimony on all four topics.

- 26 • **Topic 2. Demographic information the ADP maintains regarding ...
 27 voting patterns, use of mail-in ballots (including any increase in use by
 28 specific groups of minority voters), [and] access to mail service ...**

The State’s assertion that, “Ms. Tameron was unable to provide any type of

1 information about the demographic makeup of ADP members or Democratic voters, even
 2 when asked basic questions,” Mot. to Compel at 11, is demonstrably false.⁶ *E.g.*, Ex. 5
 3 92:14-18 (STATE: ... do you know how many of your members are Hispanic or Latino?
 4 MS. TAMERON: ...26, 27 percent of registered Democrats are Latino); 96:21-97:4
 5 (STATE: ... what percentage of registered Democrats on the [PEVL] are African-
 6 American? MS. TAMERON: It was less than – it was about 2 percent. STATE: And what
 7 percent of...registered Democrats on the [PEVL] are Asian-Pacific Islander? MS.
 8 TAMERON: It was less than...1 percent.); *see also id.* at 24:13-31:23 (general
 9 demographic information); 34:4-41:4 (demographic information on ballot collection);
 10 64:25-67:3 (demographic information on access to mail service and ballot collection);
 11 73:13-75:5 (demographic information on 2016 voting patterns as compared to other
 12 years); 82:17-83:13 (comparison of voting registration and voting patterns between 2016
 13 and previous cycles); 91:10-18 (use of early voting in 2016 compared to previous years);
 14 92:1-97:12 (demographic information on overall membership and electorate statistics);
 15 102:19-106:23 (demographic information on voting patterns among minorities); 163:8-
 16 164:20 (demographic information of voters who have had ballots collected).

17 The State’s citations in support of their claim that Ms. Tameron “was unable to
 18 provide *any* type of [demographic] information,” Mot. to Compel at 11, refer to early
 19 portions of Ms. Tameron’s deposition, during which she was asked to recall granular
 20 statistical and demographic data beyond the level of detail that a reasonably prepared
 21 witness would be expected to know. Exs. 5, 6 (asking for, *inter alia*, the percentage of
 22 ADP’s membership that identify as belonging to two or more races, are Pacific Islander,
 23 and/or speak Yaqui). It is well established that Rule 30(b)(6) is “not designed to be a
 24 memory contest.” *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D.

25
 26 _____
 27 ⁶ Ms. Tameron’s testimony to demographic data does not constitute waiver, nor
 28 does the State argue as much. Ms. Tameron testified to general or aggregated data, but did
 not provide any information concerning internal modeling or strategy. *See* Ex. 5 104:10-
 106:7 (ADP’s counsel permitting Ms. Tameron to testify as to general conclusions but
 noting objection to questions regarding internal modeling and projections).

1 135, 150 (S.D.N.Y. 1997). *Equal Employment Opportunity Comm'n v. Am. Int'l Grp.,*
2 *Inc.*, No. 93 CIV. 6390(PKL)RLE, 1994 WL 376052, at *3 (S.D.N.Y. July 18, 1994) (“It
3 is not reasonable to expect any individual to remember every fact” in a 30(b)(6)
4 deposition). The noticed 30(b)(6) topics are broad and cover large swaths of information,
5 Defs.’ Ex. M; and the witnesses “cannot be faulted for not knowing every fact that could
6 possibly come within the scope of a particular topic.” *Kress v. Pricewaterhouse Coopers,*
7 *LLP*, No. 2:08-CV-0965 LKK AC, 2013 WL 2421704, at *5 (E.D. Cal. June 3, 2013).

8 In fact, when informed of the State’s concerns that Ms. Tameron had not provided
9 sufficiently detailed answers, ADP was immediately responsive. Here, State counsel omits
10 an important fact: during the deposition, State counsel provided via email two written lists
11 of demographic data they sought from Ms. Tameron. Exs. 5, 6. *see also* Defs.’ Ex. N at
12 30:14-23; *see also id.* at 70:24-72. Ms. Tameron obtained the requested information
13 during the break and answered *all* the State’s listed demographic questions.⁷ Ex. 5 92:1-
14 97:12. The document she reviewed to refresh her memory was also produced to the State.⁸

15 _____
16 ⁷ Ms. Tameron’s initial lack of recall of granular details of demographic data is not
17 indicative of whether she was fully prepared under Rule 30(b)(6). “It is not reasonable to
18 expect any individual to remember every fact” in a 30(b)(6) deposition. *Equal*
19 *Employment Opportunity Comm’n*, 1994 WL 376052, at *3 (S.D.N.Y. July 18, 1994).
20 Nor, as the State argues, is the situation similar to that in *Great Am. Ins. Co. of N.Y. v.*
21 *Vegas Const. Co.*, 251 F.R.D. 534, 536 (D. Nev. 2008), in which case the deponent
22 “admitted on the record that he had done nothing to prepare for the deposition and had not
23 even read the subjects of deposition contained in the notice,” was “unable to recall many
24 of the documents [his organization] had produced relating to the topics of examination”
25 and was ultimately unable to offer *any* testimony on 16 of 23 designated topics. *Id.* In
26 contrast, Ms. Tameron testified to her extensive preparations for her deposition, Ex. 5
27 166:17-174:24, and stated that she was prepared to testify on all of the noticed topics, with
28 the exception that Mr. Scharff would testify to ADP’s voter-facing activities in the 2016
general election, *id.* 55:1-64:13. And although the State’s questions on demographics went
beyond the level of detail that a Rule 30(b)(6) deponent is reasonably expected to
memorize, ADP nevertheless offered to—and promptly did—seek out answers for all
specific questions from the State.

⁸ The State now argues that it needs to depose Ms. Tameron further on this
document. But she has testified already as to its contents and its origin, and the State has
the document itself in its possession. Ex. 5 173:9-174:8 (discussing origin of document);
92:1-97:12 (discussing data contained in document). Re-opening the deposition to ask
additional questions is unwarranted, particularly where the State could have asked any and
all follow-up questions to Ms. Tameron at her deposition. *See Equal Employment*
Opportunity Comm’n v. Am. Int’l Grp., Inc., No. 93 CIV. 6390(PKL)RLE, 1994 WL
376052, at *3 (S.D.N.Y. July 18, 1994) (although 30(b)(6) deponent initially could not
recall details of lengthy document, defendants had no “legitimate need” to reopen 30(b)(6)

1 Def's. Ex. O.

2 Having provided an answer to every deposition question posed on this topic *and*
 3 every question posed in the two written lists provided by the State, ADP more than
 4 fulfilled its 30(b)(6) obligations on this topic. Accordingly, ADP was under no obligation
 5 to simultaneously prepare Mr. Scharff to answer the same set of questions at his
 6 deposition three weeks later. *See Moore v. Comput. Assocs. Int'l, Inc.*, 653 F. Supp. 2d
 7 955, 960 (D. Ariz. 2009) (one of the benefits of Rule 30(b)(6) is relieving an entity of
 8 burden and expense of preparing multiple witnesses to testify to the same set of facts).

- 9
- 10 • **Topic 4. Any differences in early voting for Democratic voters between**
 11 **2016 and previous elections in Arizona, including any anecdotal or**
 12 **statistical evidence about party members who do not have a qualified**
 13 **person who could return an early ballot under HB 2023, differences in**
the number of minority voters who used mail-in ballots from 2016
compared to other years, complaints from party members about the
early voting process compared to earlier years.

14 Ms. Tameron answered all questions on this topic that Defendants posed. *See*
 15 *Tameron Tr. 73:13-75:5* (demographic information about 2016 voting patterns compared
 16 to other years); *82:17-83:13* (comparison of voting registration and voting patterns
 17 between 2016 and previous cycles); *91:10-18* (early voting patterns from 2016 compared
 18 to previous years). Mr. Scharff offered additional testimony. *See Ex. 6* (Deposition
 19 Transcript of Spencer Scharff) at *63:17* (voters who attempted to give ballots to ADP
 20 personnel); *79:8-23* (voters who contacted ADP because HB2023 blocked them from
 21 returning ballot); *99:8-20* (voters reporting problems with not receiving early ballot);
 22 *128:1-129:4* (voters who gave their ballots to Mr. Scharff to return). ADP is unable to
 23 identify which portions of the transcripts contain unanswered questions about this topic.
 24 In their meet and confer email, ADP asked the State for clarification. *See infra* 15 n.9,
 25 Def's. Ex. B at 2. The State did not respond.

- 26
- 27 • **Topic 6. Research ... relating to voting patterns of Native American,**
Latino, African American, and all other minority voters in Arizona.

28 deposition where opposing party produced document itself).

1 Ms. Tameron affirmed that she was ADP's designated 30(b)(6) witness on this
 2 topic. Ex. 5 161:4-13. She answered in full the only questions she was posed. *Id.* 28:11-
 3 20. ADP is unable to identify any questions asked on this topic that she did not answer,
 4 and the State has not responded to repeated requests to identify them. *See infra* 15 n.9.

- 5 • **Topic 7. Information concerning the [PEVL] including the number and**
 6 **demographics of Democratic voters who use PEVL, ADP's outreach to**
 7 **sign-up Democratic voters to PEVL, public outreach regarding PEVL,**
 8 **and volunteer and staff training on communicating to voters**

8 Ms. Tameron was asked about the PEVL only in a few instances and answered all
 9 questions posed to her. *See* Ex. 5 at 96:6-97:12 (demographic information of PEVL
 10 voters); 151:20-153:21 (PEVL outreach to Navajo voters); 155:5-20 (PEVL outreach to
 11 Navajo voters); 54:3-9 (ballot collection usage increased after PEVL implementation);
 12 111:22-112:2 (PEVL outreach). Mr. Scharff likewise answered many additional questions
 13 about the number and demographics of PEVL voters, public outreach regarding PEVL,
 14 and PEVL-related training. Ex. 6 95:7-101:13. ADP is unable to identify any questions
 15 posed to either witness on this topic that went unanswered, and the State again did not
 16 respond to ADP's requests to identify them. *See infra* 15 n.9.

17 **B. The State's failure to specify discrete unanswered questions leaves both**
 18 **ADP and the Court unable to adequately understand what specific**
 19 **relief is requested.**

19 As the transcript makes apparent, the State's assertion that the four enumerated
 20 topics remain "unaddressed," Mot. to Compel at 13, is flatly contradicted by the record.
 21 ADP is left to guess what, specifically, the State wants to know. Moreover, ADP's
 22 counsel requested this information at every turn: at Ms. Tameron's deposition, again at
 23 Mr. Scharff's deposition, and again in the meet and confer emails.⁹ During Ms. Tameron's

24 ⁹ *See* Ex. 5 176:17-22 (PLAINTIFFS: If there's specific things that you have
 25 concerns about... I can't know what those are unless you let me know, to know if we have
 26 a dispute about something or whether or not we can make sure Mr. Scharff is prepared
 27 about it.); *see also id.* 58:19-60:14 (PLAINTIFFS: ... If you are unable to get your
 28 questions answered today, we will ...take note, we'll make sure [we get the answer].
 Unless I have a question, I can't be specific. STATE: Okay.); Ex. 6 161:20-163:3
 (PLAINTIFFS: If you feel that there are items on the 30(b)(6) notice that have not been
 addressed or that neither witness could address, please write us a letter and tell us what
 those items are...STATE: There's already an order from the court. PLAINTIFFS: Okay.

1 deposition, the State provided written lists of outstanding demographic questions—and
 2 ADP answered *every one* of them. Ex. 7 (Email from Joseph LaRue), Ex. 8 (Email from
 3 Joseph LaRue); Ex. 5 92:1-97:12. The State nonetheless maintained that they had
 4 unanswered questions; but when ADP asked what they were, the only response was
 5 silence.¹⁰ And now, after pages of briefing, *ADP still does not know what questions the*
 6 *State has.*

7 The State’s failure to provide either Plaintiffs or the Court with a discrete set of
 8 disputed issues leaves both to wade through entire deposition transcripts and attempt to
 9 guess which topics the State *wanted* to ask about, but did not. It has also deprived ADP of
 10 the opportunity to cure any alleged defects without requiring briefing and Court
 11 intervention; a full three weeks passed between Ms. Tameron’s deposition and Mr.
 12 Scharff’s, ample time to have prepared Mr. Scharff to answer any specific questions left
 13 unaddressed by Ms. Tameron. Lastly, as a practical matter, the State’s vagueness seriously
 14 impedes ADP’s ability to proffer and appropriately prepare the requested additional
 15 30(b)(6) witness.¹¹ *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL
 16 116082, at *9 (N.D. Ill. 2000) (“[T]he recipient of a Rule 30(b)(6) request is not required
 17 to have its counsel muster all of its factual evidence to prepare a witness to be able to
 18 testify regarding a defense or claim.”) (internal citation omitted); *see also Doubt v. NCR*
 19 *Corp.*, No. C 09–5917 SBA, 2011 WL 5914284, at *1–3 (N.D. Cal. Nov. 28, 2011).

20
 21 At some point inform us of what those areas are. That would have to be part of any sort of
 22 meet and confer anyway. STATE: Well, there’s an order from the judge ordering a third
 23 30(b)(6) deposition. PLAINTIFFS: Well, and as part of the meet and confer, you will
 24 have to inform us of what those items are you claim have not been fully addressed.);
 25 Def’s. Ex. B at 1-3 (In response to each contested topic, stating that Plaintiffs’ counsel is
 26 unable to identify any posed questions that went unanswered and asking for clarification).

27 ¹⁰The State’s unwillingness to respond to ADP’s requests for clarification during
 28 the meet and confer period also deprives both parties of the “meaningful” opportunity to
 resolve the dispute that the Local Rules require. *See supra* at 1 n.1.

¹¹The only hint the State has given the Court as to how to satisfy its request for
 relief is a request that the third 30(b)(6) designee be Sam Almy, ADP’s Data Director.
 What the State seems to desire is not the opportunity to have specific questions answered,
 but rather the opportunity to depose a certain individual. But a 30(b)(6) deposition is
 topic-based, not witness-based; it is ADP’s prerogative to designate the appropriate
 witnesses. In any event, as Plaintiffs have explained, Sam Almy is outside the state hiking
 the Appalachian trail and will be unavailable through trial. Ex. 4 22:23- 23:16.

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Dated: July 6, 2017

s/ Sarah R. Gonski

Daniel C. Barr (# 010149)
Sarah R. Gonski (# 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Marc E. Elias (WDC# 442007)*
Bruce V. Spiva (WDC# 443754)*
Elisabeth C. Frost (WDC# 1007632)*
Amanda R. Callais (WDC# 1021944)*
Alexander G. Tischenko (CA# 304743)†
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960

Joshua L. Kaul (WI# 1067529)*
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703

*Attorneys for Plaintiffs the Arizona
Democratic Party, the DSCC, and the
Democratic National Committee*

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, I electronically transmitted the attached document to the Clerk’s Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

s/ Michelle DePass

General Information

Court	United States District Court for the District of Arizona; United States District Court for the District of Arizona
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	2:16-cv-01065
Status	CLOSED