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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Michele Reagan, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE DEFENDANTS' SECOND MOTION TO COMPEL

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After this Court issued its July 14, 2017 Order directing the State to provide Plaintiffs with a list of purportedly unanswered deposition questions and directing Plaintiffs to answer those questions, if possible, the State attempted to leverage that order to ask about topics that were not at issue in the first motion to compel, to attempt to obtain an incredibly broad swath of information that no live witness conceivably could have provided in a deposition, and to request information that is protected from disclosure by the First Amendment. Plaintiffs raised these issues with the State. In response, the State generally retreated from its effort to ask questions pertaining to topics that were outside the scope of the first motion to compel, but it has otherwise persisted in its position.

The discussion in the State's second motion to compel largely ignores the State's overbroad, unduly burdensome questions. Instead, the substance of the State's motion—but not its requested relief—focuses on a narrow subset of the information the State has requested. The State also fails to show why even the narrow subset of information discussed in its brief is of any real significance to this case, nor is it evident why it would be. And, the State's brief is rife with misleading or inaccurate assertions. The State's attempted misuse of this Court's order, as well as its motion for reconsideration—which raises arguments that either have already been addressed or should have been raised previously—should be rejected.

FACTS

On June 28, 2017, the State moved for an order compelling Plaintiffs to disclose documents that were withheld from production pursuant to the First Amendment privilege and to produce an additional Rule 30(b)(6) witness for the Arizona Democratic Party ("ADP"). Doc. 317 (First Motion to Compel ("MTC")). The State claimed that an additional witness was necessary because "Plaintiffs have failed to provide substantive testimony on four of the topics listed in the Notice of Deposition"—Topics 2, 4, 6, and 7. *Id.* at 12-13. In response, Plaintiffs argued that the documents at issue were properly withheld from production and that ADP had satisfied its obligations under Rule 30(b)(6). Doc. 321 (Response to First MTC). As to the latter issue, Plaintiffs pointed out that ADP's

two 30(b)(6) witnesses had in fact provided testimony on all four of the pertinent topics, *id.* at 11-12, 14-15; that, when informed that the State did not believe that one of the 30(b)(6) witnesses had provided sufficiently detailed answers, ADP obtained additional information and answered *all* of the questions the State supplied, *id.* at 13, 15-16; and that, despite repeated requests from counsel for the Plaintiffs, the State would not tell Plaintiffs what questions the State believed had not been answered, *id.* at 15-16.

A telephonic hearing on the State's First MTC took place on July 14, 2017. As the State points out, the Court, in discussing the 30(b)(6) issue, noted that "there have been some questions posed to 30(b)(6) deponents that they just couldn't answer." Doc. 336-1 (Exhibit 3 to Second MTC ("State Ex." at 18:20-21)); Doc. 336 at 11 (Second MTC). As counsel for Plaintiffs noted in the hearing, however, such questions called for obscure details like "what percentage of Democrats are Pacific Islanders"; and when questions could not be answered, Plaintiffs "asked the defendants for a list of information they wanted," Defendants "provided it," and Plaintiffs "got answers …. So those questions were answered." Doc. 336-1 (State Ex. 3 at 18:23-19:4); Doc. 321 at 12-13 (Response to First MTC).[1] Counsel for the Plaintiffs further explained that "we don't know what questions the State has that haven't been answered." Doc. 336-1 (State Ex. 3 at 18:11-12). The Court subsequently directed the State to "identify for the plaintiffs the specific questions [the State] want[s] answered," which Plaintiffs, if possible, were to answer "through an affidavit …—like an interrogatory." *Id.* at 19:13-17.

On July 19, the State served questions on Plaintiffs. Doc. 336-1 (State Ex. 4 (Second Interrogatories)). Rather than identify questions that purportedly went unanswered, however, the State sent Plaintiffs an extraordinarily broad set of interrogatories. *Id.* In an email sent the next day, Plaintiffs noted that the State's interrogatories, including subtopics and subquestions, contained over 100 questions, asked questions pertaining to topics other than the four topics addressed in the MTC, requested

[1] The State's Second MTC simply ignores this point—and has not identified a single deposition question that ultimately went unanswered.

information that is protected by the First Amendment privilege, and sought a level of detail far beyond what any 30(b)(6) witness could have provided. Exhibit 1 to Second Declaration of Joshua Kaul ("2d Kaul Decl. Ex."). Plaintiffs objected to this effort to broadly re-open discovery and requested that the State provide a substantially revised set of questions or take the issue up with the Court. *Id.*[2]

The State then sent Plaintiffs "a revised list of questions that," the State asserted, "removed interrogatories pertaining to Topics 1, 3, and 5" but that did not address the other points Plaintiffs had raised. *Id.* at 2; Doc. 336-1 (State Ex. 5) (Revised Second Interrogatories). The State's questions included requests for an explanation as to "how the ADP uses census and geographic data to determine the race of its members" (No. 1); "the primary language for White, Hispanic, Native American, and African American Democratic, Republican, and Independent voters" (No. 2); "the percentage of [ADP] members who are White, Hispanic, Native American, and African-American [for each general election] from 2004 to 2016" (No. 3); "the race or ethnicity of early voters from 2004 through 2016" and "any information that could identify the race or ethnicity of Democratic, Republican, or Independent voters by country of residence and year" (No. 5); and so forth. *Id.* 5 at 7.

Plaintiffs responded to receipt of this new—and still extremely broad—set of questions by pointing out that Plaintiffs and the State clearly had a disagreement about the nature and purpose of the questions. 2d Kaul Decl. Ex. 1. To make clear what was in dispute, however, Plaintiffs stated that they would provide question-by-question objections. *Id.* Plaintiffs thereafter provided responses and objections to the State's revised questions, Doc. 336-1 (State Ex. 8), and the State has moved for an order compelling ADP to answer the questions—presumably, every one of the questions to the extent they were not answered—that the State sent to ADP following the hearing on the

[2] The State's brief refers to this as the parties' having "negotiated." Because this "negotiat[ion]" was not filed with the State's Second MTC, Plaintiffs are submitting it as Exhibit 1 to the Second Kaul Declaration.

First MTC. Doc. 336 at 1 (Second MTC).

ARGUMENT

I. The Revised Interrogatories Seek Information That Falls Squarely Within the First Amendment Privilege

The State's argument that its revised interrogatories do not implicate the First Amendment—which is premised upon its assertion that the interrogatories do not seek ADP's confidential internal materials or proprietary modeling, but solely demographic information about Arizona's voters—is wholly misplaced.[3] A plain reading of the State's revised second interrogatories makes clear that the State seeks information explaining ADP's proprietary, internal modeling, *see* Nos. 1 and 23; information directly derived therefrom from which ADP's modeling potentially could be inferred, *see* Nos. 3, 5, 9, 17, 18, 21-24; and direct communications between ADP and its members or constituents, *see* Nos. 13, 26. All of this information, as this Court and others have recognized, constitutes ADP's "confidential internal materials," the disclosure of which would chill voters' willingness to communicate or associate with ADP and give a competitive advantage to ADP's political opponent—the Arizona Republican Party—an intervenor in this case. Doc. 329 at 3-4 (Order Denying First MTC); *see also, e.g.*, *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 177 (D.C. Cir. 2003) (compelling disclosure of political organization's internal planning materials would have chilling effect on First Amendment rights); *Ohio Org. Collaborative v. Husted*, No. 2:15-CV-01802, 2015 WL 7008530, at *3-4 (S.D. Ohio Nov. 12, 2015) (First Amendment privilege prevented compelled disclosure of strategic information); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*,

[3] The question-by-question responses contained herein specifically respond to the 15 interrogatories that the State has cited as having "deficiencies" in Exhibit 2 to its Second MTC. Doc. 336-1. As the State has not set forth any deficiencies to ADP's responses to the other interrogatories contained in its revised second set of interrogatories, *see* Doc. 336-1 (State Ex. 8), ADP presumes that the answers it has provided are sufficient and that the State has waived any ability to compel responses to those questions. Notwithstanding that presumption, ADP notes that, as set out in Doc. 336-1 (State Ex. 8), ADP maintains its responses and objections and to the interrogatories not discussed specifically herein, including its First Amendment objections.

No. 75 Civ. 5388, 1985 WL 315, at *8 (S.D.N.Y. Feb. 28, 1985) (First Amendment protects against "compelled disclosure of the identity of an association's members or sympathizers").

First, despite flatly asserting that it does "not seek 'proprietary predictive modeling and strategic communications[,]'" Doc. 336 at 3 (Second MTC), the State's *very first* revised interrogatory contradicts that assertion. In particular, it asks ADP to explain how it "uses census and geographic data to determine the race of its members." Doc. 336-1 (State Ex. 2 at 1).[4] As Ms. Tameron explained in her 30(b)(6) deposition (in response to a nearly identical question), ADP places census and geographic data into a model to determine race.[5] 2d Kaul Decl. Ex. 2 (Tameron Tr. at 24:24-25:9). This model is based on ADP's internal proprietary algorithms. *See* Doc. 336-1 (State Ex. 2 at 1). The State's effort to compel ADP to explain how it "uses census and demographic information" is thus an effort to compel ADP to divulge highly sensitive, confidential internal information about its proprietary models—information that would be useful to ARP and could cause ADP to have to change the way it operates in order to advance its mission.[6] Indeed, this Court has already recognized this exact type of information is privileged. Doc. 329 at 4 (Order Denying First MTC) (crediting Tameron affidavit and finding that the material described therein is privileged, including "ADP's voter-tracking technology and information about ADP's use of modeling"); *see also* Doc. 321 at 3-5 (Response to First MTC).[7]

[4] ADP has also already informed the State that it does not track the race of its membership; rather, it attempts to supplement its understanding of its membership with demographic information derived from modeling. 2d Kaul Decl. Ex. 2 (Tameron Tr. at 24:13-25:9).

[5] The fact that Ms. Tameron answered this question in her deposition plainly contradicts the State's assertions that ADP failed to prepare its 30(b)(6) witness and that those witnesses were unable to answer questions on the noticed topics. *See* discussion *infra*.

[6] This point is not undermined to the extent that the State seeks "backward-looking" information, *see* Doc. 336 at 4 (Second MTC); *but cf.* No. 1 (asking how ADP "*uses* census and geographic data to determine the race of its members" (emphasis added to present-tense verb)). Knowledge of ADP's practices and strategy in previous elections obviously provides insight into what ADP will do and what its strategy will be in future elections.

[7] This type of strategic information is not limited to the State's request in No. 1. Indeed, No. 23 directly seeks information about how ADP uses modeling to analyze race. Any answer that ADP provides would reveal the inputs into its underlying internal modeling and projection of voter demographics and turnout. *See* Ex. 5 to Doc. 321-2 (1st Decl. of Josh Kaul at ¶ 4).

Second, Nos. 3, 5, 9, 17, 18, and 21-24 all seek information that would directly reveal ADP's internal estimate of demographic characteristics and likely voting behavior of the electorate, all of which are based on its proprietary, internal modeling. *See* Doc. 321-1, at ¶ 5 (Tameron Decl.). Moreover, to the extent that these questions request information about polling (No. 22) or about reports commissioned by ADP (No. 21) and/or relied on by ADP (No. 24) and the details thereof, disclosure of such information would reveal to ADP's political opponents what information ADP is confidentially assessing and what its findings are, while providing significant insight into what strategic actions ADP is likely to take in future elections. And this Court has already found such information to be privileged.[8] Doc. 329 at 4 (Order Denying First MTC).

Third, Nos. 13 and 26 seek information regarding communications between ADP and voters that, to the extent they were recorded, would have been generated through ADP's election monitoring program and incident hotline. The disclosure of such information would chill ADP's ability to communicate and associate with its supporters and voters, who would be less likely to contact ADP in the future if they were aware that their information might be disclosed.[9] This is plainly privileged. Doc. 329 at 3-4 (Order Denying First MTC).

Further, to the extent the State argues that ADP waived its First Amendment privilege by providing defendants with certain demographic information about voters in a *single* election, that is simply not the case.[10] To begin with, the notion that the provision

[8] Indeed, ADP has no data related to any of these interrogatories that is contained outside of the documents that it has already listed on its privilege logs, which this Court has already found to be protected by the First Amendment privilege.

[9] To the extent that the State has asserted or will assert that it seeks only generalized information that is not privileged, such information was provided to the State through written discovery and the 30(b)(6) depositions. 2d Kaul Decl. Ex. 3 at 4-7 (Pls. Resp. to the State's First Set of Interrogatories); Ex. 2 (Tameron Tr. 108:2–110:22); Ex. 4 (Scharff Tr. 79:8-16). The information at issue here is not generalized information.

[10] In addition to the substantive arguments regarding waiver set forth herein, the State asserts that ADP produced the information in question (i.e., "the electorate breakdown") without asserting a privilege. Doc. 336 at 4 (Second MTC). In fact, *three* emails discussing or transmitting the electorate breakdown expressly reserved ADP's applicable privileges. 2d. Kaul Decl. Ex. 5.

of data about a single election (and data that ADP is not using affirmatively) broadly waived ADP's ability to object to the provision of similar information for any other election is wholly without merit. Further, ADP's First Amendment interests are more substantial where data from multiple elections are at issue. The information collected, tracked, and modeled by ADP changes between election cycles. Thus, disclosing which information (if any) ADP possesses for each election would reveal its shifting priorities between cycles, which again provides insight into its strategic priorities. Knowing in *which* elections ADP has collected particular data could also provide insight into how ADP sets its priorities as between primary and general elections, mid-term and presidential elections, and elections at different levels (e.g., local versus statewide versus federal). This is wholly different from the 2016 electorate breakdown which was provided to the State, which was created solely for the purpose of refreshing Ms. Tameron's recollection in the 30(b)(6) deposition, did not reveal what information ADP generally tracks, and was far narrower than the broad and highly detailed demographic questions that the State has asked in its revised interrogatories.[11]

II. The State Has Not Met the Heightened Relevancy Showing Required to Compel Disclosure of First Amendment-Protected Information

As this Court explained previously, where information is protected by the First Amendment privilege, the party moving for disclosure has the burden of showing that the information is "highly relevant to the claims or defenses in the litigation" as well as otherwise unavailable. Doc. 329 at 5 (Order Denying First MTC). The State has failed to meet that burden here. Specifically, the State argues that the information sought in the interrogatories is central to its defense because "[i]t relates to the racial demographics of Arizona voters and whether the use of mail-in ballots by racial minorities has changed" since the enactment of HB2023. Doc. 336 at 6 (Second MTC). As Plaintiffs have

[11] In particular, the State has provided no definition for demographics, implicating, potentially numerous categories of information, and supporting a broad-based request for information rather than the narrow approach the State purports to take in its brief.

explained at length, and as this Court has already recognized, however, Plaintiffs have not relied and are not relying on any privileged information to make their case. Doc. 329 at 7-8 (Order Denying First MTC); Doc. 321-2 (1st Kaul Decl. Ex. 3 at fn. 3). Thus, the State does not need this information to rebut the Plaintiffs' use of such information.

Nor is the sort of demographic information the State seeks of particular significance in this case for any other reason. The central questions in this case cannot be answered by simply determining whether, for example, turnout went up or down from 2012 to 2016. Indeed, defense expert Dr. Thornton acknowledged in her deposition that one cannot infer what impact the ban on ballot collection had simply by looking at the change in turnout from 2012 to 2016.[12] Moreover, the information at issue was created for a political purpose wholly separate from this case and was created in a manner (by a party to the case, using a proprietary process) that makes it not useful or reliable for the purposes of the comprehensive expert analysis needed in a voting-rights case—a sentiment that defense expert Sean Trende agrees with.[13] 2d Kaul Decl. Ex. 7 (Trende Tr. 165:10 – 170:25); *see also* Doc. 321-2 (1st Kaul Decl. ¶ 7).

In addition, even if the State could demonstrate that the information requested was highly relevant, the State's assertion that "[t]here is no other way for [it] to acquire the information" it seeks, Doc. 336 at 6 (Second MTC), misunderstands the relevant inquiry. If what the State seeks is racial demographic information about Arizona voters—which is what the State asserts in the body of its motion—*the State can conduct its own analysis of the relevant data*. The State is just as capable of obtaining and then analyzing publicly available data as ADP and Plaintiffs' experts are. And Plaintiffs' expert Dr. Rodden has

[12] Because this deposition was conducted this week, the parties currently only have a rough draft of the deposition transcript. 2d Kaul Decl. Ex. 6 (Thornton Rough Tr. 124:23-126:10).

[13] The question whether this data conflicts with Plaintiffs' experts' data is irrelevant to the resolution of this case. Defendants have been provided with the data upon which Plaintiffs' experts relied and can probe that data however they would like. Further, given that ADP's data relies on proprietary, internal modeling which is created overtime (i.e., iteratively) and may not be the same from year to year, there is simply no way to probe ADP's information effectively in the context of a litigation without disclosing the details of ADP's proprietary, internal process.

already provided the data on which he relied in preparing his analysis of demographic information about Arizona voters. As explained in his expert reports, to perform his analysis Dr. Rodden has used a combination of census data and surname analysis to estimate the race of all voters on the 2016 and 2012 Arizona voter files. These files, with the race coding, were produced to the State with the disclosure of Dr. Rodden's reports. Thus, to the extent that the State seeks demographic information on Arizona's electorate, it has already been provided to the State and the State's own experts can use that information to project turnout; evaluate whether the percentage of voters voting early has changed across elections; and, ultimately, answer precisely the questions the State claims are central to this case. For this reason, and those set forth above, the State's First Amendment arguments fail.

III. The Revised Interrogatories Are Inconsistent With 30(b)(6) Depositions

The State's Revised Second Interrogatories also far exceed both the scope of the questions permitted by this Court's July 14, 2017 Order and the requirements of Rule 30(b)(6). *See* Doc. 336-1 (State Ex. 3 at 19:13-17). The parameters of a 30(b)(6) deposition are well established. "A party who notices a Rule 30(b)(6) deposition should apply fairness and reasonableness to the scope of the matters that the witness is required to testify about." *Mailhoit v. Home Depot U.S.A., Inc.*, No. CV 11-03892 DOC (SSX), 2012 WL 12884049, at *2 (C.D. Cal. Aug. 27, 2012). "Rule 30(b)(6) witnesses must be prepared and knowledgeable, but they need not be subjected to a 'memory contest.'" *Id.* (quoting *Alexander v. F.B.I.*, 186 F.R.D. 137, 143 (D.D.C. 1998). While a party must make a good-faith effort to prepare a 30(b)(6) witness to "'fully and unevasively answer questions about the designated subject matter' ... that task becomes less realistic and increasingly impossible as the number and breadth of noticed subject areas expand." *Apple, Inc. v. Samsung*, No. C 11–1846 LHK (PSG), *Elecs. Co., Ltd.*, 2012 WL 1511901 at *2 (N.D. Cal. Jan. 27, 2012) (internal quotation marks omitted); *see also Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) ("An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task.").

In its Revised Second Interrogatories, the State has dramatically exceeded these parameters. For example, it poses a number of interrogatories that seek highly detailed information for every election *since the mid-2000s*. *See, e.g.*, Doc. 336-1 (State Ex. 5), No. 3 ("Provide the percentage of [ADP] members who are White, Hispanic, Native American, and African-American [for each general election] from 2004 to 2016"); No. 5 ("Describe the race or ethnicity of early voters from 2004 to 2016"); Nos. 9 & 12 (seeking number, ethnicity, and partisan affiliation of *every voter* requesting ballot collection from 2004 to 2016); No. 10 (number of ballots collected in election years since 2004 and information about the race or ethnicity of those voters); No. 11 (election year and county of residence for every voter attempting to use a ballot collection service since 2004); No. 23 (seeking data about analyses of voter registration records between 2006 and 2016); and No. 26 (seeking description of "any complaints" regarding out-of-precinct ballots between 2004 and 2016)).

Similarly, the State seeks information about "every complaint" by a voter that might pertain to the challenged laws, as well as sophisticated demographic analyses of those voters. *See* Doc. 336-1 (State Ex. 5), No. 13 ("Describe complaints received by the ADP by any voter, stating that it would be difficult or impossible for them to vote their early ballot because of the ban on ballot collection."); No. 14 (asking for every voter complaint about returning early ballots and "any information that could identify the race or ethnicity of the voter, the voter's county of residence, and the year complaint refers to"); No. 15 (number of, ethnicity, and county of residence for every voter who was unable to return a ballot due to H.B. 2023); No. 16 (number of those voters who complained but were able to cast a vote, the race or ethnicity of those voters, and each voter's county of residence); No. 21 (interrogatory with 11 subparts about voting patterns of racial minorities in 2016); No. 22 (interrogatory with 11 subparts about polling of voting patterns of racial minorities in Arizona); No. 24 (interrogatory with nine subparts about analyses of the voting patterns of racial minorities in Arizona).

The State claims that these "questions are the exact ones that the State Defendants

either asked or intended to ask during the 30(b)(6) depositions, but were prevented from asking by the deponents' obvious lack of knowledge and lack of preparation[.]" Doc. 336 at 19 (Second MTC). In fact, only 3 of all 15 questions that the State cites as having deficient responses in its Exhibit 2 arguably appear in either 30(b)(6) transcript. And the deponents answered each of these questions.[14] Of the remaining questions, the State either failed to ask them at all, or asked a question that was far narrower than the broad ranging interrogatories it now seeks.[15] Of course, nothing *prevented* the State from asking any deposition questions; it chose not to do so and should not now be permitted to take advantage of its failure to make a record.[16] Regardless, to the extent that the information the State seeks even exists, no deponent, no matter how well prepared, could conceivably be expected to provide the kind of expansive and extraordinarily detailed information the State now seeks in a live deposition. To the extent the State suggests otherwise, its position is plainly not credible. And, it cannot be that a party can obtain by a second round of interrogatories—issued outside the discovery period—information far beyond what it would be reasonable to expect a 30(b)(6) witness to be able to testify to by claiming (here, without any legal or factual basis) that a 30(b)(6) deposition did not meet the standards applicable to it.

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[14] For example, Ms. Tameron answered Interrogatory 26, which asked for a description of complaints received by ADP from a voter who cast an out-of-precinct ballot. 2d Kaul Decl. Ex. 2 (Tameron Tr. 108:2-109:4). Likewise, although he was not even directly asked this question, Mr. Scharff provided further examples. *Id.* at Ex. 3 (Scharff Tr. 145:18-147:4). Further, Mr. Scharff answered the equivalent of Interrogatory 13 in his deposition. *Id.* (Scharff Tr. 62:19-64-24, 71:21-79:23). Mr. Scharff was also asked some, but not all, of the parts and subparts of Interrogatory 28, regarding *The Arizona Republic* article, which, as even the State acknowledges, is now a moot issue. *Id.* (Scharff Tr. 85:12-88:9).

[15] For example, Interrogatories 3 and 5 seek data on ADP membership and early voters for each election from 2004 through 2016, but the State's deposition questions only asked about such information for 2016 (which the deponents answered). *See* 2d Kaul Decl. Ex. 2 (Tameron Tr.69:23-72:13; 91:23-97:15). Similarly, Interrogatories 21 and 24 seek information on general studies or reports of voting patterns by racial minorities, but the State's deposition questions only asked about information studies as to changes in voting patterns after HB 2023 took effect (which deponents answered). *Id.* (Tameron Tr. 130:25-131:13).

[16] Indeed, in Ms. Tameron's deposition, she specifically testified that she was prepared to testify on each of the topics in the State's notice and the State was at liberty to ask her its questions on those topics. 2d Kaul Decl. Ex. 2 (Tameron Tr. 54:18-57:13, 60:17-62:16). It simply chose not to do so.

"'[T]here must be . . . a limit to the specificity of the information the deponent can reasonably be expected to provide."' *Barten v. State Farm Mut. Auto. Ins. Co.*, No. Civ 12-399-TUC-CKJ (LAB), 2014 WL 12639943, at *2 (D. Ariz. July 11, 2014) (quotation omitted). And, "it is unrealistic to expect a [Rule 30(b)(6)] deponent to be intimately familiar with the details of every individual transaction described in a database." *Id.* (citation omitted); *see also Pollara v. Radiant Logistics, Inc.*, No. CV 12-344 GAF (JEMX), 2013 WL 12128822, at *4 (C.D. Cal. Nov. 8, 2013) ("That a 30(b)(6) witness did not commit the entire list and all of its details to memory prior to being deposed is neither surprising nor improper.").

Similarly, many of the State's revised second interrogatories are also overbroad and unduly burdensome. *Mailhoit*, 2012 WL 12884129, at *2 ("Overly broad and unduly burdensome interrogatories are an abuse of the discovery process and are routinely denied."); *see also Lucero v. Valdez*, 240 F.R.D. 591, 594 (D. N.M. 2007) (contention interrogatories requiring responding party to state "each and every fact" supporting the party's contentions impermissibly overbroad); Fed. R. Civ. P. 26 ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."). As explained, the interrogatories at issue request a wide swath of highly detailed information—such as county-by-county information and information going back to 2004—and the State has provided little, if any, justification for such broad discovery. For these reasons, the State's contention that these interrogatories are properly within the scope of a 30(b)(6) deposition is without merit. Its motion to compel should be denied.

IV. The State Defendants Have Failed to Proffer Any Grounds Warranting Reconsideration of This Court's July 25, 2017 Order (Doc. 329)

The State's request for reconsideration of this Court's Order denying its First MTC

merely regurgitates arguments already considered by this Court in its earlier filing and, as such, fails to meet even the minimal standards for granting a motion to reconsider. As this Court has explained, "[m]otions for reconsideration should be granted only in rare circumstances." *Sena v. Uber Techs. Inc.*, No. CV-15-02418-PHX-DLR, 2016 WL 4064584, at *1 (D. Ariz. May 3, 2016) (citing *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995)). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Id.* (quoting *School Dist. No. 1J, Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "Mere disagreement with a previous order is an insufficient basis for reconsideration." *Fuller v. Phoenix Fire Dep't*, No. CV 13-01296-PHX-DLR, 2015 WL 13216796, at *1 (D. Ariz. Oct. 13, 2015) (citing *Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988)). Indeed, "[s]uch motions should not be used for the purpose of asking a court 'to rethink what the court had already thought through—rightly or wrongly.'" *Sena*, 2016 WL 4064584, at *1 (quoting *Defenders of Wildlife*, 909 F. Supp. at 1351 (internal quotation marks omitted)); *see also, e.g.*, *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D. Ariz. 2003) (motions for reconsideration should not be used to repeat arguments made previously). Nor should they "'be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.'" *Defenders of Wildlife v. Martin*, No. CV-05-248-RHW, 2007 WL 1011961 at *1 (E.D. Wash. Jan. 8, 2007) (quoting *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)).

A. The Court Has Already Considered the State's Arguments

The State argues that the Court should reconsider its order because it based "its Order, in part, on Plaintiffs' assurance that they would not rely on the privileged information to support their claims." The State further argues that "[i]t is not clear . . . that the Court properly considered the need that State Defendants have for this information in order to make their defense."

As an initial matter, the State's assertion that the Court failed to consider Defendants' need for the requested information is simply not accurate. In its Order, the Court specifically balanced the competing interests of the Plaintiffs and Defendants—which would necessarily include the State Defendants' need to use the requested information as part of its defense—and found that the State had failed[17] to show that the documents were "highly relevant" under the demanding standards applicable to documents protected by the First Amendment. Doc. 329 at 5 (Order Denying First MTC).

Indeed, the very argument the State makes in the motion for reconsideration regarding its need—that ADP's protected data might conflict with or contradict Plaintiffs' experts' data—was before this Court in the original motion. *See* Doc. 317 at 6 (First MTC) ("Plaintiffs have disclosed information regarding the impact on minority voters of the laws at issue through their expert reports. Having used that information as a sword to support their claims, Plaintiffs should not be allowed to withhold relevant (and *potentially contradictory or inconsistent*) information on the 'shield' of First Amendment Privilege.") (emphasis added).[18] The Court rejected this, noting that Plaintiffs were not using the information as a sword and a shield. Doc. 329 at 7-8 (Order Denying First MTC).

Further, to the extent the Defendants assert that any specific argument was not previously before the Court, all of the pertinent facts relied on by the State in its motion for reconsideration (expert testimony; the *Arizona Republic* article; and the Tameron testimony) were available to the State when its First MTC was filed, and such arguments should have been made in that filing.[19] In short, the State is not entitled to reconsideration

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[17] Indeed, as the Court noted, the State gave a bare-bones account of its purported need for the documents at issue. Doc. 329 at 5 (Order Denying First MTC).

[18] While the State argues that there appears to be conflicting data about early vote turnout in 2016 versus other years, Ms. Tameron's testimony (at the cited section) did not discuss early vote turnout or its comparisons to previous years. *Compare* Doc. 336 at 12-13 (Second MTC) *with* 2d Kaul Decl. Ex. 2 (Tameron Tr. at 73:12 – 74:21).

[19] While the State asserts that Ms. Tameron sought to *change* her testimony on minority participation, a review of the proposed errata makes clear that she in fact sought to *clarify* that her testimony was simply based on her assumption that Latino turnout had generally increased since 2006.

of arguments that have already been rejected or that should have been raised previously.

B. The Court Correctly Found That the Journalist Privilege Applies

As the State noted in its Motion, ADP has confirmed and reported to the State that the information reported in *The Arizona Republic* article that was addressed in the First MTC was not supplied to *The Arizona Republic* by ADP, and the State admits that its related waiver argument is now mooted.[20] *See* Doc 366 at 6-8 (Second MTC). Nevertheless, the State urges the Court to reconsider its ruling on this issue, apparently seeking an impermissible advisory opinion. Specifically, the State argues that the Court misstated the holding of *Shoen I* and improperly applied the journalist's privilege, asserting that the privilege can only be invoked by the journalist. That is not the case. In *Shoen I* the court stated that "we hold that the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality." *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993). Notably, this statement makes no pronouncement about *who* can invoke or waive the privilege (e.g., the journalist versus the person providing the sources). Rather, it states only that the privilege applies to the journalist's resource materials.

Moreover, even if, as the State argues, the journalist's privilege is held by the journalist and not the source, that would not contradict this Court's finding that any information provided to *The Arizona Republic* is privileged and need not be disclosed (even if ADP had disclosed such information, *which it did not*). As the sources cited by the State explain, it is precisely because the journalist's privilege is held by the journalist that the source cannot waive it. *See, e.g.*, *In re Grand Jury Subpoena Judith Miller*, 438 F.3d 1141, 1177 (D.C. Cir. 2006) (D. Tatel, concurring) (stating that "a source's waiver is

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[20] The State's accusation that ADP has engaged in "gamesmanship" is unwarranted. ADP's witnesses previously made clear that they could not confirm that ADP had provided that information to the Republic. Further, ADP plainly would have preferred to resolve this issue sooner. And, ADP, despite having a favorable order from the court, continued to do due diligence into this collateral matter and, by doing so, attempted to save the parties further expense. That effort failed, of course, as the State has decided to brief this matter which it concedes is irrelevant.

irrelevant to the reasons for the privilege"); Kurt Wimmer, *Who Owns the Journalist's Privilege – the Journalist or the Source?*, Communications Lawyer, Aug. 2011, https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/august2011/who_owns_journalists_privilege_journalist_source_comm_law_28_2.authcheckdam.pdf. Thus, even if ADP wanted to waive the journalists' privilege in this case (as the State originally argued that ADP had by providing documents to *The Arizona Republic*) it could not. Accordingly, the Court did not err in its earlier interpretation of *Shoen I*. More pertinently here, of course, the Court need not address this issue, for explained at the beginning of this subsection.

Dated: August 11, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 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

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Federal Nature of Suit	Civil Rights - Voting[441]
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