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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Democratic National Committee, DSCC, and  
10 Arizona Democratic Party,

11 Plaintiffs,

12 v.

13 Michele Reagan and Mark Brnovich,

14 Defendants.

No. CV-16-01065-PHX-DLR

**ORDER**

15  
16 Before the Court is a combined motion to compel and motion for reconsideration  
17 (Doc. 336) filed on behalf of Defendants' Arizona Secretary of State Michele Reagan and  
18 Arizona Attorney General Mark Brnovich ("State Defendants"). The motion is fully  
19 briefed and the Court heard oral argument telephonically on August 17, 2017. At the  
20 conclusion of the telephonic hearing, the Court ordered Plaintiffs to submit certain  
21 materials for *in camera* inspection. Having considered the parties' briefs and oral  
22 arguments, and reviewed *in camera* the documents submitted by Plaintiffs, the Court  
23 grants in part and denies in part the State Defendants' motion.

24 **I. Motion for Reconsideration**

25 **A. Background**

26 On June 28, 2017, the State Defendants moved to compel production of a number  
27 of documents, over which Plaintiffs asserted a First Amendment privilege. (Doc. 317.)  
28 These documents largely contain demographic analyses and reports prepared or

1 commissioned by Plaintiffs, and records of complaints made to Plaintiff the Arizona  
2 Democratic Party (“ADP”) by voters regarding problems casting ballots. After hearing  
3 oral argument, the Court took the First Amendment privilege issue under advisement.  
4 Later, in a July 25, 2017 order, the Court sustained Plaintiffs’ assertion of the First  
5 Amendment privilege and denied the State Defendants’ motion to compel production of  
6 documents. (Doc. 329.) The State Defendants now seek reconsideration of that order.

### 7 **B. Legal Standard**

8 Motions for reconsideration rarely are granted. *Defenders of Wildlife v. Browner*,  
9 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Mere disagreement with a previous order is an  
10 insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp.  
11 1572, 1573 (D. Haw. 1988). This District’s Local Rules of Practice impose specific  
12 limitations and requirements on motions for reconsideration to ensure that they are not  
13 used simply to ask a court “to rethink what [it] had already thought through—rightly or  
14 wrongly.” *Defenders of Wildlife*, 909 F. Supp. at 1351. First, such motions ordinarily  
15 will be denied “absent a showing of manifest error or a showing of new facts or legal  
16 authority that could not have been brought to its attention earlier with reasonable  
17 diligence.” LRCiv 7.2(g). Second, a motion for reconsideration must “point out with  
18 specificity the matters that the movant believes were overlooked or misapprehended by  
19 the Court, any new matters being brought to the Court’s attention for the first time and  
20 the reasons they were not presented earlier, and any specific modifications being sought  
21 in the Court’s Order.” *Id.* Finally, “[n]o motion for reconsideration . . . may repeat any  
22 oral or written argument made by the movant in support of or in opposition to the motion  
23 that resulted in the Order.” *Id.* The court may deny a motion for reconsideration if it  
24 fails to comply with these rules. *Id.*

### 25 **C. Discussion**

26 The State Defendants do not present new facts or legal authority that could not  
27 have been brought to the Court’s attention earlier. Instead, they argue that  
28 reconsideration is warranted because “the Court made two errors of law.” (Doc. 336 at

12.) Specifically, the State Defendants contend that the Court: (1) based its decision on Plaintiffs' assurances without giving due consideration to the State Defendants' need for the requested documents and (2) improperly allowed Plaintiffs to invoke the journalist's privilege. (*Id.* at 13-15.) Having considered the State Defendants' arguments, the Court concludes that neither justifies reconsideration of its prior order.

### 1. Journalist's Privilege

First, the Court declines to reconsider the portion of its prior order discussing the journalist's privilege because the issue is moot in light of recent developments. At the time the State Defendants filed their motion to compel production of documents, they believed that ADP was the source of information provided to The Arizona Republic for use in a November 2, 2016 article entitled "What We Know About Arizona Early Voting in 5 Charts." (Doc. 336-1 at 79-83.) In an August 2, 2017 email, however, counsel for Plaintiffs informed the State Defendants:

It is now our understanding that ADP did not provide the information to The Arizona Republic. Shortly after publication of the article, an ADP representative called the author of the article and objected to the Republic's misattribution of the data to ADP. In response, the Republic relayed to the ADP that it had received the information from an individual who does not work for ADP, who said that he or she had obtained the data from ADP. The reporter refused to reveal the identity of the individual who turned over the information to ADP. ADP did not authorize any individual to release the information to the Republic. ADP does not know precisely what document(s) or data were provided to the reporter, and it cannot even confirm that the information came from ADP. Accordingly, ADP lacks knowledge to comply with the State's request to produce "documents or information provided to The Arizona Republic on which the Republic based the November 2, 2016 article "What We Know About Arizona Early Voting in 5 Charts."

(Doc. 336-1 at 181.)

Though the State Defendants accuse Plaintiffs of "gamesmanship" for failing to disclose this information earlier, they fail to explain how or why the issue remains a genuine and live discovery dispute in light of Plaintiffs' August 2 response. Plaintiffs contend that that dispute is now moot, and the Court agrees. Because Plaintiffs lack the

1 requisite knowledge to respond to the State Defendants’ discovery requests related to The  
2 Arizona Republic article, there is nothing for the Court to compel. The State Defendants’  
3 motion to reconsider this portion of the Court’s order therefore is denied.

## 4 **2. First Amendment Privilege**

5 The Court also declines to reconsider its order sustaining Plaintiffs’ assertion of  
6 the First Amendment privilege over the documents sought in the State Defendants’ first  
7 motion to compel.

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

21 At this second step, the court must “balance the burdens imposed on individuals  
22 and associations against the significance of the . . . interest in disclosure[.]” *AFL-CIO v.*  
23 *FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003). In doing so, the court considers factors such as  
24 “the importance of the litigation; the centrality of the information sought to the issues in  
25 the case; the existence of less intrusive means of obtaining the information; and the  
26 substantiality of the First Amendment interest at stake[.]” *Perry*, 591 F.3d at 1141  
27 (internal citations omitted). “Importantly, the party seeking the discovery must show that  
28 the information sought is highly relevant to the claims or defenses in the litigation—a

1 more demanding standard of relevance than under Federal Rule of Civil Procedure  
2 26(b)(1).” *Id.*

3 Contrary to the State Defendants’ contention, the Court balanced these factors and  
4 did not rely solely on Plaintiffs’ assurances that they would not use the information to  
5 make their case. (Doc. 329 at 5-6.) The Court noted that the requested documents,  
6 though arguably relevant under Rule 26(a)(1)’s more liberal standards, were not highly  
7 relevant under the more demanding standard applicable to materials protected by the First  
8 Amendment. Further, the Court noted that Plaintiffs based their internal demographic  
9 modeling off publicly available data and, therefore, the State Defendants could obtain  
10 similar information for alternative and less invasive sources. Finally, the Court  
11 concluded that the First Amendment interest at stake was substantial because granting the  
12 State Defendants’ motion to compel would require the ADP to disclose to its political  
13 rival, Intervenor-Defendant the Arizona Republican Party (“ARP”), internal strategic  
14 communications and documents. The State Defendants have not shown that these  
15 findings were manifestly erroneous. Indeed, having carefully considered the parties’  
16 arguments, the Court is left more convinced that Plaintiffs’ assertion of the First  
17 Amendment Privilege is proper.

18 For example, most of the documents requested by the State Defendants contain  
19 demographic analyses of Arizona’s electorate. Because Arizona does not track the race  
20 of its voters, those interested in this information must estimate the demographic  
21 composition of the electorate by considering data, such as voters’ surnames and location,  
22 and making certain assumptions about that information. “Demographic information”  
23 therefore refers to three broad categories of information: (1) data about voters, (2)  
24 “modeling,” meaning the method by which one uses the raw data to draw conclusions  
25 about a voter’s race or ethnicity, and (3) the resulting conclusions about the demographic  
26 composition of Arizona’s electorate.

27 The State Defendants have assured the Court that they do not seek Plaintiffs’  
28 modeling. Indeed, the State Defendants seem to concede that the proprietary algorithms

1 that Plaintiffs use to estimate the race of Arizona voters are protected by the First  
2 Amendment. Rather, the State Defendants seek Plaintiffs' conclusions about the  
3 demographic composition of Arizona's electorate and the data upon which those  
4 conclusions rest.

5 Plaintiffs have repeatedly explained, however, that ADP bases its internal  
6 demographic modeling on publicly available information, such as census data. This data  
7 is available and has already been provided to the State Defendants in the context of  
8 Plaintiffs' expert witness disclosures. There is no need for the Court to compel Plaintiffs  
9 to produce publicly available census and voter file information.

10 As to the conclusions that ADP has drawn from this data, though it is true that  
11 Plaintiffs provided the State Defendants with demographic estimates for the 2016 general  
12 election, the Court is persuaded that disclosure of similar information for a larger sample  
13 of past elections would permit the State Defendants or the ARP to discover Plaintiffs'  
14 proprietary modeling algorithms through "reverse-engineering" of the conclusions and  
15 the data. Moreover, in balancing the competing interests the Court finds that the ADP's  
16 conclusions, without any explanation as to how those conclusions were reached, are not  
17 highly relevant to this litigation. As the Court noted in its prior order, Plaintiffs have not  
18 and do not intend to rely on their own internal demographic estimates to support their  
19 claims. Instead, they rely on the estimates prepared by their expert, who has utilized  
20 publicly available data and disclosed his methods for determining the racial composition  
21 of the electorate. The State Defendants are equally capable of commissioning a similar  
22 expert analysis. That Plaintiffs internal modeling might have produced different  
23 conclusions about the demographic composition of Arizona voters is of little probative  
24 value if the method by which Plaintiffs reached those conclusions is neither sought by the  
25 State Defendants nor subject to disclosure due to the First Amendment privilege. Stated  
26 differently, Plaintiffs' internal estimates are meaningless if their reliability cannot be  
27 probed.

28 With respect to records of voter complaints, the Court previously determined that

1 such documents were privileged because they include the mental impression of ADP  
2 election observers, personal information about ADP members (meaning democratic  
3 Arizona voters), and, in the aggregate, would reveal the locations of precincts targeted by  
4 the ADP, the types of issues it found most concerning, and internal strategies for  
5 responding to issues at the polls. (Doc. 329 at 3-4.) The State Defendants have not  
6 shown that these findings were clearly erroneous.

7 During oral argument on the present motion, Plaintiffs conceded that a document  
8 production request limited to records of voter complaints about the specific election  
9 practices at issue, with appropriate redactions of personal voter identifying information,  
10 would assuage their First Amendment concerns. The Court is persuaded, however, that  
11 the process of sorting and redacting responsive records would impose a substantial  
12 burden on Plaintiffs, and that the probative value of any resulting document disclosures  
13 would not justify the time and expense required to produce them. Indeed, the primary  
14 issue in this case is whether the challenged elections practices disparately impact  
15 minority voters as compared to non-minority voters, not whether minority voters as  
16 compared to non-minority voters disproportionately complain to the ADP about the  
17 challenged voting practices. Unless affected voters of various races consistently  
18 complain to the ADP in proportion to their representation in the overall voting  
19 population, and unless the ADP's voter complaint records consistently document the race  
20 of the voter, such records are unlikely to assist the Court in making the ultimate  
21 determination at trial.

### 22 **C. Conclusion**

23 The Court therefore denies the State Defendants' motion to reconsider because  
24 they have not shown that the Court's prior order was manifestly erroneous. Moreover, in  
25 several respects the Court is more convinced that the First Amendment privilege applies,  
26 and that options to narrow the document requests to avoid the First Amendment issues  
27 would further diminish the relevancy of the documents and, in some cases, impose a  
28 substantial and unjustified discovery burden on Plaintiffs.



## II. Motion to Compel

On June 28, 2017, the State Defendants moved to compel Plaintiffs to produce a new Rule 30(b)(6) witness who could answer questions that were not satisfactorily answered by either of Plaintiffs' two previously-noticed Rule 30(b)(6) deponents. The Court held a telephonic oral argument on the State Defendants' motion on July 14, 2017. At the conclusion of that hearing, the Court ordered: (1) the parties to confer on the Rule 30(b)(6) witness issue, (2) the State Defendants to identify for Plaintiffs the specific questions for which they seek answers, and (3) 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 also directed the parties to contact the Court to schedule another hearing if they did not resolve the issue by the week of July 24, 2017.

The Court followed up on the Rule 30(b)(6) issue during a July 31, 2017 telephonic conference and, after hearing from the parties, permitted the State Defendants to file a second motion to compel by no later than August 4, 2017. In their motion, the State Defendants request that the Court compel Plaintiffs to answer sixteen interrogatories. (*See* Doc. 336-1 at 3-20.) These interrogatories fall into three broad categories: (1) questions concerning the demographic composition of Arizona voters; (2) questions concerning complaints made to ADP by voters concerning problems casting their ballots; and (3) studies and reports prepared or commissioned by Plaintiffs to estimate voter demographics or predict voter behavior. Plaintiffs have indicated that they have no information responsive to these interrogatories that is contained outside the documents previously requested by the State Defendants. Stated differently, the State Defendants now seek through interrogatories substantially the same information sought initially through requests for document production. Accordingly, in addition to other objections, Plaintiffs have asserted the First Amendment privilege in response to most of these interrogatories.

For reasons explained above and in the Court's prior order, the Court sustains Plaintiffs' assertion of the First Amendment privilege with respect to the interrogatories



1 at issue. Additionally, the Court sustains Plaintiffs' objections to the scope and burden of  
2 interrogatories 13 and 26, which seek detailed descriptions of complaints received by  
3 ADP by any voter stating that the challenged voting practices made voting difficult or  
4 impossible for them. These questions seek a level of detail that goes beyond what a Rule  
5 30(b)(6) deponent ordinarily would be expected to answer in a live deposition, and, as  
6 previously noted, options to obtain similar information through a document production  
7 request would impose a substantial burden on Plaintiffs not justified by the limited  
8 probative value these records would have at trial. Further, the Court denies the State  
9 Defendants' motion to compel an answer to interrogatory 28 (which pertains to the article  
10 published by The Arizona Republic) because Plaintiffs provided an adequate response in  
11 their August 2, 2017 email.


12 The Court, however, grants the State Defendants' motion to compel Plaintiffs to  
13 respond to interrogatory 29, which simply asks Plaintiffs to "[i]dentify the name of each  
14 person who answered each Interrogatory." In refusing to answer the question, Plaintiffs  
15 asserted the attorney-client and work product privileges. They have failed, however, to  
16 explain how this information implicates confidential attorney-client communications or  
17 attorney work product. Indeed, the Court ordered the State Defendants to submit these  
18 interrogatories in lieu of a supplemental Rule 30(b)(6) deposition. Had the Court ordered  
19 a supplement Rule 30(b)(6) deposition, the State Defendants easily would have been able  
20 to ascertain the identity of the person responding to the questions. The Court finds no  
21 basis for shielding this information simply because the State Defendants' questions are  
22 presented in writing. Accordingly,

23 **IT IS ORDERED** that the State Defendants' combined motion to compel and  
24 motion for reconsideration (Doc. 336) is **GRANTED IN PART AND DENIED IN**  
25 **PART** as follows:

- 26 1. The motion for reconsideration is denied.
- 27 2. The motion to compel answers to interrogatories 1, 3, 5, 9, 13, 17, 18, 21, 22,  
28 23, 24, 26, 27, and 28 (located at Doc. 336-1 at 3-20) is denied.

1           3. The motion to compel answers to interrogatory 29 (located at Doc. 336-1 at 20)  
2 is granted. Within **5 days** of the date of this order, Plaintiffs shall identify for the State  
3 Defendants the name of each person who answered each of the interrogatories at issue.

4           Dated this 7th day of September, 2017.

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9 Douglas L. Rayes  
United States District Judge

## General Information

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