IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

THE OHIO DEMOCRATIC PARTY, et al.	:	
	:	
Plaintiffs,	:	**Case No. 2:15-CV-1802**
	:	
v.	:	**JUDGE WATSON**
	:	
JON HUSTED, *et al.*,	:	**MAGISTRATE JUDGE KING**
	:	
Defendants.	:	

DEFENDANTS' MOTION TO COMPEL

Defendants seek an order compelling Plaintiffs to produce documents responsive to Defendants' Requests for Production Numbers 8-15, 19, 20, 22, 23, and 37. Despite Defendants' willingness to enter into a protective order, Plaintiffs have refused to provide documents responsive to these requests based on a First Amendment privilege. Because Plaintiffs have presented no evidence to support the privilege, and because Defendants' compelling interest in the documents would outweigh any burden on the Plaintiffs, Defendants respectfully request that this Court order Plaintiffs to produce documents responsive to the listed requests (either by themselves or otherwise pursuant to a protective order as described below), and order Plaintiffs to produce a privilege log for any documents that are withheld.

I. FACTUAL BACKGROUND

On September 9, 2015, Defendants served on Plaintiffs Requests for Production. These requests sought documents related to not only Plaintiffs' standing in this case but to the merits of their claims and to the Defendants' defenses. On October 9, 2015, Plaintiffs provided responses and objections to the Requests for Production. *See* Plaintiffs' Objections (provided to the Court

by e-mail on November 5, 2015). Plaintiffs claimed a number of privileges, and specifically claimed a First Amendment privilege for Requests 8-15, 19, 20, 22, 23, and 37. *Id.*

During discovery, Defendants had proposed a protective order for both Defendants' and Plaintiffs' documents. This protective order would have provided for the following measures:

- Confidential information would be used only for the purposes of this litigation;
- The information could be shown to (a) the parties, (b) the parties' attorneys, (c) employees, officers, and directors of the parties and all experts after execution of a confidentiality agreement, and (d) the Court;
- The parties would redact confidential information before using the document in court filings or proceedings that would be public; and
- Documents that contained confidential information would be returned or destroyed thirty (30) days after the end of this litigation and all appeals.

Plaintiffs agreed in part to this protective order but insisted on including a category of attorney-eyes-only documents that could not be showed to counsel's clients (i.e. the parties).

Because the documents are not only responsive to whether Plaintiffs have standing but to the merits and defenses of the case, Defendants' counsel could not agree to a prohibition on discussing responsive documents with their clients. Client participation is necessary in formulating an appropriate and effective defense to a case.

Instead of seeking a protective order or producing a privilege log, Plaintiffs informed Defendants that there were documents responsive to the Requests set out above that they had not produced. Plaintiffs have further indicated that there are some documents that they are willing to produce only with the attorney-eyes-only designation, but that there are other responsive documents (those relating to future activities) that they are wholly unwilling to produce. Although Plaintiffs' objections cite a First Amendment privilege, based on associational rights, Plaintiffs have failed to produce any evidence that their associational rights would be burdened in any way by producing the responsive documents.

In total, Plaintiffs produced around 16,000 pages of documents, claimed a number of privileges for the remaining responsive documents in their objections, and have refused to produce a privilege log for any of those documents. On the other hand, Plaintiffs received over 125,000 pages of documents from the Defendants, an additional 375,000 pages of documents from third parties, and Defendants' privilege logs detailing all withheld and redacted documents that were responsive to Plaintiffs' Requests for Production.

Defendants are in need of the responsive, but withheld, documents in order to conduct the 30(b)(6) deposition of Plaintiff ODP. Therefore, Defendants are seeking an order to compel the production of those documents. Defendants do not object to a protective order, as long as the order does not prohibit Defendants' Counsel from discussing and showing those documents to their clients. Furthermore, in order to protect the identity of the rank-and-file members of Plaintiffs' organizations, Defendants do not object to Plaintiffs redacting the names of members who are not Party officers or publicly known leaders. Defendants also seek an order directing Plaintiffs to produce a privilege log for all documents withheld or redacted based on any alleged privilege (e.g. attorney-client, work product, First Amendment, etc.).

II. LAW AND ARGUMENT

The scope of discovery is generally broad. Pursuant to Federal Rule of Civil Procedure 26, a party is generally entitled to discover any information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b). Furthermore, the scope of discovery is within the discretion of the Court. *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir.1998).

Discovery does not provide for the disclosure of privileged materials. Fed.R.Civ.P. 26(b). However, the "party objecting to discovery on the basis of any privilege has the burden of establishing the existence of that privilege." *Urseth v. City of Dayton*, 110 F.R.D. 245, 252 (S.D.

Ohio 1986); *see also Libertarion Party of Ohio v. Husted*, No. 2:23-cv-953, 2014 WL 3928293, *8 (S.D. Ohio Aug. 12, 2014) (noting that "the proponent of any privilege has the burden of making a record as to the facts pertinent to the Court's enforcement of that privilege"). Moreover, for any claim of privilege, the party must provide a privilege log. Fed.R.Civ.P. 26(b)(5)(A)(ii).

Without providing any evidence, Plaintiffs objected to Defendants' Requests for Production based on a First Amendment privilege. Plaintiffs' Objections; *see also Perry v, Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009) ("A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege*."). Accordingly, Plaintiffs bear the burden of proving that a First Amendment privilege applies to the withheld documents, which is a burden that they have not and cannot meet.

A. Plaintiffs Cannot Establish a First Amendment Privilege

The Supreme Court has held that "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association." *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). The Court further held that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *Id.* When faced with a constitutional challenge to disclosure, the courts have balanced the burdens imposed on the individuals and associations against the government interest in disclosure. *See id.* at 462-63; *Marshall v. Bramer*, 828 F.2d 355, 359 (1987); *see also Perry*, 591 F.3d at 1140; *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 176 (2003).

1. Plaintiffs have failed to show a burden to their First Amendment rights

The Sixth Circuit has noted that "[a] finding of a substantial chill on protected first amendment rights requires a *showing* that the statutory [disclosure] will result in threats, harassment, or reprisals to specific individuals." *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1220 (6th Cir. 1985) (quotation omitted) (emphasis added) (alteration in original). That the party claiming the privilege must put forth evidence of chill is supported by other courts. *See NAACP*, 357 U.S. at 462 (noting that petitioners made a showing of past reprisals); *Perry*, 591 F.3d at 1140, 1142 (requiring a prima facie showing of chill and discussing the evidence presented); *AFL-CIO*, 333 F.3d at 176 (noting that *demonstration* of retaliation requires balance of compelling state interest and detailing the evidence presented).

In *Humphreys*, the Sixth Circuit noted that, in the *NAACP* case, the party had made an "uncontroverted" showing of past "economic reprisal, loss of employment, threat of physical coercion and manifestations of public hostility." 755 F.2d at 1220. The Court then noted that, "[i]n *Buckley v. Valeo*, the seminal case on the constitutionality of compelled disclosures in the first amendment context, . . . the *Buckley* Court pointed out that 'no appellant in [that] case [had] tendered record evidence of the sort proffered in *NAACP*'" to reject the parties' argument that disclosures violated their First Amendment rights. *Id.* at 1220-21 (quoting *Buckley v. Valeo*, 424 U.S. 1, 71 (1976). Using this standard, the Sixth Circuit held that allegations of boycotts and harassment were mere speculation, and that disclosures would not "produce a 'deterrent effect' akin to that present in *NAACP*." *Id.* at 1221. The Court concluded that the disclosures did not substantially burden First Amendment rights. *Id.*

Moreover, the Sixth Circuit has held that a difference exists between private disclosures made for litigation versus public disclosures. *Marshall*, 828 F.3d at 360. In *Marshall*, the court had ordered a deponent to turn over a list of members in the KKK with the understanding that a

protective order would prevent the parties from disclosing the list or from using any of the names on the list on public court documents. *Id.* The deponent refused to disclose the list based on First Amendment grounds. *Id.* The Sixth Circuit held that the protective order made the likelihood of public disclosure minimal and that "the threat to first amendment rights [was] inconsequential." *Id.*; *see also Patterson v. Hearland Indus. Partners, LLP*, 225 F.R.D. 204, 206 (N.D. Ohio 2004) (noting that there was no First Amendment privilege when the identification of individuals would be redacted).

Here, Plaintiffs have not and cannot meet their burden. First, they have produced no evidence to support their First Amendment claim. The only submission has been their legal objections to Defendants' Requests for Production and their representation that they would not produce some documents *even with* their purposed attorney-eyes-only provision. Second, there is no evidence of threats, harassment, or reprisals, and such a claim would be specious. Third, Defendants agree to a protective order that would keep the alleged confidential information private and have even agreed that rank-and-file members can be redacted from the documents. As such, under the Sixth Circuit's holding in *Marshall*, the purported threat to First Amendment rights is unavailing. 828 F.3d at 360.

Despite this clear standard from the Sixth Circuit, Plaintiffs may assert that they need only show "other consequences which objectively suggest an impact on, or chilling of, the members' associational rights" rather than actual harassment or reprisals. *Perry*, 591 F.3d at 1140. However, this argument is unavailing. First, it is not the standard in the Sixth Circuit, and thus, should not be adopted by this Court. Second, this standard still requires the presentation of evidence, which Plaintiffs have not done. *Id.* Third, even if Plaintiffs produce evidence that members would be less willing to communicate if subject to disclosure, such

allegations are significantly less serious than those involved in cases such as *NAACP* and are easily counterbalanced by the Defendants compelling interests in the documents.

2. Defendants' compelling interests outweighs any burden on Plaintiffs' alleged rights

Even if Plaintiff could show a small burden on their First Amendment rights, Defendants' interest in disclosure of responsive documents would outweigh their burden. In this analysis, the courts look to determine whether the state has demonstrated an interest in obtaining the disclosures that "is sufficient to justify the deterrent effect" that the disclosures could have on the parties' associational rights. *NAACP*, 357 U.S. at 463. Courts have reviewed a number of factors in balancing these interests including (1) relevance; (2) the necessity of receiving the information sought; (3) the availability of the information from other sources; and (4) the nature of the information. *Tree of Life Christian Schs. v. City of Upper Arlington*, No. 2:11-cv-00009, 2012 WL 831918, *3 (S.D. Ohio Mar. 12, 2012). The party seeking discovery should show that the information is highly relevant to the claims or defenses in the litigation. *Perry*, 591 F.3d at 1161.

For example, in *Perry*, the Court noted that the information sought by the plaintiffs could be obtained from other sources without "intruding on protected activities." *Id.* at 1144. Because it was available elsewhere, plaintiffs did not show sufficient need for the information. *Id.* at 1145. However, the Court specifically noted that it was not foreclosing the possibility that some internal campaign communications could be discoverable. *Id.* at 1145 n.13. Rather, the court was not presented with a request that sought "highly relevant information that [was] unavailable from other sources." *Id.*

Here, all of Defendants' requests are both highly relevant and unobtainable from other sources. Defendants seek information regarding the *Plaintiffs*' activities as they relate to the

challenged provisions. This includes resources diverted because of the challenged provisions, get-out-the-vote plans and activities based on the challenged provisions, timing of joining the lawsuit, and communications with other Democratic Party chapters. None of this information would be available from another source. The information is in the sole hands of the Plaintiffs, and Defendants cannot obtain the information in another manner.

Furthermore, the information is highly relevant to the claims and defenses in this case, including standing. Plaintiffs have alleged that their rights and voting activities have been burdened, they had to divert resources, and that turnout of Democratic voters has been disproportionately reduced. Am. Compl. ¶¶ 23, 26, 29. Standing is a "threshold question in every federal case" and "determin[es] the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Notably, Plaintiffs claim not only organizational standing but also appear to seek standing to represent demographic groups (African-Americans, Latinos, and college students). As a threshold issue that determines whether this Court has the power to consider this case, information that goes to Plaintiffs' allegations of standing are highly relevant.

The information Defendants seek is also highly relevant to the merits of this case. Request 8 (money and resources expended), Requests 9-11, 21 (get-out-the-vote activities), Request 14 (financial information), Request 15 (programs and plans *related to* the challenged provisions) are all relevant to the actual significance of the minor changes in the law. If the changes actually had such a profound effect, one would expect to see line items and activities for training, education, and awareness related to the challenged laws. If Democratic voters were actually denied their voting right, one would expect to see significant changes in business practices and a flood of e-mails and communications.

Request 12 (information related to decision to become plaintiffs) and Request 37 (timing of filing) all relate to the timing of this lawsuit and the joining of the organizational plaintiffs. The challenged provisions were passed in early 2014. None of the organizational plaintiffs participated in the early *NAACP* litigation and did not join this case until the OOC asked to withdraw. As before, if these provisions had such an important impact, why wait until 2015 to file the case. These provisions were in effect for a gubernatorial election. If the provisions actually created a vote denial, would not it have been important to correct the issue as soon as possible. Furthermore, the information can aid the Defendants in a possible laches argument.

Requests 19-20 (communications with county chapters), Request 22 (communication related to the challenged provisions), and Request 23 (communications with officers related to the challenged provisions) are also highly relevant. If other Democratic entities disagree with this lawsuit and refused to join, that is relevant and goes to the legitimacy of Plaintiffs' claims. Furthermore, if the challenged provisions caused Democrats to be denied the right to vote, one would expect to see numerous communications among the county chapters and officers detailing instructions and information about the "significant" changes, as well as more than just two of eighty-eight Democratic county chapters in this litigation.

As to Request 13, Defendants could find no case that protected disclosure of the identity of officers and publicly known leaders. As noted above, Defendants do not object to Plaintiffs redacting the names of all other members or of leaders who are not publicly known. This is in step with the cases on the First Amendment privilege and does not seem objectionable.

Because Defendants cannot obtain the information from another source and have demonstrated that the information is highly relevant to this case, their interest outweighs any burden on Plaintiffs' First Amendment rights, particularly with the protective order described

above. Accordingly, Defendants respectfully ask this Court compel production of document responsive to Defendants' Requests.

B. The Federal Rules of Civil Procedure Require Plaintiffs to Produce a Privilege Log

The Federal Rules of Civil Procedure require a party to "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed.R.Civ.P. 26(b)(5)(A)(ii). Plaintiffs' claim that a privilege log would violate their First Amendment rights is unsupported. In *Perry*, the Ninth Circuit specifically held that "some form of a privilege log is required and [they] reject[ed] Proponents' contention that producing any privilege log would impose an unconstitutional burden." 591 F.3d at 1133 n.1. Therefore, Defendants ask that this Court order Plaintiffs to produce a log.

III. CONCLUSION

For the above-stated reasons, Defendants respectfully request an order compelling Plaintiffs to produce all documents responsive to Requests for Production Numbers 8-15, 19, 20, 22, 23, and 37 and a privilege log for all withheld documents. Defendants also seek permission to conduct the 30(b)(6) deposition after the Court has ruled on this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on November 6, 2015, and served upon all parties of record via the court's electronic filing system.

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