UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DAN MCCONCHIE, in his official capacity as Minority Leader of the Illinois Senate and individually as a registered voter, JIM DURKIN, in his official capacity as Minority Leader of the Illinois House of Representatives and individually as a registered voter, the REPUBLICAN CAUCUS OF THE ILLINOIS SENATE, the REPUBLICAN CAUCUS OF THE ILLINOIS HOUSE OF REPRESENTATIVES, and the ILLINOIS REPUBLICAN PARTY,

Plaintiffs,

v.

CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM M. MCGUFFAGE, WILLIAM J. CADIGAN, KATHERINE S. O'BRIEN, LAURA K. DONAHUE, CASANDRA B. WATSON, and WILLIAM R. HAINE, in their official capacities as members of the Illinois State Board of Elections, EMANUEL CHRISTOPHER WELCH, in his official capacity as Speaker of the Illinois House of Representatives, the OFFICE OF SPEAKER OF THE ILLINOIS HOUSE OF REPRESENTATIVES, DON HARMON, in his official capacity as President of the Illinois Senate, and the OFFICE OF THE PRESIDENT OF THE ILLINOIS SENATE,

Defendants.

No. 21-CV-3091

Three-Judge Court Pursuant to 28 U.S.C. § 2284(a)

Circuit Judge Michael B. Brennan
Chief District Judge Jon E. DeGuilio
District Judge Robert M. Dow, Jr.

Magistrate Judge Beth W. Jantz

ORDER

For the reasons discussed below, Plaintiffs' Motion to Compel Leadership Defendants to Respond to Discovery Requests [54] is granted in part and denied in part. Due to the expedited schedule in this case, the Leadership Defendants' supplemental responses and production, either as ordered by the Court (already provided to the parties by way of oral rulings in open court on August 18, 2021) or as previously promised by the Leadership Defendants as indicated below, are due by August 20, 2021, including any corresponding privilege log.

STATEMENT

Background

This case involves a challenge to the constitutionality of the apportionment of the state legislative districts set out in the 2021 redistricting plan passed by the Illinois General Assembly on May 28, 2021, and signed into law by the Governor of Illinois shortly thereafter (hereinafter, "the Redistricting Plan" or "the Plan"). [Dkt. 51, First Am. Compl.] Plaintiffs are Dan McConchie, in his official capacity as Minority Leader of the Illinois Senate and individually as a registered voter, Jim Durkin, in his official capacity as Minority Leader of the Illinois House of Representatives and individually as a registered voter, the Republican Caucus of the Illinois Senate, the Republican Caucus of the Illinois House of Representatives, and the Illinois Republican Party. Defendants are Emanuel Christopher Welch, in his official capacity as Speaker of the Illinois House of Representatives, the Office of Speaker of the Illinois House of Representatives, Don Harmon, in his official capacity as President of the Illinois Senate, and the Office of the President of the Illinois Senate (collectively, the "Leadership Defendants"), and the individual members of the Illinois State Board of Elections, in their official capacities.

According to Plaintiffs, the Redistricting Plan violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and should be declared void *ab initio*. [First Am. Compl.] Specifically, Plaintiffs allege that because the Illinois General Assembly crafted the Redistricting Plan using the American Community Survey's ("ACS") 2015-2019 estimates for population data instead of the official population counts from the 2020 decennial census, the Plan does not contain Senate and Representative Districts of substantially equal populations. [*Id.* ¶¶ 6, 7.] Given numerous itemized deficiencies in the ACS estimates, Plaintiffs allege, not only does the Redistricting Plan fail to contain substantially equal legislative districts, but "any redistricting plan based on ACS estimates *cannot* create substantially equal legislative districts." [*Id.* ¶¶ 7, 97 (emphasis in original).] Accordingly, Plaintiffs allege, the Redistricting Plan violates the principle of "one person, one vote" embodied in the Fourteenth Amendment's Equal Protection Clause. [*Id.* ¶¶ 9, 103.] Additionally, Plaintiffs allege, the Redistricting Plan violates the Equal Protection Clause because: first, the "use of ACS estimates" is arbitrary in that the General Assembly did not establish any substantive legislative record to support it; and second, the "use of ACS estimates" is discriminatory in that it results in differential undercounts that have a greater effect on minority voters. [*Id.* ¶¶ 9-11, 71-82.] "Regardless" of any attempt by the Illinois General Assembly to mitigate problems associated with the use of ACS estimates by supplementing with unspecified election data, Plaintiffs continue, because such data similarly suffers from alleged deficiencies, it

"only exacerbates the many problems inherent in the Plan[.]" [*Id.* ¶¶ 12, 83-84.] Plaintiffs conclude, therefore, that *because* the legislative districts in the Plan were drawn using ACS estimates and unspecified election data, "the districts cannot and do not satisfy the constitutional requirement of substantial population equality." [*Id.* ¶ 13.] Plaintiffs seek among other things a declaration that the Redistricting Plan is unconstitutional, a permanent injunction enjoining its enforcement, and prospective equitable relief including the appointment of a bipartisan commission to enact a new redistricting plan pursuant to the procedures set out in the Illinois Constitution. [*Id.* at Prayer for Relief.]

Because the case challenges the apportionment of a statewide legislative body, a three-judge trial court was appointed pursuant to 28 U.S.C. § 2284(a) and N.D. Ill. Local Rule 9.1. [Dkt. 33, June 28, 2021 Order.] Shortly thereafter, an expedited schedule was set to get this case, and a related one also challenging the constitutionality of the Redistricting Plan, *Contreras v. Illinois State Board of Elections, et al.*, N.D. Ill. Case No. 21-cv-3139, ready for a late September 2021 trial. [Dkt. 34, July 1, 2021 Minute Entry, dkt. 37, July 6, 2021 Minute Entry, dkt. 41, July 14, 2021 Minute Entry.] Consistent with this schedule, Plaintiffs served a set of interrogatories and production requests on July 12, 2021, and the Leadership Defendants responded on July 23, 2021. [Dkt. 55, Pls.' Mem. at 2 and Exs. A, B.] The parties conducted a teleconference on July 29, 2021, regarding the sufficiency of discovery responses, both in this case, and the related one. [*Id.*] That afternoon, Plaintiffs identified their highest priority requests, which the Leadership Defendants agreed to consider by August 2, 2021. [*Id.* at 3 and Ex. C.; Dkt. 70, Defs.' Resp. at 6.]

Plaintiffs moved to compel on August 4, 2021, asserting that the promised response had not been made and they therefore required the Court's assistance given the expedited schedule in the case.[1] [Pls.' Mem. at 2 and Exs. A, B.] According to the Leadership Defendants, however, they were already preparing their responsive letter advising of their agreement to supplement when Plaintiffs moved to compel, which letter they nevertheless transmitted the same day Plaintiffs filed. [Defs.' Resp. at 3, 6 and Ex. 2.] As in *Contreras*, therefore, the Leadership Defendants argue that the motion should be denied at the outset for failure to adequately meet and confer as required by N.D. Ill. Local Rule 37.2. [*Id*. at 7.] For this same reason, the Leadership Defendants say, many of the issues raised in the motion are moot now anyway because they have agreed to supplement all but one of their responses to the requests that Plaintiffs had previously identified as priority. [*Id.* at 7-9.] In reply, Plaintiffs reject both assertions and insist that responses should be compelled as to the entirety of their requests. [Dkt. 71, Pls.' Reply at 3.]

This Court enforces the requirement of N.D. Ill. Local Rule 37.2 that parties meet and confer in efforts to reach an accord on discovery disagreements, and the record here demonstrates why that requirement is so important in crystallizing and minimizing the disputes requiring the Court's attention and resources. The parties' submissions demonstrate to the Court that their conferral was ongoing when Plaintiffs brought their discovery dispute to the Court. Nevertheless, given the necessarily extremely expedited schedule in this case, the fact that the Leadership

[1] Because the two cases are being litigated on the same schedule, and Plaintiffs in each moved to compel similar discovery, the Court held a combined hearing in both cases on August 18, 2021, during which oral rulings were made. Nevertheless, the Court considered the motions separately, with specific reference to the unique claims and defenses in each case. *See* Fed. R. Civ. P. 26(b)(1).

Defendants have responded to the motion's entirety, and that no prejudice to the Leadership Defendants arises from its consideration, the Court declines to rule based on its otherwise premature presentation. Instead, the Court turns to its substance.

General Principles

A party may file a motion to compel under Federal Rule of Civil Procedure 37 whenever another party fails to respond to a discovery request or when its response is insufficient. FED. R. CIV. P. 37(a). In ruling on a motion to compel, the discovery standard set forth in Rule 26(b) applies. Rule 26(b)(1) provides, "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." FED. R. CIV. P. 26(b)(1). "While the federal discovery rules have an expansive reach, they are not without limits, and relevancy is perhaps the most important of those constraints." *BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc*., No. 15 C 10340, 2018 WL 946396, at *4 (N.D. Ill. Feb. 20, 2018) (internal citations omitted).

The party requesting discovery bears the initial burden of establishing its relevancy and proportionality to the needs of the case. *See, e.g.*, *Sols. Team v. Oak St. Health, Mso, LLC*, No. 17 CV 1879, 2021 WL 3022324, at *3 (N.D. Ill. July 16, 2021); *Eternity Mart, Inc. v. Nature's Sources, LLC*, No. 19-CV-02436, 2019 WL 6052366, at *2 (N.D. Ill. Nov. 15, 2019). "If the discovery appears relevant, the party objecting to the discovery request bears the burden of showing why that request is improper." *Eternity Mart*, 2019 WL 6052366, at *2 (quoting *Trading Technologies Intern., Inc. v. eSpeed, Inc.*, No. 04 C 5312, 2005 WL 1300778, at *1 (N.D. Ill. Apr. 28, 2005)); *Doe v. Loyola Univ. of Chi.*, No. 18 CV 7335, 2020 WL 406771, *2 (N.D. Ill. Jan. 24, 2020). The resolution of discovery disputes is committed to the court's broad discretion. *Fields v. City of Chicago*, 981 F.3d 534, 550-51 (7th Cir. 2020); *Thermal Design, Inc. v. Am. Soc'y of Heating, Refrigerating & Air-Conditioning Eng'rs, Inc.*, 755 F.3d 832, 837 (7th Cir. 2014). The court "may grant or deny the motion in whole or in part, and . . . may fashion a ruling appropriate for the circumstances of the case." *Gile v. United Airlines, Inc*., 95 F.3d 492, 495-96 (7th Cir. 1996). In ruling on a motion to compel, the court should "independently determine the proper course of discovery based upon the arguments of the parties." *Id.*; *accord Beijing Choice Elec. Tech. Co. v. Contec Med. Sys. USA Inc*., No. 18 C 0825, 2020 WL 1701861, at *3 (N.D. Ill. Apr. 8, 2020).

Plaintiffs' Discovery Requests

Notwithstanding Plaintiffs' earlier identification of priority requests and the Leadership Defendants' agreement to supplement their responses to almost all of them, Plaintiffs move to compel responses to the entirety of their discovery requests. [Dkt. 54, Pls.' Mot.; Pls.' Reply at 3.] According to Plaintiffs, each of their requests directly relate to claims and defenses at issue in the case, "including how the map in the Redistricting Plan was drawn, what data was used to draw the map, and whether the map results in districts of substantially equal population." [Pls.' Mem. at 5.] The Leadership Defendants oppose that assertion, however, and say that discovery into the

process of enacting the Plan and data used to draw the map is irrelevant and disproportional to the needs of the case because Plaintiffs make no claim "about *how* the ACS data was used in creating the Redistricting Plan." [Defs.' Resp. at 1.] As the Leadership Defendants see it, Plaintiffs' complaint presents the purely legal question of whether the Illinois General Assembly is required under the Fourteenth Amendment to use official census data in creating a redistricting plan, and the purely mathematical question of whether the challenged Redistricting Plan results in malapportioned districts when compared to the 2020 decennial census data. [*Id*.] In reply, Plaintiffs urge a significantly broader framing of their claims, asserting that they allege not only that the Redistricting map is malapportioned, "but also that the data and processes used to draw the map were arbitrary and discriminatory, such that the map would be unconstitutional regardless of the maximum population deviation." [*See* Pls.' Reply at 7.]

A review of the operative complaint makes clear that although it raises issues beyond the two that the Leadership Defendants identify, it is not nearly as broad as Plaintiffs say either. Notably, Plaintiffs do not allege in their complaint that the redistricting *process* was arbitrary and/or discriminatory. Rather, Plaintiffs allege that "*the choice to use ACS estimates* as the base population data is both arbitrary and discriminatory." [First Am. Compl. ¶ 99 (emphasis added).] Specifically, Plaintiffs allege that the "use of ACS estimates as the base population data is arbitrary . . . . [because the Illinois] General Assembly did not establish any substantive legislative record" to support it, "provide[] any explanation for why" they determined that the ACS estimates were "the best available population data," or explain "why [they] chose to pass a map using those ACS estimates" rather than wait for the (now-released) decennial census data.[2] [*Id*. ¶ 10, 75; *accord id.* ¶¶ 71-74, 76-77, 100]. Similarly, Plaintiff allege that the "use of ACS estimates for population data is also discriminatory . . . . [because it] results in overestimation of some sub-populations and geographic areas and the underestimation of others[,]" which undercounts have a greater effect on minority voters. [*Id.* ¶11; *accord id.* ¶¶ 77-82, 99-103).]

On Plaintiffs' allegations, the most that can be said about a broader reading of Plaintiffs' claims is that Plaintiffs challenge the choice to use ACS estimates, a choice that Plaintiffs allege was arbitrary and discriminatory. In other words, Plaintiffs have not challenged *how* the ACS data was used in creating the Redistricting Plan, rather, they have challenged *why* it was used in the first place. It is Plaintiffs' burden to establish the relevance of their discovery requests at the outset, and without any claim beyond an impermissible and/or unsupported choice to use of ACS data, Plaintiffs have not sufficiently established the arguable relevance of discovery aimed at broadly exploring "the process" by which the Redistricting Plan was created. *See Sols. Team*, 2021 WL 3022324, at *3; *Eternity Mart*, 2019 WL 6052366, at *2. While relevance is construed broadly under the Federal Rules, discovery is not without necessary limits. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978). The scope of relevant discovery must be framed by the claims and defenses in this case, not the claims or defenses that might otherwise be made. *See* FED. R. CIV. P. 26(b)(1).

Moreover, relevance alone is not the only question. The Court must also consider proportionality to the needs of the case. *See* FED. R. CIV. P. 26(b)(1). The 2015 amendments to

[2] Decennial census data was subsequently released days ago, on August 12, 2021. [*See* Defs.' Resp. at 1; Pls.' Reply at 2.]

Rule 26 emphasize, "[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." *Id.* at Advisory Committee's Notes to 2015 Amendments. "Proportionality, like other concepts, requires a common sense and experiential assessment." *Generation Brands, LLC v. Decor Selections*, *LLC*, No. 19 C 6185, 2020 WL 6118558, at *4 (N.D. Ill. Oct. 16, 2020) (citing *BankDirect Capital Fin.*, 326 F.R.D. at 175 ("Chief Justice Roberts' 2015 Year-End Report on the Federal Judiciary indicates that the addition of proportionality to Rule 26(b) 'crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.'")).

While the issues at stake in this action—voting and representational rights of Illinois voters—are plainly of fundamental importance, this factor alone does not justify discovery that strays far afield from the complained of violation of those rights. In addition to the complaint's narrow focus on the constitutionality of the choice and use of ACS data, another factor suggesting a circumscribed and proportional approach to the scope of discovery at this juncture is the extremely expedited schedule required to get this case to resolution within the time necessary to potentially implement the relief that Plaintiffs seek, if granted. Further, in light of the August 12, 2021, release of decennial census data, and its hefty significance to the parties' dispute, even if discovery into the process whereby the Plan was created were relevant, it would only be marginally so at this juncture. Plaintiffs' recent exchanges with the three-judge District Court about the relevance of process revealed a similar assessment.[3] [*See* Defs.' Mem. at Ex. 1, July 14, 2021 Hrg. Trans. at p.11:09-12 (J. Dow: "How much does the process matter to [your claims]? If the numbers are what the numbers are, isn't that going to be more important than what the process was at getting at the numbers?" Mr. Harris: "Well, absolutely."); *id*. at pp.15-16 (J. Dow: "maybe Judge DeGuilio's question may be 'Isn't this simpler than you're making it sound?'" Mr. Harris: "You know, maybe it is. We expect that it will be once the [census] numbers come out.")] To the extent that discovery into the process beyond the choice to use ACS estimates could arguably be relevant at this juncture then, such discovery is disproportionate to the needs of the case. *See Motorola Sols., Inc. v. Hytera Commc'ns Corp*., 365 F. Supp. 3d 916, 926 (N.D. Ill. 2019) (collecting cases denying marginally relevant discovery on relevance and proportionality grounds).

With these factors in mind, the Court provides the following rulings:

Interrog. No. 1: This interrogatory seeks the identification of persons answering the interrogatories, or those who were consulted or otherwise provided information in answering the interrogatories. The Leadership Defendants objected based on relevance, privilege, and work product protection. This Court agrees with Defendants that to the extent that this interrogatory seeks the identification of who among the Leadership Defendants' counsel worked on the discovery responses, such facts are irrelevant and protected from disclosure. The identification of persons consulted for or providing information in discovery, however, is routinely asked and allowed, and the motion is granted in this respect. *See, e.g., Belcastro v. United Airlines, Inc.*, No.

[3] Although Plaintiffs amended their complaint after this hearing took place, their amended complaint did not change the nature of their claims as relevant to this motion. [*Compare* dkt. 1, Compl. *with* First. Am. Compl.]

17 C 1682, 2019 WL 1651709, at *6 (N.D. Ill. Apr. 17, 2019), *objections overruled*, No. 17-CV-01682, 2020 WL 1248343 (N.D. Ill. Mar. 15, 2020). Accordingly, the motion is granted in part and denied in part as to this interrogatory.

Interrog. No. 2: This interrogatory seeks identification of persons with knowledge as to the allegations of the complaint "or any analysis of data for the Map," a description of their knowledge, identification of whether they might be called to testify at trial, and a description of the subject matter of their testimony. The Leadership Defendants objected to its compound nature and based on breadth, burden, relevance, and privilege. Given that Plaintiffs propounded well less than the maximum number of interrogatories, the compound nature of this interrogatory is no basis not to respond. Although this Court agrees that an identification and description of witnesses for trial is premature and arguably invades discovery protection, the Leadership Defendants must respond to the portion of the interrogatory that seeks an identification of persons with knowledge as to the allegations in the complaint. Given the Court's discussion above regarding the proper scope of relevant and proportional discovery, however, the Leadership Defendants need not respond with respect to "any analysis of data for the Map." Accordingly, the motion is granted in part and denied in part as to this interrogatory.

Interrog. No. 3; Production Request Nos. 35 and 37: These requests seek information about individuals involved in development of the map and documents identified in response to interrogatories or that the Leadership Defendants will otherwise use in defense of the case. Over their initial objections, the Leadership Defendants identified in their August 4 letter the documents they contend are responsive to Request Nos. 35 and 37. Plaintiffs' only challenge on reply is that the Leadership Defendants have not confirmed that they have produced all documents identified in the answers to interrogatories. (Pls.' Reply at 14.) The Leadership Defendants' obligations under the Federal Rules of Civil Procedure, including Rules 11, 26(e) and 26(g), provide Plaintiffs that assurance. Accordingly, the motion is denied as moot as to what the Leadership Defendants previously identified, and denied as to the remainder.

Interrog. Nos. 4, 5, 8, 12, 13, 15, 16, and 18; Production Request Nos. 3, 5, 6, 7, 12, 13, 16-26, 29, 34: These requests seek documents and information regarding the disaggregation process, and the data underlying the disaggregation process and/or drawing of the map. Over their initial objections, the Leadership Defendants agreed to provide the disaggregated ACS five-year data for 2015-19, voter registration data from the Illinois Board of Elections used in the disaggregation process, and the 2020 Census Bureau geography data. Plaintiffs urge on reply that the Leadership Defendants should identify whether and how any additional data was used in drawing the map. Consistent with the Court's discussion above, given that Plaintiffs' complaint is based on the claim that the Redistricting Plan is malapportioned because it uses ACS estimates instead of decennial census data, and the claim that the choice to use ACS estimates rather than decennial census data was arbitrary and discriminatory, Plaintiffs have not sufficiently explained the arguable relevance of discovery regarding the disaggregation process, or whether and how any additional data sources were used in crafting the Redistricting Plan. Accordingly, the motion is denied as moot to the extent that the Leadership Defendants have agreed to provide certain responsive information, and denied as to the remainder.

Interrogatory Nos. 6, 7, and 11: These interrogatories ask about the individuals or entities involved in disaggregating the data or drawing the map. The Leadership Defendants objected to each, but nevertheless provided responses. Plaintiffs complained, however, that the Leadership Defendants' use of the word "generally" in their responses rendered their answers vague and ambiguous, and this Court previously agreed. [*See* dkt. 63, Aug. 11, 2021 Order.] The Leadership Defendants explain in their opposition to the motion that they will amend their responses to provide specificity, and they describe both their anticipated responses and their continued objections. [Defs.' Resp. at 15.] Plaintiffs do not sufficiently explain in reply how these supplements are insufficient. Accordingly, Plaintiffs' motion is denied as moot as to these requests.

Interrog. Nos. 9, 10, and 14; Production Request Nos. 4, 11, and 15: These requests seek documents and information regarding the choice of ACS data as an appropriate data source in drawing the map. The Leadership Defendants objected on the basis of breadth, burden, relevance, ambiguity, and privilege or other protection from discovery. In accordance with the Court's discussion above, and given that Plaintiffs expressly challenge the Illinois General Assembly's choice to use ACS estimates as both arbitrary and discriminatory, the requests are relevant to the claims and defenses in the case. The Leadership Defendants have not sufficiently explained why their other objections prevent responding, an issue as to which they have the burden. *See Eternity Mart*, 2019 WL 6052366, at *2. Accordingly, Plaintiffs' motion is granted as to these requests.

Interrog. No. 17; Production Request No. 10: These requests seek documents and information regarding the software and computer code that was used in the disaggregation process and the drawing/analysis of the map, and the identities of those involved in writing the code. Over their initial objections, the Leadership Defendants identified on August 4, 2021, the software that was used but provided no other information. Plaintiffs' assertion in reply is conclusory, only that these requests are "not moot." [*See* Pls.' Reply at 12.] Consistent with the Court's discussion above, given that Plaintiffs' complaint is based on the claim that the Redistricting Plan is malapportioned because it uses ACS estimates instead of decennial census data, and the claim that the choice to use ACS estimates rather than decennial census data was arbitrary and discriminatory, Plaintiffs have not sufficiently explained the arguable relevance of discovery regarding the individuals or code involved in the disaggregation process or drawing of the map, i.e., the process and mechanics of its drawing. Accordingly, the motion is denied as moot to the extent that the Leadership Defendants have already provided responsive information, and denied as to the remainder.

Interrog. Nos. 19-21; Production Request Nos. 28, and 30-33: These requests seek documents and information regarding population counts and the demographic characteristics in each block of the map. Over their initial objections, the Leadership Defendants identified the disaggregated ACS 2015-2019 five-year data as responsive to Interrog. No. 21 and Request Nos. 28, 32, and 33. Plaintiffs acknowledge the supplementation on reply but urge that the Leadership Defendants have still not produced any information about "how those estimates fit within each of the districts in the map." [Pls.' Reply at 12.] In accordance with the Court's discussion above, given that Plaintiffs' complaint is based on the claim that the Redistricting Plan is malapportioned because it measures total population using ACS estimates instead of decennial census data, and the claim that the choice to use ACS estimates rather than decennial census data was arbitrary and discriminatory, Plaintiffs have not sufficiently explained the arguable relevance of granular "block" discovery or the like, beyond what already has been provided. Accordingly, the motion is denied as moot to

the extent that the Leadership Defendants have already provided responsive information, and denied as to the remainder.

Production Request No. 1: This request calls for all documents related to the review, analysis, critique or assessment of the map. The Leadership Defendants objected on the basis of breadth, burden, relevance, and privilege or other discovery protection. Plaintiffs make no specific argument challenging their assertions. Accordingly, the motion is denied as to this request.

Production Request Nos. 2 and 36: These requests seek documents regarding advice or communications with experts or non-profit or better government groups regarding the map or the redistricting process. The Leadership Defendants objected based on breadth, burden, relevance, and privilege or other discovery protection, and Plaintiffs made no specific argument challenging their assertions. In any case, such requests are not proportional to the needs of this case, as explained above. Accordingly, the motion is denied as to these requests.

Production Request No. 8: The Leadership Defendants responded to this request without objection that they would produce responsive materials, and Plaintiffs make no specific argument about it. Accordingly, the motion is denied as to this request.

Production Request No. 9: This request calls for the block assignment files for the map. The Leadership Defendants lodged no specific objection to the request, instead promising to produce responsive materials in their possession, custody, or control. Plaintiffs assert that the Leadership Defendants nevertheless produced a file that indicates only the assignment of block groups, and not blocks. In opposing the motion, the Leadership Defendants both rely on their general objection as to relevance and assert that although their software does not generate the information Plaintiffs seek, they have produced other materials that would permit Plaintiffs to identify the Census Blocks in each district. [Defs.' Resp. at 13-14.] They add that they expect to update their software "in the near future and will agree to produce" the requested details, if possible with the new version. [*See id.* at 14 n.4.] In reply, Plaintiffs dispute the Leadership Defendants' claimed inability, highlighting statements of the person who did the data work regarding the software's capabilities, albeit simultaneously acknowledging that those statements were made in the context of another state's redistricting matter. [*See* Pls.' Reply at 12-13.]

At the threshold, the assertion of general objections do not protect the Leadership Defendants from providing a response. *See* FED. R. CIV. P. 34(b)(2)(B); *BankDirect Capital Fin.*, 2017 WL 5890923, at *2 (general objections are "tantamount to not making any objection at all."). That said, however, the Court cannot compel a party to produce that which it does not have. To the extent that the Leadership Defendants are able to produce the requested block files, they must do so by August 20, 2021; if they later become able to supplement through a software update, they must do so expeditiously. Pursuant to Rules 26(g) and 37, the Leadership Defendants' signed discovery responses will provide Plaintiffs the assurances they need. Accordingly, the motion is granted as to this request.

Production Request Nos. 14 and 27: These requests seek documents reflecting analysis and accuracy related to the use of ACS estimates in the drawing of the map. On August 4, 2021, the Leadership Defendants agreed to produce: the text of House Bill 2777, which contains the

Redistricting Plan; the related resolutions; witness testimony and transcripts from hearings on the creation and passage of the Redistricting Plan; and emails from witnesses who testified at those hearings. Plaintiffs acknowledge the promised supplementation on reply and assert only that if the Leadership Defendants are withholding responsive material on an asserted privilege or other discovery protection, they should provide a log in order to enable Plaintiffs to assess the assertion. [Pls.' Reply at 12.] Accordingly, the motion is denied as moot as to these requests based on the promised supplementation. If the Leadership Defendants withhold any of the promised supplementation on the basis of privilege or other protection, they must provide a privilege log, as they have already agreed to do. [*See* Defs.' Resp. at 13].

Privilege Log

Finally, Plaintiffs argue that the Leadership Defendants have failed to comply with Rule 26(b)(5)(A) because although they asserted protections from discovery in response to most of Plaintiffs' requests, they have not yet produced a privilege log. [Pls.' Mem. at 7-8.] According to the Leadership Defendants, however, Plaintiffs' request is premature in advance of an agreement or determination of the scope of relevant discovery. [Defs.' Resp. at 12.] They add that this is especially so given that Plaintiffs also have not yet produced a privilege log to support their own asserted protections from discovery. [*See id.* at 13 and Ex. 3.] Finally, the Leadership Defendants say that Plaintiffs' motion is unnecessary because they intend to provide a privilege log once the contours of discovery have been determined. [*Id.* at 13.] Plaintiffs nevertheless argue on reply that a log should be compelled now so that they may assess whether withheld materials are actually privileged. [Pls.' Reply at 13-15.]

Given the Leadership Defendants' commitment to produce a log as is required under Rule 26(b)(5)(A), Plaintiffs' motion is denied as moot on this issue. This order resolves the parties' dispute as to the scope of discovery and thus provides the Leadership Defendants with the information necessary to determine whether responsive materials will be withheld from discovery, and if so, to prepare a corresponding privilege log. Accordingly, the Leadership Defendants are given until August 20, 2021, to do so, given the expedited discovery schedule in this case. To the extent that the parties dispute the adequacy of such a log or the propriety of asserted privileges, this Court expects that the parties will exhaust their efforts to meet and confer in good faith (by telephone or video, rather than just email) before filing any subsequent motion, particularly given that time is of the essence in resolving the remainder of this litigation.

CONCLUSION

For these reasons, Plaintiffs' Motion to Compel Leadership Defendants to Respond to Discovery Requests [54] is granted in part and denied in part as specifically set out herein. Due to the expedited schedule in this case, the Leadership Defendants' supplemental responses and production, both offered by the Leadership Defendants and ordered by the Court as specified above (and already provided to the parties by way of oral rulings on August 18, 2021), are due by August 20, 2021, including any corresponding privilege log. To the extent that the Leadership Defendants have already provided supplementation by letter or in filings with the Court, they are directed to incorporate such supplements into formal supplemental discovery responses.

Dated: 8/21/21

BETH W. JANTZ
United States Magistrate Judge