

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, et al.,

Plaintiffs,

v.

KYLE ARDOIN, in his official capacity as the
Acting Secretary of State of Louisiana,

Defendant.

Case No. 18-625-SDD-EWD

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
DISCOVERY**

Plaintiffs respectfully request that the Court compel production of the statewide Louisiana voter file, which contains information relevant to Plaintiffs' claims in this action. The Court should grant Plaintiffs' Motion to Compel because the voter file is directly relevant to Plaintiffs' claims, the voter file is in Defendant's possession, custody, or control, and Defendant's objections regarding burden and expense are unfounded.

The voter file is fundamentally relevant to Plaintiffs' claims regarding Section 2 of the Voting Rights Act. As Defendant knows, the data contained in the voter file, which includes voters' parish, precinct, race, political party, voting history, and more, is commonly used in cases like this to analyze racial voting patterns. In addition, Defendant's claims regarding burden and expense are baseless; the statewide voter file Plaintiffs seek is publicly available for purchase from Defendant. There is an entire system in place to provide public access to the voter file, complete with a detailed video on how to order the requested data, rendering Defendant's objections disingenuous.

Finally, Defendant's objection that he does not retain complete voter files for past elections does not provide any basis for Defendant to refuse to produce the current voter file, which is responsive to Plaintiffs' request and not subject to any legitimate objection.

Because the Louisiana voter file is fundamentally relevant to Plaintiffs' claims and none of Defendant's objections have merit, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Compel and order Defendant to immediately produce the complete current Louisiana voter file in excel or CSV format. Plaintiffs also request that the Court award Plaintiffs reasonable expenses and attorneys' fees in making this motion.

FACTUAL BACKGROUND

Plaintiffs brought this action on June 13, 2018, to vindicate their voting rights and ensure the voting power of African Americans in Louisiana is no longer diluted under Louisiana's congressional district map, which violates Section 2 of the Voting Rights Act. Plaintiffs seek, *inter alia*, an order that (1) declares that Louisiana Revised Statute § 18:1276.1 (hereinafter the "2011 Congressional Plan") violates Section 2 of the VRA, and (2) orders a new congressional map to be drawn that includes two majority-minority congressional districts. ECF No. 19 at ¶ 11.

In January, Plaintiffs requested "[a] complete version of the Louisiana voter file that includes the complete voter history for each voter from 2008 to the present."¹ Ex. 1 at 7 (Plaintiffs' First Set of Requests for Production, RFP No. 2). At the end of July, Defendant objected on the grounds that "th[e] request is way too broad calling for document production that carries a burden

¹ On September 13, 2019, Defendant's counsel represented that Defendant does not possess prior versions of the voter file. Taking Defendant at his word for purposes of this motion to compel, Plaintiffs seek to compel production of only the current voter file, which as explained above falls squarely within Plaintiffs' document request. To the extent Defendant does in fact have in his possession, custody, or control previous or older versions of the voter file that also are responsive to Plaintiffs' request, Plaintiffs do not waive their right to obtain those as well, and Defendant is obligated to produce them.

and expense beyond reason or need.” Ex. 2 at 5 (Defendant’s Responses to Plaintiffs’ First Set of Requests for Production).

Plaintiffs’ full request (Ex. 1 at 7) reads:

A complete version of the Louisiana voter file that includes the complete voter history for each voter from 2008 to present—including the November 2018 general election. The request includes, without limitation, the name, address, date of birth, gender, race, ethnicity, voter identification number, registration status, partisan affiliation, parish, voting precinct and districts, and district combo number for all persons who received a ballot in each election including (primary runoff and general runoff) for the U.S. House of Representatives, Louisiana House of Representatives, Louisiana Senate, and any statewide office from 2008 to present—including the November 2018 general election. If available, produce the requested data in Excel or .csv format.

Defendant’s full response (Ex. 2 at 5) reads:

Defendant objects that this request is way too broad calling for document production that carries a burden and expense beyond reason or need given the relatively modest plea for modification of one or another of the U. S. Congressional districts for a single election when congressional elections have been held without complaint following preclearance by the U.S. Department of Justice in the districts as drawn in 2011.

The request is non-specific and calls for statewide information for elections, precincts, districts, and voters that are not be involved in the district or districts that these plaintiffs are contesting. The burden of production for this request should be substantially reduced by limiting the request to documents that pertain to the district or districts actually at issue in the case. The plaintiffs’ failure to identify the district or districts that they contend is curative of their alleged Section 2 violation was raised in the pleadings early on in defendant’s motions and still has not been rectified. See, Doc 16-1 filed July 31, 2108. The defendant cannot be made to guess at which voters may be implicated in the request when the plaintiffs have not provided the district or districts that are the subject of their suit. The discovery request should be narrowed and limited to voters whose history is germane to the litigation and only to the extent voter history may be of benefit to a resolution of the issues actually before the court. The plaintiffs should be able to restrict their request to documents and information relevant to any Section 2 issues in a particular district or districts that they allege to be deficient and/or curative. Once tailored to the case, the Secretary of State can begin the necessary programming to produce the relevant documents. See, *Hallmark v. Cohen & Slamowitz*, 307 F.R.D. 102 (W.D. N.Y. 2015); *Allen v. Colgate-Palmolive Company*, 539 F. Supp. 57 (S.D. N. Y. 1981).

On August 2, 2019, Plaintiffs’ counsel sent an email to Defendant’s counsel to follow up on the request to produce the voter file. Ex. 3 at 4-5 (Email from A. Callais to J. Torchinsky). The

email noted the relevance of the requested material for Section 2 cases such as this and observed that Defendant offers the requested information for public purchase. Defendant's counsel responded seven days later that that they were "exploring technical issues" with Plaintiffs' request and would get back to Plaintiffs' counsel by the end of the following week. Ex. 3 at 3-4 (Aug. 9, 2019, Email from J. Torchinsky to A. Callais). More than three weeks passed without any follow-up from Defendant's counsel. Upon additional prompting from Plaintiffs' counsel, Defendant's counsel reiterated his original objection and stated without any further explanation that the voter file "is not readily or inexpensively available if available at all" and producing it "would impose an undue burden . . . that is not proportionate to the needs of the case." Ex. 3 at 3 (Sept. 5, 2019, Email from J. Torchinsky to A. Callais).

Before filing this motion to compel, Plaintiffs' counsel again attempted in good faith to clarify Plaintiffs' request and obtain disclosure of the voter file without the Court's intervention. *See* Ex. 3 at 2-3 (Sept. 11, 2019, Email from A. Callais to J. Torchinsky). Without any explanation, Defendant again refused to disclose the voter file. Plaintiffs' counsel followed up again with a phone call on September 13, 2019, during which Defendant's counsel disclosed for the first time the basis for Defendant's objection and confirmed that a current version of the statewide voter file is maintained by Defendant and available for purchase on the Secretary of State's website. *See* Ex. 3 at 1. Nonetheless, Defendant refused to disclose the current voter file. Ex. 3 at 1.

ARGUMENT

1. Plaintiffs are entitled to the current voter file in order to perform analyses relevant to their claims.

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, 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). "Relevant information need not be admissible at trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence." *Id.* "For purposes of discovery, relevancy is construed broadly to encompass 'any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue related to the claim or defense of any party.'" *Fraiche v. Sonitrol of Baton Rouge*, 2010 WL 4809328, at *1 (M.D. La. Nov. 19, 2010) (quoting *Coughlin v. Lee*, 946 F.2d 1152, 1159 (5th Cir. 1991); Fed. R. Civ. P. 26(b)(1)).

Here, the voter file is relevant to Plaintiffs' Section 2 claim. To prevail on their Section 2 claim, Plaintiffs must satisfy the three *Gingles* preconditions and demonstrate that: (1) the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) the minority group is politically cohesive; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Additionally, in evaluating the "totality of circumstances" regarding whether the current congressional plan has the effect of denying African-American voters in Louisiana an equal opportunity to participate in the political process and to elect candidates of their choice, the Court considers a variety of factors, including "the extent to which voting in the elections of the state or political subdivision is racially polarized." *Id.* at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)). Accordingly, parties to Section 2 cases and their experts routinely rely on data from state voter files (which contain relevant information about voters such as their precinct, race, and voting history) to examine and analyze racial voting patterns

within the relevant jurisdiction. *See, e.g., Perez v. Perry*, No. SA-11-CV-360, 2017 WL 962686, at *168 (W.D. Tex. Mar. 10, 2017) (finding cohesive voting based on expert analyses using voter files).

Because the data contained in the current statewide voter file will lead to admissible evidence, it is discoverable and Plaintiffs are entitled to it.

2. Producing the current voter file would not be unduly burdensome or expensive for Defendant.

Defendant cannot carry his burden to show that producing the current voter file will impose some undue burden or expense. *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, 468 (N.D. Tex. 2015) (“[A] party seeking to resist discovery [on the grounds of undue burden or expense] still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information . . .”). “Where electronic discovery is reasonably accessible, the responding party must foot the costs of searching for and producing electronic discovery.” *Canon U.S.A., Inc. v. S.A.M., Inc.*, No. CIV. A. 07-01201, 2008 WL 2522087, at *3 (E.D. La. June 20, 2008).

Defendant’s objection that the voter file “is not readily or inexpensively available” is contradicted by the fact that the Louisiana Secretary of State has established an online system to enable *anyone* to purchase the requested statewide voter file for delivery through email.² *See Sundown Energy, L.P. v. Haller*, No. CIV.A. 10-4354, 2011 WL 5079329, at *4 (E.D. La. Oct. 26, 2011) (whether production of electronically stored documents in electronic format “is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible

² Louisiana Secretary of State, *Purchase Voter Lists*, <https://www.sos.la.gov/ElectionsAndVoting/BecomeACandidate/PurchaseVoterLists/Pages/default.aspx> (last visited Sept. 13, 2019).

format (a distinction that corresponds closely to the expense of production”). Indeed, Defendant’s website contains an instructional video that provides a detailed, step-by-step tutorial on how to purchase data contained in the voter file.³ Statewide data can be purchased by credit card at \$0.01 per registered voter, capped at a maximum cost of \$5,000. For all voters statewide, purchasers can select to receive parish, name, ward, precinct, party, residence and mailing address, sex, race, age, status, registration date, registration number, last 20 dates voted, and district information.⁴ Thus, Defendant already possesses the technological infrastructure to quickly compile and electronically distribute the information requested by Plaintiffs.

Given that the Secretary of State’s office offers the requested statewide voter file electronically *as a matter of course* to the public, Defendant’s objection on grounds of burden is not well-founded. Because Defendant maintains the voter file in an electronic format and makes it readily available upon request, it is inconceivable how producing the voter file could be either burdensome or expensive for the Defendant. Accordingly, the Court should reject Defendant’s objections and grant Plaintiffs’ motion to compel.

3. Defendant’s refusal to produce the current voter file because he does not maintain complete voter files for past elections violates Rule 26.

“The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. Thus the spirit of the rules is violated . . . by . . . *unnecessary use of defensive weapons or evasive responses*. Fed. R. Civ. P. 26, Notes of Advisory Committee on Rule 26 (1983 Amendment) (emphasis added); *see also Riverkeeper v. Taylor Energy Co., LLC*,

³ Louisiana Secretary of State, How to Order Voter Lists, https://www.sos.la.gov/ElectionsAndVoting/Multimedia/HowToOrderVoterLists/story_html5.html (last visited Sept. 12, 2019).

⁴ Louisiana Secretary of State, Voter List Charges and Other Information, <https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/VoterListChargesAndInfo.pdf> (last visited Sept. 13, 2019).

309 F.R.D. 381, 384 (E.D. La. 2015) (“The discovery rules are accorded a broad and liberal treatment to achieve their purpose of adequately informing litigants in civil trials.”).

When Plaintiffs identified the commercially available voter file and repeatedly asked Defendant to produce it, Defendant objected and refused to turn over *any* data in the voter file, claiming that “[d]ata is not retained based on ‘all persons who received a ballot,’” Ex. at 3 (Email from J. Torchinsky to A. Callais). For the first time on September 13, 2019, 51 days after Defendant issued his initial objections to the Request, Defendant’s counsel clarified that the statewide voter file is not maintained by Defendant for past elections. *See* Ex. 3 at 1-2. When Plaintiffs’ counsel asked whether Defendant would then produce Louisiana’s *current* statewide voter file, Defendant refused. *See id.* at 1.

Defendant’s apparent refusal to produce the information that *is* readily available, based on the fact that Plaintiffs also requested information that may not be readily available, violates Rule 26. Plaintiffs’ Request asked for certain relevant information “for all persons who received a ballot in each election,” such as name, address, registration status, partisan affiliation, and gender. The current voter file undisputedly contains categories of information Plaintiffs seek, *see* Ex. 1 at 7; Ex. 3 at 1-3, even if it does not maintain complete information for past elections. *See* Ex. 4, Commercial Requests Record Format for Text File Voter Lists (identifying available categories including parish, precinct, name, address, sex, race, age, political party, and voting history).⁵ Defendant cannot justify his unnecessarily cabined view of Plaintiffs’ request or his refusal to produce the current statewide voter file. *Heller v. City of Dallas*, 303 F.R.D. 466, 485 (N.D. Tex. 2014) (“A party served with written discovery must fully answer each . . . document request to the

⁵ Available at <https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/RecordFormatSheet.pdf>.

full extent that it is not objectionable”). Because Defendant’s narrow reading of Plaintiffs’ discovery request violates Rule 26, the Court should grant the Motion to Compel.

4. The Court should award Plaintiffs reasonable costs and attorneys’ fees in making this motion.

Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure provides that if a court grants a party’s motion to compel, “the court *must*, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” (emphasis added). Although there are a few exceptions to this requirement articulated in subsections (i)-(iii), none apply here. As demonstrated above, Plaintiffs made multiple good faith attempts to obtain the requested materials. *See, e.g.*, Ex. 3 (multiple emails and a telephone call from Plaintiffs’ counsel identifying the requested information and its commercial availability). Defendant has failed to engage in any meaningful discussion regarding the requested materials and instead has provided boilerplate objections without explanation. *See id.* Accordingly, the Court should award Plaintiffs reasonable costs and attorneys’ fees for this motion. *Nguyen v. Louisiana State Board of Cosmetology*, Civ. A. No. 14-80-BAJ-RLB, 2016 WL 67253, at *3 (M.D. La. Jan. 5, 2016) (“Because the Court has granted Defendant’s Motion to Compel and no exceptions apply, Defendant is entitled to an award of reasonable expenses, including attorney’s fees.”). Plaintiffs respectfully request that the Court allow Plaintiffs to file an affidavit of costs and fees associated with this motion seven days after it rules on this motion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion to Compel, award Plaintiffs reasonable costs and attorneys’ fees, and allow Plaintiffs seven days to provide an affidavit of costs and fees to the Court related to this motion.

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Dated: September 18, 2019

Respectfully submitted,

By attorneys:

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2019, the foregoing Memorandum In Support Of Motion to Compel Discovery was filed electronically with the Clerk of Court using the CM/ECF system.

s/ Jennifer Wise Moroux

Jennifer Wise Moroux