

**IN THE 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,

vs.

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.

Case No. 1:21-cv-03091

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

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

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
COMPEL LEADERSHIP DEFENDANTS TO RESPOND TO DISCOVERY REQUESTS**

Plaintiffs 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, and the Republican Caucus of the Illinois House of Representatives (collectively, the "Plaintiffs") hereby respectfully move pursuant to Fed. R. Civ. P. 37(a) and N.D.

Ill. Local Rule 37.2 for entry of an Order compelling Defendants 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”) to provide substantive responses to Plaintiffs’ Interrogatories and Requests for Production and to produce a privilege log. In support of their motion, Plaintiffs state as follows.

BACKGROUND

On June 9, 2021, Senator McConchie and Representative Durkin filed the Complaint in this case seeking to invalidate the state legislative redistricting plan passed by the General Assembly on May 28, 2021 and signed into law by Governor Pritzker on June 4, 2021 (the “Redistricting Plan” or “Plan”). Compl. [Dkt. No. 1]. A Three-Judge Court was convened and set an expedited schedule, with trial set to occur on September 27-29, 2021. Order [Dkt. No. 41].

In order to meet this expedited schedule and move the case forward, the Court ordered the parties to serve discovery requests and respond by July 23, 2021. Minute Entry [Dkt. No. 37]. On July 12, 2021, Plaintiffs served the Leadership Defendants with Interrogatories and Requests for Production. On July 23, 2021, the Leadership Defendants served Plaintiffs with Objections and Responses to the Interrogatories and Requests for Production, but the responses consist almost entirely of objections, blanket assertions of privilege, and refusals to respond to discovery. *See* Leadership Defendants’ Objections and Responses to Plaintiffs’ First Set of Interrogatories, **Ex. A hereto**, and Leadership Defendants’ Objections and Responses to Plaintiffs’ First Set of Requests for Production, **Ex. B hereto**.

Specifically, the Leadership Defendants provided partial responses to only three of the 21 Interrogatories and wholly objected to the remaining Interrogatories. Ex. A. The Leadership

Defendants also responded to only two of the 37 Requests for Production. Ex. B. Moreover, the Leadership Defendants failed to provide any privilege log despite objecting on privilege grounds to 20 of the 21 Interrogatories and 32 of the 37 Requests for Production.

On July 26, 2021, the next business day after receiving the Leadership Defendants' Objections and Responses, counsel for Plaintiffs requested a meet-and-confer call for that afternoon. However, counsel for the Leadership Defendants were unavailable until July 29, 2021, at which time counsel for the parties participated in a telephonic meet-and-confer call to discuss the Leadership Defendants' insufficient responses. On the call, counsel for Plaintiffs agreed, without waiving any discovery requests and in order to expedite discovery, to identify the unanswered Interrogatories and Requests for Production that are the highest and most urgent priority. Counsel for Plaintiffs requested that the Leadership Defendants supplement their responses to these high priority requests and provide a privilege log by Monday, August 2, 2021. Counsel for Leadership Defendants agreed to advise Plaintiffs' counsel by August 2, 2021 as to whether Plaintiffs would agree to supplement their responses to these high priority requests. In the afternoon of July 29th, counsel for Plaintiffs sent an email to counsel for the Leadership Defendants identifying the six Interrogatories and eleven Requests for Production that are the highest and most urgent priority. 7/29/21 Email from P. Luetkehans, **Ex. C hereto**.

As of the filing of this Motion to Compel, the Leadership Defendants have not supplemented or amended any of their responses to Plaintiffs' written discovery, including any of their responses to the priority requests identified by the Plaintiffs, have not provided a privilege log, and have not advised Plaintiffs' counsel as to whether they will provide substantive responses. Accordingly, given the expedited schedule in this case and the time-sensitive nature and importance of this litigation, Plaintiffs have no choice but to move this Court to issue an Order

compelling the Leadership Defendants to timely provide substantive responses to all of Plaintiffs' Interrogatories and Requests for Production and to provide a privilege log for any documents, materials, or information that are being withheld or redacted on privilege grounds.

LEGAL STANDARD

“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.” *The Solutions Team v. Oak Street Health, MSO, LLC*, No. 17-cv-1879, 2021 WL 3022324, at *2 (N.D. Ill. July 16, 2021) (citing Fed. R. Civ. P. 37(a)). A party may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case. *Id.* (citing Fed. R. Civ. P. 26(b)(1)). “Once the moving party has made a preliminary showing that the discovery it seeks is relevant to the case and proportional to the needs of the case, the party opposing discovery has the burden of proving that the requested discovery should be disallowed.” *Id.* (citing *Hansen v. Country Mut. Ins., Co.*, No. 18-cv-244, 2020 WL 5763588, at *2 (N.D. Ill. Sept. 28, 2020)).

ARGUMENT

I. The Leadership Defendants Must Respond Substantively to Plaintiffs' Interrogatories.

The Leadership Defendants have objected and provided no substantive response at all to 18 of Plaintiffs' 21 Interrogatories. *See* Ex. A at IROG ¶¶ 1-5, 8-10, 12-21. Among other things, these 18 Interrogatories ask the Leadership Defendants to identify basic information that is directly relevant to the claims and defenses in this litigation, including:

- Persons who provided information used in answering the Interrogatories, persons who have information about the allegations in the Complaint, and persons who were involved in the drawing of the map in the Redistricting Plan. Ex. A at IROG ¶¶ 1-3.
- Steps taken in the disaggregation process of the 2010 census to the 2020 geography and in taking estimates from the American Community Survey (“ACS”) from the block group

level to the block level and to the precinct level and formulas used in the disaggregation process. Ex. A at IROG ¶¶ 4-5, 8.

- Information and data regarding the contention that the ACS estimates are an appropriate source of data to draw the map and the persons who made the final decision to use ACS estimates in drawing the map. Ex. A at IROG ¶¶ 9-10.
- Documents and files used or referred to during the map-drawing process, other data used to draw the map, software and computer code used in the disaggregation process, and how population counts were determined and calculated. Ex. A at IROG ¶¶ 12-21.

Other than repeated boilerplate and generic objections, the Leadership Defendants have completely refused to respond to these 18 Interrogatories solely because they believe the Interrogatories are irrelevant in light of Plaintiffs' argument that the use of ACS estimates as the main source of population data is *per se* unconstitutional. To the contrary, however, each of these 18 Interrogatories directly relates to the claims and defenses at issue in this 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. The Court should therefore order the Leadership Defendants to provide substantive responses to all 18 of these Interrogatories.

Moreover, the Leadership Defendants have not provided full or adequate responses to Interrogatories 6 and 7, which ask for the identify of every person or entity involved in the disaggregation process and the drawing and/or analysis of the map in the Redistricting Plan, or Interrogatory 11, which asks for the identities of any experts or consultants with whom the Leadership Defendants consulted regarding the map. Ex. A, IROG ¶¶ 6-7, 11. Instead of providing complete responses to these Interrogatories, the Leadership Defendants merely noted, “[g]enerally,” that Kimball Brace of Election Data Services, Inc. performed the disaggregation process. *Id.* The use of the word “[g]enerally” indicates that Mr. Brace and Election Data Services, Inc. were not the only individuals or entities involved in the disaggregation process, and the Leadership Defendants do not explain whether there were any other individuals or entities involved

in the disaggregation process or in the drawing and/or analysis of the map. The identities of these individuals and entities are directly relevant and proportional to the needs of the case, and the Court should therefore order the Leadership Defendants to supplement and amend their responses to Interrogatories 6, 7, and 11 to provide complete and accurate responses.

II. The Leadership Defendants Must Respond Substantively to Plaintiffs' Requests for Production.

The Leadership Defendants have objected and provided no substantive response at all to 35 of Plaintiffs' 37 Requests for Production. *See* Ex. B at RFP ¶¶ 1-7, 10-37. Among other things, these 35 Requests for Production ask the Leadership Defendants to produce documents regarding the following core issues:

- The drawing of the map in the Redistricting Plan, the use of ACS estimates in drawing the map, and the disaggregation and data analysis processes. Ex. B, RFP ¶¶ 1-7.
- ACS estimates used in drawing the map, census geography files used in the disaggregation process or map drawing, election information and other data that was used in drawing the map, analyses performed regarding the map, and the calculation of population counts and estimates for districts reflected in the map. Ex. B, RFP ¶¶ 10-34.
- Documents the Leadership Defendants intend to use in their defense of this litigation, communications with non-profit or better government groups involving the map or the redistricting process, and documents identified in the Leadership Defendants' responses to Plaintiffs' Interrogatories. Ex. B, RFP ¶¶ 35-37.

Other than repeated boilerplate and generic objections, the Leadership Defendants have completely refused to respond to these 35 Requests for Production solely because they believe the Requests for Production are irrelevant in light of Plaintiffs' argument that the use of ACS estimates as the main source of population data is *per se* unconstitutional. To the contrary, however, each of these 35 Requests for Production directly relates to the claims and defenses at issue in this 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. The Court should

therefore order the Leadership Defendants to provide substantive responses to all 35 of these Requests for Production.

Moreover, the Leadership Defendants have not provided a full or adequate response to Request for Production 9, which asks for “block assignment files” and the identity of the district to which each 2020 Census block was assigned. Ex. B, RFP ¶ 9. The Leadership Defendants stated that they “will produce responsive documents in their possession, custody, or control.” *Id.* However, the Leadership Defendants have produced a file that indicates only the assignment of **block groups** (not blocks), despite clearly drawing district boundaries based on blocks. The file omits the block index numbers and Plaintiffs are therefore unable to use the file to match the map districts as drawn. Therefore, the Court should order the Leadership Defendants to supplement and amend their production in response to Request for Production Number 9 and provide a file that includes block index numbers and allows Plaintiffs to match the map districts as drawn.

III. The Leadership Defendants Must Produce a Privilege Log.

Finally, the Leadership Defendants have not even complied with the most basic of discovery obligations—providing a privilege log—despite objecting on privilege grounds to 20 of the 21 Interrogatories and 32 of the 37 Requests for Production. Ex. A, IROG ¶¶ 1-20; Ex. B, RFP ¶¶ 1-7, 10, 12-37.

Rule 26(b)(5)(A) **requires** a party asserting a privilege as the basis for withholding responsive documents to produce a privilege log identifying those documents. Fed. R. Civ. P. 26(b)(5)(A) (“When a party withholds information otherwise discoverable by claiming that the information is privileged,” the party must “expressly make the claim” and “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.”); *see also Rossman v. EN Engineering, LLC*, 335 F.R.D. 171, 172-73 (N.D. Ill. 2020) (explaining that “[c]ompliance with Rule 26(b)(5)(A) is not optional” and that parties must produce a privilege log including any document withheld on privilege grounds).

The Court should order the Leadership Defendants to produce a privilege log in the form required by the Federal Rules of Civil Procedure and the Local Rules of this Court including any documents, materials, or information that are being withheld or redacted on privilege grounds.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court enter an Order compelling the Leadership Defendants to provide substantive responses to all of Plaintiffs’ Interrogatories and Requests for Production and to produce a privilege log for any documents, materials, or information that are being withheld or redacted on privilege grounds.

Dated: August 4, 2021

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 4, 2021, the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, which will provide notice to all counsel of record in this matter.

/s/ Charles E. Harris, II
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