IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, *et al.*, Defendants.	)	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV861

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PROTECTIVE ORDER OR FOR OTHER APPROPRIATE RELIEF

NOW COME Defendants, by and through undersigned counsel, and submit this memorandum in support of their motion pursuant to Rule 26(c) of the Federal Rules of Civil Procedure for a protective order or other appropriate relief.

INTRODUCTION

Defendants seek this Court's relief from the discovery war of attrition being waged by Plaintiffs in these consolidated cases. Despite this Court having extended the discovery period in this case to 2 February 2015, Plaintiffs are attempting to compress *all* written and electronic discovery on *all* issues into a mere three-month time period from January 2014 until 1 April 2014, the deadline for expert witness reports needed for a preliminary injunction motion. While early on and often Defendants implored Plaintiffs to prioritize their discovery requests so that Defendants could focus attention on those requests that would be most needed for the expert witness deadline, Plaintiffs have flatly refused to do so, and have unreasonably insisted on production of everything regardless of whether it relates to upcoming deadlines. Moreover, Plaintiffs continue to issue seemingly never-ending requests for documents and electronic information on almost a weekly basis, further complicating Defendants' good faith efforts to gather and review responsive, non-privileged information. In light of Plaintiffs' intransigence on these issues, Defendants request the Court's assistance.

NATURE OF THE CASE

Plaintiffs collectively filed three separate actions challenging the legality of 2013 N.C. Sess. Laws 381, known as the "Voter Information Verification Act, or "VIVA" (sometimes referred to by its bill designation, HB 589): *United States v. North Carolina*, No. 1:13-cv-861 (M.D.N.C.) (hereinafter "*United States*"); *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.) (hereinafter "*NAACP*"); and *League of Women Voters of North Carolina v. North Carolina*, No. 1:13-cv-660 (M.D.N.C.) (hereinafter "*LWV*"). A fourth group of plaintiffs have been granted leave to intervene in the *LWV* action. (M.D.N.C. 1:13-cv-660 [D.E. 62].) By order of the Court, the three actions have been consolidated for discovery and scheduling purposes. *United States* D.E. 30; *NAACP* D.E. 39; *LWV* D.E. 41.

Plaintiffs' claims focus on VIVA's elimination of practices adopted by the General Assembly within the last decade. For instance, in 2000, the General Assembly allowed voters to cast "no-excuse" in-person absentee ballots at county sites prior to election day—one-stop absentee voting. Later that decade, the General Assembly adopted same-day registration—allowing first time voters to register to vote (after normal registration had closed twenty-five days before an election) during one-stop voting. Finally, during the past decade, the General Assembly allowed out-of-precinct voting—where voters may vote on Election Day at a precinct other than the precinct to which they have been assigned (provided it is within the same county as his or her assigned precinct).

VIVA reduced the number of days for one-stop in-person absentee voting from 17 to 10 while mandating that the total hours of one-stop voting in each county be at least

the same in 2014 as the number of hours available in 2010, and that the number of hours available in presidential elections be at least the same as the number of hours available in each county for the 2012 election. This change takes effect in 2014.

VIVA also eliminated same-day registration and out-of-precinct voting effective in 2014. In making this change, North Carolina has returned to prior, long-standing practices, which are consistent with the majority of the states which do not allow out-of-precinct voting or same-day registration.

VIVA also establishes a photo ID requirement for one-stop voting and in-person voting on Election Day. Except for first-time voters who are registering by mail and voting for the first time, mail-in absentee voters are not required to submit an ID when they make their application for an absentee ballot or return their marked ballot to the county board of elections. Unlike the other provisions challenged by Plaintiff, the photo ID requirement does not go into effect until 2016.[1]

VIVA also eliminates a recently enacted program that allowed 16-year-olds to "pre-register." In making this change, VIVA returned North Carolina to prior practices consistent with the vast majority of other states. Moreover, even under VIVA, 17-year-olds are still able to register and vote provided they will turn 18 years old prior to the general election. This change is effective in 2014.

[1] North Carolina's photo ID requirement is less restrictive than other such requirements which have been held constitutional by the United States Supreme Court. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

STATEMENT OF FACTS RELEVANT TO THE MOTION

Plaintiffs Insist on Compressing the Discovery Period into a Few Months

The Scheduling Order entered in these three cases provides for discovery to close on 2 February 2015. *United States* D.E. 30; *NAACP* D.E. 39; *LWV* D.E. 41. However, the Scheduling Order also provides for preliminary motions, including any motion for preliminary injunction, to be filed by 5 May 2014. This schedule was one of two proposed by the Court; the other schedule would have provided for *all* discovery to be completed by 1 April 2014 and trial during the summer of 2014. *Id*. Despite the preference of the *LWV* and *NAACP* Plaintiffs for the alternate schedule, the Court adopted the schedule that allowed for longer discovery. The Scheduling Order specifically states:

> As noted during the hearing, the Court has concerns that the first option, with the July 2014 trial date, would not allow Plaintiffs sufficient time to complete discovery and obtain the evidence needed to proceed on their claims.

Id. at 3. With regard to discovery prior to preliminary motions, the Court said:

> THE COURT: Well, even if I do ultimately go with [the current schedule], you understand as part of that I am anticipating that there is going to be this expedited push of discovery early so that plaintiffs have what they need for a preliminary injunction.

Tr. of Rule 16 Conf. at 47:12–22 (Exhibit 4 (*United States* D.E. 56, *NAACP* D.E. 70, *LWV* D.E. 72)) Notwithstanding the Court's clear recognition that full discovery in these cases could not be completed by the Spring of 2014, and the Court's clearly-stated intention that the anticipated "expedited push for discovery" be focused on ensuring that

Plaintiffs have what they need for a preliminary injunction motion, Plaintiffs have in practice acted as though the cases are progressing under the schedule *not* adopted by the Court. Rather than focus on discovery necessary for a preliminary injunction motion, Plaintiffs have repeatedly insisted that *all* discovery served on Defendants is equally necessary for preparation of such a motion—including discovery related only to provisions of VIVA that do not take effect until 2016—and that responses must be provided immediately.

Plaintiffs Serve Hundreds of Discovery Requests With Each Passing Week

To date, Plaintiffs have served nearly 400 discovery requests on multiple state agencies, the North Carolina General Assembly, and individual legislators, with new requests coming in weekly. (*See* Exhibit 1 to Defendants' Opposition to Plaintiffs' Motion to Compel Production of Documents (*United States* D.E. 56, *NAACP* D.E. 70, *LWV* D.E. 72)—Appendix of Discovery and Subpoenas Served On Defendants). The requests span documents created as early as 1995 to documents and communications presently being generated daily related to implementation of VIVA. In addition, Plaintiffs are requiring Defendants to use over 380 advanced boolean search terms to search the individual email boxes and electronic files of over 60 custodians across multiple state agencies. (*See* Exhibit 2 (*United States* D.E. 56, *NAACP* D.E. 70, *LWV* D.E. 72)—Final Search Terms).

The Email Volume Produced by Plaintiffs' Unreasonable Search Terms

The volume of email produced by applications of Plaintiffs' search terms is overwhelming. For example, the email boxes from a dozen custodians from the

Department of Transportation ("DOT") alone consist of approximately 2-and-a-half million documents. Moreover, searching the email boxes of just the legislative custodians requires searching approximately 10 million emails.

After applying the search terms the volume of individual files (*i.e.*, individual emails or electronic documents) is astounding. For instance, applying the search terms to the State Board of Elections ("SBE") custodians resulted in *403,566* individual files that would need to reviewed for relevance and for privilege issues. Obviously it will take hundreds if not thousands of hours to review that many individual files.[2] Moreover, the overbroad search terms clearly caused this massive amount of likely irrelevant files. For instance, application of Plaintiffs' required search term "("in-person" w/30 vot*) OR ("absentee" w/30 vot*)" yielded *68,985* individual files. It is hard to imagine that many, if not any, of these 68,985 files contain any information useful to any party in this litigation, much less useful for the court's evaluation of Plaintiffs' expected motion for preliminary injunction premised exclusively on a facial challenge to the underlying legislation. Similarly, application of Plaintiffs' required search term "("out of precinct") OR ("wrong precinct") OR ("incorrect precinct") AND (provisional OR ballot OR vot*)" yielded *56,696* individual files. Again, it is difficult to determine how this extremely broad term could yield relevant information, particularly when balanced against the time, effort, and resources it will take the various State agencies involved to review them.

[2] In its search, the SBE did not limit the time frame for each custodian's email box. It searched whatever was there for however long it had been there. Obviously, limiting the search to a more relevant time frame, such as 2013 (discussed below) would likely significantly reduce the number of individual files that need to be reviewed.

Similarly, the email volume produced by the General Assembly's application of the search terms to 75 individuals was enormous, even though that search was limited to files from January 2013 to the present. The total number of files searched by the General Assembly staff was approximately 10,000,000 files which yielded *283,461* individual files that would need to be reviewed individually by Defendants for responsiveness, relevance, and privilege issues. As with the SBE results, it is clear that Plaintiffs' search terms have produced likely non-responsive information. For instance, application of Plaintiffs' search term "Voter ID" yielded 43,212 individual files while application of their term "voter identification" yielded 2,873 files. Plaintiffs have at no point provided a justification for why any mention of "Voter ID" by itself may yield relevant information as opposed to just being a fishing expedition for communications by legislators and their staffers. As a further example, Plaintiffs' search term "("HB589" OR "HB 589" OR "H.B.589" OR "H.B. 589" OR "House Bill 589" OR "H589" OR "Bill 589")" yielded 20,185 files. Yet Plaintiffs have never justified why references to HB 589 in isolation would be calculated to only producing information relevant to this case, especially since that bill contained numerous other provisions never challenged in this litigation. Coupling a term like "HB 589" with another limiting term such as "race" or "disparate impact" would be just one way to more specifically target potentially relevant records.

In fact, in attempting to search the massive volume of electronic records required by Plaintiffs, General Assembly staff had to run the search terms three times because of hardware and software problems, and ultimately had to make an emergency purchase of

computer capable of performing the forensics analysis required by Plaintiffs' requests.[3] Defendants have been diligently attempting to comply with their discovery obligations but Plaintiffs' shotgun approach to creating their search terms and serving discovery requests have caused numerous problems.[4]

Thus, at present, application of Plaintiffs' search terms has produced approximately *712,027* individual files; each of those 712,027 individual files must now be individually reviewed by a person to determine whether the file is actually responsive to discovery requests and, if so, whether any privilege applies. It is precisely this sort of involved process that prompted the Court's concern at the Rule 16 Conference as to whether full discovery could be completed by the Spring of 2014.

Given the realities of this production and in keeping with the Court's instruction during the Rule 16 Conference that there would be "this expedited push of discovery early so that Plaintiffs have what they need for a preliminary injunction," and in recognition of the fact that many of the requests being propounded by Plaintiffs have nothing to do with the evidence needed for their preliminary injunction motion, Defendants proposed early on to conduct the discovery in stages. (*See* Exhibit 3—December 23, 2013 Email from T. Farr to D. Donovan and Exhibit 4—Transcript of Rule

[3] In fact, many of the search terms were so complex that the software used was not capable of running the searches. Thus, the number of individual files or records that ultimately may have to be searched could exceed 712,027 files.

[4] In addition, application of the search terms by the North Carolina Department of Transportation and the Office of the Governor produced over 5,000 and 20,000 individual files, respectively, that will need to be individually reviewed, even when limited to 2013 records. While the number of files from these agencies are much less than those discussed above, in any normal litigation even that number of files to search would be considered extremely voluminous.

16 conference at 47:8. (*United States* D.E. 56, *NAACP* D.E. 70, *LWV* D.E. 72)) Specifically, Defendants asked Plaintiffs to identify the categories of documents that were most important to preparing their expert reports and preliminary injunction motion. Plaintiffs flatly rejected this request and responded that everything was equally important and had to be produced within 30 days. (*See* Exhibit 5—December 23, 2013 Email from D. Donovan to T. Farr and Exhibit 6—December 29, 2013 Email from D. Donovan to T. Farr (*United States* D.E. 56, *NAACP* D.E. 70, *LWV* D.E. 72)) Given Plaintiffs' refusal to work with Defendants to structure a useful, realistic production schedule, Defendants have been forced to treat all 393 requests and over 380 search terms for the 63 custodians as equally important and to search for, collect, and review the massive amounts of documents and data described above.

ARGUMENT

Defendants have already shown the unreasonableness overall of Plaintiffs' discovery requests and Plaintiffs' position with regard to discovery in Defendants' Opposition to Plaintiffs' Motion to Compel Production of Documents (*United States* D.E. 56, *NAACP* D.E. 70, *LWV* D.E. 72). That brief, including all exhibits thereto, is incorporated herein by reference as though fully set forth. While Defendants have been able to produce databases and a significant amount of hard documents believed to be responsive to Plaintiffs' discovery requests, the search of electronic documents presents a different situation entirely. There simply can be no question that Plaintiffs' expectation that Defendants conduct an adequate review of over 700,000 individual electronic files within a matter of a few weeks is unduly burdensome and expensive. Coupled with the

380 search terms put forth by Plaintiffs, it is apparent that the discovery requests for email are a fishing expedition, not discovery targeted toward preparation for any preliminary injunction motion.

Defendants fully recognize the need to provide Plaintiffs with discovery that is relevant to a motion for preliminary injunction. Defendants have been working and continue to work diligently to provide that discovery. However, because Plaintiffs have consistently refused to consider reasonable requests that they differentiate between discovery needed for a preliminary injunction motion and discovery needed for a trial or summary judgment motion, and continue to serve production requests on almost a weekly basis, Plaintiffs are actually impeding production and it is necessary for the Court to impose some reasonableness.

The Scheduling Order provides for trial of this to occur in the summer of 2015. The clear intent of this schedule is to provide for final judgment before the 2016 election cycle, which is the first election cycle in which the photo ID requirement will be enforced.[5] In other words, there is no enforcement action with regard to photo IDs to enjoin in 2014 or 2015, and by the time enforcement of the photo ID requirement begins in 2016, final judgment will have been entered in these cases.

By contrast, the other provisions of VIVA challenged by Plaintiffs—those concerning same-day registration, out-of-precinct provision balloting, changes to the schedule for one-stop absentee voting and poll observers—go into effect with the 2014

[5] VIVA does require that voters be informed when they vote during the 2014 and 2015 election cycles that a photo ID will be required beginning in 2016. No photo ID will be required to vote in elections in 2014 or 2015, however.

election cycle, prior to the scheduled trial and therefore prior to final judgment. These are the provisions that might be appropriate subjects of a preliminary injunction motion. Were Plaintiffs to limit the expected production of records to records related to the provisions that go into effect before trial, Defendants could focus on those emails and provide them much more quickly. Because Plaintiffs are unwilling to approach production of emails in a reasonable manner, this Court's protective order is necessary to shield Defendants from unduly burdensome and unrealistic discovery by requiring Plaintiffs to provide search terms that narrow in on the provisions of VIVA that go into effect in 2014. Moreover, even assuming Plaintiffs agreed to prioritize their requests for purposes of the preliminary injunction motion, the number of files produced by their search terms that they expect Defendants to review is unreasonable and should be limited by the Court.

In addition to requiring new search terms from Plaintiffs, the Court should impose a time-limit on the electronic records that must be reviewed. Given that Plaintiffs' claims challenge a law enacted by the 2013 General Assembly, it would be reasonable to limit the initial review of emails to those created on or after the day that the General Assembly convened, or 9 January 2013.

Moreover, if Plaintiffs continue to insist that *all* requested electronic files are needed immediately and are not required to limit their request—whether by search terms or by time—the Court should require Plaintiffs to bear the costs of producing those emails. It is reasonable to assume that at this time hundreds of hours of state personnel whose jobs do not involve responding to unreasonable discovery requests have already

been expended in this fishing expedition. Defendants are State agencies and State officials with limited resources both in terms of personnel and money; they have no financial resources other than those appropriate by the General Assembly from taxpayer monies. For example, the SBE has ongoing duties in connection with extremely important state functions – that is, implementing elections – and does not have the budget or authority to hire the legions of extra personnel it would take to comply with Plaintiffs' unreasonable requests. *See* Declaration of Kim Strach, SBE Executive Director, attached hereto as Exhibit A. It is unduly burdensome for Plaintiffs to expect State agencies and officials to compromise their ability to fulfill their governmental duties in order to satisfy Plaintiffs' unreasonable requests. It is equally burdensome for Plaintiffs to expect the taxpayers of North Carolina to cover the cost of their fishing expedition.

CONCLUSION

For the foregoing reasons, Defendants respectfully pray for an Order from the Court:

(1) Imposing a cap on the number of Requests for Production pursuant to Rules 34 or 45, Fed. R. Civ. P., that may be served by the parties going forward in this action;

(2) Requiring Plaintiffs to re-formulate search terms for the search of electronic records to search terms reasonably calculated to lead to the discovery of evidence admissible in any preliminary injunction proceedings before the Court, and in general to more precisely identify records that may contain admissible or discoverable evidence;

(3) Limiting Defendants' obligation to search for and review documents, whether electronic or otherwise, to 2013, the legislative year of passage of VIVA, unless Plaintiffs can specifically justify an identifiable category of documents that should be excluded from such limitation;

(4) Excluding from Defendants' obligation to search for and review documents, whether electronic or otherwise, any production of documents subject to legislative immunity, or post-enactment documents regarding administration or implementation of VIVA, for the same reasons set forth in Defendants' Response to Plaintiffs' Motion to Compel;

(5) Requiring Plaintiffs to bear the financial burden of any review for electronic records that exceeds 50,000 individual files or records; and

(6) Awarding Defendants their reasonable costs and attorneys' fees incurred in prosecuting the instant motion.

This the 17th day of February, 2014.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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