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 the Governor of North Carolina, et al., Defendants.	**UNITED STATES' RESPONSE TO DEFENDANTS' OPPOSITION TO THE MOTION TO COMPEL** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 13-cv-861

On January 24, 2014, plaintiffs in the cases *NAACP v. McCrory*, 1:13-cv-658, and *League of Women Voters v. North Carolina*, 1:13-cv-660 (hereinafter "NAACP Plaintiffs" and "LWV Plaintiffs"), filed a motion to compel production of documents by Defendants, based on requests originally served on November 29, 2013, and December 2, 2013. *See, e.g.*, 1:13-cv-658, ECF No. 58, at 3. The United States filed a statement supporting the motion on January 28, 2014, *see* ECF No. 62, 1:13-cv-658, and Defendants responded on February 10, 2014, *see* ECF No. 56, 1:13-cv-861. The United States files this reply brief in further support of the motion, to address a few issues raised in Defendants' brief.

The Fourteenth and Fifteenth Amendments guarantee the right of citizens of the United States to vote free from discrimination on the basis of race. Section 2 of the Voting Rights Act protects this fundamental right by forbidding laws and practices that have the purpose or result of denying or abridging the right to vote on account of race or color or language minority status. *See* 42 U.S.C. § 1973(a). The State of North Carolina has a long, judicially recognized history of voting discriminating on the basis of race. *See, e.g., Gingles v. Edmisten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984) ("[T]he State of North Carolina . . . officially and effectively discriminated against black citizens in matters touching their exercise of the voting franchise . . . from ca. 1900 to ca. 1970."), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); *see Ward v. Columbus Cnty.*, 782 F. Supp 1097, 1103 (E.D.N.C. 1991) ("[T]he legacy of discrimination continues to handicap black citizens in [Columbus County] in their ability to participate effectively in the political process."); *Johnson v. Halifax Cnty.*, 594 F.

Supp. 161, 169 (E.D.N.C. 1984) ("Blacks in Halifax County and North Carolina have been subjected to a long history of official racial discrimination concerning their right to vote and participate in the political process.").

Defendants' *ad hominem* criticism of the lawsuits challenging House Bill 589, *see, e.g.*, ECF No. 56, 1:13-cv-861, at 1, 6-7, changes neither these critical protections nor the history of discrimination in voting in North Carolina. Nor does such criticism address the State's own data showing the negative impact the changes implemented by House Bill 589 will have on African-American voters. *See, e.g.*, Complaint, ECF No. 1, 1:13-cv-0861, ¶¶ 29-34, 37-38, 42, 49-50. In fact, if anything, Defendants acknowledge that HB 589 will have a disparate impact on certain demographic groups (although Defendants do not explicitly identify which groups it considers "politically favored"). *See* ECF No. 56, 1:13-cv-0861, at 6-7.

In addition, as part of their effort to limit discovery, Defendants question whether the totality of circumstances test applies in the context of vote denial, rather than vote dilution. *See* ECF No. 56, 1:13-cv-861, at 8 n.4. The plain language of Section 2, however, provides that violations of this provision of the Voting Rights Act are established when, "***based on the totality of the circumstances,*** it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members" based on race, color, or membership in a language minority group. 42 U.S.C. § 1973(b) (emphasis added); *see also* S. Rep. No. 97-417, at 27-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 204-207 (identifying a non-exhaustive list of factors that may be relevant to whether a particular practice

violates the Section 2 discriminatory results test). The Supreme Court has squarely held that "[t]he results test mandated by the 1982 amendment is applicable to *all claims* arising under § 2," *Chisom v. Roemer*, 501 U.S. 380, 398 (1991) (emphasis added), and courts have recognized that Section 2 covers vote denial challenges to voting requirements or qualifications that restrict or interfere with the ability of minority voters to register, cast a ballot, or have that ballot counted. *See, e.g.*, *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1247, 1262-68 (N.D. Miss. 1987), *aff'd sub nom.*, *PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (holding that a prohibition on voter registration outside of the registrar's office and dual registration requirement for municipal elections resulted in unequal access to voter registration opportunities for minority voters); *Brown v. Dean*, 555 F. Supp. 502, 504-506 (D.R.I. 1982) (finding that a change in polling place location interacted with low minority car ownership and poor public transit to cause "constructive disenfranchisement" of minority voters).

Moreover, Defendants mischaracterize the United States' lawsuit as a "facial challenge of the constitutionality" of House Bill 589.[1] *See* ECF No. 56, 1:13-cv-861, at 17. The United States, however, has brought its claim under the broad protections afforded by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, *see, e.g.*, Complaint, ECF No. 1, 1:13-cv-861, ¶¶ 1, 95-100, and as noted above, the "totality of the

[1] Although the State refers to House Bill 589 as the Voter Information Verification Act or "VIVA," that designation applies to only the first six parts of House Bill 589 addressing voter identification and a few other requirements. *See* 2013 N.C. Sess. Laws 381, Sec. 1.1. Other provisions of the act, such as those limiting early voting or eliminating same-day registration, are in other sections of the bill and were added during a rushed session of the North Carolina Senate.

circumstances" test applies. The United States' Complaint alleges that challenged provisions of House Bill 589 will have the purpose and result of discriminating on the basis of race. *See* Complaint, ECF No. 1, 1:13-cv-861, at ¶¶ 95-100. Nothing in the language of Section 2 or in the United States' Complaint limits this challenge to a facial one. The NAACP and LWV Plaintiffs likewise bring claims under Section 2.

Based on their mischaracterization of the Plaintiffs' Complaints, Defendants argue that the parties are not entitled to post-enactment discovery regarding implementation of the provisions of House Bill 589. ECF No. 56, 1:13-cv-861, at 18. But "the burden of showing that the requested discovery is not relevant to the issues in the case is on the party resisting discovery." *United States v. Duke Energy Corp.*, 2012 WL 1565228, at *8 (M.D.N.C. Apr. 30, 2012) (quoting *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978)). At the discovery stage, "relevancy is more properly considered synonymous with 'germane,' as opposed to competency or admissibility." *Elkins v. Broome*, 2004 WL 3249257, at *2 (M.D.NC. Jan. 12, 2004). And courts routinely consider legal claims under the Voting Rights Act based on the most recent available information. *See, e.g.*, *United States v. Osceola Cnty.*, 475 F. Supp. 2d 1220, 1224-25, 1232-33 (M.D. Fla. 2006) (considering data from elections occurring after the County adopted the challenged at-large election system); *Dillard v. Baldwin Cnty. Bd. of Elections*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988) (to prove discriminatory intent under Section 2, plaintiffs must show that racial discrimination was a motivating factor "behind the enactment *or maintenance*" of a challenged electoral system and that the "the system *continues today* to have some adverse racial impact") (emphasis added).

Simply put, the United States has brought claims under Section 2 alleging both the discriminatory purpose and discriminatory results of House Bill 589 as to minority voters. Post-enactment discovery regarding the choices and actions of Defendants in implementing House Bill 589 is entirely relevant in assessing the impact of the challenged provisions on African Americans and other minorities. The Court and the parties should have the benefit of all relevant information that develops on the question of whether the challenged provisions of House Bill 589 will result in unequal access to the political process for minority voters.

Finally, the United States notes Defendants' delay in producing documents. The NAACP Plaintiffs and the United States did not physically receive requested portions of the SEIMS voter registration and SADLS Department of Motor Vehicles databases until February 3, 2014. Although Defendants refer to the production of approximately 8,400 pages (2,494 documents) (the first documents produced since Defendants' initial disclosures on January 8), the United States received those documents on February 10, 2014, the same day Defendants filed their brief in opposition to the motion to compel. The United States appreciates that a large production of documents can take time and that documents may be produced on a rolling basis, but Defendants' delay in starting the production, as well as unreasonable limitations on producing post-enactment documents, present challenges to the United States in preparing for depositions, preparing expert reports, and filing any motion for a preliminary injunction due in a few months. The

United States therefore supports the NAACP's and the League of Women Voters' motion to compel. [2]

CONCLUSION

For the reasons set forth above, the United States supports the NAACP Plaintiffs and LWV Plaintiffs' motion to compel production of documents.

[2] On February 17, 2014, Defendants filed a motion for a protective order. *See* ECF No. 60, 1:13-cv-861. While the United States does not address here every argument raised in that motion, we note a few key points. Regarding email searches, Defendants have proceeded using a set of terms and custodians following discussions between the parties. This list includes some but not all of the search terms requested by Plaintiffs and comprises approximately 44 searches, not 380 individual search terms as represented by Defendants. Moreover, as represented by Defendants to Plaintiffs during a meet and confer call on February 17, the 403,566 records yielded from the application of the search terms to State Board of Elections email records have not undergone de-duplication—a process which will significantly reduce the number of records. Plaintiffs and the United States have stated a willingness to work with Defendants regarding any particular search term that may yield a large number of records that are not relevant to the inquiry.

Notably, given the scope of the voting changes enacted by the North Carolina legislature, the fundamental right to vote at stake in this case, and the long history of racial discrimination in voting in North Carolina, a large volume of relevant, non-privileged discovery is to be expected. The United States therefore opposes the State's latest motion.

Dated: February 18, 2014

Respectfully submitted,

RIPLEY RAND
United States Attorney
Middle District of North Carolina

/s/ Gill P. Beck

GILL P. BECK
NCSB No. 1375
Special Assistant Unites States Attorney
100 Otis Street
Asheville, NC 28801
Telephone: (828) 259-0645

JOCELYN SAMUELS
Acting Assistant Attorney General
Civil Rights Division

/s/ John Albert Russ IV

T. CHRISTIAN HERREN, JR.
JOHN A. RUSS IV
CATHERINE MEZA
DAVID G. COOPER
SPENCER R. FISHER
ELIZABETH M. RYAN
Attorneys, Voting Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 305-0132

CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on February18, 2014, I electronically filed the foregoing United States' Response to Defendants' Opposition to the Motion to Compel**,** using the CM/ECF system in case numbers 1:13- cv-658, 1:13- cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

/s/ John Albert Russ IV

JOHN A. RUSS IV
U.S. Department of Justice
Civil Rights Division - Voting Section
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
Phone: (800) 253-3931
Email: john.russ@usdoj.gov