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' MOTION FOR PROTECTIVE ORDER** 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

INTRODUCTION

On February 17, 2014, Defendants in the above-captioned cases filed a motion seeking a protective order or other relief. *See* 1:13-cv-861, ECF No. 59. The United States files this response brief opposing the Defendants' motion.[1]

Defendants' motion is without merit and serves only as a distraction from the issues before the Court and as corroboration of the need for the Court's intervention as requested by the NAACP and LWV Plaintiffs in their motion to compel, *see* 1:13-cv-861, ECF No. 54. Defendants' motion lacks information sufficient to justify their requests. In particular, Defendants provide the Court with no basis to support their contention that Plaintiffs' search terms are "not reasonably calculated to lead to the discovery of . . . admissible or discoverable evidence," Defs.' Br. (1:13-cv-861, ECF No. 60) at 13; no statement that they have reviewed *any* of the alleged "712,027 individual files" responsive to the searches they have run so far, *see id.* at 9; no estimate of the time or expense that will be needed to review those documents; and no reasonable proposal setting out what documents they believe they can produce in time for Plaintiffs' experts to consider them in preparing their reports due April 1. Furthermore, the number of records that Defendants cite in their brief are inflated and do not reflect the actual number

[1] Defendants simultaneously filed a motion to expedite seeking to require Plaintiffs to respond within three days, by February 20. Although the United States opposes Defendants' attempt to shoehorn their last-minute motion onto the previously scheduled February 21 hearing, we nevertheless file this short response to address inaccuracies in the Defendants' memorandum. We also note that Defendants' late filing of their reply brief in support of their motion to quash has caused the parties additional, needless time pressure in preparing for tomorrow's hearing. *See* 1:13-cv-861, ECF No. 65 (filed February 20, 2014, two days past the February 18 deadline set by the Court in its Order entered February 3).

of records that they will need to review. For these reasons and those that follow, Defendants' motion should be denied.

ARGUMENT

I. Defendants have failed to comply with the meet-and-confer requirement of Local Rule 37.1(a).

Defendants have failed to meet the requirement of Local Rule 37.1(a), which states that "[t]he Court will not consider motions and objections relating to discovery unless moving counsel files a certificate that after personal consultation and diligent attempts to resolve differences the parties are unable to reach an accord." Defendants' counsel certified that they conferred with Plaintiffs' counsel and that Plaintiffs' counsel agreed to consider prioritizing requests, but during their February 17 phone call with Plaintiffs, Defendants did not even discuss two of the issues raised in their motion—specifically, they did not indicate a desire for a cap on the number of requests for production that may be served going forward, and they did not ask Plaintiffs to share the burden of discovery expenses, *see* Defs.' Br. at 13-14 ¶¶ 1, 5.

II. Plaintiffs' document requests are likely to lead to discovery of relevant evidence.

Even if the Court were to overlook Defendants' failure to follow the Local Rules, the motion should still be denied because all of Plaintiffs' document requests are crafted to lead to discovery of relevant evidence and are therefore within the scope of permissible discovery under Rule 26. None of Defendants' proposed limitations are warranted.

Defendants have failed to show that the requested discovery is not relevant to the issues in this litigation, or to the issues likely to be addressed in any preliminary

injunction motions. *See United States v. Duke Energy Corp.*, No. 1:00-CV-1262, 2012 WL 1565228, at *8 (M.D.N.C. Apr. 30, 2012) ("[T]he burden of showing that . . . requested discovery is not relevant to the issues in the case is on the party resisting discovery." (quoting *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978))); *Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 243-44 (M.D.N.C. 2010) (same). Defendants, in conclusory fashion, assert that Plaintiffs' search terms are "unreasonable" because applying some of them yields a large number of documents. *See* Defs.' Br. at 6-8. They have not, however, shown that these documents are irrelevant. Instead, they offer mere speculation. *See id.* at 7 ("It is hard to imagine that many, if not any, of these . . . files contain any information useful to any party in this litigation."); *id.* ("It is difficult to determine how this extremely broad term could yield relevant information."). It is not even clear from these statements whether Defendants have actually begun reviewing these documents to evaluate their responsiveness to Plaintiffs' requests. This is insufficient to meet their burden of proving that the requested discovery is not relevant. *See Kinetic Concepts*, 268 F.R.D. at 249.

To the contrary, the requested discovery is relevant to the claims in this litigation, and the Court should reject Defendants' efforts to narrow the substantive and temporal scope of Plaintiffs' discovery. All aspects of the highly unusual legislative procedures surrounding the development, consideration, and passage of HB 589, *see* U.S. Compl. (1:13-cv-861, ECF No. 1) ¶¶ 51-66, are potentially relevant to the General Assembly's intent in enacting the bill; the Plaintiffs have alleged as part of their allegations under Section 2 of the Voting Rights Act that the Assembly acted with a discriminatory intent,

see id. ¶¶ 80-92, 99. Therefore, Defendants' argument that Plaintiffs "have never justified why references to HB 589 in isolation would be calculated to only producing information relevant to this case," Defs.' Br. at 8, is unavailing. Indeed, documents in the Defendants' possession referencing "HB 589," the bill at issue in this litigation, are likely to be relevant to the General Assembly's procedures for and consideration of the bill. Similarly, the Court should also reject Defendants' argument urging it to "requir[e] Plaintiffs to provide search terms that narrow in on" the challenged provisions of HB 589 other than the voter photo identification requirement, *see* Defs.' Br. at 12. Since HB 589 contained only a voter photo identification requirement and related provisions when it was introduced in the House, focusing only on documents relating to the challenged non-ID provisions (that were added to the bill late in the legislative process) may exclude documents directly relevant to the legislative process.

Notwithstanding Defendants' unsupported assertions to the contrary, the requested pre-enactment information is also relevant to the United States' claims in this case, and to any preliminary injunction motion the United States may file. The historical context surrounding the enactment of HB 589 is an important component of the United States' claim under Section 2 of the Voting Rights Act, *see* U.S. Compl. ¶¶ 18-22, 81, 97, and is an integral part of the totality of the circumstances test that courts apply in analyzing such claims. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (listing "the history of voting-related discrimination in the State or political subdivision" as a "factor[] which typically may be relevant to a § 2 claim") (citing S. Rep. No. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206). This includes documents predating the

General Assembly's consideration of HB 589. The Defendants' request for Court intervention limiting their "initial review" to documents created after the start of the 2013 session of the General Assembly, *see* Defs.' Br. at 12, should therefore be rejected.[2]

Finally, Defendants have failed to justify their request for a cap on future requests for production. Substantial document discovery is common in voting rights cases and is to be expected in a case of this nature. Furthermore, some of Plaintiffs' discovery requests reflect similar sets of documents requested from multiple individuals or agencies likely to have relevant information.

III. Defendants have not shown that Plaintiffs' discovery requests impose undue burden or expense.

Despite this Court's direction at the initial pretrial conference to proceed with "an expedited push of discovery," Transcript 12/12/2013 at 47:12-16, the Defendants have produced very few documents, and have done so only after considerable delay. Their initial disclosures contain 156 documents (2,351 pages) comprising primarily publicly available legislative records, and they have produced an additional 2,494 documents (8,359 pages) containing primarily election administration materials from county boards of elections. Apart from portions of voter and driver license databases, this is the sum total of Defendants' productions to date. Despite repeated requests from Plaintiffs to move ahead with their review and production of email documents and Defendants'

[2] Notwithstanding the relevance of older documents, however, the Plaintiffs have suggested that Defendants prioritize the review and production of documents from 2013 to the present. Exhibit A at 1, 2-3 (Feb. 17 6:15pm O'Connor Email; Feb. 19 7:32pm O'Connor Email).

representation that they would begin such productions the week of February 24, Defendants have given no indication that they have even begun their review of such documents.[3]

In light of Defendants' inaction, their contention that they should not be required to comply with Plaintiffs' discovery requests because those requests are unduly burdensome lacks credibility. Defendants have failed to meet their burden of "demonstrating that they will suffer undue burden and expense by complying with the discovery." *Kinetic Concepts*, 268 F.R.D. at 249.

A. Plaintiffs' position regarding the relevance of the documents requested in no way hampers Defendants from conducting their review and production in the most efficient possible way.

From the beginning, the parties have always contemplated rolling productions of electronic documents. *See* Consent Order Re ESI (1:13-cv-861, ECF No. 43) ¶ 9. The Plaintiffs have assumed that Defendants would proceed with such productions in the most efficient way possible, especially in light of the Court's direction to the parties at the initial pretrial conference to proceed with "an expedited push of discovery early so that plaintiffs have what they need for a preliminary injunction." Transcript 12/12/2013 at

[3] Defense counsel have made numerous statements in their brief regarding the large number of potentially relevant documents identified using the search terms. Defendant Kim Westbrook Strach states in a declaration appended to Defendants' motion that the SBOE has "now provided or will soon provide the vast majority of documents responsive to plaintiffs' requests." Strach Decl. (1:13-cv-861, ECF No. 60-1) ¶ 12. Nonetheless, Defendants have yet to produce a single email and have given little indication that they have even begun the process of reviewing and producing email documents. It therefore appears that Defendants are trying to take credit for completing their document productions while at the same time arguing that completing those productions would be impossible or unreasonably burdensome.

47:12-16. Defendants have repeatedly requested that Plaintiffs prioritize their document requests that "focus on discovery necessary for a preliminary injunction." Defs.' Br. at 6. Plaintiffs have declined this offer, however, because all of the requested documents are potentially relevant to a preliminary injunction, but as noted below, Plaintiffs have suggested that Defendants could prioritize producing the 2013 information first, as part of a rolling production.

Defendants' insistence on obtaining such a specific type of prioritization flies in the face of this Court's guidance at the initial conference. In response to a concern raised by counsel for the NAACP Plaintiffs that the Defendants might resist complying expeditiously with discovery requests, the Court stated as follows: "My intent would be that you pursue whatever discovery it is you want to pursue. They [*i.e.*, Defendants] understand we're all under an expedited response in the sense that there's not going to be routine extensions of discovery periods . . . . I'm also not limiting by topic or otherwise what it is that you choose to pursue." Transcript 12/12/2013 at 51:4-22.

Further, Defendants have proceeded using a set of search terms and custodians developed in the course of discussions between the parties. The list of search terms includes some but not all of the terms requested by Plaintiffs and comprises approximately 44 searches, not "380 advanced Boolean search terms," as represented by Defendants. *Compare* Defs.' Br. at 6 *with* Exhibits B and C (search results provided by Defendants to Plaintiffs). In their brief, Defendants have for the first time identified several search terms they believe are overbroad. Defs.' Br. at 7-8. Defendants list the numbers of hits these search terms resulted in, but they did not provide any such numbers

to the Plaintiffs in conjunction with any of their requests for prioritization; rather, Plaintiffs were not aware of these numbers until after they requested information from the Defendants about their search results, which was the same day that Defendants filed the instant motion. Even then, Defendants never raised any concerns about specific search terms and never proposed any refinement of those terms that might address their concerns while still reaching the categories of documents Plaintiffs believe are relevant.

B. Defendants have provided Plaintiffs and this Court with inaccurate numbers regarding the records to be reviewed, and therefore their motion should be denied.

Defendants have failed to provide the Court with clear and accurate information about the number of documents identified through their searches, and the timing of Defendants' motion cut off any opportunity for the Plaintiffs to obtain clarification. Defendants should not be permitted to complain about the burden of complying with Plaintiffs' requests without first providing clear, reliable, and accurate information regarding the extent of such burden. *See Kinetic Concepts*, 268 F.R.D. at 249.

In their Friday, February 14 email (sent at the end of the day), Defendants proposed a phone call with all parties on the morning of Monday, February 17 (a federal holiday), Exhibit A at 6 (Feb. 14 6:02pm Strach Email), and Plaintiffs agreed. During the call, Defendants informed Plaintiffs that there were 770,000 documents responsive to the search terms they have run so far. Plaintiffs requested a breakdown of the results yielded from the searches. After the call, Plaintiffs sent a follow-up email reiterating their request for information about Defendants' search results, and further requesting that the breakdown be organized by search term and by custodian. *Id.* at 4 (Feb. 17 2:29pm Allen

Email). Defendants provided the requested information broken down by search term for documents in the possession of the State Board of Elections ("SBOE"), and offered to provide such information for documents in the possession of the legislature if Plaintiffs agreed that doing so would not waive any of Defendants' objections regarding legislative privilege. *Id.* at 3-4 (Feb. 17 3:36pm Strach Email); Exhibit B (attachment to Feb. 17 3:36pm Strach email). Plaintiffs consulted with each other and agreed that they would (1) accept Defendants' condition and request information about the legislature's documents, (2) ask for some additional information regarding the search results for the SBOE's documents, and (3) suggest that Defendants prioritize documents from 2013 to the present for review and production. Although Defendants filed their motion before Plaintiffs had a chance to send their response, Plaintiffs sent their response anyway, under the assumption that the meet-and-confer process would continue simultaneously with briefing of the motion. *Id.* at 2-3 (Feb. 17 6:15pm O'Connor Email). On February 19, after two follow-up emails, Defendants sent the legislative search information they had offered to provide, but they have so far provided no other reply to Plaintiffs' email as of February 19. *Id.* at 2 (Feb. 19 10:17am Strach Email); Exhibit C (attachment to Feb. 19 10:17am Strach Email).

Plaintiffs have identified at least three sources of uncertainty or errors regarding Defendants' numbers. First, Defendants represented (and repeated in their brief, Defs.' Br. at 7) that approximately 400,000 documents in the possession of the SBOE are responsive to the search terms. The spreadsheet regarding the SBOE document searches that they provided in response to our request for more information lists the number of

"records" associated with each of 44 search terms. Exhibit B. Adding up the number of "records" listed for each term yields a total of 403,566. *Id.*

This number, however, does not reflect the actual number of documents to be reviewed. First, many of the documents are undoubtedly responsive to more than one search term, and therefore it is not accurate to add together the number of documents responsive to each search term. The same uncertainty exists with respect to the "283,461 individual files" yielded by searching General Assembly documents. *See* Exhibit C. Second, on the phone call with the parties, Defendants indicated that the SBOE documents had not been de-duplicated—*i.e.*, the numbers had not been adjusted to reflect multiple copies of the same document. De-depulication will significantly reduce the number of records that need to be reviewed. And third, the spreadsheet Defendants provided for the SBOE documents included a number of errors in the search terms.[4] If the searches were conducted exactly as listed in the spreadsheet, these errors also call into question the accuracy of the numbers.

For all of these reasons, Defendants' alleged numbers of records requiring review are exaggerated, and neither Plaintiffs nor this Court can rely on these numbers as a reliable indicator of how many non-duplicated records have to be reviewed. Defendants' motion should therefore be denied.

[4] For example, search term 5 includes the connector "2/30" instead of "w/30," search terms 1, 8 and 10 are missing quotation marks, and search terms 13 and 14 have stray quotation marks. *See* Exhibit B. These errors in defining the search terms could well have inflated the number of documents that the searches identified.

IV. Defendants must bear the costs of complying with their discovery obligations.

Defendants have failed to demonstrate that anything about Plaintiffs' discovery requests justifies a departure from the general presumption under the Federal Rules of Civil Procedure that "the responding party must bear the expense of complying with discovery requests." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *see also Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F. 3d 249, 261 (4th Cir. 2013).

CONCLUSION

For the reasons set forth above, the Defendants' motion for a protective order or other relief should be denied.

Dated: February 20, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on February 20, 2014, I electronically filed the foregoing **United States' Response to Defendants' Motion for Protective Order,** 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.

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