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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, EMMANUEL BAPTIST CHURCH, NEW OXLEY HILL BAPTIST CHURCH, BETHEL A. BAPTIST CHURCH, COVENANT PRESBYTERIAN CHURCH, CLINTON TABERNACLE AME ZION CHURCH, BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC., ROSANELL EATON, ARMENTA EATON, CAROLYN COLEMAN, BAHEEYAH MADANY, JOCELYN FERGUSON-KELLY, FAITH JACKSON, and MARY PERRY,

Plaintiffs,

v.

PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, KIM WESTBROOK STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections, JOSHUA B. HOWARD, in his official capacity as Chairman of the North Carolina State Board of Elections, RHONDA K. AMOROSO, in her official capacity as Secretary of the North Carolina State Board of Elections, JOSHUA D. MALCOLM, in his official capacity as a member of the North Carolina State Board of Elections, PAUL J. FOLEY, in his official capacity as a member of the North Carolina State Board of Elections and MAJA KRICKER, in her official capacity as a member of the North Carolina State Board of Elections,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER OR FOR OTHER APPROPRIATE RELIEF

Case No.: 1:13-CV-658

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, A. PHILIP RANDOLPH INSTITUTE, UNIFOUR ONESTOP COLLABORATIVE, COMMON CAUSE NORTH CAROLINA, GOLDIE WELLS, KAY BRANDON, OCTAVIA RAINEY, SARA STOHLER, and HUGH STOHLER, Plaintiffs, v. THE STATE OF NORTH CAROLINA, JOSHUA B. HOWARD in his official capacity as a member of the State Board of Elections, RHONDA K. AMOROSO in her official capacity as a member of the State Board of Elections, JOSHUA D. MALCOLM in his official capacity as a member of the State Board of Elections, PAUL J. FOLEY in his official capacity as a member of the State Board of Elections, MAJA KRICKER in her official capacity as a member of the State Board of Elections, and PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, Defendants.	**Case No.: 1:13-CV-660**

UNITED STATES OF AMERICA, Plaintiffs, v. THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and KIM W. STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections, Defendants.	)	**Case No.: 1:13-CV-861**

INTRODUCTION

The 2014 election cycle has officially begun already. In a diligent effort to conduct the discovery necessary to meet the Court's deadlines associated with seeking preliminary injunctive relief, Plaintiffs in *NAACP v. McCrory* ("NAACP Plaintiffs") and *League of Women Voters of N.C. v. North Carolina* ("LWV Plaintiffs") served discovery requests almost three months ago. The Plaintiffs seek to obtain the information necessary for this Court to have a full picture before it when considering that request for injunctive relief. The right of all North Carolinians to participate freely in a major national and state election is at stake, and it is understood by the Court and all parties that Plaintiffs will be asking this Court to safeguard that right. Rather than proceeding at a pace that somehow disrespects the Court's scheduling order, as insinuated by Defendants, Plaintiffs recognized that the Court in fact anticipated an "expedited push" in discovery in the early part of 2014. At this point, Plaintiffs are not even seeking expedited discovery, but simply seeking the discovery they requested almost three months ago.

From the outset, the Plaintiffs have tried to work with the Defendants to expeditiously and efficiently facilitate the production; the Defendants unfortunately have delayed at every turn and utterly failed to produce any emails or electronic documents. And, crucially, while Defendants seek extraordinary relief from this Court on a number of fronts, they have utterly failed to engage in even the most basic level of effort to confer with Plaintiffs as to several of these issues. Instead, with Plaintiffs' Motion to Compel the production of the very same materials at issue fully briefed, Defendants suddenly and without conferring brought the instant Motion -- and the motion seeks extraordinary relief

without basis in an effort to avoid their discovery obligations in these cases. For the reasons discussed below, LWV and NAACP Plaintiffs respectfully request that the Court Deny Defendants' Motion for Protective Order or for Other Appropriate Relief.

ARGUMENT

Under Rule 26 of the Federal Rules of Civil Procedure, a party seeking the protective order has the burden to show good cause for it. Fed. R. Civ. P. 26(c). Rule 26(b)(2)(C) requires a showing that "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in this action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C). To establish good cause in this instance, Defendants must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981). Defendants flatly fail to meet this threshold, and have cited no case law supporting their extraordinary requests for relief. One declaration from one of the state agencies involved in this litigation does not constitute "a particular and specific demonstration of fact." *Id.* In fact, that declaration actually supports ***Plaintiffs'*** position: Ms. Strach concedes in her declaration that all the documents (both electronic and hard copy) have already been collected from the State Board of Elections. The only remaining task is for the lawyers — lawyers from a large, private law firm, lawyers from other law firms and lawyers from the Attorney General's office — to review and produce those documents in a timely manner.

Plaintiffs will address each of the extraordinary elements of relief sought by Defendants in turn:

Relief Sought in Defendants' Motion:

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**

This relief requested is unsupported and inappropriate. As with every request for relief set forth in Defendants' Motion, Defendants have failed to satisfy this Court's meet-and-confer requirement. Although they have complained about the number of requests, Defendants have not broached with Plaintiffs the topic of limiting the future number of Requests for Production made by the parties going forward. However, given the scope of the issues at stake in this election, and, in fact, the reasonable number of Requests for Production propounded thus far in light of that scope, this request for relief is unwarranted — and certainly not ripe at this point in the case.

Moreover, the math employed by Defendants in their Motion is suspect. They claim that Plaintiffs have served nearly 400 requests for production to date. But that counts each of the 17 identical Requests for Production issued to 13 legislators separately. Using Defendants' math, the 50 Requests for Production propounded to every LWV Plaintiff (9 total) would equate to 450 discovery requests—more than the number propounded by all Plaintiffs.

Significantly, while Defendants have devoted significant attention to the (inflated) **number** of requests, they have not once—neither in the instant Motion, in their Opposition to Plaintiffs' Motion to Compel, nor in their discussions with Plaintiffs in the

course of many meet-and-confer discussions—identified discovery requests that they believe are inappropriate or unrelated to the subject matter of this case. Indeed, a review of the search terms suggested by Defendants and agreed upon by the parties to identify documents potentially responsive to these requests reveals that those terms are all closely related to the subject matter at issue in this litigation.

The simple fact is that even disregarding the fundamental rights at stake in this case, Plaintiffs have not propounded an unreasonable or unmanageable number of discovery requests. More importantly, "[i]f a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery." *Zubulake v. UBS Warburg* (*Zubalake I*), 217 F.R.D. 309, 321 (S.D.N.Y. 2003). If ever extensive discovery were warranted in litigation, this is that case.

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;

Again, Defendants failed to properly meet-and-confer on this relief requested from the Court, and the relief is unnecessary given the repeated efforts Plaintiffs have made to address possibly overbroad search terms—efforts to which Defendants have yet to respond.

As an initial matter, the search terms currently being employed were agreed upon by all parties and were, in fact, based on Defendants' initial list of proposed search terms. Moreover, Defendants are in the best position to assess which terms are potentially

problematic insofar as they are yielding an unacceptable number of false positives, etc. and should propose revisions, along with the basis for them. On their own initiative, Plaintiffs have made a good faith effort, based on the spreadsheet of search terms and "hits" provided to Plaintiffs ***only this week***, *see* Ex. A, 2/17/2014 and 2/19/2014 emails from Phil Strach to Plaintiffs, to identify which search terms might be producing "false positives" or be otherwise overbroad. Plaintiffs have explicitly offered to work with Defendants to refine the search terms and thereby reduce the number of documents that Defendants would thus have to review. *See* Ex. B, 2/17/2014 email from Bridget O'Connor to Phil Strach ("Finally, with respect to your note about 'many of the current search terms' being 'just too broad in general to generate meaningful and relevant data,' Plaintiffs are happy to work with Defendants to refine the agreed-upon list of search terms in response to the results that you are seeing in your searches. To date, we have not received any proposed modifications to the Defendants' search terms."). In that exchange, Plaintiffs specifically requested from Defendants the lists of "hits" de-duplicated by custodian and by search so that they could better identify potentially problematic search terms, but Defendants have not responded to that request. (We ask that the Court compel the Defendants to provide the Plaintiffs this basic information in order to work cooperatively in discovery.) Rather than working with Plaintiffs to refine those search terms that Defendants believe are overbroad or the terms specifically identified by Plaintiffs as potentially overbroad based on the number of "hits" returned, Defendants instead filed this last-minute motion.

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;

While Defendants have made clear, in their response to Plaintiffs' Motion to Compel, that they do not believe they are legally obligated to produce materials developed prior to 2013 ("pre-enactment materials") and have objected to Plaintiffs' Requests for Production on that basis, Defendants have again not properly met-and-conferred with Plaintiffs on this specific request for relief. Indeed, they previously discussed searching back to 2000 and indicated that they would raise any proposed limitations with Plaintiffs.

Defendants mischaracterize LWV and NAACP Plaintiffs' Requests for Production, implying that responding to those requests would demand massive historic research. In fact, there are only very limited subject matter areas in which LWV and NAACP Plaintiffs have requested documentation back to 1995, including documentation of voter fraud and materials from the 2000s relating to the implementation of the provisions stricken by HB589. Within the discrete subject area of documentation of voter fraud, they have asked members of only one branch of government and two agencies (the legislature, the State Board of Election, and the Governor's Office) to provide documentation of: (i) instances of in-person voter fraud and (ii) instances of absentee voter fraud. Given that "voter fraud" has been a major justification put forth by some Defendants in support of House Bill 589 during the legislative process, it will be critical for Plaintiffs to understand the evidentiary basis, if one exists, that underpins that

justification. Similarly, the information sought from the 2000s relating to the enactment of the voter provisions stricken by HB589 (including, *inter alia*, early voting and same-day registration) is highly relevant, because the circumstances surrounding the passage of these provisions and the effect that these provisions had once implemented will be crucial to understanding the effects of HB589's repeal of these provisions. .

Moreover, in response to Defendants' concerns about the breadth of documents they would need to review, Plaintiffs offered an eminently reasonable compromise—that Defendants start with reviewing documents from 2013, and work their way backward. *See* Ex. B, 2/17/2014 email from Bridget O'Connor to Phil Strach. This ensures that production by Defendants moves forward, and that Plaintiffs have access to the evidence most critical to their preliminary injunction motions. Plaintiffs also offered another proposal for prioritization of Defendants' review by targeting the categories of search results with the lowest "hit" numbers first, while working cooperatively to review and potentially refine the precision of the search terms for searches yielding the highest "hit" results. *See* Ex. C, 2/19/2014 email from Bridget O'Connor to Phil Strach. Defendants have similarly declined to respond to that proposal.

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;

As an initial matter, with regard to the legislative immunity request, the breadth of the relief requested by Defendants is stunning. Defendants want relief

from even **searching and reviewing** the documents that could be subject to the legislative immunity. Such request is illogical—it cannot be determined that the immunity or privilege, if any, applies **before** Defendants even identify and examine the documents. Furthermore, a court in the Western District of North Carolina recently ordered production of non-privileged portions of e-mail because the emails might include "relevant and material evidence," even though the custodian argued that performing the privilege review would be an undue burden and expense. *Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am.*, 2007 U.S. Dist. LEXIS 88820, *34, *39-40 (W.D.N.C. Nov. 19, 2007); *see also Zubulake v. UBS Warburg LLC (Zubulake II)*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("It should be emphasized that EQT does not complain of the cost or burden of retrieving the emails in question. It has already retrieved the emails. EQT's position is that the only reasonable search for privileged and responsive documents is done by human beings on an individual document basis. As the bulk of trending case law and the recent amendments to the rules indicate, this is an untenable position.").

The issue of production duties where claims of legislative immunity have been raised is already properly before this Court in the Motion to Quash Subpoenas (ECF No. 56 in *NAACP v. McCrory*, 1:13-cv-00568) and the LWV Plaintiffs' Motion to Compel (ECF No. 68 in *LWVNC, v. North Carolina*, 1:13-cv-00660). Plaintiffs refer the Court to their position stated in briefing on those Motions. Likewise, Plaintiffs' position on Defendants' duty to disclose post-

enactment evidence, particularly as it relates to implementation of the challenged new laws, has been fully briefed in support of Joint Plaintiffs' Motion to Compel (ECF No. 58 in *NAACP v. McCrory*, and ECF No. 59 in *LWVNC v. North Carolina*).

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

Yet again Defendants have petitioned this Court for relief without first having met-and-conferred on the issue with Plaintiffs.

More significantly, Defendants have articulated no basis either for cost-shifting generally in their motion, or specifically at this procedural point. The Court warned Defendants that "there is going to be this expedited push of discovery early," Tr. of Rule 16 Conf. at 47:12-22, and that has been true, but as described above, the extent of discovery in the two months in which discovery has been open has been more than reasonable given the numerous changes to North Carolina's election laws specifically at issue in this litigation. The 50,000 records threshold set by Defendants appears to be completely arbitrary, and is certainly not supported by law.

Indeed, in civil rights litigation, when engaging in a "proportionality" analysis to fairly apportion discovery costs, the trend has been to refrain from shifting that cost from state defendants to plaintiffs in the discovery process. *John B. v. Goetz*, 879 F. Supp. 2d 787, 887, 889 n. 42 (M.D. Tenn. Jan. 28, 2010) (declining to shift costs to plaintiffs where state "Defendant's resources are extensive and Plaintiffs' resources are miniscule," further noting that plaintiffs' lead counsel were "a not-for-profit organization that has

limited financial resources and relies significantly on the pro bono services of large law firms" and defendants had access to the state attorney general's office and private counsel retained for the litigation). .

The Defendants fail to provide any support for any "cost shifting" for discovery. And for good reason. Such cost shifting for electronic discovery is only available when the data being sought is "inaccessible." *Zubulake,* 216 F.R.D. at 284 ("It is worth emphasizing again that cost-shifting is potentially appropriate only when inaccessible data is sought."). Here, as described in the Strach Declaration, the data has been produced and the documents have been collected -- they just have not been produced.

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

This request is baseless. Defendants have utterly failed to comply with the Federal Rules of Civil Procedure, they have failed to comply with the local rules, and their requests for relief are without any support in law or fact. As such, this request is inappropriate and meritless, and should be denied.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court deny Defendants' Motion for Protective Order or for Other Appropriate Relief.

Respectfully submitted,

/s/ Allison J. Riggs

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2014, I served Plaintiffs' Response in Opposition to Defendants' Motion for a Protective Order with the Clerk of Court using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which on the same date sent notification of the filing to the following:

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Respectfully Submitted,

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