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

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION OF MARCH 3, 2014 ORDER

NOW COME defendants, by and through their undersigned counsel, and hereby respond to Plaintiffs' Motion for Clarification of March 3, 2014 Order. [*United States* D.E. 76; *NAACP* D.E. 91; *LWV* D.E. 94] Plaintiffs have gone beyond what defendants understood they would be filing—a simple request that the Court clarify the meaning of Section 2(b)(2) of the Court's March 2, 2014, Order [*United States* D.E. 74; *NAACP* D.E. 89; *LWV* D.E. 92]—and have included arguments as to why their interpretation of Section 2(b)(2) should be adopted as well as representations concerning the discovery process that is ongoing. Plaintiffs fail, however, to accurately characterize that discovery process. For these reasons, defendants are compelled to submit this short response.

ARGUMENT

Section 2(b)(6) of the March 3, 2014, Order states:

> Upon notification of Plaintiffs' identification of responsive materials, the first of which will occur no earlier than 7 March 2014 Defendants shall have five business days to identify any of those emails or other electronic records that they may believe are not responsive or protected by the attorney-client privilege, the work product doctrine or legislative privilege or immunity (subject to the Court's ruling on that issue). If Plaintiffs identify more than 3,000 emails or other electronic records, at any one time, Defendants will be afforded one extra day for every 1,000 documents in excess of the 3,000 to make the identification described above.

Plaintiffs appear to suggest that defendants have somehow been dilatory in not conveying to plaintiffs their understanding of the meaning of this provision until six business days after plaintiffs made their first identification of documents. Defendants have not been dilatory. Defendants did not explain their understanding of this provision

to plaintiffs any earlier because defendants did not know until plaintiffs' counsel sent an email at 5.54 P.M. on the fifth business day after the first identification what plaintiffs understood Section 2(b)(6) to mean. [*United States* D.E. 76-4; *NAACP* D.E. 91-4; *LWV* D.E. 94-4] Until that email, defendants were not aware of any disagreement in interpretation between the parties. Upon learning of plaintiffs' interpretation, defendants responded with their understanding at 8:35 A.M. the next business day. *Id*.

Plaintiffs also claim that defendants' interpretation of Section 2(b)(6) denied them prompt access to some documents, a situation they claim is "particularly unreasonable in light of the fact that Plaintiffs have taken on the lion's share of the burden in reviewing the Defendants documents for production." [*United States* D.E. 76, p. 5; *NAACP* D.E. 91, p. 5; *LWV* D.E. 94, p. 5] This claimed "unreasonableness" is irrelevant to the meaning of Section 2(b)(6). Indeed, defendants see the clear language of Section 2(b)(6) as promoting reasonableness by balancing the need for defendants to respond to plaintiffs' identifications promptly with the need for plaintiffs to exercise appropriate judgment in the number and types of documents they identify as responsive. But even so, plaintiffs ignore that the situation they find themselves in is one of their own creation.

Plaintiffs created the situation they find themselves in by insisting throughout the discovery process that the discovery be had on *all* issues in these case, including the Voter ID requirement that does not go into effect until 2016, rather than focusing their discovery requests on provisions of the challenged law that go into effect in 2014 and would be the subject of a preliminary injunction motion. They created the situation they find themselves in by refusing to prioritize for defendants the discovery that they need

most for their preliminary injunction motion so that discovery could proceed on a rolling basis, insisting rather that all discovery requests—nearly 400 in all—were equally important and should be complied with immediately. They created this situation when they required the use of over 380 advanced boolean search terms to search the individual email boxes and electronic files of over 60 custodians across multiple state agencies and, when it was apparent that these searches had produced an overwhelming volume of documents, when they refused to consider ways of narrowing the searches. And they have created the situation now, in their identification of responsive documents, by identifying documents that simply cannot possibly be considered responsive. For example, the documents identified by plaintiffs on 14 March 2014 as responsive have included many unresponsive documents, such as the following:

- Numerous copies of a memo on the permissibility of firearms in polling places;
- Nominations of persons to fill vacancies on county boards of elections;
- Numerous emails discussing whether county boards of elections should permit testimony of witnesses via Skype;
- Lists of vendors of voting equipment;
- Biographies, candidacy statements and even a photograph of appellate judicial candidates for inclusion in the 2004 Judicial Voter Guide; and
- At least 300 documents that contain nothing more than xml code for font styles and formatting on internet pages.

All of these are documents generated by plaintiffs' search terms, and all of these are documents defendants must review under Section 2(b)(6) because plaintiffs have identified them as responsive. While defendants may see no point in utilizing the time

and efforts of counsel to challenge plaintiffs' designation of these documents as responsive, defendants must still review them pursuant to Section 2(b)(6). Had plaintiffs not improperly identified these documents, the Section 2(b)(6) review could be completed more quickly and plaintiffs might not have added to the review time defendants are afforded by Section 2(b)(6). Defendants believe that Section 2(b)(6) balances the obligations of the parties by requiring prompt review from defendants, while at the same time discouraging plaintiffs from "overdesignating" documents as responsive.

Finally, plaintiffs fail to recognize the cumulative effect that their interpretation of Section 2(b)(6) would have. Plaintiffs designated over 7,000 documents as responsive on 14 March. On 21 March, they designated over 10,000 documents. Under plaintiffs' interpretation of Section 2(b)(6), defendants would have been required to respond to the first 3,000 of plaintiffs' 14 March designations by 21 March, and respond as to 1,000 of the remaining identification each day the following week, while at the same time reviewing the first 3,000 of the documents identified on 21 March. This is a situation that will repeat—and depending on the number of documents identified by plaintiffs at any one time, intensify, with three or more separate identifications having to be reviewed on any one day—week-after-week until discovery is complete. For this reason, plaintiffs' interpretation of Section 2(b)(6) is not only contrary to the plain language of that provision, it is burdensome and unreasonable.

CONCLUSION

For the foregoing reasons, defendants pray that the Court interpret Section 2(b)(2) in a manner consistent with its clear language, so as to provide that if plaintiffs identify more than 3,000 documents as responsive at any one time, to be "afforded one extra day for every 1,000 documents in excess of the 3,000 to make the identification" required by Section 2(b)(2).

This the 27th day of March, 2014.

ROY COOPER
ATTORNEY GENERAL OF NORTH CAROLINA

By: /s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants North Carolina and State Board of Election Defendants.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants North Carolina and State Board of Election Defendants.

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(d)
Counsel for Governor Patrick L. McCrory

By: /s/ Robert C. Stephens
Robert C. Stephens (State Bar #4150)
General Counsel
Office of the Governor of North Carolina
20301 Mail Service Center
Raleigh, North Carolina 27699
Telephone: (919) 814-2027
Facsimile: (919) 733-2120
E-mail: bob.stephens@nc.gov
Counsel for Governor Patrick L. McCrory

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:

***Counsel for United States of America*:**

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
U.S. Department of Justice
Room 7254-NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Gill P. Beck
Special Assistant United States Attorney
Office of the United States Attorney
United States Courthouse
100 Otis Street
Asheville, NC 28801

Counsel for NCAAP Plaintiffs:

Penda D. Hair
Edward A. Hailes, Jr.
Denise D. Liberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
phair@advancementproject.com

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Adam Stein
TIN FULTON WALKER & OWEN
312 West Franklin Street
Chapel Hill, NC 27516
astein@tinfulton.com

Thomas D. Yannucci
Daniel T. Donovan
Susan M. Davies
K. Winn Allen
Uzoma Nkwonta
Kim Knudson
Anne Dechter
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
tyannucci@kirkland.com

Counsel for League of Women Voter Plaintiffs:

Anita S. Earls
Allison J. Riggs
Clare R. Barnett
Southern Coalition for Social Justice
1415 Hwy. 54, Suite 101
Durham, NC 27707
anita@southerncoalition.org

Laughlin McDonald
ACLU Voting Rights Project
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
lmcdonald@aclu.org

Dale Ho
Julie A. Ebenstein
ACLU Voting Rights Project
125 Broad Street
New York, NY 10004
dale.ho@aclu.org

Christopher Brook
ACLU of North Carolina Legal Foundation
PO Box 28004
Raleigh, NC 27611-8004
cbrook@acluofnc.org

***Counsel for the Intervening Plaintiffs*:**

John M. Davaney
jdevaney@perkinscoie.com
Marc E. Elias
melias@perkinscoie.com
Kevin J. Hamilton
khamilton@perkinscoie.com
PERKINS COIE, LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960

Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Caroline P. Mackie
cmackie@poynerspruill.com
POYNER SPRUILL, LLP
301 Fayetteville St., Suite 1900
Raleigh, NC 27601

This, the 27th day of March, 2014.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr