

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

NORTH CAROLINA STATE )  
CONFERENCE OF THE NAACP, *et al.*, )

Plaintiffs, )

v. )

1:13CV658

PATRICK LLOYD MCCRORY, in his )  
official capacity as Governor of North )  
Carolina, *et al.*, )

Defendants. )

LEAGUE OF WOMEN VOTERS OF )  
NORTH CAROLINA, *et al.*, )

Plaintiffs, )

*and* )

LOUIS M. DUKE, *et al.*, )

Plaintiffs-Intervenors, )

v. )

1:13CV660

THE STATE OF NORTH CAROLINA, *et al.*, )

Defendants. )

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

1:13CV861

THE STATE OF NORTH CAROLINA, *et al.*, )

Defendants. )

**DEFENDANTS' RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION TO COMPEL**

On June 25, 2014, Plaintiffs filed a motion to compel the following depositions on or before July 3, 2014: (1) a second deposition of Kim Westbrook Strach (but as an individual rather than as the Rule 30(b)(6) designee of the North Carolina State Board of Elections (“SBOE”)) (“Strach”); (2) Cherie Poucher, current Director of the Wake County Board of Elections (“Poucher”); and (3) Carolyn Justice, former member of the North Carolina House of Representatives (“Justice”). For the reasons set forth below, the motion should be denied.

**FACTUAL BACKGROUND**

Defendants filed their response to Plaintiffs’ motions for preliminary injunction on Wednesday, June 18, 2014. Defendants attached declarations from Strach, Poucher, and Justice to their response. Strach was previously deposed on April 16, 2014 as the Rule 30(b)(6) designee of the SBOE, a deposition which exceeded the seven-hour limitation imposed by Fed. R. Civ. P. 30(d)(1).

Five days after Defendants’ response was filed<sup>1</sup>, on the afternoon of June 23, 2014, counsel for Plaintiffs asked Defendants to make Strach, Poucher, and Justice available for a deposition prior to the deadline for Reply Briefs, June 30, which essentially would have required the depositions to have occurred the same week of the request. (*See* Ex. A to Plaintiffs’ Motion to Compel)

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<sup>1</sup> While the five days referenced above included a weekend, in prior exigent circumstances created by the nature of this case, it has not been uncommon for counsel for the parties to exchange emails during evenings and weekends.

Moreover, two other depositions had already been scheduled the week of this request: Gary Bartlett (June 24, 2014) and Senator Earline Parmon (June 27, 2014). These depositions were scheduled well in advance by Defendants.

When Defendants objected to the belated nature of Plaintiffs' request, Plaintiffs, by email on Tuesday, June 24, 2014, changed their position and stated that the depositions could occur either this week or "early" next week, the week beginning June 30, 2014. (*Id.*)

The week of June 30 is a holiday week and State and County offices will be closed Friday, July 4. In addition, one-stop absentee voting for the second primary (July 15) begins July 3, 2014 in numerous counties around the state, including Wake County. Strach, who aside from being a party was identified in Defendants' Initial Disclosures as a potential witness, is currently preparing for the beginning of one-stop absentee voting, which includes supervising all second primaries across the State. Poucher, who was also identified as a potential witness in Defendants' Initial Disclosures, is currently preparing for the beginning of one-stop absentee voting in the second primary in Wake County.<sup>2</sup>

To date, Plaintiffs have served no subpoenas for the requested depositions.

### **ARGUMENT**

The reason for Defendants' opposition to this motion is simple: basic fairness. After sitting on their hands for five days, Plaintiffs decided to create a fire drill by

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<sup>2</sup> Plaintiffs' motion notes that they have scheduled a deposition with Michael Dickerson, Director of the Mecklenburg County Board of Elections ("Dickerson"). (*NAACP D.E.* 148, p.4) Notably, however, there are no second primaries this year in any election contests in Mecklenburg County.

demanding the depositions of three additional witnesses the week before a holiday week, as well as close to the hearing on preliminary motions in these cases and the start of one-stop absentee voting in the second primary. On the afternoon of Monday, June 23, Plaintiffs demanded these additional depositions over the next three or four days, even though depositions were already scheduled for two of those days. In our system, which requires “reasonable notice” to all parties of a deposition, Fed. R. Civ. P. 30(b)(1), that is not the way depositions are noticed or scheduled. This stands in stark contrast to Defendants’ scheduling of depositions to date in this matter. Every deposition taken by Defendants has been with ample advance notice and with agreement from Plaintiffs and non-party witnesses as to dates, locations and times.

Moreover, two of the witnesses, Poucher and Justice, are non-parties who submitted relatively short declarations on discrete issues. The other witness, Strach, is sued in her official capacity only, and in that capacity she was already deposed for nearly eight hours on most if not all of the subject matter contained in her declaration. Further, Plaintiffs’ argument that they did not have the opportunity to depose Strach as an individual witness rather than as the designated witness of the SBOE is a distinction without a difference, as Strach has been sued in her official capacity. During the deposition, Plaintiffs probed Strach’s individual knowledge and knowledge in her official capacity as Executive Director on numerous matters. Indeed, Plaintiffs went so far as to inquire about purely personal matters involving Strach. (*NAACP* D.E. 112-25, p. 5) If Plaintiffs are unable to meet their burden on their motions for preliminary injunction, it

will have had nothing to do with the opportunities they had to depose Strach, Poucher, or Justice.<sup>3</sup>

Moreover, as they have done previously in this case, Plaintiffs simply ignore that the witnesses and agencies in this case are performing the public's work. Strach is responsible for elections statewide, and in that capacity is preparing for the opening of one-stop absentee voting in numerous second primaries across the State. Poucher is also a public servant and currently preparing for the opening of one-stop absentee voting in a second primary in Wake County. Plaintiffs simply ignore this in their motion. While Plaintiffs point out Dickerson's willingness to make himself available for a deposition next week, Plaintiffs fail to disclose that there are no second primaries in Mecklenburg County demanding his immediate attention.<sup>4</sup> Therefore, Plaintiffs' argument that Dickerson's availability somehow means that Strach and Poucher should be available does not stand up.

Likewise, while Plaintiffs point out that Defendants are still deposing witnesses who submitted declarations in May in support of Plaintiffs' motions for preliminary

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<sup>3</sup> Moreover, in the experience of undersigned counsel in federal district court in North Carolina, it is the exception, not the rule, that all declarants are deposed in advance of a preliminary injunction hearing. While Plaintiffs should and will get the opportunity to depose declarants during the discovery period in this matter, discovery is ongoing and Defendants are not aware of any right to depose a declarant prior to a preliminary injunction hearing. Indeed, because of the sheer number of declarations filed by expert and fact witnesses for Plaintiffs (at least 11 expert witnesses and dozens of fact witnesses), Defendants will have had time to depose only a fraction of Plaintiffs' declarants by the time of the preliminary injunction hearing.

<sup>4</sup> Plaintiffs also fail to disclose that in setting a deposition date for Dickerson, Plaintiffs did not consult with counsel for Defendants regarding their availability for his deposition, which will take place in Charlotte, necessitating a six-hour round trip for Defendants' counsel to be present.

injunction, Plaintiffs fail to point out that Defendants made the request that these witnesses be made available for deposition over a month ago. The only reason Defendants are still deposing any of Plaintiffs' declarants is because Plaintiffs did not make them available any sooner.

### CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied. Alternatively, at a minimum, Defendants respectfully request that the Court limit each deposition to one (1) hour and direct that it be held on a date and at a time prior to July 4 that does not interfere with the witness' public duties and/or previously scheduled holiday plans.

This the 26<sup>th</sup> day of June, 2014.

ROY COOPER  
ATTORNEY GENERAL OF NORTH  
CAROLINA

/s/ Alexander McC. Peters  
Alexander McC. Peters  
Senior Deputy Attorney General  
N.C. State Bar No. 13654  
apeters@ncdoj.gov

/s/ Katherine A. Murphy  
Katherine A. Murphy  
Special Deputy Attorney General  
N.C. Stat Bar No. 26572  
kmurphy@ncdodoj.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@ncu.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 26<sup>th</sup> day of June, 2014.

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

/s/ Thomas A. Farr  
Thomas A. Farr

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