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 STATE OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV861

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Defendants in the above captioned cases jointly submit this Opposition to Plaintiffs' Motion to Compel Production of Documents.

INTRODUCTION

The Fourth Circuit has recognized that state legislators are often subjected to "political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). Based on the discovery proceedings so far in these consolidated cases, Plaintiffs are undoubtedly engaged in a political war of attrition.

Introduction to VIVA

Plaintiffs filed three separate actions challenging the legality of 2013 N.C. Sess. Laws 381, known as the "Voter Information Verification Act, or "VIVA" (sometimes referred to by its bill designation, HB 589): *United States v. North Carolina*, No. 1:13-cv-861 (M.D.N.C.) (hereinafter "*United States*"); *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.) (hereinafter "*NAACP*"); and *League of Women Voters of North Carolina v. North Carolina*, No. 1:13-cv-660 (M.D.N.C.) (hereinafter "*LWV*").

Plaintiffs' claims focus on VIVA's elimination of practices adopted by the General Assembly within the last decade. For instance, in 2000, the General Assembly allowed voters to cast "no-excuse" in-person absentee ballots at county sites prior to election day – one-stop absentee voting. Later that decade, the General Assembly

adopted same-day registration – allowing first time voters to register to vote (after normal registration had closed twenty-five days before an election) during one-stop voting. Finally, during the past decade, the General Assembly allowed out-of-precinct voting – where voters may vote on Election Day at a precinct other than the precinct to which they have been assigned (provided it is within the same county as his or her assigned precinct).

VIVA reduced the number of days for one-stop in-person absentee voting from 17 to 10 while mandating that the total hours of one-stop voting in each county be at least the same in 2014 as the number of hours available in 2010, and that the number of hours available in presidential elections be at least the same as the number of hours available in each county for the 2012 election. This change takes effect in 2014.

VIVA also eliminated same-day registration and out-of-precinct voting effective in 2014. In making this change, North Carolina has returned to prior, long-standing practices, which are consistent with the majority of the states which do not allow out-of-precinct voting or same-day registration.

VIVA also establishes a photo ID requirement for one-stop voting and in-person voting on Election Day. Except for first-time voters who are registering by mail and voting for the first time, mail-in absentee voters are not required to submit an ID when they make their application for an absentee ballot or return their marked ballot to the

county board of elections. Unlike the other practices challenged by Plaintiff, the photo ID requirement does not go into effect until 2016.[1]

VIVA also eliminates a recently enacted program that allowed 16-year-olds to "pre-register." In making this change, VIVA returned North Carolina to prior practices consistent with the vast majority of other states. Moreover, even under VIVA, 17-year-olds are still able to register and vote provided they will turn 18 years old prior to the general election. This change is effective in 2014.

Plaintiffs' Discovery Requests

To date, Plaintiffs have served nearly 400 discovery requests on multiple state agencies, the North Carolina General Assembly, and individual legislators with new requests coming in weekly. (*See* Exhibit 1 – Appendix of Discovery and Subpoenas Served On Defendants). The requests span documents created as early as 1995 to documents and communications presently being generated daily related to implementation of VIVA. In addition, Plaintiffs are requiring Defendants to use over 380 advanced boolean search terms to search the individual email boxes and electronic files of over 60 custodians across multiple state agencies. (*See* Exhibit 2 – Final Search Terms). The volume of email is overwhelming. For example, application of the first search term to the email boxes of 18 legislators and staffers yielded approximately 10 million emails. The email boxes from a dozen custodians from the Department of Transportation ("DOT") alone consist of approximately 2 and a half million documents.

[1] North Carolina's photo ID requirement is less restrictive than other such requirements which have been held constitutional by the United States Supreme Court. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

Despite the magnitude of these discovery requests and the sheer volume of data involved, Defendants are diligently working to produce responsive non-privileged documents as efficiently as possible. In fact, in the weeks since the first requests were served, Defendants have produced over 8,500 pages of hard documents and all of the data from the databases at the State Board of Elections (the SEIMS database) and the Department of Transportation (the SADLS database) responsive to all of the various discovery requests served by Plaintiffs, including requests that were served less than 30 days ago. The production of this data, consisting in part of information on all registered voters and licensed drivers in the State of North Carolina and including personally identifiable information designated as Confidential and Highly Confidential under the Protective Order entered in this case, required extreme care.

Given the realities of this production and in keeping with the Court's instruction during the Rule 16 Conference that there would be "this expedited push of discovery early so that plaintiffs have what they need for a preliminary injunction," and in recognition of the fact that many of the requests being propounded by plaintiffs have nothing to do with the evidence needed for their preliminary injunction motion, Defendants proposed early on to conduct the discovery in stages. (*See* Exhibit 3 – December 23, 2013 Email from T. Farr to D. Donovan and Exhibit 4 – Transcript of Rule 16 conference at 47:8.) Specifically, Defendants asked Plaintiffs to identify the categories of documents that were most important to preparing their expert reports and preliminary injunction motion. Plaintiffs flatly rejected this request and responded that everything was equally important and had to be produced within 30 days. (*See* Exhibit 5

– December 23, 2013 Email from D. Donovan to T. Farr and Exhibit 6 – December 29, 2013 Email from D. Donovan to T. Farr.) Given Plaintiffs' refusal to work with Defendants to structure a useful, realistic production schedule, Defendants have been forced to treat all 393 requests and over 380 search terms for the 63 custodians as equally important and to search for, collect, and review the massive amounts of documents and data described above. [2]

The primary basis for Plaintiffs' Motion to Compel is Defendants' alleged failure to produce the SEIMS and SADLS databases and Defendants' alleged insistence on "standing on their objections" to the production of documents created pre-enactment and post-enactment. (*See, e.g.*, Pl's Mot. to Comp. at 4).[3] Given that the parties agreed on January 23, 2014 to a production date for the databases, that Defendants communicated in writing their intent to "produce all not privileged relevant pre-enactment documents, notwithstanding their objections," and that the parties had scheduled a meet and confer for January 31 to specifically discuss those objections, Plaintiffs were well aware at the time of filing on January 24, that their Motion was premature at best and disingenuous at worst.

[2] For example, the photo ID requirement is not scheduled to be enforced until 2016. The other changes challenged by Plaintiffs will become operative in 2014. Most of the discovery sought by Plaintiffs concerns photo ID. It would have been more than reasonable for Plaintiffs to have agreed that discovery at this stage should be focused on practices to be implemented in 2014.

[3] This Motion was filed by the League of Women Voters and the NAACP (the "LVW Plaintiffs" and "ACCP Plaintiffs," respectively). The United States filed a Statement in Support of the LWV Plaintiffs and NAACP Plaintiffs' Motion to Compel.

Inexplicably, Plaintiffs refused to withdraw their Motion or, at the very least, to re-file it so that it would accurately reflect the only real disagreement between the parties, namely the relevance of post-enactment documents. This position was troubling after the January 31 meet-and-confer, where Defendants confirmed that they would produce relevant non-privileged pre-enactment documents. It was even more troubling after the production of the SEIMS and SADLS databases on January 31, in accordance with the parties' agreement. Plaintiffs' insistence on pressing forward with this Motion can only be described as a frivolous attempt to generally complain to the Court about an approximate 30-day delay and demand "immediate production" of all documents without regard to whether those are relevant to the preliminary injunction motion and without regard to the realities of the massive amounts of electronically stored information described above. Because all but one of the issues raised by Plaintiffs' Motion to Compel have been resolved by the parties, the Court should summarily dismiss the Motion. As to the remaining issue – Defendants' objections to the production of post-enactment documents – the Court should deny the Motion.

BACKGROUND

Legal Background

Plaintiffs' Motion to Compel should be considered in the context of the baseless legal claims asserted in this case. At their core, Plaintiffs are asserting a constitutional or statutory right to an election system that maximizes their groups' voting opportunities. The law, however, requires equality of *opportunity* to vote, not maximization of the

voting ability for politically favored groups. *Bartlett v. Strickland*, 556 U.S. 1, 35-36 (2009).

The law challenged by Plaintiffs returned North Carolina to the mainstream of States' election laws in providing an election system that ensures equal opportunity for all voters regardless of their status. In VIVA, North Carolina repealed a few election law provisions that put North Carolina in the minority as compared to other states. By repealing these provisions, North Carolina has enacted a voting system that now comports with the election systems in place in a majority of the States since the 1982 amendments to Section 2 of the Voting Rights Act, the statute upon which Plaintiffs principally and erroneously rely. Have the majority of states been in violation of the Constitution or the VRA all this time? Of course not.

Notably, this is not a redistricting case (involving claims of vote dilution), where the impact of the law is known immediately after enactment and where minority voters have no control over the districts imposed upon them. Nor is this a disparate impact case under the Constitution or VRA. Instead, these claims are Plaintiffs' attempt through litigation to foist upon the State of North Carolina an election system that maximizes *their* opportunities to vote and comports with the get-out-the-vote programs *they* favor for *their* political advantage. Plaintiffs fail to allege or explain why minorities are "denied" equal opportunity by changes in elections procedures that would require that they register and vote according to the same rules that apply to everyone else. There is no "neutral" practice here that prevents them from electing their candidate of choice, or registering, or

voting. Instead, each and every voter has the ability to control his or her own conduct as it relates to registering to vote and voting according to the rules that apply to everyone.

Section 2 of the VRA does not prohibit a State from modifying its election system just because it no longer favors the political interests of a specific group. Returning North Carolina to rules in place prior to the enactment of the challenged provisions no more violates the law now than it did in the absence of the voting schemes favored by Plaintiffs. Indeed, in the landmark *Thornburg v. Gingles*, 478 U.S. 30 (1986) opinion, a case involving a challenge to a redistricting plan, Justice Brennan emphasized that Section 2 "only protect[s] racial minority votes from diminution *proximately caused* by the [challenged procedure]; *it would not assure racial minorities proportional representation*." *Id.* at 49, n.17 (first emphasis added, second emphasis in original). Moreover, *Gingles* confirms that Section 2 only reaches denials of equal "*opportunity*" caused by the state's departure from an *objective benchmark*, but does not require a maximizing alternative that provides "electoral *success*." *Bush v. Vera*, 517 U.S. 952, 976-81 (1996); *see also Strickland*, 556 U.S. at 20 (plurality opinion).[4]

[4] Plaintiffs' heavy reliance on the *Gingles* "totality of the circumstances" test is dubious. In vote dilution cases challenging redistricting plans, the "totality of the circumstances" are not an issue until Plaintiffs prove the "*Gingles* preconditions," i.e., that the minority group could constitute a reasonably compact majority in a single member district, is politically cohesive, and cannot elect its candidates of choice because of bloc voting by the majority white group. *Gingles*, 478 U.S. at 50-51. Plaintiffs have incorrectly cast their case as a "vote dilution case." That is not accurate because vote dilution is a term that traditionally applies only to challenges to redistricting plans. *See generally Gingles*, 478 U.S. at 30; *White v. Regester*, 412 U.S. 755 (1973). Instead, this case is actually about alleged "vote denial," i.e., that Plaintiffs will allegedly be denied an equal opportunity to vote because of their race. It is far from certain that the *Gingles* "totality of the circumstances" test even applies to claims of this nature. *Brown v. Detzner*, 895

Thus, the legal basis for Plaintiffs' claims is tenuous at best and the taxpayers of the State of North Carolina should not be dragged through a discovery war of attrition so that Plaintiffs may fight a political war of attrition.

Discovery Proceedings Background

Plaintiffs' Motion to Compel primarily concerns two sets of requests for production of documents. On November 29, 2013, the *NAACP* Plaintiffs and the *LWV* Plaintiffs served Plaintiffs' First Set of Requests for Production of Documents upon Defendant the Governor of North Carolina Patrick Lloyd McCrory (hereinafter the "McCrory RFPs"). The McCrory RFPs are attached hereto as Exhibit 7. On December 2, 2013, the *NAACP* Plaintiffs and the *LWV* Plaintiffs served a separate set of Requests for Production of Documents on members of the North Carolina State Board of Elections (hereinafter the "SBE RFPs"). The SBE RFPs are attached hereto as Exhibit 8.

Both the McCrory RFPs and the SBE RFPs are characterized by burdensome and overbroad requests, nearly all of which lack time limitations. Accordingly, Defendants served written responses to both the McCrory and SBE RFPs on January 8, 2014 objecting to many of Plaintiffs' requests on the grounds of burdensomeness, privilege, overbreadth, relevance, and vagueness. Defendants further objected to Plaintiffs' requests to the extent that they were overbroad as to temporal scope. Many of Plaintiffs' requests

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F.Supp.2d 1236, 1249-50 (M.D. Fla. 2012) (citing *Simmons v. Galvin*, 575 F. 3d 24, 42 n.24 (1st Cir. 2009)).

sought information predating the enactment of VIVA. While responsive pre-enactment documents and communications are potentially relevant, because Plaintiffs either failed to specify any time period for which this information was sought or provided a vastly overbroad temporal scope, such as "1995 to the present," Defendants objected to many of the requests to the extent they exceeded a reasonable time frame. Defendants also objected to Plaintiffs' requests to the extent they sought post-enactment information.

In addition to the McCrory RFPs, the SBE RFPs, and the RFPs served by the United States, Plaintiffs have propounded on Defendants and various agencies and legislators hundreds of discovery requests, including, without limitation, requests for production of documents, interrogatories, and subpoenas. (*See* Exhibit 1). With every passing week, additional discovery requests are served. Producing documents responsive to these requests requires, *inter alia*, the collection of documents from over 60 custodians across multiple state agencies, the application of over 380 complex ESI search terms *for each custodian* and a review of all of that information for responsiveness and privilege. The enormity of this task is demonstrated by the more than 10 million results generated by the application of a single search term in a single agency.

In their Motion to Compel, Plaintiffs seek: (1) all documents responsive to Plaintiffs' requests for production by February 14, 2014; (2) the production of the SEIMS and SADLS databases immediately (to the extent they have not been produced by January 31, 2013); (3) all pre-enactment documents that are responsive to Plaintiffs' requests for production, and (4) all post-enactment documents that are responsive to Plaintiffs' requests for production.

Since the first sets of requests were served, the parties have engaged in multiple email communications and meet-and-confer conferences in an attempt to expedite discovery. Given the Court's instructions on discovery during the Rule 16 Conference concerning the "short deadlines for preliminary injunction," the Defendants recognized early on that the sheer magnitude of data at issue would require a practical, collaborative approach to producing the documents needed for the preliminary injunction motion. Accordingly, Defendants requested that Plaintiffs identify the documents necessary to prepare their expert reports and preliminary injunction motion in order of priority so that Defendants could produce those expeditiously and on a rolling basis as provided by the Order regarding Discovery of Documents and Electronically Stored Information (the "ESI Order"). Unfortunately, Plaintiffs refused to consider this approach and responded that all information was equally relevant and required immediate production, including documents that were prepared after the enactment of VIVA. (*See* Exhibit 5 – December 23, 2013 Donovan Email and Exhibit 6, December 29, 2013 Email from Donovan to Tom Farr).

Accordingly, Defendants proceeded to identify the relevant custodians, propose search terms for the collection of relevant emails and to collect the information on the SEIMS and SADLS databases. Because of Plaintiffs' refusal to cooperate as described above, Defendants have been unable to perform a targeted collection and production of documents and instead have been forced to identify and collect from over 60 custodians using over 380 complex search terms which has resulted in an overwhelming number of "hits," most of which are likely not even responsive to the requests at hand.

The parties held a conference on January 23, 2014, to address outstanding ESI issues. The purpose of that conference was to come to agreement on search terms and to discuss production of the SEIMS and SADLS databases. (*See* Exhibit 9 – January 16, 2014 Email from Amy Pocklington to Winn Allen and others). The parties reached agreement on both of these issues including a January 31 production deadline of the SEIMS and SADLS databases. During this conference, Plaintiffs asked whether Defendants planned to "stand on" their objections to the McCrory and SBE RFPs. Defendants replied that they were not prepared to discuss their objections to specific requests given that this topic was outside of the agreed-to scope of the conference. However, Defendants offered to schedule another meet-and-confer to address and resolve the issue of Defendants' objections to written discovery. Plaintiffs agreed.

On January 24, 2014, to Defendants' surprise, Plaintiffs sent an email concluding that Defendants planned "to stand on their objections" to all pre-enactment information. (Exhibit 10 – January 24, 2014 Email from B. O'Connor to Defense Counsel). Defendants attempted to clarify this inaccurate conclusion by promptly responding that they intended to "produce relevant, non-privileged documents and communications, notwithstanding [their] stated objections." (Exhibit 11, January 24, 2014 Email from P. Strach to Plaintiffs' Counsel). Defendants further reminded Plaintiffs that specific objections had not yet been discussed, but offered to go through Defendants' objections "with respect to each RFP" at the parties' meet-and-confer scheduled for January 30, 2014. (*Id.*) Plaintiffs responded to this email communication by filing their Motion to Compel that same day. They did so even after receiving Defendants' email response,

which made clear that Defendants would produce pre-enactment documents, and **prior** to the scheduled meet-and-confer on this very issue.

Given the parties' earlier communications as described above, Defendants immediately notified Plaintiffs that they should withdraw their Motion as it was moot and premature and therefore in contravention of Federal Rule 37(a)(1) and Local Civil Rule 7.1. (*See* Exhibit 12 – January 25, 2014 Email from A. Pocklington to Plaintiffs' Counsel). Despite subsequent email communications where Plaintiffs voiced their willingness to attempt to resolve the "discovery disputes," and Defendants repeatedly clarified that they were not standing on their objections and would welcome the opportunity to clarify any misunderstandings, Plaintiffs refused to withdraw their Motion to Compel.

On January 30, 2014, the parties conducted the scheduled meet-and-confer to discuss Defendants' objections. Defendants again reiterated that they would produce relevant non-privileged pre-enactment documents and offered to go through their objections, line-by-line, to discuss the time period for which Defendants would produce documents. Defendants also attempted to offer a compromise on Plaintiffs' requests for post-enactment documents. Plaintiffs declined to engage in this detailed review, but agreed with Defendants' position on pre-enactment documents. Plaintiffs also rejected Defendants' proposed compromise on post-enactment documents.

On January 31, 2014, Defendants produced all responsive information from the SEIMS and SADLS databases, as promised. On February 6, 2014, the parties met and conferred on the issue of email production and the parties agreed that production of all

responsive, non-privileged paper documents would be substantially complete by February 20, 2014 and that email production would begin the last week in February. On February 7, 2014, Defendants produced approximately 8,500 pages of paper documents responsive to Plaintiffs' requests including many pre-enactment documents.

Accordingly, with the exception of Defendants' objections to produce post-enactment documents, which Plaintiffs have refused to compromise on despite Defendants' attempts, Plaintiffs have already received all the relief they have requested in their Motion. This Motion was filed without a good-faith attempt to resolve the issues therein; it was filed even though Defendants made very clear that they did not intend to stand on most of their objections, and it was filed prior to a meet-and-confer conference scheduled on the very issues it presented. Under these circumstances, the Court should deny Plaintiffs' Motion to Compel.

ARGUMENT

I. Plaintiffs' Motion to Compel is Without Merit and Should be Dismissed

Plaintiffs seek production of all documents responsive to their 393 document requests by February 14, 2014. This arbitrary deadline not only ignores the realities of the magnitude of this document production, but is also contrary to the agreement of the parties. As of the filing of this Opposition, the majority of hard-copy documents responsive to Plaintiffs' requests have been produced. Any remaining hard-copy documents are scheduled to be produced by February 20, 2014. Moreover, Plaintiffs agreed at a meet-and-confer conference on February 6, 2014, that Defendants will begin producing responsive emails during the week beginning February 24, 2014.

Consequently, Plaintiffs' demand that all responsive documents be produced by February 14, 2014 is both impractical and in contravention of the parties' agreement.

Defendants have expended enormous time and resources attempting to comply with Plaintiffs' discovery requests. Plaintiffs have done nothing to facilitate an orderly, targeted production aimed at preparing them for their pending motion for preliminary injunction. To the contrary, Plaintiffs continue to pile on discovery requests and insist on searches of electronic documents with terms that are likely to yield large numbers of documents that have nothing to do with this litigation, much less the preliminary injunction motion.

In addition to being unreasonable, Plaintiffs' demands have largely been resolved. Many hard-copy documents have already been produced; more will be provided by February 20, 2014. On February 6, 2014, the parties agreed that Defendants would begin producing responsive electronic information during the week beginning February 24, 2014.

II. Plaintiffs' Motion to Compel is Moot as to the SADLS and SEIMS Databases

Plaintiffs demand that Defendants immediately produce relevant information from the SADLS and SEIMS databases by January 31, 2014 but, as promised by Defendants, these databases were provided to Plaintiffs on that date. Consequently, Plaintiffs' Motion to Compel is moot on this point.

To the extent that Plaintiffs are dissatisfied with the "delay" in the production of those databases, which they refer to as "readily producible," Plaintiffs' position does not

take into account the volume of data exported from those databases and the "Highly Confidential" nature of most of that data. Under the Protective Order, Defendants were required to designate data containing personally identifiable information, including social security numbers, as Highly Confidential, so that its dissemination is limited to attorneys and their staff. The data had to be reviewed to ensure it was appropriately designated. It also had to be exported on encrypted hard drives accompanied with chain of custody documentation. (*See* Exhibit 13, Cover Letter to Database Production). Accordingly, Plaintiffs' Motion to Compel this production is moot.

III. Plaintiffs' failure to meet and confer on pre-enactment documents and their insistence on ignoring Defendants' repeated assertions that they would produce pre-enactment documents violates Federal Rule 37(a)(1).

The Federal Rules of Civil Procedure require parties to certify that they have "in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain court action." Fed. R. Civ. P. 37(a)(1). Similarly the Local Rules of this Court are clear 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." L.R. 37.1(a).

Before Plaintiffs filed their Motion to Compel, Defendants made clear that they would produce relevant, non-privileged pre-enactment documents and communications notwithstanding their stated objections. On January 30, 2014, the parties held a meet-and-confer conference, as planned, to address the precise issues raised in the Motion to Compel. During this conference, Defendants reiterated that the requested pre-enactment

documents would be produced notwithstanding their stated objections. On February 7, 2014, Defendants did, in fact, produce approximately 8,500 pages of documents, many of them created pre-enactment.

The fact that Plaintiffs have unnecessarily forced Defendants to waste precious time responding to a Motion to Compel which is in large part moot while simultaneously arguing that Defendants are not producing documents quickly enough illustrates the challenges Defendants continue to face in their discovery efforts.

IV. Post-Enactment Information is Irrelevant and Therefore Not Subject to Discovery

The only issue properly before the Court is the discoverability of post-enactment information. Plaintiffs seek all relevant post-enactment information requested in their various document requests. (Pl's Mot. at 13-18). Plaintiffs are not entitled to these documents. Plaintiffs bring a facial challenge of the constitutionality of VIVA; consequently, Plaintiffs' requests seeking documents produced after its enactment are not reasonably calculated to lead to the discovery of admissible evidence. None of the plaintiffs have pled an "as applied" challenge to any of the provisions of SL 2013-581. The distinction between facial challenges and "as applied" challenges to statutes is well defined and clear. *Crawford*, 553 U.S. at 185-87, 200.

Plaintiffs' lawsuits assert facial challenges to SL 2013-581 under various statutory and constitutional provisions. *U.S. v. N.C.* Compl. (Doc 1), ¶¶ 2, 96-100; *League of Women Voters of North Carolina v. N.C.* Compl. (Doc 1), ¶¶ 1, 75-76, 78-82, 84-97, 99-101; *NCNAACP v. McCrory* First Am. Compl. (Doc 26), ¶¶ 1, 7-13, 105-20, 122-32,

134-42. The scope of discovery is limited to non-privileged matter that is "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Discovery of "relevant" information includes discovery "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). While some information prior to the enactment of VIVA might fall within these discovery limits, post-enactment information obviously does not. In the absence of as-applied challenges to the statute at issue, the Court should not permit state officials responsible for executing the law to be burdened with post-enactment fishing expeditions by Plaintiffs.

Plaintiffs are not entitled to post-enactment information for at least two reasons. First, for the reasons stated in the Memorandum of Law in Support of Motion to Quash Subpoenas to State Legislators, post- enactment communications between legislators, their staff, and their lawyers are all protected by legislative immunity, legislative privilege, and their communications with their lawyers are also protected by the attorney client privilege and the work product doctrine. (*See* Doc. 45). While Plaintiffs cite a few decisions in support of their arguments, those cases are not persuasive. None of those decisions are by the Fourth Circuit and several involve cases where a legislator elected to testify and therefore waived his or her legislative immunity.

Second, the only other post-enactment documents that would be responsive to Plaintiffs' requests are those involving implementation or administration of the law. However, nothing in the Complaints explain a specific act or any act of actual implementation that discriminates, other than passage of the law itself. Indeed, because no elections have even been held yet under the challenged provisions, nothing has even

been implemented. What Plaintiffs are really seeking are documents reflecting the mental thought processes and communications between staff as they discuss how ultimately to implement the law. Essentially, then, Plaintiffs expect Defendants to send them emails and other communications between and among state personnel as they carry out their day-to-day duties of preparing to administer future elections under the new law. Such interference with the daily functioning of the many state agencies implicated in this litigation is unreasonable and harassing. As Defendants have already explained to Plaintiffs, if Defendants issue formal guidelines that Plaintiffs believe are discriminatory or if an election reveals alleged discriminatory effects involving actual implementation, then Plaintiffs can then amend their complaints or bring new claims making such allegations. As of now, however, any such claims are, at best, hypothetical and should not be used to drag the State and its agencies through burdensome discovery.

Moreover, as explained above, information regarding administration of the law is irrelevant in a suit contesting the facial legality of the law. Nothing in Plaintiffs' Complaint alleges that a state official has made a discriminatory decision in implementing or administering the law. It is also sheer speculation to argue that minorities will be disproportionally under-represented in the number of newly registered voters or the number of voters following the 2014 primary or the 2014 general election. The cases cited by Plaintiffs are not helpful to their argument. Plaintiffs primarily rely on an opinion from the Eastern District of New York, *Favors v. Cuomo*, (Motion Ex. I), to argue that courts routinely allow discovery of post-enactment legislative materials. *Favors* does not assist Plaintiffs. In *Favors*, the Senate Minority of New York sought to

compel post-enactment materials from the Senate Majority regarding a 2012 *redistricting* plan. Similarly, in *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562, 2013 WL 690496, at *2 (E.D. Wis. Feb. 25, 2013), the court granted Plaintiff's motion to compel post-enactment communications regarding the passage of Acts 43 and 44 regarding *redistricting*. For the reasons described above, redistricting cases are completely inapposite to the instant case because, unlike the laws challenged here, the impact of a redistricting statute is known once the statute is enacted.

Plaintiff's citations to other opinions are also irrelevant or clearly distinguishable: *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (discussing rule that plaintiffs in racial discrimination cases must show a foreseeable and anticipated impact of the law at the time it was created); *Detzner*, 895 F.Supp. 2d at 1245-46 (considering deposition testimony of former chairman of Republican Party in an unrelated case but ultimately not relying on the testimony); *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012) (case involving South Carolina's request for preclearance of proposed Voter ID Act).

CONCLUSION

For the foregoing reasons, Defendants respectfully ask the Court to deny Plaintiffs' Motion to Compel.

This the 10th day of February, 2014.

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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:

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