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, MARY PERRY, and MARIA TERESA UNGER PALMER 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' MOTION TO COMPEL PRODUCTION OF DOCUMENTS** **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

As predicted during the Initial Pretrial Conference, Defendants are blocking and delaying discovery in this case. After two months, the State still has not produced basic databases regarding North Carolina voters that their IT professionals said could be produced immediately. Moreover, the State argues that most of the documents requested by plaintiffs are not discoverable either because (i) they were created ***before*** the new law was enacted, (ii) they were created ***after*** the new law was enacted, or (iii) they were created ***during*** the enactment of the law, but are protected from discovery by alleged doctrines of legislative privilege. In other words, pursuant to Defendants' objections, essentially no documents are subject to discovery in this case. It remains unclear whether Defendants will stand by those preposterous objections. But what is clear is that Defendants have delayed, and delayed, and delayed. Defendants' tactics, unfortunately, are exactly what Plaintiffs told the Court would happen during the very first conference in this case.

Despite—or perhaps ***because*** of—the approaching deadlines for Plaintiffs to file preliminary injunction motions and expert reports, Defendants are engaged in an ongoing and calculated effort to block discovery. Plaintiffs served their requests for production nearly eight weeks ago. Since that time, Governor McCrory has produced just three documents and the State Board of Elections—the state agency with primary responsibility for implementing and administering these new provisions—has produced only a limited set of materials almost exclusively from the publicly-available legislative record surrounding Session Law 2013-581. Neither Defendant has produced ***any***

internal, non-public documents or communications. These games must end. In light of the swiftly approaching deadlines by which plaintiffs must file expert reports and move for preliminary injunctive relief, this Court should compel Defendants' to immediately comply with their discovery obligations.

For these reasons, and those described below, Plaintiffs in *North Carolina State Conference of the NAACP, et al. v. McCrory, et al.* and Plaintiffs in *League of Women Voters of N.C., at al. v. North Carolina*, respectfully request that the Court grant the following relief on an expedited basis:

> An Order that Defendants must produce:
>
> (1) all documents responsive to Plaintiffs' requests for production by February 14, 2014.
>
> (2) the SIEMS database and the SADLS database immediately (to the extent they have not been produced by January 31, 2014, the date to which Defendants recently committed after weeks of unnecessary delay);
>
> (3) all pre-enactment documents that are responsive to Plaintiffs' requests for production, regardless of when those documents were created; and
>
> (4) all post-enactment documents that are responsive to Plaintiffs' requests for production, including those documents created on or after August 12, 2013.

Concurrently with this motion, Plaintiffs have filed a motion for an expedited briefing schedule and hearing date. In light of the case schedule—including expert reports that are due on April 1, 2014 and preliminary injunction motions that are due on May 5, 2014—these issues must be resolved as soon as possible.

BACKGROUND

The above-captioned cases bring constitutional and statutory challenges to Session Law 2013-581, a sweeping piece of election legislation that imposes a number of voting

laws designed to deny or abridge the right to vote for an untold number of North Carolina citizens on account of race or ethnicity.[1]

The NAACP Plaintiffs and LWV Plaintiffs jointly served a request for production of documents on Defendant Patrick Lloyd McCrory on November 29, 2013. *See* Ex. A, Plaintiffs' First Set of Requests for Production to Defendant Patrick Lloyd McCrory ("McCrory RFPs"). The NAACP Plaintiffs and the LWV Plaintiffs jointly served a separate request for production of documents on certain members of the State Board of Elections on December 2, 2013. *See* Ex. B, Plaintiffs' First Set of Requests for Production to Members of the North Carolina State Board of Elections ("SBE RFPs").

Defendants served written responses to those requests on January 8, 2014. *See* Ex. C, Defendant Patrick Lloyd McCrory's Objections and Responses to Plaintiffs' Joint First Set of Requests for Production ("McCrory RFP Responses"); *See* Ex. D, Defendants Members of the North Carolina State Board of Elections Objections and Responses to Plaintiffs' Joint First Set of Requests for Production ("SBE RFP Responses"). Those written responses lodged a broad array of objections to Plaintiffs' discovery requests, including objections on burden, privilege, overbreadth, relevance, vagueness, and timeframe grounds. *See, e.g.*, Ex. C, McCrory RFP Responses 2-4; Ex. D, SBE RFP Responses at 2-5. In particular, Defendants objected to producing any documents created after August 12, 2013. *See* Ex. C, McCrory RFP Responses 4; Ex. D, SBE RFP

[1] These cases have been consolidated for purposes of discovery only. For ease of reference, this motion will refer to the plaintiffs in Case No. 13-cv-658 as the "NAACP Plaintiffs," the plaintiffs in Case No. 13-cv-660 at the "LWV Plaintiffs," and the plaintiff in Case No. 13-cv-861 as the "DOJ," and collectively, "Plaintiffs." Defendants in all three cases will be referred to as "Defendants."

Responses at 4. Defendants also objected to producing any documents created before a date which "exceeds a reasonable time frame," although Defendants have refused to specify the specific date before which they will not produce documents. *See, e.g.*, Ex. C, McCrory RFP Responses 5-7; Ex. D , SBE RFP Responses at 6-9. Notably, Defendants' responses do not indicate an intention to produce documents responsive to these requests notwithstanding their objections, but rather refer solely to Defendants' initial disclosures for documents outside the scope of the listed objections.

To date, Defendants have made only one document production. That production was made on January 8, 2014, and included only three documents produced by Defendant McCrory and only 153 documents from the other Defendants in this case. *See* GOV0000001 - GOV00000005; SBE00000001 - SBE00002351. Notably, the production consisted almost entirely of publicly-available materials.

The NAACP Plaintiffs and LWV Plaintiffs have attempted to meet-and-confer with Defendants regarding their document productions on multiple occasions over the last several weeks. In particular, the parties conducted a meet-and-confer telephone conference on January 7, 2014, to discuss with Defendants and their information-technology specialists the status of Defendants' efforts to produce certain databases responsive to the Plaintiffs' discovery requests. *See* Ex. E, 01/09/2014 Email from B. O'Connor to Defense Counsel. The parties have also exchanged correspondence regarding possible search terms and custodians. Finally, the parties held a meet-and-confer telephone conference on January 23, 2014. *See* Ex. F, 01/24/2014 Email from B. O'Connor to Defense Counsel. During that conference, Defendants addressed some of

the issues discussed herein (as addressed in this Motion and upon which the parties could not agree), but refused to address others.

The parties are scheduled to hold another telephone conference on January 30, 2014 to address other discovery-related issues that the Defendants indicated they were not prepared to address during the January 23, 2014 meet-and-confer call. Plaintiffs' intend to participate in good faith in that conference, including to continue to attempt to resolve the issues raised by this motion. However, in light of the approaching deadlines for filing expert reports and moving for preliminary injunctive relief, Plaintiffs cannot delay any further in filing this motion. Plaintiffs have waited as long as possible to file this motion, but Defendants' delay tactics have made it necessary to seek the Court's assistance while the parties continue ongoing efforts to resolve their disagreements.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 37, this Court should enter an order compelling Defendants to produce the following categories of documents on the following terms:

> (1) all documents responsive to Plaintiffs' requests for production by February 14, 2014.
>
> (2) the SIEMS database and the SADLS database immediately (to the extent they have not been produced by January 31, 2014, the date to which Defendants recently committed after weeks of unnecessary delay);
>
> (3) all pre-enactment documents that are responsive to Plaintiffs' requests for production, regardless of when those documents were created; and
>
> (4) all post-enactment documents that are responsive to Plaintiffs' requests for production, including those documents created on or after August 12, 2013;

I. Defendants Have Unduly Delayed In Producing Documents And Should Be Compelled To Complete Document Productions By A Date Certain.

Despite repeated requests from Plaintiffs, Defendants have unreasonably delayed in producing responsive documents in this case. In light of the schedule under which this case is proceeding and the impending harm to the voters of North Carolina as the Defendants proceed with implementation of these provisions, these delays are unacceptable and the Court should order Defendants to produce all documents responsive to Plaintiffs' discovery requests no later than February 14, 2014.

The NAACP Plaintiffs served Defendants with their requests for production on November 29 and December 2, 2013. *See* Ex. A, McCrory RFPs; Ex. B, SBE RFPs. Defendants have thus had almost eight weeks to produce documents in response to those requests, not to mention (in light of the paltry production thus far of any kind) that more than five months that have passed since this case was filed. To date, however, Defendants have produced only a handful of responsive documents, the overwhelming majority of which are publicly available. For example, Defendant McCrory has produced only ***three*** total documents in this case, all of which are press releases that are publicly available on the Governor's website. *See* GOV0000001 - GOV00000005. Similarly, the State Board of Elections has produced only 153 total documents, amounting to less than 400 total pages. The documents produced by the State Board of Elections, moreover, are almost exclusively public documents from the legislative record surrounding Session Law 2013-581, and none of those documents include any internal documents or communications that are not part of the public record. *See* SBE00000001 -

SBE00002351. Collectively, these productions do not even come close to fully responding to the document requests served by Plaintiffs.

As this Court made clear during the Rule 16 Conference, delays of this nature are simply not acceptable in this case in light of the schedule under which the parties are operating. During that conference, Defense counsel informed the Court that it likely would need "some extensions" to respond to Plaintiffs' discovery requests. *See* Ex. G, Tr. of Rule 16 Conf. at 47:8. This Court unequivocally informed Defendants that such extensions would not be forthcoming:

> THE COURT: Well, even if I do ultimately go with [the current schedule], you understand as part of that I am anticipating that there is going to be this expedited push of discovery early so that plaintiffs have what they need for a preliminary injunction.
>
> MR. PETERS [DEFENSE COUNSEL]: We do understand that, Your Honor.
>
> THE COURT: And so while I don't know how great a tweak you anticipate, there isn't a lot of room for extending those things given the short deadlines for preliminary injunction.
>
> MR. PETERS: We do understand that, Your Honor.

Id. at 47:12-22. Indeed, when counsel for the NAACP Plaintiffs raised the concern that Defendants might unduly delay their document productions, the Court reiterated its intentions to move discovery along expeditiously in this case:

> THE COURT: My intent would be that you pursue whatever discovery it is you want to pursue. They understand we're all under an expedited response in the sense that there's not going to be routine extensions of discovery periods, and they're going to be obligated to respond and to appear for the depositions when you notice them so that you have what you can get.

Id. at 51:10-15. Defendants, however, have expressly disregarded those instructions and

have instead done exactly as the NAACP Plaintiffs predicted—refused to produce responsive documents within the time limits prescribed by the Federal Rules of Civil Procedure.

Defendants' delay in producing documents is substantially prejudicing Plaintiffs' ability to litigate this case. Under the current schedule, Plaintiffs' expert reports are due in just over two months, on April 1, 2014, and all preliminary injunction motions are due on May 5, 2014. *See* Scheduling Order at 4 [12/13/13 ECF No. 39]. That leaves the parties with precious little time to conduct meaningful discovery in this case before those filings are due. In addition, obtaining full document productions from Defendants is necessary so that Plaintiffs can adequately prepare for and conduct many of the depositions in this case. The longer Defendants delay in producing documents, therefore, the more condensed the timeframe becomes for conducting depositions in advance of the preliminary-injunction filing date. Defendants should not be permitted to benefit from their flouting of this Court's express instruction regarding the need for prompt document productions.

For those reasons, the NAACP Plaintiffs request that this Court order Defendants to complete their document productions by no later than February 14, 2014—over ten weeks from when the requests were served. By that date, Defendants will have had over two months to complete their document productions, which is double the time provided for in the Federal Rules. *See* Fed. Rule Civ. Pro. 34. Such a deadline would be consistent with this Court's admonition that "routine extensions" would not be granted in this case and with the condensed case schedule that is necessary in this case in order to

fully brief and argue preliminary injunction motions.

II. Defendants Should Be Compelled to Immediately Produce the SEIMS and SADLS Databases.

Defendants' delay in producing documents is particularly unacceptable with respect to two databases maintained by the State—the State Elections Information Management System ("SEIMS") and the State Automated Driver License System ("SADLS"). Plaintiffs have repeatedly requested copies of both databases, which are critical to the analyses that will be conducted by Plaintiffs' expert witnesses. *See See* Ex. B, SBE RFPs. Defendants have indicated that both databases are readily producible, but delayed in producing those databases, indicating that they required additional time because they were "in the process of reviewing the data and scrubbing it for confidential and personally identifiable information." *See* Ex. H, 1/16/14 Email from A. Pocklington to Counsel. Plaintiffs have previously indicated to Defendants that their experts specifically need the types of personally identifiable information contained in the databases in order to conduct proper matching of records. Following Plaintiffs' objection to any such scrubbing because the Joint Protective Order entered in this case specifically protects confidential and personally identifiable information so as to enable the parties to exchange discovery (*see* Joint Protective Order at 2-3 [01/03/04 ECF No. 47]), Defendants indicated that they no longer planned to "scrub" the data, but that they would still need an additional week to produce the databases, and finally committed to producing them by Friday, January 31, 2014.

During the parties' meet-and-confer telephone conference on January 23, 2014,

Defendants informed Plaintiffs that they would produce the SEIMS and SADLS databases by no later than January 31, 2014—the latest date provided in a series of moving targets. If Defendants comply with that commitment, no relief from this Court will be necessary. If, however, Defendants fail to meet that January 31, 2014 deadline, or produce the databases in an incomplete fashion, Plaintiffs request that this Court order Defendants to produce complete copies of the SEIMS and SADLS immediately. In light of the April 1, 2014, deadline for submitting expert reports in support of Plaintiffs' motions for preliminary injunction, any in the production of these database prejudice Plaintiffs' ability to present the Court with a full and complete expert analysis.

III. Defendants Should Be Compelled To Produce All Pre-Enactment Documents That Are Responsive to Plaintiffs' Requests for Production, Regardless Of When Those Documents Were Created.

In an effort to further avoid discovery, defendants also have refused to produce any "pre-enactment information that exceeds a reasonable time frame." Ex. C, McCrory RFP Responses at 5-8; Ex. D, SBE RFP Responses at 6-11 (same). Defendants have not clarified the "time frame" before which they will not produce documents, beyond stating that, with respect to the Department of Transportation, they will not produce documents before January 1, 2013. The Defendants refused to clarify their proposed "time frame" for other custodians.

Defendants' decision not to produce documents created before their unspecified "time frame" cannot be justified. These cases challenge both the motivation for enacting Session Law 2013-581, as well as the impact that law will have on racial and ethnic minorities in North Carolina. Resolving those questions requires discovery not only into

the circumstances surrounding the enactment of Session Law 2013-581 itself, but also a careful examination of the history of race relations and voting legislation in North Carolina. For example, courts routinely look to numerous historical factors in resolving claims brought under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), including:

- the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
- the extent to which voting in the elections of the state or political subdivision is racially polarized;
- the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
- the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
- whether political campaigns have been characterized by overt or subtle racial appeals;
- whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
- whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See Thornburg v. Gingles, 478 U.S. 30, 36-37 (1986) (quoting S. REP. No. 97-417, at 28-29). Evaluating each of those factors requires an investigation into historical election-law practices in North Carolina that reach back in time to well before the enactment of

Session Law 2013-581.

Similarly, many of the challenged provisions in this case repealed previous laws that the North Carolina General Assembly had enacted to expand voting opportunities. *See, e.g.*, N.C. Gen. Stat. § 163-227.2 (2002) (establishing three weeks of early voting); N.C. Gen. Stat. § 163-166.11 (2002) (allowing voters who show up in the wrong precinct on election day to vote a provisional ballot); N.C. Gen. Stat § 163-82.6 (2007) (establishing same-day registration). The reasons why the legislature felt it necessary to enact those provisions in the first place—including facts concerning elections that pre-dated these laws—are thus directly relevant to evaluating why the legislature felt it necessary to repeal those provisions and the effect those repeals could have on the citizens of North Carolina.

Finally, voting rights cases—involving many of the same issues raised in these cases—routinely involve some inquiry into ***both*** the circumstances surrounding the law at issue ***and*** certain events and historical facts that occurred before the enactment of the law, but that are nonetheless relevant to resolving those claims. *See, e.g., Florida v. U.S.*, 885 F. Supp. 2d 299, 348 (D.D.C. 2012) (noting that "the historical background of a [jurisdiction's] decision"; "the specific sequence of events leading up to the challenged decision"; and "[d]epartures from the normal procedural sequence" are all relevant factors in determining whether the changes to the state's voting laws were motivated by race) (quoting *Vill. of Arlington Heights v. Metro. Housing Dev. Co.*, 429 U.S. 252, 267-68 (1977)). There is no reason for this Court to take a different approach in this case.

IV. Defendants Should Be Compelled To Produce Documents Created After August 12, 2013.

In their written objections and responses, Defendants object to producing ***any*** documents or communications created "after August 12, 2013, the date on which SL 2013-581 was formally enacted." Ex. C, McCrory RFP Responses at 4; Ex. D, SBE RFP Responses at 4 (same). Defendants argue that these documents "are not relevant or likely to lead to the discovery of admissible evidence, and is unduly burdensome and harassing." Ex. C, McCrory RFP Responses at 4; Ex. D, SBE RFP Responses at 4 (same).

Rule 26, however, imposes no temporal cut-off point for discovery. *See* Fed. R. Civ. Pro. 26(b)(1) (explaining that parties can obtain discovery of all information "reasonably calculated to lead to the discovery of admissible evidence"). "Accordingly, courts routinely hold that it is the relevance of the information contained in the request documents—not the time of events in relation to their creation—that determines discoverability." Ex. I, *Favors v. Cuomo*, slip op. at 9-10 (E.D.N.Y. Aug. 27, 2013) (citing cases). Indeed, courts hearing similar challenges brought under Section 2 of the Voting Rights Act have routinely granted motions to compel the production of post-enactment documents. *See, e.g.*, Ex. I, *Favors*, slip op. at 9-15 (memorandum and order granting motion to compel production of responsive post-enactment documents); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2013 WL 690496, No. 11-CV0562, at *2 (E.D. Wis. Feb. 25, 2013) (ordering that the scope of discovery include post-enactment evidence).

Post-enactment information is directly relevant to two of the central issues at stake in this litigation. *First*, post-enactment evidence is likely to lead to the discovery of admissible evidence in support of Plaintiffs' intentional discrimination claims (under both the Fourteenth Amendment and Section 2 of the Voting Rights Act). Documents created after August 12, 2013 could very well bear upon the objectives and motivations of the legislators that enacted SL 2013-581. Moreover, by shedding light on what impact SL 2013-581 actually has on racial and ethnic minorities in North Carolina, post-enactment documents will be highly relevant to evaluating the "foreseeable and anticipated" impact of the law at the time it was enacted—an important consideration in evaluating intentional-discrimination claims. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). For those reasons, at least two federal courts considering intentional discrimination claims under Section 2 of the VRA and the Fourteenth Amendment within the last year have acknowledged that post-enactment communications are properly subject to discovery. In *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2013 WL 690496, at *2, for example, the Court expressly rejected the very argument advanced by Defendants here:

> [N]or is there any logic to an argument that items post-dating the passage of Acts 43 and 44 would necessarily lack relevance. Rather, it is entirely logical to believe that emails and other materials circulated after the passage of Acts 43 and 44 could relate to the objectives or motives of the legislators and others involved in the passage of those Acts.

Id. Similarly, a federal court in New York recently granted a motion to compel the production of post-enactment emails and documents, explaining that it is "the relevance

of the information contained in the requested documents—not the timing of events in relation to their creation—that determines discoverability." Ex. I, *Favors*, slip op. at 9.

Second, documents created after August 12, 2013 are directly relevant to Plaintiffs' discriminatory "results" claims under Section 2 of the Voting Rights Act. As both the Supreme Court and a broad array of lower courts have recognized, the discriminatory results analysis required by Section 2 requires a "searching practical evaluation of the past ***and present*** reality" of the challenged electoral system in operation. *Gingles*, 478 U.S. at 45 (emphasis added). Understanding that "present reality" requires assessing the actual, current conditions in which the challenged practices will operate, which in turn requires the most recent evidence available, including post-enactment evidence on how the challenged practice will be implemented. Indeed, post-enactment evidence will necessarily be relevant to a number of topics, including: (i) the State's plans for implementing SL 2013-581's voter-identification requirement; (ii) the impact the elimination of same-day registration and reduced early-voting periods has on waiting times and election turnout; (iii) the consequences of increasing the number poll watchers and observers; (iv) the State's efforts to educate the electorate about the requirements of SL 2013-581; and (vi) the State's efforts to provide open access to the identification needed to vote.

For that reason, courts evaluating voting laws under both Section 2 and Section 5 of the Voting Rights Act routinely look post-enactment evidence. *See, e.g.*, *Brown v. Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012); *Texas v. Holder*, No. 12-128, slip op. at 10 (D.D.C. June 5, 2013) (order granting motion to compel production of documents and

deposition testimony regarding legislators' communications that post-dated the enactment of the challenged law); *South Carolina v. United States*, 898 F. Supp. 2d 30, 35, 39-41 (D.D.C. 2012) (recognizing the "key unanswered question at the time of Act R54's enactment: namely, how would the reasonable impediment provision be interpreted and enforced?" and analyzing potential racially disparate effects in light of implementation).

Notwithstanding this clear line of authority, Defendants have tried to justify their refusal to produce any post-complaint documents by arguing that "the claims filed by all of the plaintiffs in these consolidated actions are limited to challenging the ***facial*** legality or constitutionality of various provisions of SL 2013-581" and "[n]one of the plaintiffs have pled an '***as applied***' challenge to any of the provisions of SL 2013-581." Defs.' Brief in Support of Mot. Regarding Order on Electronically Stored Documents at 4, 8 [01/02/14 ECF No. 45].

That is simply wrong—as plaintiffs previously have explained. *See* Pls.' Brief in Opp. to Defs' Mot. Regarding Order on Electronically Stored Documents [01/08/14 ECF No. 51]. Claims brought under Section 2 of the VRA necessarily implicate not only the facial validity of a challenged electoral system, but also require a fact-intensive "practical evaluation" of how the system will actually operate. *Gingles*, 478 U.S. at 45. All three complaints in these cases therefore include allegations challenging not only the ***facial*** validity of SL 2013-581, but also the manner in which SL 2013-581 will be ***applied*** by employees, agencies, and officials in North Carolina. *See, e.g.*, NAACP First Am. Compl. ¶ 131 [ECF No. 026] (challenging "Defendants' actions in implementing and enforcing the provisions of H.B. 589"); ¶ 132 (same); ¶ 141 (same); ¶ 142 (same); ¶ 47

(naming Governor McCrory in part because he oversees "agencies that are involved with the implementation and enforcement of H.B. 589"); LWV Compl. ¶¶ 18-22 [ECF No. 001] (named members of the Board of Elections because they are "charged with administering the election laws of the State of North Carolina"); DOJ Compl. at 21 [ECF No. 001] ("Implementation of HB 589 Will Have a Discriminatory Result"); ¶ 98 (challenging, *inter alia*, "North Carolina's implementation and enforcement" of H.B. 589); ¶ 99 (challenging the "implementation" of voter photo identification requirements). Thus, contrary to Defendants' arguments, Plaintiffs do in fact assert "as-applied challenges to the statute at issue." 1/2/14 Defs.' Br. at 9 [ECF No. 045].

There is no basis in law or logic for limiting Plaintiffs' claims at this early stage of the litigation to asserting only facial challenges to SL 2013-581. The distinction between facial and as-applied challenges "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Defendants thus cannot "prevent[] the Court from considering certain remedies"—such as Plaintiffs' as-applied challenges to SL 2013-581—through a restrictive interpretation of the pleadings. For that reason, courts routinely reject early attempts by defendants to preclude plaintiffs from asserting as-applied challenges. *See Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Corbett*, Civil Action No. 09-951, 2010 WL 3885373, at *7 (W.D. Pa. Sept. 28, 2010) (denying motion by State Attorney's General to prevent plaintiffs from challenging a statute on an "as applied" basis in light of "the Supreme Court's admonition in *Citizens United* that the distinction between facial and as-applied challenges goes to the breadth of the remedy

employed by the Court rather than to what must be pleaded in a complaint") (quotations omitted); *Barrett v. Claycomb*, No. 2:11-CV-04242, 2013 WL 5567194, at *30 (W.D. Mo. Sept. 13, 2013) (rejecting the argument that "Plaintiffs are not entitled to as-applied relief because they requested [only] facial relief" in their complaint on the grounds that defendant's argument "confuse[d] the breadth of the appropriate remedy with what must be pleaded in the complaint"); *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013) (relying on *Citizens United* to reject as "unconvincing" the State's argument that the Union could not assert an as-applied challenge "because the Union's complaint requested only facial relief"). There can be no question, therefore, that all of the Plaintiffs in these consolidated cases assert as-applied, as well as facial, challenges to SL 2013-581. For that reason, documents created after August 12, 2013 are plainly relevant in this case and thus satisfy the low bar for discoverability set by the Federal Rules.

CONCLUSION

For the foregoing reasons, the NAACP Plaintiffs and LWV Plaintiffs respectfully request that the Court enter an order requiring Defendants to produce:

(1) all documents responsive to Plaintiffs' requests for production by February 14, 2014.

(2) the SIEMS database and the SADLS databases immediately;

(3) all pre-enactment documents that are responsive to Plaintiffs' requests for production, regardless of when those documents were created; and

(4) all post-enactment documents that are responsive to Plaintiffs' requests for production, including those documents created on or after August 12, 2013.

Dated: January 24, 2014

Respectfully submitted,

By: /s/ *Adam Stein*

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 37.1

In accordance with Middle District of North Carolina Local Rule 37.1, Plaintiffs certify that the parties were not able to reach agreement on these matters after personal consultation and diligent attempts to resolve their differences. The parties have discussed these issues via email, including emails on January 9 and 16, 2014. The parties also held two meet-and-confer telephone conferences on these matters, on January 7, 2014, and on January 23, 2014. In attendance at the most recent conference were, among others, Bridget K. O'Connor, counsel for the NAACP Plaintiffs; Dale Ho, counsel for the LWV Plaintiffs; John Russ, counsel for the DOJ; and Tom Farr and Amy Pocklington, counsel for Defendants. During that conference, Defendants addressed some of the issues discussed herein (as addressed in this Motion and upon which the parties could not agree), but refused to address others.

The parties are scheduled to hold another meet-and-confer telephone conference on January 30, 2014 to address other discovery-related issues that the Defendants indicated they were not prepared to address during the January 23, 2014 meet-and-confer call. Plaintiffs' intend to participate in good faith in that conference, including to continue to attempt to resolve the issues raised by this motion. However, in light of the approaching deadlines for filing expert reports and moving for preliminary injunctive relief, Plaintiffs cannot delay any further in filing this motion. Plaintiffs have waited as long as possible to file this motion, but Defendants' delay tactics have made it necessary to seek the Court's assistance while the parties continue ongoing efforts to resolve their disagreements.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014, I served Plaintiffs' Motion to Compel Production of Documents 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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