

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

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

Plaintiffs,

v.

ALAN HIRSCH, in his official capacity
as Chair of the North Carolina State
Board of Elections, *et al.*,

Defendants.

**PLAINTIFFS' REPLY
IN SUPPORT OF NOTICE
OF PROPOSED DISCOVERY**

No. 1:18-cv-01034

INTRODUCTION

Plaintiffs were diligent and acted in good faith¹ to obtain relevant documents and information during the original discovery period in this litigation. Now Plaintiffs come before the court seeking limited additional discovery from the State Board Defendants to address new information and unexpected delays that have occurred since that time. It was not foreseeable that the ultimate trial date in this case would take place more than three years after the close of discovery, without any evidence in the record regarding the present implementation of the law. State Board Defendants will not be prejudiced by having to complete their previously agreed upon production of the *Holmes* Litigation discovery documents and to provide updated information about the impact and implementation of S.B. 824 before this case proceeds expeditiously to trial. This evidence is highly relevant to Plaintiffs' claims, and Plaintiffs have repeatedly demonstrated their willingness to meet and confer to reduce any burden on the State Board.

¹ The State Board Defendants concede that they "have no reason to question Plaintiffs' good faith" in seeking this discovery. State Board Resp., 9, ECF No. 205.

ARGUMENT

A. There is No Prejudice to State Board Defendants²

State Board Defendants argue that evidence relating to the implementation of S.B. 824 is “irrelevant.” State Board Resp., 5, ECF No. 205. However, Rule 26(b)(1) of the Federal Rules of Civil Procedure defines the scope of discovery broadly as “any nonprivileged matter that is relevant to any party's claim or defense.” The question here is not whether this evidence will be admissible at trial, but whether it is subject to discovery. *Id.* (“Information within this scope of discovery need not be admissible in evidence to be discoverable.”).

The evidence sought here easily meets this standard, and is likely to include evidence critical to this case. Each of Plaintiffs’ claims requires an analysis of the impact of the challenged law, and a Section 2 claim may “be established by proof of discriminatory results alone.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 238 (4th Cir. 2013). Federal courts addressing challenges to voter ID laws routinely consider this kind of evidence. *See* Notice of Proposed Disc., 10, ECF No. 203. Contrary to the State Board Defendants’ assertion, the Fourth Circuit in *Raymond* did not even address Plaintiffs’ Section 2 claim; it addressed the persuasiveness of implementation evidence only in a claim for discriminatory intent. *N.C. NAACP v. Raymond*, 981 F.3d 295, 310 (4th Cir. 2020). It did not address whether implementation evidence is discoverable.

² State Board Defendants are asking that this be treated as a “Motion to Extend Discovery after Time is Expired” under Rule 6(b)(1)(B). Plaintiffs object to this request, as the court did not ask the Plaintiffs to file such a motion – rather, they were asked to file a Notice of Proposed Discovery. *See* July 26, 2023 Minute Entry. Nevertheless, Plaintiffs have demonstrated that there has been no “excusable neglect” on their part with regards to this request.

In this case, the State Board Defendants have themselves repeatedly relied upon implementation evidence to assert that S.B. 824 complied with the Voting Rights Act and the Constitution.³ *See* Defs.’ Opp’n to Pls.’ Prelim. Inj. 24, 30, ECF No. 97 (discussing continued approvals for new IDs and “reasonable assum[ption] that the number of free IDs issued [should] only continue to rise”); *see id.* 27 (discussing the county boards’ ability to authorize staff to provide IDs at other locations); *see also* Prelim. Inj. Tr. (Dec. 9, 2019) 97, ECF No. 119 (Defendants discussing college and universities that have been approved); *see id.* 102 (“there are a number of ways that the State Board is interpreting this law to ensure that it is not too strictly construed”); *see id.* (explaining that it is unlikely for a panel of mixed-party judges to unanimously find “no reasonable resemblance”); *see id.* 126 (a voter only needs to “put down in [the] reasonable impediment affidavit” the reasons for not having an ID, “and then the County Board must accept that affidavit.”). The State Board Defendants again relied on implementation evidence in support of their untimely filed Motion for Summary Judgment. *See* Defs. Mot. for Summ. J. 18, ECF No. 178 (describing an administrative rule that permits county boards to issue voter IDs at other locations);⁴ *see id.* 19 (voters’ “vote will count if they return later with their qualifying ID”).

State Board Defendants also argue that Plaintiffs’ requests are “extremely burdensome” because they lack an end date. State Board Resp., 5, ECF No. 205. However, discovery obligations are routinely ongoing until the end of fact discovery set by the Court.

³ Throughout this litigation, the State Board Defendants have reproduced documents from the *Holmes* litigation related to implementation and did not object to production of this evidence on relevance grounds. *See e.g.*, Joint Report Pursuant to FRCP 26(f), 2, 3, ECF No. 77.

⁴ This administrative rule, 08 N.C. Admin Code 17.0107(a) has now expired, further emphasizing the relevance and importance of implementation evidence.

Nothing different is proposed here. In addition, Plaintiffs are seeking to move expeditiously to trial by the summer of 2024 and the State Board's discovery obligations under such a schedule would span less than a year. If needed, Plaintiffs remain open to meet and confer with the State Board in order to further narrow any specific requests.

Finally, the State Board Defendants argue that Plaintiffs' motion could "nullify" their pending Motion for Summary Judgment. *Id.* 6. However, that motion was untimely filed, and this Court made clear that it may or may not rule on it. The State Board is now generating highly probative evidence that it is obligated to produce and that the court will need to resolve this case. It is not prejudicial to the State Board Defendants that probative evidence might disturb their untimely filed motion. In any case, any schedule for additional discovery would also include time for filing dispositive motions before trial.

B. There is No Prejudice to Legislative Defendants

Despite the Court ruling that Plaintiffs could not obtain additional discovery from Legislative Defendants, they argue that they are prejudiced by Plaintiffs' Notice of Proposed Discovery *to the State Board* because they have been "foreclosed from participation in this matter and had no opportunity to engage in discovery" themselves. Legislative Defs.' Opp'n, 1, ECF No. 204. However, the truth is that Legislative Defendants have chosen to act as passive spectators since their motion to intervene was granted. Legislative Defendants have not filed initial disclosures or chosen to propound any discovery. In December 2021, the Legislative Defendants declined to join the State Board's request for a stay of this case, which would have allowed Legislative Defendants to engage in limited additional discovery. *See* Mot. Stay, Continue Trial, Allow Permissive

Intervention, 6, ECF No. 192. When this Court offered Legislative Defendants the opportunity to serve additional discovery on either the State Board Defendants or Plaintiffs before the status conference, the Legislative Defendants declined to do so.⁵

C. There Has Not Been an Unreasonable Delay in This Case

State Board Defendants argue that Plaintiffs should have sought to re-open this case in June 2022, State Board Resp., 7, ECF No. 205, but doing so would have run afoul of the concerns explicitly stated by this Court. The December 30, 2021 stay order cited the potential for conflicting orders in the state and federal litigations. Order, ECF No. 194. At the time the U.S. Supreme Court permitted Legislative Defendants to intervene in this case, the *Holmes* Litigation was already on its way to the court of last resort, where a final decision was imminent, and the law was stayed through a state court injunction. The North Carolina Supreme Court's unprecedented decision to rehear the *Holmes* case was entirely unexpected and outside of Plaintiffs' control. Once the final decision on reconsideration was issued in the *Holmes* Litigation, Plaintiffs promptly filed their motion to lift the stay and sought a status conference. ECF No. 202.

CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' request to serve the additional discovery attached as Exhibits A-C to their Notice of Proposed Discovery on State Board Defendants, and require State Board Defendants to respond within 30 days of service, consistent with the Federal Rules of Civil Procedure.

⁵ If this Court permits Legislative Defendants the opportunity to serve discovery, Plaintiffs reserve our right to seek and request additional discovery from the Legislative Defendants as well.

Respectfully Submitted this 23rd day of August 2023

By: /s/ Irving Joyner

Irving Joyner
NC State Bar No. 7830
P.O. Box 374
Cary, NC 27512
Phone: (919) 319-8353
ijoyner@ncu.edu

By: /s/ Penda D. Hair

Penda D. Hair
DC Bar No. 335133
FORWARD JUSTICE
P.O. Box 42521
Washington, DC 20015
Phone: (202) 256-1976
phair@forwardjustice.org

Caitlin A. Swain
NC Bar No. 57042
Kathleen E. Roblez
NC Bar No. 57039
Ashley Mitchell
NC Bar No. 56889
FORWARD JUSTICE
P.O. Box 1932
Durham, NC 27721
Phone: (919) 323-3889
cswain@forwardjustice.org
kroblez@forwardjustice.org
amitchell@forwardjustice.org

By: /s/ Jeremy Karpatkin

James W. Cooper
DC Bar No. 421169
Jeremy C. Karpatkin
DC Bar No. 980263
**ARNOLD & PORTER KAYE
SCHOLER LLP**
601 Massachusetts Avenue, NW
Washington, DC 20001-3743
Phone: (202) 942-6603

James.W.Cooper@arnoldporter.com
Jeremy.Karpatkin@arnoldporter.com

By: /s/ John C. Ulin

John C. Ulin

CA Bar 165524

TROYGOULD

1801 Century Park East

Los Angeles, CA 90067

Phone: (310) 789-1224

julin@troygould.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing PLAINTIFFS' REPLY IN SUPPORT OF NOTICE OF PROPOSED DISCOVERY with the Clerk of Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

This, the 23rd day of August 2023.

/s/ Jeremy C. Karpatkin
Jeremy C. Karpatkin

CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies that pursuant to Local Rule 7.3(d)(1), the foregoing has a word count of less than 3,125 words not including the caption, signature block and certification of word count. This document was prepared in Microsoft Word, from which the word count is generated.

Dated this 23rd day of August 2023.

/s/ Jeremy C. Karpatkin
Jeremy C. Karpatkin