UNITED STATES DISTRICT COURT
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,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Legislative Defendant Intervenors.

CASE NO. 1:18-cv-1034

LEGISLATIVE DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR RULE 37 MOTION TO STRIKE OR ORDER DISREGARDED PLAINTIFFS' MARCH 20, 2024 AMENDED SUPPLEMENTAL DISCLOSURES

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INTRODUCTION

Legislative Defendants respectfully move to strike Plaintiffs' Amended Supplemental Disclosures served on March 20, 2024. *See* Exhibit A attached hereto. Subject to the scheduling order that Plaintiffs agreed to and that this Court entered, fact discovery closed on May 15, 2020. *See* Joint Rule 26(f) Report, Doc. 77 at 4. Now, less than two months before trial, Plaintiffs have newly identified numerous individuals and organizational representatives likely to have discoverable information and seven new categories of documents that Plaintiffs may use to support their claims at trial. Of course, given the timing of Plaintiffs' disclosure, it is impossible for Defendants to take discovery into these newly identified individuals and organizations. Moreover, Plaintiffs neglected to identify many such individuals by name, as Rule 26(a)(1)(A) requires. Plaintiffs' vague categorizations of organizational representatives, election officials, poll workers, and voters could encompass thousands of individuals throughout North Carolina. Finally, it is equally impossible given the timing of Plaintiffs' disclosure of seven newly identified document categories years after the close of discovery that include documents that are not in the possession, custody, or control of Defendants and whose location Plaintiffs vaguely describe only as "Counsel for Plaintiffs," to take discovery of Plaintiffs regarding these unproduced documents Plaintiffs may use to support their claims at trial.

Plaintiffs should not be allowed to sandbag Defendants by dramatically broadening their disclosures on the eve of trial. To prevent the prejudice that would inevitably result if Plaintiffs are permitted to rely on these untimely disclosures, Legislative Defendants ask the Court to strike Plaintiffs' Amended Supplemental Disclosures (or declare them

disregarded), and enter an order excluding all newly identified individuals, or categories of individuals, from testifying on behalf of Plaintiffs at trial, and excluding all documents from the newly identified categories that are not in Defendants' possession, custody, or control from admission by Plaintiffs at trial. Alternatively, to reduce the prejudice that will be suffered by Legislative Defendants should these untimely disclosures be allowed to stand, the Court should order Plaintiffs to immediately serve new disclosures providing the names of each individual with discoverable information who Plaintiffs intend to rely upon at trial and to order Plaintiffs to make those individuals available for deposition before trial, to afford Legislative Defendants the opportunity to obtain document discovery from all new identified individuals before trial, and ordering Plaintiffs to immediately produce all documents in the newly identified categories that are located with "Counsel for Plaintiffs." Legislative Defendants acknowledge trial is fast approaching and that the discovery necessary to remediate the prejudice caused by Plaintiffs' late disclosure would require postponing the trial date, so their preference is for this Court to strike, or order disregarded, the late-filed disclosure and prohibit Plaintiffs from relying on those late disclosed witnesses and documents at trial.[1]

[1] To be clear, Legislative Defendants do not accept that Plaintiffs timely identified other individuals included in their prior supplemental disclosures served after the close of fact and expert discovery or that such individuals can testify as witnesses at trial. Legislative Defendants were not parties at the time Plaintiffs filed their post-discovery supplemental disclosures in 2021 because the Court denied their attempt to intervene and participate in discovery, so Legislative Defendants were not in a position to object to the untimely disclosures at that time. If Plaintiffs attempt to include any such late-identified fact or expert witnesses in their pretrial disclosures or witness lists, Legislative Defendants reserve the right to move to exclude such witnesses from testifying at trial or otherwise seek appropriate discovery to cure Plaintiffs' prejudicial and untimely actions. Similarly,

QUESTION PRESENTED

Whether the Court should strike Plaintiffs' Amended Supplemental Disclosures.

STATEMENT OF FACTS

Plaintiffs filed suit on December 20, 2018. Compl., Doc. 1. On January 14, 2019, Legislative Defendants moved to intervene. Mot. to Intervene, Doc. 7. Plaintiffs opposed intervention. Opposition to Mot. to Intervene, Doc. 38. Agreeing with Plaintiffs, this Court denied intervention. Order Denying Mot. to Intervene, Doc. 56. Legislative Defendants renewed their motion to intervene, Doc. 60, and asked the Court to allow them "to fully participate as defendants in this suit during the pendency of the appeal" about their intervention. Br. Supporting Proposed Intervenors' Mot. for a Stay, Doc. 76 at 1. Legislative Defendants asked for the right "to fully engage in discovery, motions practice, presentation of evidence, and briefing." *Id.* at 1. Plaintiffs again opposed Legislative Defendants' participation as intervenors, Doc. 66, and this Court limited Legislative Defendants to participating as amici curiae, Doc. 100. At Plaintiffs' insistence, Doc. 99, the Court struck all preliminary-injunction stage evidence that Legislative Defendants offered, Doc. 116.

While Legislative Defendants were attempting to enter the case as intervenors, Plaintiffs and State Board Defendants agreed to a schedule such that formal discovery opened "immediately, with initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A) to occur by operation of the Rule." Joint Rule 26(f) Report at 2. Witness disclosures were

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Legislative Defendants reserve the right to move to exclude late-identified documents that would be prejudicial to Legislative Defendants if admitted.

required to occur on or before March 15, 2020. *Id.* at 3. And fact discovery closed on May 15, 2020. *Id.* at 4. The Court adopted the Joint Rule 26(f) Report's schedule for this case via a text order on October 1, 2019.

On October 18, 2019, Plaintiffs served their initial disclosures to the State Board Defendants. *See* Plaintiffs' Initial Disclosures, Ex. B. These disclosures named seven individuals who represented Plaintiff North Carolina State Conference of the NAACP and six of its North Carolina branches that counsel for Plaintiffs also represented. *Id.* at 2-3. Plaintiffs also identified the Chair of the State Board of Elections; the Secretary for the State Board of Elections; members of the State Board of Elections; Kim Strach, who previously served as Executive Director of the State Board of Elections; Kate Fellman of You Can Vote; Courtney Patterson of the Lenoir County Board of Elections; and 30(b)(6) witnesses and custodians for the State Board and the North Carolina Department of Transportation. *Id.* at 4-5. Finally, Plaintiffs identified the organization Common Cause, Senator Floyd McKissick, Senator Teresa Van Duyn, former Representative Henry M. Michaux, Representative Robert Reives II, Representative Marcia Morey, and the principal clerks of each legislative house. *Id.* at 5-7. For documents, Plaintiffs disclosed one category of documents consisting of "[d]ocuments and communications relating to the Plaintiffs' get-out-the-vote and voter registration activities, voter registration and education activities" that were "primarily located at the offices of the Plaintiffs." *Id.* at 8.

Half a year passed. The witness disclosure deadline came and went. Then, "a month after their self-selected cut-off for disclosure of witnesses, and the evening before Plaintiffs' hand-picked, expert report/disclosure deadline," Plaintiffs asked the Court to

create a new discovery schedule with, among other changes, disclosure of fact witnesses by September 4, 2020, and close of fact discovery on October 2, 2020. Order Denying Mot. for Reconsideration, Doc. 140 at 3. Magistrate Judge Auld denied Plaintiffs' last-minute request. *Id.* at 17. Plaintiffs objected, Doc. 143, but Judge Biggs overruled Plaintiffs' objection and affirmed the order maintaining the discovery schedule Plaintiffs and State Board Defendants had agreed to. Order Overruling 2020 Objection, Doc. 148 at 5.

Another year passed. On September 10, 2021, Plaintiffs served what purported to be "Supplemental Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1)." *See* Plaintiffs' First Supplemental Disclosures, Ex. C. These "supplemental" disclosures newly disclosed individuals supposedly "identified" in Plaintiffs' preliminary injunction filings—not in their initial disclosures—along with Dreama Caldwell of Down Home North Carolina; Kenya Myers of Disability Rights North Carolina; Emily Mistr of the North Carolina Justice Center and Campbell Law School; Kristen Powers of Benevolence Farm; Margaret Hassel, formerly of Compass Center for Women and Families; Iliana Santillan of El Pueblo; Marcus Bass of Advance Carolina and the North Carolina Black Alliance; Rev. Dr. William J. Barber II of Repairers of the Breach; Danell Burney, a voter in an unspecified election; and Mary Degree of Cleveland County NAACP. *Id.* at 1-3. Plaintiffs had "[n]o supplemental information regarding documents." *Id.* at 3.

Two months later on November 9, 2021, Plaintiffs changed organizational representatives for the North Carolina State Conference of the NAACP and three NAACP branches that counsel for Plaintiffs represents in this litigation. Plaintiffs' Second Supplemental Disclosures, Ex. D. Plaintiffs did not mention any new documents.

Three years after fact discovery closed, the Supreme Court ruled that Legislative Defendants were "entitled to intervene in this litigation." *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 200 (2022); *see* Mandate, Doc. 200. Proceedings in this case, however, remained stayed for another year until Plaintiffs filed a Motion to Lift Stay and For a Status Conference on June 9, 2023, Doc. 202.

At the status conference on July 26, 2023, "Plaintiffs requested that the Court reopen the discovery period to allow them to serve the Elections Board and the Legislative Leaders with a raft of new discovery demands, as well as to conduct depositions Plaintiffs previously had not pursued." Order Denying Mot. to Reopen Discovery, Doc. 210 at 11. The "Elections Board and the Legislative Leaders opposed the reopening of discovery and voiced objections to the discovery Plaintiffs proposed." *Id.* Plaintiffs "failed to develop any argument for the Court to find excusable neglect," and the record did not support such a finding. *Id.* at 15. Their request would set back the litigation and prejudice Defendants. *Id.* at 16-19. Plaintiffs strategically decided not to engage in more extensive discovery so that they could focus on "other aspects of the litigation, such as pursuing preliminary injunctive relief and contesting intervention by the Legislative Leaders." *Id.* at 23. And Plaintiffs' conduct was not in good faith. *Id.* at 30. Accordingly, Magistrate Judge Auld denied Plaintiffs' motion to reopen discovery. *Id.* at 31.

Plaintiffs objected to that order. Doc. 211. At the November 21, 2023 hearing in front of Judge Biggs, Plaintiffs' opening included a lengthy discussion of what they claimed to have seen in the 2023 municipal elections. Transcript Excerpts, Ex. E at 14, 18-21. Counsel for Plaintiffs described—but did not identify by name—voters, poll workers, and

members of county boards and their alleged experiences in the 2023 municipal elections. *Id.* at 18-21. Counsel for the State Board Defendants pointed out that what Plaintiffs now claimed to be "looking for" in discovery "is not directly relevant to the law itself as it's written." *Id.* at 33-34. Counsel for Legislative Defendants reiterated their position that they were "content to go forward with the record that was in place," but that Plaintiffs were attempting to prejudice Legislative Defendants through one-sided expansion of the record. *Id.* at 59-60. Judge Biggs then overruled Plaintiffs' objection to Magistrate Judge Auld's decision not to reopen discovery, Doc. 228, and set a trial date of May 6, 2024, Doc. 229.

Over four months after the 2023 municipal elections and over a month after Judge Biggs overruled Plaintiffs' objection, Plaintiffs served "Amended Supplemental Disclosures," Ex. A, on March 20, 2024. To be sure, limited aspects of these disclosures were amendments, such as the clarification of which individuals now represented Plaintiff North Carolina State Conference of the NAACP and the branches participating in this lawsuit. *Id.* at 2-3. But many aspects of Plaintiffs' last-minute disclosures clearly were not mere amendments. Plaintiffs newly disclosed the following individuals or categories of individuals who had not previously appeared in any party's disclosures:

- Tomas Lopez (no description provided);
- Organizational Representative from Democracy North Carolina (unnamed);
- Organizational Representative from Vote Riders (unnamed);
- Tyler Daye (Precinct Chief Judge of unidentified precinct);
- Election officials who implemented S.B. 824 during the 2023 Municipal elections or the 2024 Primary elections (names and contact information

unprovided);

- Poll workers who assisted voters with voting provisionally due to S.B. 824's photo identification requirement during the 2023 Municipal elections or the 2024 Primary elections (names and contact information unprovided);
- Former Congressman G.K. Butterfield;
- Former Representative [sic] Joel Ford;
- Julius Perry (voter in unspecified election);
- Shelia Relette Brower (voter in unspecified election);
- Jeanette Dumas (voter in unspecified election);
- Individual voters who voted provisionally using an ID Exception Form in the 2023 Municipal elections or the 2024 Primary elections (names and contact information unprovided);
- Individual voters who voted provisionally using the "Return with ID" option during the 2023 Municipal elections or the 2024 Primary elections (names and contact information unprovided);
- Individual voters who had to obtain one of the forms of ID accepted for voting under S.B. 824 (names and contact information unprovided); and
- Individual voters who were unable to cast any ballot in the 2023 Municipal elections or the 2024 Primary elections due to the photo voter ID requirement of S.B. 824 (names and contact information unprovided).

Id. at 2-8. Former "Representative" Joel Ford is presumably former Senator Joel Ford,

whose declaration the Court struck at the preliminary-injunction stage at *Plaintiffs'* insistence. *See* Stricken Amicus Brief, Doc. 96 at 33-34. Plaintiffs still failed to identify by name the representative of Common Cause. Ex. A at 6.

Plaintiffs also newly identified seven categories of documents that they would use to support their claims and expanded upon the one previously identified category to now include "third-party organizations'" documents and communications relating to get-out-the-vote, voter registration and education activities, including resources diverted to address the adverse impact of S.B. 824" in addition to such activities by Plaintiffs. *Id.* at 9. Further, of the seven entirely new categories of documents, five of them identify "Counsel for Plaintiffs" among the locations where relevant documentation can be found. *Id.* at 9-10. One newly identified category consisting of "[m]aterials concerning the legislative history and process of H.B. 1092, S.B. 824, H.B. 1169 and S.B. 747 including transcripts/recordings of legislative sessions, bill analysis, amendments, and correspondence relating to the legislative process, including any documents or communications relating to plans to revise or amend these statutes" lists "Counsel for Plaintiffs" as the exclusive source of relevant documentation they may rely on at trial. *Id.* at 9.

On March 27, 2024, Legislative Defendants informed the other parties that they intended to file this motion to strike. The parties met and conferred on April 1, 2024. Plaintiffs oppose the motion while State Board Defendants take no position on the motion.

ARGUMENT

Plaintiffs failed to timely disclose at least fifteen individuals or categories of individuals and whole categories of documents until years after discovery closed. Legislative Defendants still do not know the names of many individuals whom Plaintiffs vaguely identified in their March 2024 disclosures and cannot evaluate what relevant documents or information they might have. While the disclosures would still have been untimely, for individuals and documents related to the 2023 municipal elections, at a minimum Plaintiffs could have made those disclosures months ago when their motion to reopen discovery was pending, and the Court could have considered this issue when the parties were before the Court on February 27, 2024. Instead, Plaintiffs waited to "amend" their disclosures over a month after Judge Biggs rejected Plaintiffs' objections to the order denying their request to reopen discovery and after Plaintiffs withdrew their motion for supplemental disclosures. With trial quickly approaching, Legislative Defendants—whom Plaintiffs succeeded in shutting out of discovery—have no ability to cure the surprise caused by these late disclosures in a way that avoids the extreme prejudice Plaintiffs apparently intended. *See S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003).

As Legislative Defendants have consistently stated, given Plaintiffs failure to engage in discovery and timely disclose witnesses during the discovery period, coupled with Legislative Defendants inability to participate in discovery during that period, the trial record in this case should be confined (at most) to the record before the Court during the preliminary injunction proceedings. (We say at most because Plaintiffs' failure to disclose

experts under Rule 26(a)(2) means that Plaintiffs should not be able to present any expert evidence at trial.) But Plaintiffs are once again attempting to expand the record to correct their failure to identify witnesses and follow the discovery schedule Plaintiffs and State Board Defendants agreed to. This Court should, therefore, strike Plaintiffs late-served March 2024 disclosures and prohibit Plaintiffs from offering any of the newly identified individuals or documents at trial. Alternatively, the Court could reopen discovery so Legislative Defendants can obtain discovery from Plaintiffs and conduct depositions of the numerous newly identified individuals or categories of individuals—which would likely push the trial date into or beyond the 2024 general election. In light of the May 2024 trial date, Legislative Defendants' preference is for the Court to strike Plaintiffs' Amended Supplemental Disclosures.

I. Plaintiffs Failed To Timely Disclose the New Individuals and Documents.

Plaintiffs' supposed "amended" supplementation is an unacceptable attempt to engage in "unlimited bolstering" of initial disclosures to include new witnesses and documents that Plaintiffs omitted but now want to use for trial. *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002). The Amended Supplemental Disclosures are "not a proper supplemental" disclosure "pursuant to Rule 26(e)" because Plaintiffs are "not attempting to correct the original" disclosures but to "add information" that they left out of their disclosures. *Thomasville Furniture Indus. v. Pulaski Furniture Corp.*, 2011 WL 13239926, at *1-2 (M.D.N.C. Dec. 1, 2011) (granting motion to strike when trial was only two months away).

The Rules of Civil Procedure require parties to disclose "the name and, if known,

the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(i). Parties must also disclose "a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A)(ii). Rule 26(e) requires parties to "supplement or correct" their disclosures, but such disclosures must be done "in a timely manner" when "the disclosure or response is incomplete or incorrect" or "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1). "On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney . . . fails to obey a scheduling or other pretrial order." Fed. R. Civ. P. 16(f). Under the Rules of Civil Procedure, a "party is not allowed to use" a witness the party failed to disclose for trial by the disclosure deadline "at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Other sanctions under Rule 37 for failing to obey a scheduling order include "striking pleadings in whole or in part," Fed. R. Civ. P. 37(b)(2)(A)(iii), and "prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence," Fed. R. Civ. P. 37(b)(2)(A)(ii).

The scheduling order for this case required Plaintiffs to make their initial disclosures in October 2019, to disclose fact witnesses by March 2020, and to conclude fact discovery

by May 2020. Joint Rule 26(f) Report at 3-4. Plaintiffs waited four years after the deadline for disclosing fact witnesses to make their Amended Supplemental Disclosures. Of course, Rule 26 "imposes a duty to supplement initial disclosures in a timely fashion" that continues even after the close of discovery. *Gomez v. Haystax Tech., Inc.*, 761 F. App'x 220, 230 (4th Cir. 2019). But Plaintiffs must disclose individuals and information when they become "aware of" them. *Id.* at 234 (ruling party untimely waited three weeks to disclose two witnesses at the end of discovery and another three weeks to disclose a witness after discovery closed); *see also id.* at 231 (ruling party also untimely disclosed information that the party "must have known of" for nearly two years before disclosing); *Intercollegiate Women's Lacrosse Coaches Ass'n v. Corrigan Sports Enters.*, 2023 WL 6282921, at *9 (M.D.N.C. Sept. 26, 2023) ("The question is whether" party "should have known of the identities of" individuals "who would support its case, and if it did not know of them at the time of its initial disclosures, whether it should have known of them during discovery so as to comply with its duty to supplement its disclosures under Rule 26(e).").

Here, Plaintiffs surely knew about—or should have known about—and should have disclosed many of the newly identified individuals years ago. Organizations such as Democracy North Carolina and Vote Riders have existed for the duration of this lawsuit. G.K. Butterfield was a Congressman from 2004 until the end of 2022. Joel Ford was a State Senator whom Legislative Defendants tried to submit a declaration for at the preliminary-injunction stage. Plaintiffs list Tyler Daye as a "Precinct Chief Judge" of an unidentified precinct, but he also works for Common Cause, an organization Plaintiffs identified in 2019. *See* Common Cause North Carolina, *Tyler Daye: Policy & Civic*

Engagement Manager (last visited Mar. 2024), https://bit.ly/3TDu4Ci (also noting that Tyler Daye previously "worked with Democracy NC and the League of Women Voters of NC on redistricting reform initiatives").

Other newly identified witnesses and new categories of documents are apparently part of Plaintiffs' "new theory of the case" about implementation during the 2023 municipal and 2024 primary elections. *Gomez*, 761 F. App'x at 230. To the extent witnesses such as Tomas Lopez, Tyler Daye, Julius Perry, Shelia Relette Brower, Jeanette Dumas, and the unnamed election officials, poll workers, and individual voters have information regarding the 2023 municipal elections, then Plaintiffs should have immediately disclosed their identity after the municipal elections and while their objection to the order denying the reopening of discovery was still pending. *See Intercollegiate Women's Lacrosse*, 2023 WL 6282921, at *11 ("[T]he timing of IWLCA's disclosures more than three months after IWLCA received the information at the close of discovery . . . raises doubts as to how justified IWLCA's delay was."). Instead, Plaintiffs refused to provide the names of potential witnesses regarding the 2023 municipal elections at the November 2023 hearing in front of Judge Biggs. To be sure, the 2024 primary election just concluded. However, Plaintiffs' Amended Supplemental Disclosures lumped the 2023 municipal elections together with the 2024 primary elections, so Defendants have no way to know which election the newly identified individuals have information about. And pushing off disclosures for the 2023 municipal elections until four months after those elections leaves the Court with little time to decide how to address implementation witnesses or, if this Court allows their late disclosure and testimony, to provide Legislative Defendants with

the opportunity to obtain discovery from and depose all such witnesses. Plaintiffs' belated disclosure of likely implementation witnesses simply is not timely.

Likewise, Plaintiffs' belated identification of seven new categories of documents upon which they may rely at trial along with an expansion of the one category they did previously disclose is untimely. Discovery closed years ago, so Legislative Defendants have no way to obtain (and Plaintiffs certainly have not provided) any of the documents whose location is identified simply as "Counsel for Plaintiffs." Ex. A at 9-10. On their face, many of these categories of documents pertain to topics that are far from new and that Plaintiffs would have been aware of, or should have been aware of, years ago while discovery was open (*e.g.*, "[d]ocuments and communications relating to . . . preparation for the 2016 primary election;" "[m]aterials prepared by County Boards of Elections and third parties (including legislators and third-party organizations) regarding the implementation of photo ID requirements . . . in preparation for the 2016 primary election;" and "[m]aterials concerning the legislative history and process of H.B. 1092, S.B. 824, H.B. 1169 and S.B. 747"). *Id.* at 9.

Even if Plaintiffs had served the Amended Supplemental Disclosures earlier, "Rule 26(a) does not countenance generic disclosures: a 'party must' provide 'the name . . . of each individual likely to have discoverable information.'" *Intercollegiate Women's Lacrosse*, 2023 WL 6282921, at *9 (quoting Fed. R. Civ. P. 26(a)(1)(A)(i)) (underlining in original). Plaintiffs' new disclosures are "inadequate" and should have included "specific names once they were determined." *Id.* Legislative Defendants are left guessing as to the identity of "Organizational Representative[s]," "Election officials," "Poll workers," and

"Individual voters" with information Plaintiffs intend to use. Ex. A at 5-8. Rule 26(a) puts the burden on Plaintiffs to identify individuals by name and, where available, to provide their contact information. Years after discovery closed and months after the 2023 municipal election, Plaintiffs have still failed to comply with those basic disclosure requirements.

II. The Disclosure Failures Were Not Substantially Justified or Harmless.

Plaintiffs' untimely disclosure of at least fifteen individuals or categories of individuals and whole categories of documents was not substantially justified or harmless. The Fourth Circuit has instructed that, when "determin[ing] whether a nondisclosure of evidence is substantially justified or harmless" for purposes of a Rule 37(c)(1) analysis, "a district court should be guided by the following factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." *S. States*, 318 F.3d at 597.[2] "[C]ourts need not find that every *Southern States* factor weighs against the non-disclosing party if exclusion is otherwise warranted." *Intercollegiate Women's Lacrosse*, 2023 WL 6282921, at *10 (quotation omitted). "The non-disclosing party bears the burden of establishing that the nondisclosure was substantially justified or was harmless." *Gomez*, 761 F. App'x at 229-30 (quotation

[2] Some opinions in this Court have used the six *Akeva* factors instead, but the Court recently clarified that the *Akeva* factors "do not materially differ from the *Southern States* factors." *Barnhill v. Accordius Health at Greensboro, LLC*, 2023 WL 7634449, at *7 (M.D.N.C. Nov. 14, 2023), *report and recommendation adopted*, 2023 WL 8281570 (M.D.N.C. Nov. 30, 2023). Legislative Defendants proceed here using the *Southern States* framework.

omitted). Here, Plaintiffs cannot carry their burden of establishing that they were substantially justified in waiting so long to make their Amended Supplemental Disclosures or that such untimely disclosure was harmless to Defendants. Each of the *Southern States* factors weighs in favor of striking Plaintiffs' Amended Supplemental Disclosures.

First, the belated Amended Supplemental Disclosures are yet one more attempt by Plaintiffs to surprise Defendants and "make an end-run around the normal timetable for conducting discovery" after they agreed to a discovery schedule that concluded years ago. *Colony Apartments v. Abacus Proj. Mgmt., Inc.*, 197 F. App'x 217, 223 (4th Cir. 2006). During that discovery period, Plaintiffs "made a calculated decision to save time and money by not" actively engaging in discovery. Order Denying Mot. to Reopen Discovery at 26 (quotation omitted). Plaintiffs did not supplement their initial disclosures at all during the discovery period. And "Plaintiffs continued to bide their time" after discovery closed, "rather than to request leave to reopen discovery" for new evidence. *Id.* at 25. Plaintiffs also successfully excluded Legislative Defendants from participating in discovery during the discovery period.

Now that Defendants have successfully stopped Plaintiffs' late efforts to reopen discovery, Plaintiffs have newly identified numerous individuals, categories of individuals, and documents that Plaintiffs no doubt hope to use as witnesses and evidence at trial. Plaintiffs thus surprised Defendants with their Amended Supplemental Disclosures.

Second, Plaintiffs have left Legislative Defendants with no opportunity to cure the surprise, so this factor heavily weighs against Plaintiffs. The ability to cross-examine a late-disclosed individual at trial is not enough to cure surprise. *See S. States*, 318 F.3d at

598. Unless this Court orders otherwise, Legislative Defendants cannot obtain discovery from and depose the fifteen individuals or categories of individuals that Plaintiffs newly disclosed. *See Campbell v. United States*, 470 F. App'x 153, 157 (4th Cir. 2012); *see also* Plaintiffs' Mot. to Strike, Doc. 99 at 3-4 ("Consideration of this extra-record material" offered by Legislative Defendants "would be improper and fundamentally unfair to Plaintiffs" because "Plaintiffs did not have the opportunity to depose" then-Amici's "proposed experts and declarants regarding their opinions."). Discovery closed years ago. By untimely disclosing previously "undisclosed witnesses," Plaintiffs have attempted to "ensure[] that Defendants ha[ve] little, if any, ability to impeach" them and have increased the burden on Defendants of preparing for trial. *Intercollegiate Women's Lacrosse*, 2023 WL 6282921, at *10. The prejudice to Legislative Defendants is severe.

Third, Plaintiffs' late disclosure of individuals and documents presents serious risks of delaying the trial. If Plaintiffs really want those individuals to be able to testify at trial and such late-disclosed evidence to be admitted at trial, then the Court would need to reopen discovery for Defendants to obtain information from and depose potentially over a dozen individuals. With trial less than two months away, it "is too late for another round of discovery that would be necessitated by permitting the new" disclosures from Plaintiffs. *Thomasville Furniture Indus.*, 2011 WL 13239926, at *2. Allowing Plaintiffs' Amended Supplemental Disclosures would be inconsistent with the Court's May 2024 trial date and desire to issue a decision before the 2024 general election.

Fourth, while Plaintiffs' vague Amended Supplemental Disclosures do not enable Legislative Defendants to know their full significance, the disclosures are likely of

marginal importance, at best, to Plaintiffs' facial challenge of North Carolina's voter ID law. "The State Board has made very clear its view (which Legislative Defendants share) that evidence related to implementation of the Voter ID law is not relevant for purposes of proving a facial claim." Legislative Defendants' Resp. to Plaintiffs' Obj., Doc. 212 at 8. Objecting to Magistrate Judge Auld's refusal to reopen discovery, Plaintiffs asked Judge Biggs to order the State Board Defendants to supplement their disclosures. Order Overruling 2023 Objection, Doc. 228 at 17. But Plaintiffs never amended or supplemented their own disclosures to include implementation evidence. When Judge Biggs remanded for consideration of State Board Defendants' obligation to supplement, the State Board and the Plaintiffs mutually resolved that disagreement by the State Board placing on its website the categories of documents Plaintiffs were seeking and with State Board Defendants disclosing only "[p]ublic records concerning the implementation efforts of the S.B. 824's voter photographic ID requirement by the North Carolina State Board of Elections as found on the North Carolina State Board of Elections' website." Not. of Parties' Resolution of Discovery Dispute, Doc. 233 at 2-3.

To the extent any implementation evidence is admissible, the public records and statistics available on the State Board's website are sufficient for the Court to tell how the law has been implemented. Discrete county board decisions and the experiences of a few individual voters are too "small in absolute terms" to determine whether the voter ID law facially violates the Constitution or VRA. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2344 (2021). If it were otherwise, then Plaintiffs would surely have acted with more diligence in disclosing the new individuals and documents instead of "present[ing] a new

theory of the case during the tail end of" trial preparation. *Gomez*, 761 F. App'x at 230. In any event, if the Court disagrees and this case now is going to be about the implementation of the voter ID law during the 2023 municipal and 2024 primary elections, then there needs to be the opportunity for full discovery into Plaintiffs' planned evidence relating to those elections.

Fifth, as explained above, Plaintiffs have no valid excuse for untimely disclosing so many new individuals and documents as supporting their case. In large part, Plaintiffs were not amending supplemental disclosures. They were adding individuals and documents "for the first time" even though their identification "had been required earlier." *SSS Enters., Inc. v. Nova Petroleum Realty, LLC*, 533 F. App'x 321, 324 (4th Cir. 2013). Plaintiffs have likely known the identity of several individuals for years and have still failed to name the relevant individuals in many other categories. Rule 26(e) supplementation "does not cover failures of omission" due to parties' "inadequate or incomplete preparation." *Akeva*, 212 F.R.D. at 310. "The basic purpose of Rule 26(a) 'is to allow the parties to adequately prepare their cases for trial and to avoid unfair surprise.'" *Intercollegiate Women's Lacrosse*, 2023 WL 6282921, at *8 (quoting *Russell v. Absolute Collection Servs.*, 763 F.3d 385, 396 (4th Cir. 2014)). Plaintiffs flouted Rule 26's requirements for their own advantage.

Bad faith is not required for this factor to weigh against Plaintiffs so the Court need not reach that concern. *See S. States*, 318 F.3d at 596. But it certainly supports such a finding. *See id.* at 598. And Plaintiffs' effort to drastically expand the scope of their initial disclosures on the eve of trial suggests bad faith, and it is of a piece with Plaintiffs' other efforts to escape the consequences of the tactical decisions that they made when discovery

was open in this case. *See* Sep. 12, 2023 Order Denying Plaintiffs' Motion to Reopen Discovery, Doc. 210 at 30 (noting that Court could not say that Plaintiffs' "conduct was in good faith"). The *Southern States* factors all weigh against Plaintiffs.

III. Striking the Amended Supplemental Disclosures Is the Best Remedy.

Legislative Defendants ask the Court to strike, or order disregarded, Plaintiffs' untimely Amended Supplemental Disclosures, which they cannot establish were substantially justified or harmless. Rule 37(b)(2)(A)(iii) authorizes a district court to strike disclosures that fail to comply with a party's disclosure obligations under a Rule 26(f) scheduling order. This sanction is particularly appropriate when trial is "two months" or less away, and when "[i]t is too late for another round of discovery that would be necessitated by permitting" the disclosure of new individuals or information. *Thomasville Furniture Indus.*, 2011 WL 13239926, at *2-3 (granting motion to strike late disclosure and noting that not doing so would also require adjudication of motion to exclude); *see also SSS Enters.*, 533 F. App'x at 323-24 (affirming district court that struck incomplete disclosures and then denied motion to file "supplemental" disclosures after deadline passed); *Managed Care Sols., Inc. v. Essent Healthcare, Inc.*, 2010 WL 3385391, at *2 (S.D. Fla. Aug. 23, 2010) (striking plaintiff's supplemental disclosures).[3]

To the extent the Court does not believe it can technically strike the Amended Supplemental Disclosures, which Plaintiffs have simply served on Defendants, Legislative

[3] If the Court desires to strike the Amended Supplemental Disclosures only in part, Legislative Defendants ask the Court to strike all parts that are not identical to Plaintiffs' initial disclosures or that do not engage in a one-for-one substitution of individuals who have taken over positions identified in Plaintiffs' initial disclosures from October 2019.

Defendants ask the Court to order them "disregard[ed]" under Rule 37(c)(1) and prohibit Plaintiffs from relying on such witnesses and evidence at trial. *Intercollegiate Women's Lacrosse*, 2023 WL 6282921, at *7, *39 (granting the motion to strike "in that the court will disregard the declarations and documents at issue"); *see also Gomez*, 761 F. App'x at 233 (affirming exclusion of witnesses where party waited mere weeks to disclose witnesses at the end of discovery and right after the end of discovery).

Alternatively, the Court could order Plaintiffs to serve new disclosures providing the names of each individual with discoverable information to afford Legislative Defendants the opportunity to obtain discovery from and depose all new identified individuals, and to produce all documents in the newly identified category of documents. *See Barnhill v. Accordius Health at Greensboro, LLC*, 2023 WL 8281570, at *1 (M.D.N.C. Nov. 30, 2023) (adopting recommendation to order depositions and allow prejudiced defendants the ability to serve new expert disclosures, with plaintiff paying premiums incurred by defendants). If the Court adopts this option, Legislative Defendants ask the Court to order Plaintiffs to pay any premiums incurred by Defendants to expedite the depositions and deposition transcripts or recordings and any of Legislative Defendants' attorney's fees that the Court deems appropriate. *See* Fed. R. Civ. P. 37(c)(1). However, this final option would require postponing trial, so Legislative Defendants acknowledge that it is the least consistent with the Court's goal of holding a trial in May 2024.

CONCLUSION

Legislative Defendants respectfully ask the Court to strike, or order disregarded, Plaintiffs' Amended Supplemental Disclosures.

Dated: April 1, 2024

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 6,046 words as measured by Microsoft Word.

/s/ Nicole J. Moss
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on April 1, 2024, I electronically filed the foregoing Memorandum with the Clerk of the Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
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