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*.	No. 1:18-cv-01034

PLAINTIFFS' REPLY IN SUPPORT OF OBJECTION TO MAGISTRATE JUDGE'S SEPTEMBER 12, 2023 ORDER DENYING PLAINTIFFS' MOTION TO REOPEN DISCOVERY

Both the State Board Defendants and Legislative-Intervenors Oppositions' (ECF Nos. 212 & 213) to Plaintiffs' Objection (ECF No. 211) are misplaced. The Court should grant the Objection and order the State Board to fully supplement its prior voluntary productions, as required by the plain language of Rule 26(e).

1. Both the Legislative-Intervenors and State Board Defendants' Oppositions are premised on mischaracterizing the limited nature of the Objection as seeking to "reopen discovery" generally. ECF No. 212 at 1–4; ECF No. 213 at 2–4. Plaintiffs' Objection is far more limited than Defendants suggest: to be clear, Plaintiffs are not objecting to the aspects of the Magistrate Judge's rulings: (i) denying discovery as to the Legislative-Intervenors, and (ii) denying requests to reopen discovery generally. Rather, Plaintiffs are only objecting to the Magistrate Judge's specific ruling that the State Board Defendants are not required, pursuant to their Rule 26(e) obligations, to supplement their prior productions of "public records concerning the implementation efforts of S.B. 824's voter

photographic ID requirement." *See* ECF No. 211 at 5, 7–9 (discussing ECF No. 210 at 22–24).

2. Nowhere in their papers do the State Board Defendants, the only party who would be required to supplement its prior productions, complain that ordering such a production would cause them undue burden or that producing such materials would delay the proceedings. *See generally* ECF No. 213. This is presumably because the State Board Defendants' implementation efforts have been proceeding only since the *Holmes* decision was reached earlier this year, and will only entail production of a discrete amount of materials. Because it does not concern any production obligation on their part, the Legislative-Intervenors have no standing to argue, as they do, that granting the Objection will in any way burden or prejudice the Legislative-Intervenors. ECF No. 212 at 2–4. Nor should the Court give any weight to the Legislative-Intervenors' speculative assertions about "substantial delay" to the overall trial schedule of this case. ECF No. 212 at 4–6.

3. With regard to the State Board Defendants and Legislative-Intervenors contentions that Plaintiffs did not raise supplementation of discovery, *see* ECF No. 212 at 3–5, ECF No. 213 at 6, that is incorrect: Plaintiffs discussed supplementation in their prior filings. *See* ECF No. 202 at 5 (calling for SBOE to "update discovery" on impacts and implementation); ECF No. 203 at 6 (calling on SBOE to "supplement their prior productions" on impact and implementation); and ECF No. 208 at 1 (requesting SBOE to "provide updated information about the impact and implementation of SB 824"). In fact, the proposed First Requests for Production to State Board Defendants specifically noted

that Requests 9-20 were seeking "Updates to Requests from the *Holmes v. Moore* Litigation." ECF No. 203, Ex. A, at 10. Moreover, the Magistrate Judge discussed the Rule 26(e) supplementation obligation at length in the September 12, 2023 decision. *See* ECF No. 210 at 23–24. Accordingly, this issue is squarely before the Court.

4. The Legislative-Intervenors cite to *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*) to support their argument that discovery should not be reopened. ECF No. 212 at 5–6. Legislative-Intervenors claim that "it is almost inevitable that reopening discovery now will lead to a trial only after the 2024 election cycle," *id.* at 6, in order to avoid "violat[ing] the teaching of *Purcell*," *id.*, is wrong for two reasons.

First, Legislative-Intervenors misread *Purcell*. The court in *Purcell* cautioned courts against *issuing orders* that change voting regulations close to an election. *Purcell* does not speak to or provide any guidance on discovery, trial dates, or when matters should be adjudicated, as opposed to when ordered relief should become effective.

Second, Legislative-Intervenors' alleged concern that reopening discovery will result in a delayed trial schedule is unfounded. Plaintiffs recently filed a motion to set a trial date in early February 2024 in order to guarantee an expeditious trial schedule that would be completed well in advance of the March 5, 2024 primary election. *See* ECF No. 215. Notably, the Legislative-Intervenors indicated that they object to setting a trial date until after Plaintiffs' Objection (ECF No. 211) is resolved. *Id.* at 1. If Plaintiffs' Motion to Set a Trial Date is granted, the limited expansion of the State Board Defendants' Rule 26(e) supplementation duty would not cause any unnecessary delays to trial. As for *Purcell*

issues, the Court has the discretion, during or at the conclusion of trial, to hear evidence from the parties as to how and when any injunctive relief should be timed to avoid any changes to election rules too close to an election.

5. Legislative-Intervenors assert that the State Board Defendants share the Legislative-Intervenors' view that evidence related to implementation of the Voter ID law is irrelevant. ECF No. 212 at 8. State Board Defendants, however, have notably repeatedly relied upon implementation evidence to assert that S.B. 824 complied with the Voting Rights Act and the Constitution. *See, e.g.,* Pls.' Reply in Support of Notice of Proposed Disc., ECF No. 208 at 3 (citing numerous instances of SBOE citing to implementation evidence in numerous past filings in this case). In the original Joint 26(f) Report, both parties agreed that "[d]iscovery will be needed on . . . the State Board's implementation of [S.B. 824] and a prior voter identification law," ECF No. 77, and State Board Defendants' initial and supplemental disclosures cited such documents relating to implementation efforts of S.B. 824 as documents that they intended to use to support their defenses in this action. *See* Pls.' Objection to the Magistrate's September 12, 2023 Order, ECF No. 211, Ex. A; *see also id.*, Ex. B ("[a]ll public records concerning the implementation efforts of the S.B. 824's voter photographic ID requirements . . . .").

In addition, the State Board Defendant's untimely Motion for Summary Judgment (ECF No. 182) relies on the Voter ID law's implementation provisions to assert that the impact of S.B. 824 will be "extremely limited." ECF No. 182 at 15. The State Board Defendants specifically cited the law's ameliorative provisions and "an aggressive voter

education program" (ECF No. 182 at 7) as the basis for asserting that the law will have insignificant impacts on voters.

The assertion by Defendants that Plaintiffs' claim is facial and not as applied (ECF No. 205 at 4 and ECF No. 212 at 8) is also inaccurate. Plaintiffs' Complaint clearly states that its challenge to S.B. 824 relates directly to the implementation of the law. *See, e.g.,* Complaint ¶¶ 106, 108, 109, 112–114 (identifying "the State's implementation of those provisions [of S.B. 824]" as the basis for the claims against S.B. 824).

6. Plaintiffs maintain the position that the State Board's implementation evidence is relevant to Plaintiffs' claims.

7. Since the State Board previously identified and produced copies of its implementation materials pursuant to its Rule 26(a)(1)(A)(ii) obligations, it is obligated under the plain language of Rule 26(e) to supplement its prior productions. In holding otherwise, the Magistrate made a clear legal error in misinterpreting the scope of Rule 26(e). That portion of the Magistrate's September 12, 2023 Order should be overruled, and the State Board should be ordered to supplement its prior productions expeditiously.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court overrule the Magistrate Judge's order denying Plaintiffs' Motion to Reopen Discovery.

Respectfully Submitted this 17 day of October 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing PLAINTIFFS' REPLY IN SUPPORT OF OBJECTION TO MAGISTRATE JUDGE'S SEPTEMBER 12, 2023 ORDER DENYING PLAINTIFFS' MOTION TO REOPEN 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 17 day of October 2023.

/s/ Jeremy C. Karpatkin
Jeremy C. Karpatkin

CERTIFICATE OF WORD COUNT

The undersigned counsel hereby certifies that pursuant to Local Rule 7.3(h), 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 17 day of October 2023.

/s/ Jeremy C. Karpatkin
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