

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

**ACTION NC,  
DEMOCRACY NORTH CAROLINA,  
NORTH CAROLINA A. PHILIP  
RANDOLPH INSTITUTE,  
SHERRY DENISE HOLVERSON,  
ISABEL NAJERA, and  
ALEXANDRIA MARIE LANE,**

Plaintiffs,

v.

**KIM WESTBROOK STRACH,**  
*in her official capacity as Executive  
Director of the North Carolina State Board  
of Elections,*

**RICK BRAJER,**  
*in his official capacity as Secretary of the  
North Carolina Department of Health and  
Human Services,*

**KELLY THOMAS,**  
*in his official capacity as Commissioner of  
the North Carolina Division of Motor  
Vehicles, and*

**NICK TENNYSON,**  
*in his official capacity as Secretary of the  
North Carolina Department of  
Transportation,*

Defendants.

Civil Action No. 1:15-cv-01063-LCB-JLW

**ORAL ARGUMENT REQUESTED**

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY**

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Plaintiffs, by their undersigned counsel, submit this Memorandum of Law in Support of Plaintiffs' Motion for Expedited Discovery.

## **I. STATEMENT OF THE NATURE OF THE MATTER**

As set forth in more detail in Plaintiffs' Complaint (Dkt. No. 1) and Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Preliminary Injunction Brief") (Dkt. No. 33-2), this case concerns Defendants' widespread non-compliance with Sections 5 and 7 of the National Voter Registration Act of 1993 ("NVRA").<sup>1</sup> Plaintiffs' Motion for Preliminary Injunction ("Preliminary Injunction Motion") seeks preliminary injunctive relief requiring Defendants to protect the right of North Carolina voters to participate in the democratic process, to comply with Sections 5 and 7 of the NVRA, and to take measures to remedy past and preclude future violations of the law.<sup>2</sup> In the interest of brevity, Plaintiffs incorporate by reference their Preliminary Injunction Brief and their submissions in support thereof.<sup>3</sup>

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<sup>1</sup> Plaintiffs seek equitable relief against defendants Kim Westbrook Strach, Rick Brajer, Kelly Thomas, and Nick Tennyson, all in their official capacities (collectively, "Defendants"; Strach, Thomas, and Tennyson together, "Section 5 Defendants"; Brajer and Strach together, "Section 7 Defendants").

<sup>2</sup> Throughout this memorandum, Plaintiffs are discussed collectively, as well as in two groups: (1) the "Individual Plaintiffs", which is comprised of Sherry Denise Holverson, Isabel Najera, and Alexandria Marie Lane, collectively; and (2) the "Organizational Plaintiffs", which is comprised of Action NC, Democracy North Carolina, and the North Carolina A. Philip Randolph Institute, collectively.

<sup>3</sup> The Preliminary Injunction Motion is supported by the declarations of Christopher Butler ("Butler Decl."), Pamela Cataldo ("Cataldo Decl."), Matthew M. D'Amore ("D'Amore Decl."), Colline Ferrier ("Ferrier Decl."), Catherine M. Flanagan ("Flanagan Decl."), Robert Hall ("Hall Decl."), Sherry Denise Holverson ("Holverson Decl."), Juliette Muniz Lafargue ("Lafargue Decl."), Alexandria Marie Lane ("Lane Decl."), Alexander P. McCoy ("McCoy Decl."), Melvin Montford ("Montford Decl."), Isabel

Plaintiffs seek expedited discovery to promote judicial economy and enable the record to be more fully developed before a hearing on Plaintiffs' Motion for Preliminary Injunction. With expedited discovery, Plaintiffs expect to establish additional facts and grounds—which Plaintiffs expect to be ample—that support granting Plaintiffs' Motion for Preliminary Injunction. Without expedited discovery, there is a real risk that Plaintiffs may not receive effective relief, particularly for the 2016 election cycle. For the Individual Plaintiffs, this would allow Defendants to evade review and increase the risk that the Individual Plaintiffs will be disenfranchised should they relocate or move. For the Organizational Plaintiffs, this would mean the continued diversion of essential resources to combat voter disenfranchisement caused by Defendants' ongoing, systemic violations of the NVRA. Such resources would otherwise be spent on voter education, outreach, and other activities important to their missions.

Accordingly, Plaintiffs ask this Court to order expedited discovery as requested herein and as set forth in Plaintiffs' proposed order.

## **II. STATEMENT OF FACTS**

This motion accompanies Plaintiffs' Preliminary Injunction Motion and Brief, and respectfully incorporates the facts therein. As set forth in Plaintiffs' Preliminary Injunction Brief, Defendants have violated and are continuing to violate Sections 5 and 7 of the NVRA by failing to make voter registration opportunities properly available through their online portals (Section 5 and Section 7), failing to transmit voter

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Najera ("Najera Decl."), and Emily Seawell ("Seawell Decl."). All references to any declaration are to the declaration filed with the Preliminary Injunction Motion.

registration information from the North Carolina Department of Motor Vehicles (“DMV”) to the appropriate state elections officials (Section 5), and failing to provide the proper notices of rights and voter registration forms to applicants for public assistance (Section 7).

While Plaintiffs believe that they are entitled to preliminary injunctive relief based on the publicly available facts set forth in their Preliminary Injunction Brief and supporting declarations, additional facts such as the numbers of individuals disenfranchised by Defendants’ misconduct, the internal policies and practices that underlie Defendants’ violations of the law, and Defendants’ internal studies of compliance with the NVRA (and efforts to bring themselves into compliance) are all expected to provide further support for Plaintiffs’ Preliminary Injunction Motion as well as assist with crafting appropriate temporary relief. These facts are not in Plaintiffs’ possession, but should be readily available to Defendants.

Plaintiffs filed their Complaint on December 15, 2015, seeking declaratory and injunctive relief against Defendants for violations of Sections 5 and 7 of the NVRA. On January 29, February 4, and February 26, 2016, Plaintiffs’ counsel contacted Defendants to request that discovery commence. D’Amore Decl. at ¶ 15. Defendants declined to commence discovery without an order from the Court. *Id.* While Defendants’ response to the Complaint would have been due on or about February 16, 2016, Defendants requested an extension of time to respond to the Complaint to March 17, 2016. (Dkt. No. 25.) Plaintiffs consented to this request, subject to Defendants’ agreement that

“plaintiffs’ consent to this motion shall not prejudice or otherwise adversely affect any motion for a preliminary injunction filed by plaintiffs.” *Id.* at ¶ 8.

With the November 2016 general election fewer than eight months away, Plaintiffs seek expedited discovery to develop a fuller record in time for a hearing on their Preliminary Injunction Motion, and propose a schedule, as discussed below and detailed in the accompanying proposed order.

### **III. QUESTION PRESENTED**

1. Should this Court permit limited expedited discovery of information that is pertinent to the hearing on Plaintiffs’ Preliminary Injunction Motion?

### **IV. ARGUMENT**

Pursuant to Rules 26, 30, 33, and 34 of the Federal Rules of Civil Procedure, a court may, in its discretion, order expedited discovery. Expedited discovery is particularly appropriate where a party seeks preliminary injunctive relief. *See* Fed. R. Civ. P. 26, advisory committee’s note to 1993 amendment (stating that expedited discovery “will be appropriate in some cases, such as those involving requests for preliminary injunction”); *KBG Holding Corp. v. Union Bank & Trust Co.*, 56 Fed. App’x 111, 114 (4th Cir. 2003) (“The parties engaged in expedited discovery in preparation for . . . hearings on the competing motions for preliminary injunction.”); *Dan River, Inc. v. Unitex Ltd.*, 624 F.2d 1216, 1220 (4th Cir. 1980) (“The district court also set a hearing on the motion for preliminary injunction and directed the parties to engage in discovery on an expedited basis prior to that hearing.”); *Mitra v. State Bank of India.*, No. 03 Civ. 6331 (DAB), 2005 WL 2143144, at \* 7 (S.D.N.Y. Sept. 6, 2005) (“Requests for expedited



discovery are typically appropriate in cases involving requests for preliminary injunction[s] . . . .”) (internal quotation marks omitted); *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 844 (D.D.C. 1996) (“Expedited discovery is particularly appropriate when a plaintiff seeks [preliminary] injunctive relief because of the expedited nature of injunctive proceedings.”); *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (granting motion after finding that “[f]urther development of the record before the preliminary injunction hearing will better enable the court to judge the parties’ interests and respective chances for success on the merits”), *aff’d in part*, 746 F. 2d 429 (8th Cir. 1984).

While a specific standard has not been established in this Circuit, *L’Occitane, Inc. v. Trans Source Logistics, Inc.*, No. WMN-09-cv-2499, 2009 WL 3746690, at \*2 (D. Md. Nov. 2, 2009), many courts in the Fourth Circuit apply a “reasonableness test.” *Id.* The “reasonableness test” takes into account the totality of the circumstances, *id.*, and should apply in this case.

Under the reasonableness test, a court “examine[s] the discovery request . . . on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances.” *Dimension Data N. Am., Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528, 531 (E.D.N.C. 2005) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O’Connor*, 194 F.R.D. 618, 624 (N.D. Ill. 2000)) (internal quotation mark omitted). Courts have considered such factors as “the timing of the motion, whether the party seeking discovery has narrowly tailored its requests to gather information relevant to a preliminary injunction determination, and whether the requesting party has shown a

likelihood of irreparable harm without access to expedited discovery.” *Lewis v. Alamance Cty. Dep’t of Soc. Servs.*, No. 1:15-cv-298, 2015 WL 2124211, at \*1 (M.D.N.C. May 6, 2015) (citing *Dimension Data*, 226 F.R.D. at 531-32).

Some courts have borrowed tests from the standard for a preliminary injunction in deciding whether to order expedited discovery in light of *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).<sup>4</sup> However, this more stringent approach has not been adopted by the Fourth Circuit or the Supreme Court. Several district courts in this Circuit have continued to apply the reasonableness test event after the Supreme Court’s decision in *Winter*. See, e.g., *Nutrition & Fitness, Inc. v. Progressive Emu, Inc.*, No. 5:12-CV-192-F, 2012 WL 1478734, at \*4 (E.D.N.C. Apr. 27, 2012) (applying *Dimension Data*’s reasonableness test; ordering expedited discovery in support of a preliminary injunction motion); *United Healthcare Servs., Inc. v. Richards*, No. 3:09-cv-215-RJC-DCK, 2009 WL 4825184, at \*2 (W.D.N.C. Dec. 2, 2009) (applying *Dimension Data*’s reasonableness test). As Moore’s Federal Practice has noted, there has been a “gravitation to the reasonableness test.” 6-26 Moore’s Federal Practice—Civil § 26.121[2] (2015).

Regardless of the approach taken, expedited discovery in this case is warranted.

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<sup>4</sup> See *Lewis*, 2015 WL 2124211, at \*1 (noting that two standards exist in the Fourth Circuit); *ForceX, Inc. v. Tech. Fusion, LLC*, No. 11-cv-00088, 2011 WL 2560110, at \*6–7 (E.D. Va. June 27, 2011) (applying the first two elements of the *Winter* test, specifically whether plaintiffs have demonstrated that (1) plaintiffs are likely to succeed on the merits of their claims, and (2) plaintiffs are likely to suffer irreparable harm in the absence of gathering expedited discovery).

**A. Expedited Discovery is Warranted Under the Reasonableness Standard.**

Taking into consideration the record to date in light of all surrounding circumstances, expedited discovery is appropriate under the reasonableness standard.

**1. A Legally Cognizable Urgency Exists.**

First, a legally cognizable urgency exists—a preliminary injunction motion is pending. It is well-established that courts may grant motions for expedited discovery when a preliminary injunction is pending. *See* Section IV, *infra*. Here, the Preliminary Injunction Motion has been filed to obtain necessary relief on a temporary basis prior to the November 2016 general election. A short period of discovery and an early hearing are necessary to ensure that if relief is awarded, it can be put in place in time to be effective and avoid irreparable harm to North Carolina voters. Accordingly, good cause exists because Plaintiffs seek to use expedited discovery to more fully develop the factual record for the hearing on the Preliminary Injunction Motion.

**2. The Requested Discovery is Narrowly Tailored.**

Second, the expedited discovery that Plaintiffs seek is narrowly tailored to address issues relevant to the pending Plaintiffs' Preliminary Injunction Motion. Specifically, Plaintiffs seek discovery on the following topics:

- 1) The Section 7 Defendants' alleged failure to provide to their public assistance clients (1) voter registration applications to those who do not decline in writing to register to vote as required by 52 U.S.C. § 20506(a)(6)(A); and (2) written disclosures of voter registration rights under 52 U.S.C. § 20506(a)(6)(B), including for both issues, information such as (i) data, (ii) training, processes, and procedures, and (iii) reports, evaluations, and investigations regarding compliance with Section 7 of the NVRA.

- 2) The Section 5 Defendants' alleged failure to (a) collect and/or transmit voter registration information to the appropriate elections officials and (b) to provide voter registration opportunities to customers interacting with the DMV by the Internet, including for both issues information such as (i) data, (ii) training, processes, and procedures, and (iii) reports, evaluations, and investigations regarding compliance with Section 5 of the NVRA.

As set forth on the proposed order submitted herewith, Plaintiffs seek a limited number of requests for production, interrogatories, requests for admission, and depositions, to be completed by May 6, 2016.

**3. Plaintiffs Would Be Irreparably Harmed by Not Having Expedited Discovery.**

Third and finally, without access to expedited discovery, Plaintiffs will be irreparably harmed—particularly with respect to the 2016 election cycle. Here, the purpose of the expedited discovery—and Plaintiffs' Preliminary Injunction Motion—is to prevent the irreparable harm that Plaintiffs (and potentially a large number of North Carolina voters) would suffer in the absence of relief. For the Individual Plaintiffs, this may result in their being unable to exercise their right to vote in the 2016 election should they relocate within the State. For the Organizational Plaintiffs, they face the harm of continued diversion of essential resources to combat voter disenfranchisement when those resources could be used for other important programs such as voter education and get-out-the-vote efforts. *See* Montford Decl. at ¶¶ 9–21; McCoy Decl. at ¶¶ 7–23; Hall Decl. at ¶¶ 7–16.

Though Plaintiffs have proffered evidence of Defendants' wrongdoings, additional, expedited discovery will help Plaintiffs more fully develop the record for the preliminary injunction hearing. For example, as set forth more fully in Plaintiffs'

Preliminary Injunction Brief, the Section 7 Defendants are failing to provide the required disclosures in writing of voter registration rights to their public assistance clients, *see* Ferrier Decl. at ¶¶ 5–14; Cataldo Decl. ¶¶ 6–10; D’Amore Decl. Ex. C, at 30; D’Amore Decl. Ex. D, at 5–7, 15, and failing to provide voter registration forms to all those who do not decline in writing to receive one, *see* Ferrier Decl. at ¶¶ 5–14; Cataldo Decl. ¶¶ 6–10; D’Amore Decl. Ex. C, at 20–21. Plaintiffs have evidence of these practices, but lack internal documentation and evidence as to how the various North Carolina Department of Health and Human Services (“DHHS”) agencies implement these practices.

Additionally, Plaintiffs know from training materials that Defendants have made public that Defendants have uncovered some non-compliance themselves, D’Amore Decl. Ex. D, at 5–7, 15, and the results and findings of investigations like this will assist in establishing the need for injunctive relief and the appropriate remedy to implement.<sup>5</sup>

With respect to the Section 5 Defendants’ violations of the NVRA, Plaintiffs supply, for example, declarations regarding the DMV’s failure to transmit voter registration information as the law requires, *see* Holverson Decl. at ¶¶ 17, 19–22; Lane Decl. at ¶¶ 15, 17–23; Najera Decl. at ¶¶ 8–11, 14–17, data received in response to public records requests indicating that voters were forced to vote provisionally despite having registered at DMV (*see* Flanagan Decl. at ¶¶ 5–7 & Exs. I–K), and declarations and screenshots regarding the DMVs failure to offer voter registration services through its

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<sup>5</sup> Plaintiffs intend to seek depositions of persons knowledgeable regarding the contents of the training, such as the deposition of Veronica Degraffenried of the North Carolina State Board of Elections, whom Plaintiffs believe has knowledge regarding other relevant information, such as (i) data, (ii) training, processes, and procedures, and (iii) reports, evaluations, and investigations regarding compliance with Section 7 of the NVRA.

online portal, *compare* Butler Decl. Ex. A, at 2 (screenshot from December 22, 2015), *with* Butler Decl. Ex. A, at 4 (screenshot from February 2, 2016); Lafargue Decl. at ¶¶ 9–13.<sup>6</sup> But the mechanics of the Section 5 Defendants’ online service and the mechanisms they use to attempt to transmit information to elections officials from in-person or online transactions are unknown—all Plaintiffs know is that frequently they fail to work, leaving voters and Plaintiffs burdened and often disenfranchised. Discovery is necessary to confirm the cause and extent of these problems so that they can be remedied before they threaten the November 2016 general election.

**B. Expedited Discovery is Warranted Under the Alternative Analysis.**

In the alternative, if this Court were to apply the alternative analysis that looks to likelihood of success on the merits and irreparable harm, expedited discovery is still warranted. Plaintiffs are likely to succeed on the merits as set forth in their Preliminary Injunction Brief, and in the absence of expedited discovery, Plaintiffs would be irreparably harmed, particularly with respect to the 2016 election.

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<sup>6</sup> No voter registration services appear to have been offered through the DMV website at least through the date the Complaint was filed. Butler Decl. Ex. A. Defendants, however, have changed their website since this action began. Discovery is therefore needed into the prior and existing forms of the website to determine the extent of their non-compliance prior to the change, and to determine whether the current version of the website is in fact in compliance.

**1. Plaintiffs Are Likely to Succeed in Establishing Violations of Section 7 of the NVRA.**

For the reasons discussed in Plaintiffs' Preliminary Injunction Memorandum, Plaintiffs are likely to succeed in establishing the Section 7 Defendants' violations of Section 7 of the NVRA.

The Section 7 Defendants are violating the requirement that voter registration rights must be disclosed in writing. For example, the Section 7 Defendants are systematically failing to provide clients written notice of their voter registration rights during in-person and telephonic transaction. The Section 7 Defendants have deviated from statutory requirements, abdicating responsibility for informing their clients of their rights in writing. Also, though Defendants appear to employ an "online" system to record client preferences for in-person transactions, the system is inadequate to advise clients of their rights during such transactions.

Also, the Section 7 Defendants are failing to distribute voter registration applications absent written declination during online ePass transactions, when written declination is required by the NVRA. By permitting users to leave NVRA's voter preference question blank, the ePass system effectively converts voter registration into an "opt in" system when the statute requires it to be "opt out" and in writing.

**2. Plaintiffs Are Likely to Succeed in Establishing Violations of Section 5 of the NVRA.**

For the reasons discussed in Plaintiffs' Preliminary Injunction Brief, Plaintiffs are likely to succeed in establishing the Section 5 Defendants' violations of Section 5 of the NVRA. The Section 5 Defendants have violated and continue to violate these

requirements in at least two ways: (1) by repeatedly failing to transmit voter registration information to the appropriate state elections official; and (2) by failing, until seemingly after receipt of a pre-litigation letter from Plaintiffs, to offer any voter registration services through the self-service online portal.

**3. Plaintiffs Will Experience Irreparable Harm in the Absence of Expedited Discovery.**

Second, as discussed in Section IV(A)(3) above, Plaintiffs would experience irreparable harm in the absence of expedited discovery. Accordingly, expedited discovery is warranted under the alternative analysis.

**V. CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court allow Plaintiffs to take limited and narrowly-tailored discovery on an expedited basis prior to this Court's hearing of Plaintiffs' Preliminary Injunction Motion.



Dated: March 21, 2016

Respectfully submitted,

Stuart Naifeh\*  
Naila Awan\*  
Dēmos  
220 Fifth Ave., 2nd Flr.  
New York, NY 10001  
Telephone: 212-485-6055  
Email: snaifeh@demos.org

Dorian L. Spence\*  
Lawyers' Committee for Civil Rights  
Under Law  
1401 New York Avenue, NW, Suite 400  
Washington, D.C. 20005  
Telephone: 202-662-8600  
Email: dspence@lawyerscommittee.org

Catherine M. Flanagan\*  
Project Vote  
1420 K Street, NW, Suite 700  
Washington, D.C. 20005  
Telephone: 202-546-4173  
Email: cflanagan@projectvote.org

By: /s/ Allison J. Riggs  
Allison J. Riggs (State Bar #40028)  
Anita S. Earls (State Bar #15597)  
Southern Coalition for Social Justice  
1415 West Highway 54, Suite 101  
Durham, NC 27707  
Telephone: 919-323-3380  
Facsimile: 919-323-3942  
Email: anita@southerncoalition.org

By: /s/ Matthew M. D'Amore  
Matthew M. D'Amore\*  
Joshua R. Stein\*  
MORRISON & FOERSTER LLP  
250 West 55th Street  
New York, NY 10019  
Telephone: 212-468-8168  
Email: MDAmore@mofo.com

Steven M. Kaufmann\*  
Kirk A. Sigmon\*  
MORRISON & FOERSTER LLP  
2000 Pennsylvania Avenue, NW, Suite 6000  
Washington, D.C. 20006  
Telephone: 202-887-8749  
Email: SKaufmann@mofo.com

*Counsel for All Plaintiffs*

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\* Appearing pursuant to local rule 83.1(d).

### **CERTIFICATE OF SERVICE**

I hereby certify that on this date, I have electronically filed Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Expedited Discovery with the Court using the CM/ECF system, which will send electronic notification to the following:

Lauren M. Clemmons  
Alexander McClure Peters  
N.C. Department of Justice  
POB 629  
Raleigh, NC 27602-0629  
Email: lclemmons@ncdoj.gov  
Email: apeters@ncdoj.gov

*Counsel for Defendant Kim Westbrook Strach*

Thomas A. Farr  
Michael Douglas McKnight  
Patrick D. Lawler  
Phillip John Strach  
Ogletree Deakins Nash Smoak & Stewart, P.C.  
4208 Six Forks Road, Suite 1100  
Raleigh, NC 27609  
Email: thomas.farr@ogletreedeakins.com  
Email: michael.mcknight@odnss.com  
Email: patrick.lawler@ogletreedeakins.com  
Email: phil.strach@ogletreedeakins.com

*Counsel for Defendants Rick Brajer,  
Kelly Thomas, and Nick Tennyson*

Dated this 21st day of March, 2016.

By: /s/ Matthew M. D'Amore