

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

JUDICIAL WATCH, INC.,

Plaintiff,

v.

NORTH CAROLINA, *et al*,

Defendants.

Civil Action No. 3:20-cv-211-RJC-DCK

**UNOPPOSED MOTION TO VACATE MEMORANDUM AND  
RECOMMENDATION BY MAGISTRATE JUDGE (DOC. NO. 61)**

NOW COMES Plaintiff Judicial Watch, Inc. (“Plaintiff”) by and through undersigned counsel to respectfully move this Honorable Court to vacate the Magistrate Judge’s Memorandum and Recommendation (Doc. No. 61) as moot. Specifically, the parties have resolved this matter by written agreement and have stipulated to a voluntary dismissal. Defendants have indicated that they do not oppose the relief requested in this motion.

In support, Plaintiff shows the following unto the Court: <sup>1</sup>

The complaint in this action alleged violations of the NVRA. Section 8 of the Act requires states to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters” who have changed residence or have died “from the official lists of eligible voters.” 52 U.S.C. § 20507(a)(4). With respect to those who may have moved, it specifies a particular process for sending them address confirmation notices. *Id.*, § 20507(d)(2). If a notice is sent to a voter, and if the voter then fails to respond to it or vote (or otherwise appear) during a statutory period encompassing the next two general federal elections, that voter’s registration is

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<sup>1</sup> Defendants do not subscribe to all statements or arguments by Plaintiffs herein. Defendants do not concede that this action was meritorious when filed, while Plaintiff continues to maintain that it was meritorious when filed.

cancelled. *Id.*, § 20507(d)(1)(B). During that waiting period, voters are termed “inactive.” However, they may still appear and vote. *Id.*, § 20507(e).

The complaint, filed April 9, 2020, alleged that the total registration rates, and in particular the inactive registration rates, of Defendants the State of North Carolina, Mecklenburg County, and Guilford County were too high to be compatible with compliance with the NVRA. (Doc. No. 1, ¶¶ 36-39, 40-46, 53-61.) The notice-of-violation letters sent by Plaintiff to Defendants, which were attached to the complaint, identified high overall registration rates, high inactive rates, and low removals of those who failed to respond to a notice and vote in two general federal elections. (Doc. Nos. 1-1 at 3; 1-2 at 3.)

The allegations in the complaint and the notice-of-violation letters relied primarily on survey data collected from the states and published by the Election Assistance Commission (EAC) in 2019. (Doc. No. 1, ¶¶ 32-35.) The EAC collects this data and issues a report on it to Congress every two years. 52 U.S.C. § 20508(a)(3).

On July 27, 2020, Defendants moved to dismiss the complaint. (Doc. Nos. 38, 39.) On August 16, 2021, while these motions were pending, the EAC released its latest survey data from the states. On August 20, 2021, Magistrate Judge David C. Keesler issued his Memorandum and Recommendation, recommending that this action be dismissed, primarily on the grounds that sovereign immunity bars the claims against the State and State Board, and that the statutory notice of claims to the other Defendants was inadequate. (Doc. No. 61.) On August 26, 2021, Plaintiff moved, without opposition, to extend its time to object to the Magistrate Judge’s recommendations, so that it could assess the latest EAC data. (Doc. No. 62.) This motion was granted. (Doc. No. 63.)

Plaintiff has completed this assessment, and it concludes that data relating to Defendants has materially improved. To be specific, the total number of inactive registrations reported by North Carolina dropped from about 1.2 million in 2019, to about 765,000 in 2021 (a 36% drop). The statewide percentage of inactive registrations dropped from 17% in 2019, which the complaint alleged to be a national outlier (Doc. No. 1, ¶ 45(d)), to 10% in 2021, which is close to the median state inactive rate. The number of registrations removed for failure to respond to an address confirmation notice and vote in two consecutive elections has increased, from about 220,000 for the period reported in 2019, to about 590,000 for the period reported in 2021 (a 168% increase).

Data for Mecklenburg County and Guilford County also showed improvement. From 2019 to 2021, the percentage of inactive registrations reported in Mecklenburg County dropped from 15.5% to 13%, and in Guilford County from 19% to 11%. The number of registrations removed for failure to respond to an address confirmation notice and vote in two elections increased during that same period, from roughly 21,000 to 51,000 in Mecklenburg County, and from 7,000 to 33,000 in Guilford County (a 142% and 372% increase, respectively). In light of Defendants' substantial increases in removals of ineligible voters since this suit commenced, Plaintiff has determined in good faith that this legal action should not be pursued.

The parties have concluded a written agreement resolving this case, and they intend to file a stipulation of voluntary dismissal with prejudice concurrently with this motion. Plaintiff had planned to file substantive objections to the Magistrate Judge's recommendations, but now has lost the opportunity to do so due to the unanticipated changes in the underlying facts, which moot the case. Accordingly, Plaintiff respectfully submits that the Magistrate Judge's Memorandum and Recommendations should be vacated as moot.

Similar circumstances were present in *Aetna Inc. v. Blue Cross Blue Shield*, No. 11-15346, 2013 U.S. Dist. LEXIS 158137, at \*4 (E.D. Mich. Nov. 5, 2013). The magistrate judge there issued a report and recommendation concerning a dispute over expert discovery and a related third-party subpoena. The third-party respondents objected to that recommendation, but the parties settled the discovery dispute prior to any ruling. *Id.* The court noted that the parties had “resolved the issues relating to” discovery and were not pursuing the third-party subpoenas. *Id.* at 5. “Since the underlying motions are now rendered moot, the Court grants [the parties’] request to vacate and set aside the Report and Recommendation as moot. The Court does so without ruling on the merits of the Report and Recommendation.” *Id.* (citations omitted).

Magistrate judges’ recommendations have been vacated as moot in a variety of other circumstances on the basis of changed facts. *See, e.g., Pipes v. McBride*, No. 2:05cv58, 2008 U.S. Dist. LEXIS 76576, at \*21 (N.D. W. Va. Sep. 18, 2008) (recommendation that motion to dismiss be granted was vacated as moot “due to circumstances occurring after [its] filing,” *viz.*, exhaustion of claims); *Redleski v. Plumley*, No. 1:15cv89, 2016 U.S. Dist. LEXIS 27713, at \*1-2 (N.D. W. Va. Feb. 9, 2016) (recommendation that plaintiff not be allowed to proceed in forma pauperis vacated as moot when plaintiff paid fee); *Porterfield v. JP Morgan Chase, N.A.*, SA-12-CV-815-DAE, 2014 U.S. Dist. LEXIS 98439, at \*6, 7 (W.D. Tex., July 21, 2014) (“In light of new discovery presented at the hearing” on objections to a recommendation to grant an injunction, “and to provide the parties an opportunity to settle the case,” it was vacated); *Strowder v. Sloan*, No. 1:16CV251, 2017 U.S. Dist. LEXIS 13125, at \*2-4 (N.D. Ohio Jan. 31, 2017) (where state court freed petitioner, recommendation concerning motion to dismiss was vacated as moot).

Accordingly, Plaintiff, without opposition, requests that the Magistrate Judge’s recommendation on the motions to dismiss be vacated as moot. A Proposed Order is attached.

WHEREFORE, Plaintiff respectfully moves this Honorable Court to issue an order vacating the Magistrate Judge's Memorandum and Recommendation (Doc. No. 61) as moot.

Respectfully Submitted, this the 17<sup>th</sup> day of February, 2022.

/s Russ Nobile  
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Defendants.

**ORDER**

THIS MATTER is before the Court on the unopposed motion of Plaintiff Judicial Watch, Inc., for issuance of an order vacating the Magistrate Judge's Memorandum and Recommendation in this matter, Doc. No. 61, as moot.

IT APPEARING TO THE COURT, for the reasons stated in the Plaintiff's Motion, that such an order is appropriate, and IT FURTHER APPEARING that this motion is not opposed by any party, it is therefore

ORDERED, that the Magistrate Judge's Memorandum and Recommendation, Doc. No. 61, is hereby vacated as moot.

SO ORDERED, this the \_\_\_ day of February, 2022.

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FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
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**ORDER OF DISMISSAL**

Pursuant to the stipulation of the parties under Federal Rule of Civil Procedure 41(a)(1)(A)(ii), that this action be dismissed with prejudice as to all claims, causes of action, and parties, with each party bearing that party's own attorney's fees and costs,

IT IS ORDERED THAT THIS ACTION BE, AND HEREBY IS, DISMISSED WITH PREJUDICE as to all claims, causes of action, and parties, with each party bearing that party's own attorney's fees and costs, and

IT IS FURTHER ORDERED, that the Court shall retain jurisdiction to determine the pending, unopposed motion to vacate the Magistrate Judge's recommendation (Doc. No. 61) previously filed in this action.

SO ORDERED, this the \_\_ day of February, 2022.

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**STIPULATION OF DISMISSAL**

Plaintiff Judicial Watch, Inc., and all Defendants hereby stipulate under Federal Rule of Civil Procedure 41(a)(1)(A)(ii) that this action be dismissed with prejudice as to all claims, causes of action, and parties, with each party bearing that party's own attorney's fees and costs; and

Plaintiff requests, and Defendants do not object, that the Court retain jurisdiction to determine the pending motion to vacate the Magistrate Judge's recommendation (Doc. No. 61) previously filed in this action. Nothing in this stipulation of dismissal is intended to bar the Court's retaining jurisdiction for that purpose.

Respectfully submitted, this the 17<sup>th</sup> day of February, 2022.



/s Russ Nobile

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**MEMORANDUM OF UNDERSTANDING  
AND SETTLEMENT**

Plaintiff Judicial Watch, Inc., (“Plaintiff”) and defendants North Carolina; the North Carolina State Board of Elections; Karen Brinson Bell; the Mecklenburg County Board of Elections; Michael G. Dickerson; Carol Hill Williams; the Guilford County Board of Elections; Charlie Collicutt; and Horace Kimel, Jr. (“Defendants”), as represented by the undersigned counsel in the action entitled *Judicial Watch, Inc. v. North Carolina, et al.*, Civil Action No. 3:20-cv-211-RJC-DCK (filed April 9, 2020), hereby agree to resolve that action on the following terms and for the following consideration, the sufficiency of which is hereby conceded:

1. Defendants agree not to oppose a motion by Plaintiff to vacate the Magistrate Judge’s Memorandum and Recommendation, Doc. No. 61.

2. Plaintiff agrees to voluntarily dismiss the case, with prejudice, and Defendants agree to stipulate to a filing pursuant to Rule 41(a)(1)(A)(ii). The form of this stipulation, which shall be signed by all parties, is attached hereto.

3. The motion to vacate referred to in paragraph 1 and stipulation of dismissal referred to in paragraph 2 shall both be filed simultaneously on the same day, and not later than December 19, 2021.

4. The North Carolina State Board of Elections agrees to provide to Plaintiff within 30 days of dismissal a written explanation, based on its best estimate and understanding, as to why the number of inactive voters on North Carolina’s voter registration list dropped from the numbers reported in EAVS 2019 to the numbers reported in EAVS 2021.

a. Plaintiff will have the opportunity to make a reasonable non-burdensome request for clarification based on the North Carolina State Board of Elections’ explanation.

b. The North Carolina State Board of Elections agrees to provide a reasonable non-burdensome response to such a request.

5. Plaintiffs do not admit herein to any failure of their claims, and Defendants do not admit herein to any liability.

6. Each party shall bear its own costs and attorneys' fees.

7. This agreement may be signed in counterparts, and a faxed, emailed, or copied signature shall be deemed as valid as an original.

8. Entire Agreement. This Agreement contains the entire agreement and understanding between the Plaintiffs and Defendants with respect to the subject matter of this Agreement. This Agreement shall not be changed unless in writing and signed by the parties hereto.

9. Severability. The invalidity or unenforceability of any provision of this Agreement shall not affect or impair any other provisions, which shall remain in full force and effect.

10. Choice of Law. This Agreement is to be interpreted pursuant to the laws of North Carolina, except where the application of federal law applies.

11. Binding Effect: Plaintiffs and Defendants represent and warrant that they have authority to enter into this Agreement and that this Agreement shall be binding upon, and inure to the benefit of, their successors and assigns. Each of the persons executing this Agreement on behalf of a Plaintiff or Defendants represents and warrants that he or she has the authority to do so.


Dated:



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