IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION No. 1:15-CV-559

THE CITY OF GREENSBORO, LEWIS A. BRANDON III, JOYCE JOHNSON, NELSON JOHNSON, RICHARD ALAN KORITZ, SANDRA SELF KORITZ, CHARLI MAE SYKES, and MAURICE WARREN II *Plaintiffs*, v. THE GUILFORD COUNTY BOARD OF ELECTIONS, *Defendant*, MELVIN ALSTON, JEAN BROWN, HURLEY DERRICKSON, STEPHEN GOLIMOWSKI, WAYNE GOODSON, JIM KEE, EARL JONES, SHARON KASICA, and WILLIAM CLARK PORTER, *Defendant-Intervenors*.	)	**INDIVIDUAL PLAINTIFFS' REPLY TO MOTION TO COMPEL COMPLIANCE WITH SUBPOENAS**

Individual Plaintiffs submit this Reply in response to Legislative Respondents' Opposition to Motion to Compel ("Opposition")

THE DOCUMENTS SOUGHT IN THE SUBPOENAS ARE HIGHLY RELEVANT TO PLAINTIFFS' CONSITUTIONAL CLAIMS

At issue in this discovery dispute is whether Legislative Respondents can refuse to provide critically important documents evidencing the motive and/or intent for the deviations of the districts in the challenged legislation and the extent to which race predominated in the creation of District 2. The subpoenas seek particularized information including but not limited to:

> 1) reasons or motivations for the deviations in the enacted districts: "documents…that reflect or discuss the rationale or purpose for enacting or supporting any provision in 2015 N.C. Sess. Laws 138." *E.g.,* D.E. 74-1 at 11, ¶ 1;
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> 2) racial predominance: "documents relating to…the racial composition of the municipal voting districts of the City of Greensboro, and/or racially polarized voting in the City of Greensboro…" *E.g.,* D.E. 74-1 at 11, ¶ 2;
>
> 3) factual information such as "polls or surveys" and "any estimate, research, report, study, or analysis" that was available to the Legislative Respondents when enacting the challenged districts. *E.g.,* D.E. 74-1 at 13, ¶ 8.

However, Legislative Respondents assert that no matter the relevance of the information sought, a blanket legislative privilege applies and excuses them from production. But this position would effectively preclude plaintiffs from prosecuting voting rights claims where the motives or reasons for the deviations and racial make-up of the challenged districts is at issue, even in a situation like this one, where is Court has already deemed the challenged districts constitutionally dubious. *See* D.E. 35 ("The

plaintiffs have shown a likelihood of success on the merits as to their claims that the Act violates the Greensboro voters' equal protection rights…"). Legislative Respondents fail to recognize the qualified nature of the privilege asserted and how the balance of equities favor the production of the information sought here—information that goes to the heart of Individual Plaintiffs' claims.

LEGISLATIVE RESPONDENTS WRONGLY CONFLATE ABSOLUTE AND QUALIFIED PRIVILEGES

In their Opposition, Legislative Respondents failed to meaningfully engage with the relevant case law and instead rely on dicta. D.E. 77, at 7-10. For example, Legislative Respondents rely heavily *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 176-77,181 (4th Cir. 2011)—not a voting rights matter, but an age discrimination case—in support of their position. But in that case, the Fourth Circuit expressly declined to decide the claims that defendants in that case made that legislative privilege excused their compliance with document subpoenas, stating, "we decline to intervene in the EEOC's investigation at this time. It is simply too early to tell whether the investigation will ever involve the application of coercive process against legislators and accordingly premature to address speculative claims of legislative privilege." *Id.* at 177. In fact, the Fourth Circuit allowed the district court to enforce the modified subpoenas issued to government officials that requested only factual data available to them, items such as "[a]nalyses and standards WSSC used in deciding to abolish the existing positions..." *Id.* at 177-180. Legislative Respondents' reliance on subsequent dicta by the Fourth Circuit on legislative immunity, when the Court expressly declined to

rule on the applicability of any privileges in that case, is not binding on this Court. *U.S. v. Freeman*, 741 F.3d 426, 438 (4th Cir. 2014) ("Dicta is not binding on anyone for any purpose.") And beyond that, *EEOC* stands in clear opposition to Legislative Respondents' resistance to producing "any estimate, research, report, study or analysis" available to the legislature during consideration of the challenged law. E.g., D.E. 74-1 at 13, ¶ 7.

Moreover, Legislative Respondents fail to address in their Opposition the balancing test that a majority of courts have applied when evaluating parties' resistance to production on the basis of legislative privilege or immunity. *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337-38 (E.D. Va. 2015). "This test examines: '(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of government in the litigation;' and (v) the purposes of the privilege." *Id.* at 338 (*citing Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014)). *Bethune-Hill* required the disclosure of various documents of state legislators in a racial gerrymandering claim including but not limited to: (a) documents created after the challenged legislation's enactment date; (b) documents shared or received from anyone not employed by the legislature; (c) documents "reflecting strictly factual information – regardless of source – are to be produced;" (d) documents "produced by committee, technical, or professional staff for the House;" (e) all documents by legislators whose

privileges were waived[1]; (f) documents created by legislators and aides that "pertains to or reveals an awareness of: racial considerations employed in the districting process, sorting of voters according to race, or the impact of redistricting upon the ability of minority voters to elect a candidate of choice;" and (g) a privilege log for all other documents that raised an applicable privilege. *Id.* at 343-44. In ordering said production, the *Bethune-Hill* Court understood that redistricting cases involve important rights that outweigh the privileges asserted. "In such a situation the public interest in vindicating vital constitutional rights overcomes the presumption of common-law privilege and warrants production." *Id.* at 345. *See also, Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (Motz, J., and Murhaghan, J., controlling concurrence) (recognizing that legislative immunity is not absolute and the unique nature of legislatively-performed redistricting weighs against the privilege).

In fact, most federal courts recognize that legislative privilege is qualified and does not prevent the disclosure of documents related to legislators' consideration and adoption of voting statutes. "In cases involving constitutional challenges related to voting rights, the vast majority of federal courts have found that the federal common law also affords state legislators *only a qualified* (*i.e.*, not absolute) legislative privilege against having to provide records or testimony concerning their legislative activity." *Nashville Student Organizing Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015) (emphasis added). And as the Court in *Nashville* recognized, there are:

[1] Legislative Respondents did not provide documents until after the deadline in the subpoenas and therefore the privilege arguments of Legislative Respondents are waived. *See Howard v. Milam*, No. 88-2966, (4th Cir. May 10, 1990) (attached as *Exhibit A*).

> a litany of recent federal decisions in which, in cases involving federal constitutional challenges premised on the right to vote, federal courts have found that the qualified privilege did not (at least in part) shield state legislators from producing responsive records or testifying at deposition. *See, e.g., Rodriguez,* 280 F. Supp. 2d at 95-96; *Favors v. Cuomo,* 285 F.R.D. 187, 214 (E.D.N.Y. 2012); *Perez v. Perry,* SA-11-CV-635, slip op. (W.D. Tex. Aug. 1, 2011) (Docket No. 102 in that case); *Perez,* 2014 U.S. Dist. LEXIS 1838, 2014 WL 106927, at *1; *Veasey v. Perry*, No. 2:13-cv-193, 2014 U.S. Dist. LEXIS 45935, 2014 WL 1340077, at *1 (S.D. Tex. Apr. 3, 2014), *aff'd in part and rev'd in part*, 796 F.3d 487, 2015 U.S. App. LEXIS 13999, 2015 WL 4645642 (5th Cir. 2015); *Bethune-Hill v. Va. State Bd. of Elections,* 114 F. Supp. 3d 323, 2015 U.S. Dist. LEXIS 68054, 2015 WL 3404869, at *9-15 (E.D. Va. May 26, 2015); *Baldus v. Members of the Wis. Gov't Accountability Bd.,* No. 11-CV-562, 11-CV-101, 2011 U.S. Dist. LEXIS 142338, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014).

Id. at 969-970. In *Nashville*, the district court carefully reviewed the applicable five factor balancing test and found that, in the challenge to Tennessee's voter ID law, subpoenas issued to state legislators, which included document requests, were allowed. *Id.* at 968-972. The topics to be addressed by the legislators in the subpoenas were: "the legislators' recollection of legislative deliberations concerning the provision, the legislators' understanding of the provision's scope, the legislators' knowledge of objective facts supporting the [no student ID] distinction embodied in the provision, and the legislators' knowledge of objective facts concerning voter fraud in Tennessee and in general." *Id.* at 968-69. Like the Individual Plaintiffs in this case, plaintiffs in *Nashville* acknowledge that they have limited information of discriminatory intent including recordings of legislative hearings, legislative emails, and documents responsive to document subpoenas. *Id.* at 970. "Particularly given the dearth of available documentary evidence outside of the legislative history, additional relevant information may come

from the legislators themselves." *Id.* at 971. The district court, in failing to quash the subpoenas, carefully balanced the strong need for information from the creators of the legislation at issue with the privacy and other interests of the legislators, including requiring deposition transcripts of legislators to be reviewed on an "attorneys eyes only" basis. *Id.* The seriousness of the constitutional issue in *Nashville* justified the discovery procedure adopted by the district court and Legislative Respondents' failure to even acknowledge the qualified privilege, that is applied by courts like in *Bethune-Hill* and *Nashville,* is telling.

Instead, Legislative Respondents argue that the district court decisions in the "VIVA litigation" and an agreement on the eve of trial in the consolidated *Wright* and *Raleigh Wake Citizens Assoc.* cases somehow requires this Court to deny Individual Plaintiffs' Motion. D.E. 77 at 2-4, 8-10. This is wrong. First, neither action is binding on this Court. Second, both the magistrate court and district court in the "VIVA litigation," applying the balancing test described above, ordered the production of many of the categories of documents. "Thus, the Court concludes now, as it did previously, that legislative privilege is not absolute, but rather requires 'a flexible approach that considers the need for the information while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process.'" *League of Women Voters*, No. 1:13-cv-660, ECF No. 205 (J. Peake Order, Nov. 20, 2014), at 5 (*citing* ECF No., 94 at 9). And while that court did not order the production of everything sought by plaintiffs in that case, that situation is distinguishable because the scope of discovery there (and, potentially the burden in responding to the discovery) was much more expansive and that

discovery decision is currently on appeal with the merits decision. *See N.C. State Conf. of the NAACP v. McCrory*, No. 16-1468 (4th Cir. Joint Reply Brief, June 14, 2016, at 24, n. 11).[2] Finally, the agreement described in the Opposition in the *Wright/ RWCA* litigation was reached with plaintiffs reserving all rights to the full discovery but accepting, given the trial date set for just days later, a smaller set of production in order to proceed to trial in time for a pre-election resolution. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 5:15-cv-156 (E.D.N.C. 2015) (pre-trial oral agreement between plaintiffs and legislators served with subpoenas duces tecum)).

Individual Plaintiffs, here, are entitled to the discovery requested, and there is ample time before trial for the Court to resolve these discovery disputes. Nothing from the two cases cited by Legislative Respondents limits this Court's authority to order the requested production.

APPLYING THE BALANCING TEST REQUIRES DISCLOSURE OF LEGISLATIVE COMMUNICATIONS

Applying the proper test that Legislative Respondents ignored in their Opposition, all of the factors weigh in favor of compelled production. The first factor, the relevance of the evidence sought, cannot be disputed. On the second factor, the subpoenas seek communications and factual information that would speak to the intent and motives for the certain characteristics of enacted districts, including the population deviations and the racial packing of District 2. D.E. 74-1. There can be no better source for that

[2] That court's decision on the production of a privilege log does not control here for all the same reasons. *League of Women Voters*, No. 1:13-cv-660, ECF No. 205 (J. Peake Order, Nov. 20, 2014), at 11-13.

information than production from the individual legislators who passed the law in, as this Court recognized, a seriously flawed manner "on the eve of the filing period with no advance notice of the boundaries of the reapportioned districts…" D.E. 35 at 13. Factor three, the seriousness of the issues, is also clearly present; this Court already held that denying Greensboro voters the right to vote equally constituted irreparable harm. D.E. 35 at 15. As to factor four, the role of government in the litigation, the legislators are not parties to this litigation. Their indirect role also favors disclosure to Individual Plaintiffs because their limited involvement in the case minimizes any administrative burden and courts have ordered legislative communications to be produced by non-party legislators. *E.g.*, *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994) (court-ordered production of minutes, agendas, and other documents considered or produced by a quasi-legislative settlement committee where legislators on the committee were not party defendants). Finally, given that this Court has already preliminarily indicated that the challenged legislation ignored other constitutional protections, this Court should allow the discovery sought in order to fully vindicate all of the constitutional rights violated in this law, and to ensure that the fundamental right to vote is not in any way abridged or devalued.

INDIVIDUAL PLAINTIFFS' COUNSEL DID CONFER PURSUANT TO THE RULES

Much of Legislative Respondents' argument in their Opposition related not to the substance or importance of the subpoenas themselves, but as to whether Individual Plaintiffs' counsel was dilatory in responding to the deficiencies in the subpoena responses or whether Individual Plaintiffs' counsel conferred pursuant to Fed. R. Civ. P.

37(a)(1) and LR 37.1. D.E. 77 at 2-5, 11-13. Legislative Respondents' arguments here are without merit and a distraction from the central issue involved in this Motion.

The numerous conferences between counsel for Legislative Respondents and Individual Plaintiffs highlight both the significant deficiencies in the subpoena responses and the diligence with which Plaintiffs have acted on this issue. The subpoenas were served on Legislative Respondents on February 22, 2016 with a response date of March 7, 2016. D.E. 74-1. Legislative Respondents untimely served their response after the March 7, 2016 deadline[3] and there was no indication in the response that key documents were missing, such as emails from personal email accounts of the legislators describing the bill at issue to third parties. D.E. 77-2. Individual Plaintiffs' counsel, after reviewing the produced documents, timely responded by phone and by email to counsel for Legislative Respondents on March 10, 2016 that the subpoena responses were incomplete. D.E. 77-3. In fact, subsequent documents provided to Individual Plaintiffs, on March 24th and March 30th, were only due to Individual Plaintiffs' continued correspondence with Legislative Respondents that the responses remained (and remain) deficient. D.E. 77-3-77-8. Legislative Respondents also somehow claim that, "Plaintiffs' assertion that they have not received a full production of non-privileged material lacks merit," D.E. 77 at 11,[4] but then simultaneously admit that their subpoena responses to-

[3] The response was produced on March 8, 2016. D.E. 77-2.

[4] In fact, in responding to the subpoenas, counsel for Legislative Respondents noted that the only materials that they would be producing would be communications between legislators and third parties, and they were claiming privilege for all other documents, even factual information available to the General Assembly—information that, under *EEOC*, is clearly not privileged. D.E. 77-2.

date are incomplete, due to errors made in the search process. "[A] new search is being conducted by the IT legislative staff using the terms 'Guilford County Board of Elections,' 'SB36' and 'HB263.'" D.E. 77 at 12.

The plain language of the emails attached to Legislative Respondents' filing contradicts Legislative Respondents' claims that Plaintiffs did not comply with Fed. R. Civ. P. 37(a)(1) and LR 37.1. From the very beginning of the dispute, on March 10, 2016, Individual Plaintiffs' counsel stated that court assistance would be sought if a resolution could not be reached. D.E 77-3. Legislative Respondents' counsel also sent correspondence confirming that Court intervention was discussed and that if Individual Plaintiffs sought correspondence between legislators and legislative staff, this Court would have to decide the issue. D.E. 77-4. These issues were also discussed by phone, and those conversations are documented in the Certificate of Compliance with Local Rule 37.1 on page 23 of the Motion. Over the course of seven email correspondence exchanges and three phone conversations, including specific discussions of court involvement, Plaintiffs' counsel clearly satisfied the rules' conference requirement.

CONCLUSION

Individual Plaintiffs respectfully request this Court grant Individuals Plaintiffs' Motion to Compel Compliance with Subpoenas. Also pending before the Court is a motion to quash the subpoena for deposition of Senator Trudy Wade. Given related issues raised in both discovery disputes and to most efficiently use the Court's time, Plaintiffs would be amenable to a joint hearing on both issues after briefing on the motion to quash has concluded.

Respectfully submitted this 20th day of June, 2016.

/s/ Allison J. Riggs

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served copies of the foregoing Reply on all parties and Legislative Respondents who have entered an electronic appearance in this action through the cm/ecf filing system.

This the 20th day of June, 2016.

/s/ George E. Eppsteiner

_____

George E. Eppsteiner
Counsel for Individual Plaintiffs

LORETTA HOWARD, Administratrix of the Estate of Lorenzo C. Howard, deceased, Plaintiff - Appellant, v. JIM R. MILAM, a/k/a Jimmy Milam, a/k/a Jimmie R. Milam; CARTER LEE WOLFORD; LARRY ROBINETTE; ADERY PACIFIC, employees, agents, and servants; and TALL TIMBER COAL COMPANY; RAWL SALES AND PROCESSING CO.; A.T. MASSEY COAL COMPANY, INC.; ST. JOE'S MINERALS CORPORATION; FLUOR CORPORATION; SCALLOP CORPORATION; BUREAU OF MINE SAFETY AND HEALTH ADMINISTRATION, (United States Department of Labor), jointly and severally, Defendants - Appellees, NATIONAL LABOR RELATIONS BOARD, Party-in-Interest - Appellee.

No. 88-2966

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1990 U.S. App. LEXIS 26948

February 8, 1990, Argued
May 10, 1990, Decided

NOTICE: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. (No. CA-84-3526). Robert J. Staker, District Judge.

Howard v. Milam, 905 F.2d 1529, 1990 U.S. App. LEXIS 7655 (4th Cir. W. Va., 1990)

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Richard Engram, Jr., Welch, West Virginia, for Appellant.

Norman Keith Fenstermaker, JENKINS, FENSTERMAKER, KRIEGER, KAYES & FARRELL, Huntington, West Virginia; Carol A. Casto, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellees.

ON BRIEF: Michael W. Carey, United States Attorney, Gary E. Pullin, Assistant United States Attorney, Charleston, West Virginia; Howard M. Persinger, Jr., Williamson, West Virginia, for Appellees.

JUDGES: Before WIDENER, PHILLIPS, and MURNAGHAN, Circuit Judges.

OPINION BY: PHILLIPS

OPINION

PHILLIPS, Circuit Judge:

Loretta Howard (Howard), as administratrix of the estate of her deceased husband Lorenzo C. Howard, brought this wrongful death action after her husband was killed in an accident at a Pike County, Kentucky, coal mine. She alleged that negligent acts of a fellow employee, various supervisory personnel, and corporate defendants, and breach of statutory duty by the United States Mine Safety and Health Administration,

proximately caused the death of her husband. The district court dismissed [*2] the case for lack of subject matter jurisdiction. Finding complete diversity lacking, the court considered the alleged bases for federal question jurisdiction and ruled that Howard had failed to state justiciable federal claim. We agree with the district court that Howard failed to state a justiciable federal claim and affirm that basis.

I

Lorenzo Howard, an employee of defendant Tall Timber Coal Company ("Tall Timber"), was killed on February 10, 1984, when he was struck by a "continuous miner machine" operated by a fellow employee, defendant Milam. The equipment was removed from the scene of the accident before federal investigators arrived, and certain roofing structures in the mine were reinforced to bring the mine into compliance with federal regulations. The investigative team from the United States Department of Labor's Mine Safety and Health Administration ("the Agency") ruled that the decedent had placed himself in a hazardous position near the miner machine and that it could not be determined how he was struck and killed.[1] No citations were issued to Tall Timber, though the investigators' report did note that the actions altering the scene of the accident violated federal regulations.

1 An [*3] investigative team from the Kentucky Department of Mines and Minerals reached the similar conclusion that "the victim fur unknown reasons positioned himself in an unsafe location which allowed the continuous miner boom to come in contact with him causing fatal injuries." A United Mine Workers investigator also concluded that decedent was in an "unsafe location" when fatally injured by the continuous miner.

Howard, a West Virginia resident, tiled this wrongful death action in West Virginia district court on November 7, 1984. Jurisdiction was premised on general federal question jurisdiction, *28 U.S.C. § 1331*, the Federal Tort Claims Act (FTCA), and the Administrative Procedure Act (APA), with pendent state claims asserted under Kentucky statutory and case law. Howard claimed that Milam was negligent in the operation of the mining machine, that Tall Timber supervisors were negligent for failing to train and then assign properly trained personnel to operate such machinery, and that the corporate defendants, allegedly aligned in parent and subsidiary relationships, were liable on the basis of respondeat superior. Some of these individual and corporate defendants were citizens of West Virginia. [*4] Howard also charged that the Agency had failed adequately to police or regulate the coal mining industry in Kentucky.

Early in the proceedings, defendants moved to dismiss the case for lack of subject matter jurisdiction.[2] In response, Howard sought in May 1985 to amend her complaint to delete the non-diverse defendants. Among the exhibits attached to the motion to amend was an internal National Labor Relations Board (NLRB or "the Board") memorandum, which Howard included apparently seeking application of the "single-employer" doctrine to the corporate defendants.[3] The memorandum had been prepared by Board counsel in an unrelated case, but analyzed the corporate relationships of the corporations named as defendants in this case. In June 1985, the NLRB moved to intervene for the limited purpose of seeking an order striking Howard's exhibit and recalling the memorandum. The NLRB, also propounded interrogatories designed to elicit how Howard or her attorney obtained what it asserted was a confidential document. Howard responded by moving the court to compel joinder of the NLRB as amicus curiae or as an involuntary party-plaintiff or party-defendant. After a hearing, the court entered an [*5] order December 11, 1985, granting the Board's motion to intervene and ordering Howard to answer the interrogatories within forty-five days.

2 A magistrate's order entered April 15, 1985, noted that it, was "apparent from a review of the record that serious questions with respect to subject-matter jurisdiction [were] raised by defendants' motions."

3 According to the district court, the single-employer doctrine and the NLRB memorandum apparently addressing the doctrine were presented by Howard as supporting her claim that the court could exercise personal jurisdiction over the corporate defendants in this case. See Howard v. Milam, No. 3:84-3526, slip op. at 21 n.14 (S.D.W. Va. July 8, 1988).

Howard did not respond to the Board's interrogatories within forty-five days. She filed objections to the interrogatories outside this time limit,[4] but a magistrate determined the objections were untimely

and that any privilege that might have been available upon timely objection was waived. The magistrate ordered Howard to answer the interrogatories within ten days and rejected a response to that order by her counsel. The district court affirmed the magistrate's ruling; when Howard's attorney, Richard [*6] Engram, still refused to answer the propounded questions, the court entered a show cause order on threat of contempt. At the subsequent show cause hearing the district court, despite the magistrate's earlier waiver ruling, heard counsel's argument that the factual basis for his refusal to answer was protected by attorney-client privilege. The court rejected the privilege argument and counsel's offer at that time to withdraw memorandum and substitute a district court opinion on the single-employer doctrine. Howard then requested that the district judge recuse himself, and when that motion was denied moved to transfer the case to another judge in the district. The district court denied the transfer motion, and this court, treating Howard's "appeal" of the denial of the transfer motion as a petition for mandamus, rejected her petition.[5]

4 Counsel captioned the response "Answers," hut the district court found they were "quintessentially objection." Slip op. at 15 n.8.

5 See Howard v. Milam, No. 87-1634 (4th Cir. Dec. 18, 1987) (order denying petition for mandamus).

Procedural maneuvering continued below. The district court did grant Howard's motion to amend her complaint in July 1986; defendants [*7] renewed motions to dismiss in response to the amended complaint. The court heard argument on the motions on June 25, 1587. The motions were under consideration until a status conference was held on March 14, 1988. At the status conference, the court granted Howard's motion to again amend her complaint, this time adding back the non-diverse defendants she deleted in the *first amendment*. On March 29, 1988, Howard filed a Freedom of Information Act (FOIA) claim seeking disclosure of the NLRB memorandum and moved the district court to stay the civil action pending resolution of the FOIA claim.[6]

6 Howard had by this time returned the internal memorandum to the Board.

The district court disposed of all outstanding motions and issue in a comprehensive memorandum order entered July 8, 1988. Addressing housekeeping matters first, the court confirmed that Howard would be allowed to amend her complaint, essentially restoring it to its original posture. The court rejected Howard's motion to stay pending resolution of the FOIA claim, finding that the question whether she could obtain the subject document was not relevant to the issues before the court and that, on balance of harms, greater harm would [*8] accrue from further delay in a case that had already dragged on over four years.

The court also "affirmed" its own order granting the NLRB's motion to intervene.[7] The Board had argued that it could intervene as a matter of right under *Fed. R. Civ. P. 24(a)(2)*, but the court found it unnecessary to answer this question because it held that permissive intervention under *Rule 24(b)(2)* was appropriate. The court tied the intervention issue to the contempt issue as Engram apparently attempted to avoid a finding of contempt by arguing that the intervention, which led to the interrogatories he refused to answer, was inappropriate. The court reviewed the facts and found by clear and convincing evidence that there was no legal basis why Engram should not be held in contempt. Citing *Fed. R. Civ. P. 37(b)(2)(D)*, the court awarded the Board reasonable expenses incurred as a result of Engram's refusal to obey the court's orders.

7 The court treated Howard's "renewed motion to dismiss" the NLRB as a *Fed. R. Civ. P. 60(b)* motion for reconsideration of the court's earlier order granting the Board's motion to intervene. See slip op. at 18.

The court also ruled against Howard on the principal motions to [*9] dismiss for lack of subject matter jurisdiction. Because Howard had added non-diverse defendants as parties, the only question for the court was whether a basis for federal question jurisdiction was stated. First, the court found that Howard's failure to seek administrative remedies mandated dismissal of the FTCA claim against the Agency. In addition, under Kentucky law, the substantive law to be applied for the FTCA claim, the Federal Mine Safety and Health Act of 1977 ("the Act"), *30 U.S.C. §§ 801-962*, created no duty on the part of the government to a miner like Lorenzo Howard; even it the Act created a tort duty, recovery under the FTCA was barred because mine safety regulation and inspection is a "discretionary function."[8] The court further ruled, following established precedent, that no private right of action exists under the Act. Finally, the

court ruled that the APA affords no independent basis for subject matter jurisdiction. The court denied Howard's request to amend the jurisdictional basis of her complaint.9 Without a basis for federal question jurisdiction, the court dismissed the complaint as to all defendants.

8 See *28 U.S.C. § 2680(a).*

9 Howard had apparently requested, [*10] in the event that the court found no subject matter jurisdiction, leave to (again) amend the jurisdictional allegations of her complaint. After denying this request, the court added that even if the non-diverse defendants were deleted (for the second time), substantial questions of personal jurisdiction and, for defendant Tall Timber, subject matter jurisdiction, remained. See slip op. at 11 n.6.

Howard filed a motion pursuant to Fed. R. Civ. 50(e), requesting the district court to alter or amend the judgment. The court treated the motion as a *Rule 60(b)* notion and denied it. In a second order, the court indicated that it cited *Rule 60(b)* only to show that Howard demonstrated none of the traditionally recognized grounds for relief from judgment and that whether analyzed under *Rule 59(e)* or *Rule 60(b)*, her motion was meritless.

This appeal followed. Howard's principal contention in that the district court erred when it ruled that it lacked subject matter jurisdiction over the case. In addition, she questions the court's management of the case, alleging that she was denied the right to a fair and impartial forum and challenging the various procedural rulings by the court and its imposition [*11] of contempt sanctions against Engram. We address first the jurisdictional question and then, in turn, the other issues.

II

The first question here is the jurisdictional basis for the plaintiff's claim. We hold, in agreement with the district court, that Howard's complaint fails to state a claim arising under federal law. Rather than ruling, as did the district court, that in these circumstances subject matter jurisdiction was facially lacking, mandating summary dismissal, we hold that Howard's complaint fails to state a federal claim upon which relief can be granted and affirm the district court's dismissal on that basis.

A

Howard asserts jurisdiction based on the general federal question statute, *28 U.S.C. § 1331.* The claim allegedly "arising under" federal law charges the Agency with breaching an asserted statutory duty under the Act to protect coal miners like Lorenzo Howard. She charges that as a direct and proximate result of the Agency's failure "to police or regulate the coal mining industry in the State of Kentucky and the conduct of the defendants," her husband was killed. Because there is no private right of action under the Federal Mine Safety and Health Act of 1977, and because [*12] Howard has no cause of action under the FTCA, she has stated no federal claim in her complaint.[10]

10 In the jurisdictional statement of her complaint, Howard lists the Administrative Procedure Act, *5 U.S.C. §§ 551-559, 701-706,* as an apparent basis for jurisdiction. The law is clear, however, that the APA provides no independent basis for federal jurisdiction when there is no substantive federal statutory (or common law) basis for the claim. See *Califano v. Sanders, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).* See generally 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3659 (1985) [hereinafter Wright, Miller, & Cooper].

Courts uniformly have held, and we agree, that there is no private cause of action for violation of the Mine Safety and Health Act. See, e.g., *Raymer v. United States, 660 F.2d 1136, 1140 (6th Cir. 1981); Ayala v. Joy Mfg. Co., 580 F. Supp. 521, 525 (D. Colo. 1984); McCreary v. United States, 488 F. Supp. 538, 539 (W.D. Pa. 1980).*[11] Howard's only response is the wholly conclusory, and manifestly unpersuasive, one that "[t]he government should be held accountable" in this case for allegedly negligent inspection and investigation of Kentucky' coal mines. [*13] Rather than presenting argument contrary to consistent authority, she argues that the Act is unconstitutional and discriminatory "because it denies 'miners' due process for violations by governmental officials in the inspection of the coal' mines." This purported constitutional challenge is meritless: the Act without question passes the minimum rationality test for due process and equal protection challenges. See, e.g., *Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 83, 93-94, 98 S. Ct. 2620, 57 L.*

Ed. 2d 595 (1978).

11 The courts in Raymer and McCreary were interpreting the Coal Mine Health and Safety Act of 1969, which was redesignated the Federal Mine Safety and Health Act of 1977 with the passage of various administrative amendments that year; the court in Ayala was interpreting the redesignated 1977 act. The 1977 amendments effected no substantive change evincing any intent by Congress to create a private cause of action under the act.

Howard's contention that the alleged negligence of Agency officials in enforcing the Act states a claim under FTCA also fails. She is precluded from bringing her claim under the FTCA because she did not first present that claim to the agency involved. "The [*14] FTCA clearly provides that, prior to bringing an action against the United States, a claimant 'shall have first presented the claim to the appropriate Federal agency.'" *Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986)* (quoting *28 U.S.C. § 2675(a)*).[12] The administrative exhaustion requirement was intended to improve and expedite disposition of monetary claims against the federal government, simultaneously enabling consideration of the claim by the agency with superior information and easing court congestion. See *id. at 124* (citing *Meeker v. United States, 435 F.2d 1219, 1222-23 (8th Cir. 1970)).* The requirement of filing an administrative claim is jurisdictional and may not be waived; dismissal is mandatory it the plaintiff fails to file a claim with the proper agency. *Id. at 123-24.*

12 In relevant part, *28 U.S.C. § 2675(a)* states:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim [*15] to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.

(Emphasis added.) The claimant must present the claim to the appropriate agency within two years after it accrues. See *28 U.S.C. § 2401(b).*

Howard does not dispute that she made no effort to present her claim to the Agency. Her argument that tiling this action within two years from the date the cause of action arose provided sufficient notice to the Agency and eliminated the need to press the claim administratively is simply incorrect. See *Bernard v. U. S. Lines, Inc., 475 F.2d 1134, 1136 (4th Cir. 1973)* (filing suit in federal count insufficient) (per curiam); see also *Henderson, 785 F.2d at 123-24* (filing state court suit insufficient). Howard also argued before the district court, and obliquely suggests in this court, that the administrative exhaustion requirement should be waived as futile because the Agency would have dismissed her claim on essentially the same grounds as the district court eventually cited to dismiss the case. This contention is flatly inconsistent with Congressional intent behind the exhaustion requirement, and is meritless. [*16] See *Manko v. United States, 830 F.2d 831, 840 (8th Cir. 1987).* Finally, Howard's citation of *Southern Ohio Coal Co. v. Secretary of Labor, 781 F.2d 57 (6th Cir. 1986),* supplementing *774 F.2d 693 (6th Cir. 1985),* does not support the argument that presentation of her claim to the Agency was not required. In Southern Ohio Coal, the court held that mine operators were not required to exhaust administrative remedies before mounting a court challenge on procedural due process grounds to an administrative rule adopted by the Secretary. In contrast, Howard's tort action is a paradigmatic case for administrative exhaustion under the FTCA.[13]

13 Given our affirmance of the jurisdictional dismissal of Howard's FTCA claim, we need not consider the district court's alternative rulings that under the applicable law, see *28 U.S.C. § 2674,* the law of Kentucky, the Agency breached no duty to the decedent, see *Raymer v. United States, 660 F.2d 1136, 1144 (6th Cir. 1981); Taylor v. United States, 521 F. Supp. 185, 187 (W.D. Ky. 1981),* and that her claim was barred by the "discretionary function" exception in *28 U.S.C. § 2680(a),* see *Russell v. United States, 763 F.2d 786, 786-87 (10th Cir. 1985)* (per curiam); [*17] see also *Hylin v. United States, 755 F.2d 551, 554*

(7th Cir. 1985) (construing Federal Metal and Nonmetallic Mine Safety Act) (per curiam).

B

The district court did not abuse its discretion in dismissing the entire case, federal and non-federal claims and defendants, once it determined that Howard's complaint stated no basis for federal question jurisdiction.[14] Though the court ultimately held, and we have affirmed, that there is no private cause of action under the Federal Mine Safety and Health Act, we cannot say that that claim was so facially insubstantial that summary jurisdictional dismissal was warranted. Federal jurisdiction was invoked to the extent necessary to determine that, in this case, no federal claim exists. See *Ridenour v. Andrews Fed. Credit Union, 897 F.2d 715, 719 (4th Cir. 1990)*. That federal jurisdiction was sufficient to support pendent jurisdiction over the state law claims even if the federal claims were, properly, dismissed. See generally 13B Wright, Miller, & Cooper, § 3561. But the court followed the general rule that where all federal claims are dismissed before trial, any pendent state claims should be dismissed as well. See *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*; [*18] *Ridenour, 897 F.2d at 722*. The court did not abuse its discretion in declining to exercise pendent jurisdiction over the state law claims asserted against the non-federal defendants.[15] See, e.g., *Abernathy Schenley Indus., 556 F.2d 242, 244 (4th Cir. 1977)*.

14 Complete diversity was lacking, foreclosing diversity jurisdiction under *28 U.S.C. § 1332(a)*.

The district court did not specifically address its disposition of the non-federal claims and defendants in its memorandum opinion, but Howard apparently raised the issue of the pendent state parties and claims in her Rule 59(e) motion to alter or amend the judgment.

15 We note that the Supreme Court recently made clear that federal courts have no jurisdiction over pendent parties for whom an independent jurisdictional basis is lacking when the plaintiff alleges jurisdiction solely on the basis of a FTCA claim. See *Finley v. United States, 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989)*. In view of our finding that dismissal was warranted for failure to state a claim upon which relief could be granted, we need not consider further the problems created by pendent party jurisdiction.

III

Howard also challenges the district court's management of the case [*19] and various procedural rulings before and after its ruling on appellees' dismissal motions. First, Howard contends that the court improperly permitted the NLRB to intervene and abused its discretion when it refused to stay the proceeding pending resolution of her FOIA claim. We find that these claims were mooted when the district court determined that Howard failed to state a justiciable federal claim. She also argues that the district court erred when it rejected her motion for relief from judgment. Subsumed in all these contentions is Howard's claim that the district judge was biased against her and that she was denied the right to a fair trial before an impartial decisionmaker. Finally, Howard attempts to challenge on appeal the district court's contempt finding and imposition of attorney's fees as sanction against her attorney Richard Engram. We reject each of these contentions.

A

We summarily reject Howard's claim that the district court erred when it rejected her Rule 59(e) motion to alter or amend the judgment entered against her. She presented no new grounds for relief, and we have held that the district court correctly ruled that Howard failed to state a justiciable federal [*20] claim. It was no abuse of discretion to deny Howard's request to amend (for the third tithe) the jurisdictional basis of her complaint. See *Smith v. Ayres, 845 F.2d 1360, 1366 (5th Cir. 1988)*. The dismissal of the pendent state claims and parties was proper. The court did not abuse its discretion in denying Howard's motion. See *Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989)*; see also *Green v. Foley, 856 F.2d 660, 665 (4th Cir. 1988)* (abuse of discretion standard applies to review of denial of *Rule 60(b)* motion). See generally 11 Wright & Miller, § 2817 (discussing overlap of *Rule 59(e)* and *Rule 60*).

B

Howard's claim that she was denied the right to a fair trial before an impartial decisionmaker is completely unsubstantiated. In the absence of any other supporting facts, her claim is based solely on the fact that she lost most of the battles and ultimately the war in this case. We find nothing in the record that would raise fundamental

fairness concerns.

C

Finally, Howard attempts to raise on appeal the district court's imposition of contempt sanctions against her attorney Richard Engram.[16] The notice of appeal in this case was filed on behalf of Howard; Engram did not attempt [*21] to appeal the court's contempt ruling and imposition of sanctions. See *Fed. R. App. P. 3(c)* ("The notice of appeal shall specify the party or parties taking the appeal . . . ."). The specificity requirement in *Rule 3(c)* is jurisdictional and inflexible. See *Torres v. Oakland Scavenger Co., 487 U.S. 312, 314-18, 108 S. Ct. 2405, 101 L. Ed. 2d 285 (1988)*. When a district court sanctions an attorney, the attorney is the real party in interest and the appeal must be taken in the attorney's name. See *Rogers v. National Union Fire Insurance Co., 864 F.2d 557, 559-60 (7th Cir. 1988)*; *DeLuca v. Long Island Lighting Co., 862 F.2d 427, 429-30 (2d Cir. 1988)*; see also 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 203.17[1] (1990). Engram might have been able to appeal the contempt ruling, see 15 Wright, Miller, & Cooper, § 3914.42, at 444 (Supp. 1990), but he is not a party to this action. See *Bessette v. W. B. Conkey Co., 194 U.S. 324, 329, 24 S. Ct. 665, 48 L. Ed. 997 (1904)*. We are thus jurisdictionally barred from considering the appeal of the contempt finding and the award of sanctions against Engram.[17]

16 We [*22] note that the issue of the propriety of the appeal of the contempt ruling and the imposition of sanctions was not raised by the parties.

17 We observe, however, that a district court has inherent power to sanction attorneys by civil contempt for noncompliance with a court order and that judicial sanctions for civil contempt may be employed to compensate the complainant for losses sustained. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)*; *United States v. United Mine Workers, 330 U.S. 258, 303-04, 67 S. Ct. 677, 91 L. Ed. 884 (1947)*; see also *Fed. R. Civ. P. 37(b)(2)* (court may require attorney to pay reasonable expenses, including attorney's fees, caused by failure to obey court order).

IV

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED