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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, *et al.*, Defendants.	)	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV861

OBJECTION TO ORDER OF 27 MARCH 2014 GRANTING IN PART AND DENYING IN PART LEGISLATIVE MOVANTS' MOTION TO QUASH AND PLAINTIFFS' MOTIONS TO COMPEL

NOW COME Senator Phil Berger, Senator Tom Apodaca, Senator Thom Goolsby, Senator Ralph Hise, Senator Bob Rucho, Representative Thom Tillis, Representative James Boles, Jr., Representative David Lewis, Representative Tim Moore, Representative Tom Murry, Representative Larry Pittman, Representative Ruth Samuelson and Representative Harry Warren (collectively "the legislative movants"), by and through undersigned counsel, and hereby **OBJECT** to the Order of 27 March 2014 Granting in Part and Denying in Part Legislative Movants' Motion to Quash and Plaintiffs' Motions to Compel ("the Order") in the above-captioned action. [*NAACP* D.E. 94; *LWV* D.E.97; *US* D.E. 79] Specifically, the legislative movants object to the Order as follows:

1. The legislative movants object to the Order's failure to recognize an absolute legislative immunity from discovery, contrary to Supreme Court and Fourth Circuit precedent;
2. The legislative movants object to the Order's holding, contrary to Supreme Court and Fourth Circuit precedent, that legislative privilege is qualified, whether in the context of a claim brought under the Voting Rights Act or otherwise;
3. The legislative movants object to the Order's holding, contrary to Supreme Court and Fourth Circuit precedent, that the applicability of legislative

immunity or of legislative privilege must be evaluated on a case-by-case basis to specific discovery requests;

4. The legislative movants object to the Order to the extent it suggests that they have conceded that the Voting Rights Act in any way creates an exception to the doctrines of legislative immunity or privilege as interpreted by the Supreme Court or by the Fourth Circuit; and

5. The legislative movants object to the Order to the extent that it would require them to identify, on or before 14 April 2014, the identify of any legislator who might chose to waive his or her immunity and privilege and testify solely for the purpose of providing rebuttal evidence to as yet unknown evidence from plaintiffs.

In support of this Objection, the legislative movants show the Court the following:

INTRODUCTION

The practical import of legislative immunity and legislative privilege cannot be overstated. That message was sent by the Fourth Circuit on this issue just a few years ago and was reiterated just two months ago. The underlying doctrine is centuries old; neither Plaintiffs' passion nor the passage of time dilutes its strength. Nor should it. Legislative immunity and privilege are blind to the politics of the party in power; they transcend electoral majorities. The reason immunity and privilege are absolute and enduring, as demonstrated below, is because a qualified immunity—one where legislators, regardless of party, work knowing that their quiet study and contemplation is

liable to exposure for all the world to see—stifles legislative deliberation generally. It stifles the give and take of negotiation among legislators. It stifles legal research and likely rules out the employment of professional, non-partisan staff. It stifles constituent and stakeholder input.

The adverse effect on the quality of legislative output of an uncertain privilege would be no different from the burden on the judiciary were litigants losing at trial to have access on appeal to communications between the trial court and its law clerks. The doctrines of separation of power and federalism are premised on the bedrock principle that the people act through their legislature convened. Plaintiffs seek to delve into the minds of *individual* legislators and extrapolate from that the legislative *body's* reasoning. Legislative immunity is merely a long-standing recognition that such an effort is futile and indeed harmful because no one legislator speaks for the body convened but all legislators—regardless of party—need the freedom to deliberate privately on the weighty policy choices they face.

NATURE OF THE MATTER BEFORE THE COURT

The *NAACP* and *LWV* actions were filed on 12 August 2013, challenging various provisions of the Voter Identification Verification Act, 2013 N.C. Sess. Laws 381 ("VIVA"), also sometimes referred to as H.B. 589. [*NAACP* D.E. 1; *LWV* D.E. 1] The *NAACP* plaintiffs filed their First Amended Complaint on 13 November 2013. [*NAACP* D.E. 26] The United States filed its complaint on 30 September 2014. [*US* D.E. 1] On 13 December 2013, this Court consolidated these three cases for purposes of discovery and scheduling. [*NAACP* D.E. 39; *LWV* D.E.41; *US* D.E.30]

STATEMENT OF THE RELEVANT FACTS

On 4 December 2013, plaintiffs gave notice pursuant to Rule 45(a)(4) of the Federal Rules of Civil Procedure of their intent to serve subpoenas on various persons and organizations, including the legislative movants. On 10 December 2013, counsel for defendants in the North Carolina Attorney General's Office informed counsel for plaintiffs that he was authorized to accept service of all subpoenas to the legislative movants, with the exception of the subpoena to Senator Thom Goolsby, for which he did not yet have authorization. On 11 December 2013, plaintiffs served the subpoenas on the legislative movants, with the exception of Sen. Goolsby, through counsel in the North Carolina Attorney General's Office. On 18 December 2013, counsel for defendants in the North Carolina Attorney General's Office informed counsel for plaintiffs that he was authorized to accept service of the subpoena to Sen. Goolsby, and on 19 December 2013, plaintiffs served the subpoena on Sen. Goolsby, through counsel in the North Carolina Attorney General's Office. All of the subpoenas served on the legislative movants were returnable 20 January 2014.

Each of the subpoenas served on the legislative movants purports to require the production of documents and includes what is designated as "Plaintiffs' First Set of Requests for Production" to each of the legislative movants. The documents sought in these requests for production are as follows:

1. All documents and communications received or created by you concerning the rationale, purpose, implementation, and/or text of H.B. 589.

2. All documents concerning communications between you and your constituents regarding any provision in H.B. 589 or any other election law proposed during the 2013 session of the General Assembly.

3. All documents concerning communications between you and any other legislator in the North Carolina General Assembly regarding any provision in H.B. 589 or any other election law proposed during the 2013 session of the General Assembly.

4. All documents concerning communications between you and the office of the Governor of North Carolina regarding any provision in H.B. 589 or any other election law proposed during the 2013 session of the General Assembly.

5. All documents concerning communications between you and any North Carolina state agency regarding any provision in H.B. 589 or any other election law proposed during the 2013 session of the General Assembly.

6. All documents concerning communications between you and any lobbyists, political organizations, or public interest groups regarding any provision in H.B. 589 or any other election law proposed during the 2013 session of the General Assembly.

7. All documents and communications received or created by you concerning procedural irregularities in enacting H.B. 589.

8. All documents and communications received or created by you related to any incident of in-person voter fraud or any incident of voter fraud involving absentee ballots from 1995 to the present.

9. All documents and communications received or created by you relating to reports or data issued by the State Board of Elections concerning proposed, debated, or enacted voting legislation during the 2013 session of the General Assembly.

10. All documents and communications received or created by you referring or relating to any estimate, report, study, or analysis of the number, race, and/or ethnicity of registered voters who do not have any of form of photo identification that is acceptable to vote under H.B. 589.

11. All documents and communications received or created by you referring or relating to estimates, reports, studies, or analyses of (i) the costs to voters to secure documents required to obtain the photo

identification required to vote as set forth in H.B. 589; or (ii) the costs or expense to the State of North Carolina associated with implementing the photo identification requirement set forth in H.B. 589.

12. All documents and communications received or created by you referring or relating to a comparison of the State of North Carolina's voter registration database with NCDOT records, including but not limited to any such documents that provide a subset of registered voters who do not have an NCDOT-issued ID.

13. All documents and communications received or created by you referring or relating to any estimate, report, study, or analysis of H.B. 589's impact on future elections, including the impact of H.B. 589 on voter turnout, one-stop absentee voting (early voting), and/or potential increased waiting times at polls.

14. All documents and communications received or created by you referring or relating to any estimate, report, study, or analysis of any provision in H.B. 589 or any election law proposed or enacted during the 2013 session of the North Carolina General Assembly.

15. All documents and communications received or created by you relating to the cost or expense, including any estimates or analyses, of administering any provision in H.B. 589 or any election law proposed or enacted during the 2013 session of the North Carolina General Assembly.

16. All documents and communications received or created by you relating to the costs or expense of election administration for local, state, and federal elections, before the implementation of H.B. 589.

17. All documents and communications received or created by you relating to any data tracking, recording, and/or studying voting patterns by race.

Exhibits 1-13.

Undersigned counsel represents each of the legislative movants. None of the legislative movants has waived his or her legislative immunity, and none presently intends to do so.

On 27 March 2014, Magistrate Judge Joi Elizabeth Peake issued her order, by which she granted in part and denied in part the legislative movants' Motion to Quash and plaintiffs' Motions to Compel and held that the application of legislative immunity or privilege to categories of documents would have to be considered on a case-by-case basis.[1]

ARGUMENT

I. The Importance of Legislative Immunity and Privilege.

The doctrines of absolute legislative immunity and legislative privilege have withstood the test of time. The reason for their longevity lies in the chilling effect a qualified immunity would have in civil cases challenging duly enacted laws by the people's elected representatives.

Put simply, anything less than absolute immunity and privilege in civil cases challenging legislative action would amount to a plaintiffs' veto. If state legislators considering and deliberating over important public policies must worry that their political adversaries through civil litigation will be able to discover their confidential deliberations, they will decline to engage in the robust discussion and research necessary for the enactment of laws important to the entire State. Thus, having lost at the ballot box, having lost in legislative committees, and having lost a floor vote on a particular

[1] On 26 February 2014, plaintiffs served notices of deposition on Senators Tom Apodaca and Bob Rucho, on Representatives David Lewis, Thom Tillis, and Harry Warren and on Special Counsel to the Speaker and President *Pro Tem* Gerry Cohen. By agreement of the parties, these depositions have not been held pending a decision of the Court on the legislative movants' Motion to Quash and the plaintiffs Motions to Compel. These notices of deposition were not, therefore, before the Court when the 27 March 2014 Order was entered.

policy choice, political adversaries of the legislative majority may be empowered to effectively inhibit legislators—the direct representatives of the people—from making public policy decisions they deem to be in the best interests of the State. As stated by the Supreme Court, "[t]he claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Legislative immunity exists to preclude what amounts to a veto by those on the losing end of public policy decisions. Just two month ago, the Fourth Circuit re-affirmed that legislative immunity "prevents those who were defeated in elections from waging political war through litigation." *McCray v. Md. Dep't of Transp.*, 2014 WL 323272, at *4 (4th Cir. Jan. 30, 2014).

The United States Supreme Court has long recognized a broad right "of legislators to be free from arrest *or civil process* for what they do or say in legislative proceedings." *Tenney*, 341 U.S. at 372 (emphasis added). The Supreme Court has expressly extended this protection to state legislators, *Tenney*, 341 U.S. at 372-76, with respect to actions within the "sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 377.[2] As the Fourth Circuit has emphasized:

[2] The Order is correct that the Supreme Court has held that the Speech and Debate clause of the United States Constitution does not itself apply to state legislators. This in no way lessens the applicability of absolute legislative immunity for state legislators, however. The Speech and Debate clause did not create the doctrine of legislative immunity; rather, it claimed the benefits for that common law doctrine for the United States Congress. Legislative power, and therefore the common law history and doctrine of legislative immunity as described in *Tenney*, existed in

> Legislative immunity's practical import is difficult to overstate. As members of the most representative branch, legislators bear significant responsibility for many of our toughest decisions, from the content of the laws that will shape our society to the size, structure, and staffing of the executive and administrative bodies carrying them out. Legislative immunity provides legislators with the breathing room necessary to make these choices in the public's interest, in a way uninhibited by judicial interference and undistorted by the fear of personal liability. It allows them to focus on their public duties by removing the costs and distractions attending lawsuits. It shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box . . . Legislative immunity thus reinforces representative democracy, fostering public decision making by public servants for the right reasons.

EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011).

Importantly, legislative immunity frees legislators not only from the consequences of litigation, it also frees them "from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). "Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. "The purpose of the doctrine [of legislative immunity] is to prevent legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves." *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1988).

The scope of legislative immunity is broad and, contrary to the holding of the Order, absolute. Unlike many privileges, it does not simply attach to the content of communications. Rather, it encompasses all aspects of the legislative process and forbids

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North Carolina prior to the ratification of the United States Constitution, and currently is exercised through the General Assembly. N.C. CONST. art. II, § 1.

plaintiffs from seeking *any* production at all from the legislative movants. "Where, as here, the suit would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force." *Schlitz*, 854 F.2d at 45. Indeed, speaking specifically in the context of a federal agency—the Equal Employment Opportunity Agency—attempting to subpoena a local governmental unit for records, the Fourth Circuit stated "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes" and held that "if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, *they would not need to comply*." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 (emphasis added); *Gravel v. United States*, 408 U.S. 606, 616, 628 (1972) (approving of protective order forbidding any questioning "concerning communications between the Senator and his aides during the term of their employment and related to [any] legislative act of the Senator"); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 532 (9th Cir. 1983) (affirming denial of motion to compel former federal legislator to testify in deposition about legislative matters).

This is one reason why the Order's case-by-case approach in untenable. While in ordinary discovery disputes, a case-by-case analysis of documents, and encouragement for the parties to resolve disputes themselves is laudable, in the instance of legislative privilege, the absolute nature of the privilege discourages such an approach. Legislative immunity exists to safeguard the deliberations of the bedrock expression of popular sovereignty—the legislators directly elected by the people. Any case-by-case approach

sows doubt that can have a chilling effect both on legislators' own deliberations and, perhaps more problematic, open and free communication between constituents and legislators. This chilling effect, which runs counter to the separation of powers, would continue long past this present discovery dispute and would create uncertainty regardless of what party controls either house of the General Assembly. These are among the reasons that the Supreme Court and the Fourth Circuit have consistently held legislative immunity to be an absolute immunity,

Just as a judge is allowed to research and craft judicial opinions without fear of discovery by others of his or her deliberative process, the deliberative process of legislators must be protected to ensure the smooth functioning of our system of government. Legislators must be allowed to deliberate more thoughtfully and with greater autonomy about the "tough decisions" the Fourth Circuit has recognized they are charged with making for the State. If every e-mail and document in the possession of a legislator became subject to public scrutiny simply because someone filed a civil lawsuit and requested it in discovery, the State would have a very difficult time enacting laws. Legislative immunity and privilege protects the majority and the minority, the legislators central to moving legislation and those on the periphery, and even those ordinary citizens who choose to participate in the process by petitioning their legislator, but who might be deterred from doing so if they thought their communications with their legislators could end up as evidence in a court proceeding.

Undermining the bedrock democratic policies necessitating the immunity and privilege is particularly inappropriate where, as here, civil litigants have already been

provided all of the information they need to challenge the legislative motive of a duly enacted law. Defendants have provided thousands of pages of documents to Plaintiffs here constituting the entire legislative record of the challenged law, including the following:

- All public versions of the bill, including all filed bills, introduced committee or floor amendments (introduced and passed, introduced and failed or introduced and withdrawn), committee substitutes and enrolled and ratified versions, as well as voting results and fiscal notes on the bill;
- Transcripts and audio files of all committee hearings, committee debates and floor debates on the bill;
- Available voting records and minutes for committee consideration of the bill;
- Notices of committee meetings or hearings;
- Relevant House Journal entries;
- Relevant Senate Journal entries;
- Relevant House Principal Clerk's Log entries;
- Relevant Senate Principal Clerk's Log entries;
- Public sign-up sheets for committee meetings on the bill; and
- Documents and information provided by members of the public testifying at legislative hearings on the bill.

The legislature acts as one body and not as individual members. Each member of the House of Representative and of the Senate may have a different motivation for voting for or against any particular piece of legislation; it is the intent of the General Assembly as a whole, then, and not the motivation of any particular legislator that is relevant to the purpose of a law. Every document that could possibly shed light on the legislature's motive as a body has been provided to Plaintiffs.

II. Legislative Immunity is Absolute.

A. The *only* exception to absolute legislative immunity is criminal cases.

Except where the Supreme Court or the Fourth Circuit have carved out an exception, the default rule is that legislative immunity is broad and absolute for state legislators on matters involving their legislative activity. *Tenney*, 341 U.S. at 372, 377 (recognizing broad right of state legislators to absolute immunity for actions within the "sphere of legitimate legislative activity"); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975) (mandating that legislative immunity, and the privileges flowing from it, be interpreted "broadly to effectuate its purposes"); *accord Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. The Order fails to recognize this.

The only exception that the Supreme Court or the Fourth Circuit have carved out of the broad legislative immunity recognized by *Tenney* is the exception for criminal cases. *United States v. Gillock*, 445 U.S. 360, 373 (1980). *Gillock* involved consideration of legislative immunity as applied to a *criminal indictment*, not a "federal civil action," and as such it, and other cases that rely on it, is plainly inapplicable to this situation, particularly in the face of *Tenney*. *Comm. for a Fair & Balanced Map v. Ill.*

State Bd. of Elections, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) (acknowledging that in *Gillock*, the U.S. Supreme Court "carved out an exception from *Tenney*" in cases involving "federal criminal liability"); *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989) (erroneously failing to rely on or even cite *Tenney*, but acknowledging that *Gillock* "plainly does not control" a civil discovery question).

The Supreme Court has never carved out any other exceptions from *Tenney*. The Fourth Circuit has never carved out any other exceptions from the right recognized in *Tenney*. Instead, as to matters involving legislative activity, the Fourth Circuit continues to recognize and enforce absolute legislative immunity. *McCray*, 2014 WL 323272, at *4. Because the Supreme Court and the Fourth Circuit have mandated that legislative immunity is absolute except in criminal cases, the Order improperly recognized an exception to legislative immunity for election law cases.

B. The Order's reliance on *Marylanders for Fair Representation, Inc. v. Schaefer* is misplaced.

The Order relies heavily on the concurring opinion of two members of the three-judge panel in *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992). This reliance is misplaced for three reasons. First and most obviously, to the extent that *Marylanders* finds an exception to otherwise absolute immunity recognized by the Supreme Court and the Fourth Circuit, the decisions of the Supreme Court and of the Fourth Circuit, not *Marylanders*, control.

Second, even if *Marylanders* could give rise to an exception not recognized by the Supreme Court or the Fourth Circuit, the exception that *Marylanders* purports to find to

otherwise absolute immunity is not in the context of the Voting Rights Act *per se*, but rather is in the specific context of redistricting. The concurring opinion states:

> Legislative redistricting is a *sui generis* process. While it is an exercise of legislative power, it is not a routine exercise of that power. The enactment of statutes ordinarily involves the implementation of public policy by a duly constituted legislative body. Redistricting involves the establishment of the electoral structure by which the legislative body becomes duly constituted. Inevitably, it directly involves the self-interest of the legislators themselves.

Marylanders, 144 F.R.D. at 304. Thus, it was legislators' self-interest in re-election—and in drawing the very districts from which they could be re-elected—that drove the concurring opinion in *Marylanders* to find a limited exception to otherwise absolute immunity. As the concurring opinion noted, this situation is *sui generis*, a unique exercise of power unlike any other exercised by a legislature. It was this unique nature of power that directly implicated how the legislature would be made up, as well as potentially influenced whether those very members voting might more easily be re-elected, that prompted the concurring opinion to find a limited exception to legislative immunity.[3] To the extent, then, that the Order finds an exception to absolute legislative immunity in cases brought under the Voting Rights Act, the Order goes even further than did the concurring opinion in *Marylanders*.

Moreover, no such redistricting exception has been recognized by state or federal courts in North Carolina. In North Carolina legislators have routinely invoked legislative

[3] The Order seems to suggest in n. 1 that the legislative movants may have conceded that an exception to legislative immunity exists in redistricting cases. No such concession has been made, as is clear from the supplemental brief filed on 26 February 2014. [*NAACP* D.E. 85; *LWV* D.E. 88; *US* D.E. 72] All that the legislative movants noted was that the exception found in *Marylanders*, to the extent one was found, went no further than the context of redistricting.

immunity to avoid testifying and other discovery obligations in redistricting cases. In the 2011 cycle of redistricting, two Republican legislators, Rep. David Lewis and Sen. Bob Rucho, voluntarily waived their immunity in order to testify about the redistricting plans and one other Republican legislator, Rep. Ruth Samuelson, waived her immunity to testify on one issue at trial. In addition, two Democrat legislators, Sen. Dan Blue and Rep. Larry Hall, also waived their immunity to testify at trial. However, no other legislator waived immunity in that case. Moreover, in *Cromartie v. Hunt*, No. 4:96-CV-104-BO, a redistricting case out of the 1990 redistricting cycle involving allegations of intentional discrimination because of race, legislators used legislative immunity to block certain testimony. For instance, then-Senator Roy Cooper agreed to waive his personal legislative immunity to testify in a deposition and then asserted the immunity during the deposition when asked questions that might cause him to reveal statements made by other legislators to Sen. Cooper. Excerpts from the deposition during which this immunity was asserted are attached as Exhibit 14.[4]

Third, even the concurring opinion in *Marylanders* did not allow for discovery directly from legislators. While the concurring opinion urged a "less categorical" approach to the immunity issue, it only went so far as to allow the *non-legislator members* of the redistricting commission at issue in that case to be deposed. The concurring opinion refused to consider the possibility of legislators being deposed, at

[4] The Attorney General has also previously instructed General Assembly staff attorneys to not answer questions about their conversations with General Assembly members who had not waived their legislative immunity. Excerpts from a deposition in the *Cromartie* case where such an instruction was given are attached as Exhibit 15.

least until discovery had been sought by all other means possible, and made it clear that the judges would "flatly prohibit" any depositions of actual legislators regarding the actual enactment of the bill. *Marylanders*, then, does not hold that discovery can be sought directly from legislators. To the extent that the Order reads it otherwise, the order is contrary to *Tenney*, and *Tenney* must control.[5]

III. In the Fourth Circuit, Legislative Immunity and Legislative Privilege are Co-Extensive and Both Absolute.

The Fourth Circuit has made it clear that legislative privilege exists to safeguard legislative immunity.[6] Legislative immunity would be nearly useless if private litigants could initiate civil actions and harass legislators with civil process and other discovery actions. As that Court has put it: "Legislative *privilege* against compulsory evidentiary process *exists to safeguard* this legislative *immunity* and to further encourage the republican values it promotes." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181

[5] The Court would be wading into a complicated thicket if it attempts to rank the "importance" of federal statutes in assessing whether one statute or the other justifies imposition of a qualified instead of absolute privilege. In *Wash. Suburban Sanitary Comm'n*, the Fourth Circuit has already decided that discrimination claims under Title VII do not warrant undermining absolute legislative immunity or privilege.

[6] Neither legislative immunity nor legislative privilege, which are grounded in the common law, should be confused with legislative confidentiality required, subject to criminal penalties, of legislative employees by N.C. GEN. STAT. § 120-129 *et seq*. This statutory imposition of confidentiality exists to safeguard legislative immunity by protecting communications between legislators and "legislative employees," whether those employees work for one legislator or whether as part of a central staff they work at different times for different legislators. Like legislative immunity and legislative privilege, this statutory confidentiality can only be waived by the legislator involved. Notably, while N.C. GEN. STAT. § 120-132(c) allows a court to compel testimony that otherwise would be confidential if "the disclosure is necessary for the proper administration of justice," the ability of a court to do so is specifically made subject to "the common law of legislative privilege and legislative immunity."

(emphasis added). The Court also cited with approval *MINPECO, S.A. v. Conticommodity Servs., Inc*., 844 F.2d 856, 859 (D.C. Cir. 1988) for the proposition that "[d]iscovery procedures can prove just as intrusive" as being named as a party to a suit. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. Finally, the Court made it clear that if the EEOC had sought "to compel information from legislative actors about their legislative activities, they would not need to comply." *Id.*

The Fourth Circuit's approach is consistent with the Supreme Court's approach in *Eastland*, 421 U.S. at 501. There, the Court held that any "interference" from civil litigation is barred by legislative immunity. 421 U.S. at 503. Accordingly, the Court quashed a subpoena to federal legislators holding that they were "completely immune" from it. *Id.* at 506. Other circuit courts have held similarly. In *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995), the Court held that a party is "no more entitled to compel [legislators'] testimony – *or production of documents* – than it is to sue [legislators]." *Id.* at 421 (emphasis added). Rather, there is no "difference in the vigor" with which the privilege deriving from the immunity protects document production and testimony versus protection against the suit itself. *Id.*

IV. To the Extent that the Order Would Preclude any Legislator to Waive Immunity in Order to Rebut Evidence Offered by Plaintiffs, the Order is Prejudicial to Defendants.

The Order requires that

> by April 14, 2014, Defendants must notify Plaintiffs of the identity of any legislator on whom they will rely in response to any preliminary injunction motion, whether by affidavit, testimony, or documentary evidence otherwise subject to legislative privilege, in order to allow Plaintiffs

> sufficient time to undertake additional discovery with respect to any legislator waiving the legislative privilege.

Defendants, while objecting to any decision that would subject a legislator to discovery in these cases, acknowledge that if a legislator does intend to waive immunity and privilege and offer evidence, plaintiffs are entitled to adequate notice of this fact. However, it would be unduly prejudicial to defendants to preclude, solely on the basis that notice had not been given by 14 April, any legislator from waiving immunity and privilege if the waiver is done solely for the purpose of offering rebuttal evidence. In such an instance, where it is defendants who would lack notice of the need for any such rebuttal evidence until such time as plaintiffs' evidence is offered, it is defendants who would be prejudiced for lack of notice. Accordingly, to the extent that the Order would preclude any legislator from offering rebuttal evidence, it is erroneous.

CONCLUSION

For the foregoing reasons, the Objection to the Order of 27 March 2014 Granting in Part and Denying in Part Legislative Movants' Motion to Quash and Plaintiffs' Motions to Compel should be sustained.

This the 2nd day of April, 2014.

ROY COOPER
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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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