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 20 NOVEMBER 2014 GRANTING IN PART AND DENYING IN PART LEGISLATIVE MOVANTS' MOTION TO QUASH AND PLAINTIFFS' MOTIONS TO COMPEL

NOW COME Defendants and 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 20 November 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. 207; *LWV* D.E. 205; *US* D.E. 194] Specifically, defendants and legislative movants object to the Order to the extent it requires the production of communications between legislators and constituents. The Order reflects an incorrect application of the balancing test adopted by the Magistrate Judge and will chill the First Amendment rights of constituents to communicate matters of concern to legislators without the risk of public attack or criticism by third parties. Based on similar positions on the scope of the First Amendment's protection taken by plaintiffs and third parties *in this very case*, plaintiffs should not object to the position advanced here by defendants and legislative movants.

INTRODUCTION

While defendants and legislative movants disagree with certain aspects of the Order by the Magistrate Judge, they have elected to file objections solely regarding the

issue of constituent communications. Defendants and legislative movants have produced a log for attorney-client communications between the State defendants and their agents with outside counsel that were exchanged prior to the commencement of this litigation, however, by agreeing to provide a log of attorney-client communications pre-litigation, the legislative movants and defendants do not waive their argument for any appeal that these communications are also protected by legislative immunity or privilege under the common law and as codified by statute (N.C. Gen. Stat. § 120-129(2)).[1]

The Magistrate Judge's order requires the legislative movants and defendants to produce all communications between legislators and third parties. The legislative movants and defendants will produce communications between legislators and state agencies, however, while they are not filing objections to this part of the Magistrate Judge's order, the legislative movants and the defendants are not waiving their right to argue in any future appeal that legislative privilege applies to communications between legislators and state agencies involving information-gathering related to the challenged legislation.

The instant objections are limited to communications between constituents and legislators. Such communications clearly fall within the ambit of legislative privilege to the extent they relate to information-gathering efforts by a legislator related to the legislation in question. Production of these emails would also chill the First Amendment rights of constituents to petition their legislators for the redress of grievances.

[1] The referenced privilege log was delivered to counsel for plaintiffs on Monday, December 8, 2014, the same day the instant objections are being filed.

ARGUMENT

THE MAGISTRATE JUDGE ERRED IN ORDERING PRODUCTION OF COMMUNICATIONS BETWEEN LEGISLATORS AND CONSTITUENTS

The Magistrate Judge applied a five-part balancing test in deciding to order the production of communications between legislators and constituents. Under this test the Magistrate Judge evaluated the following factors: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and issues; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.[2]

The legislative movants and defendants agree that the issues in this case are of great importance and that the government is involved in the litigation. However, the Magistrate Judge erred in application of the other three factors. Use of the five-part test should have resulted in an order quashing plaintiffs' subpoenas or more limited disclosure obligations related to constituent communications.

[2] The Order entered by the Magistrate Judge states that the parties "have not presented any basis to revisit the conclusions reached in the prior Orders addressing legislative privilege" and therefore reaffirms that "legislative privilege is not absolute" but rather requires the balancing approach adopted in the Order. Case No. 13-cv-660 (ECF No. 205) at 5. However, defendants did provide such a basis in their Brief on the Issue of Legislative Immunity and Legislative Privilege Pursuant to Joint Status Report. Case 13-cv-658 (ECF No. 133) at 7 (explaining an interpretation of *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174 (4th Cir. 2011) not considered by the District Court whereby the Fourth Circuit's discussion of the scope and reach of the privilege was not *dicta*). Defendants also asserted that the Fourth Circuit's approach is similar to the "deliberative process privilege" adopted by other courts. *Id.* at 10.

First, regarding relevance of the evidence, it is difficult to understand how an opinion from a constituent has any relevance whatsoever to the intent of the legislature as a whole, or even a single legislator, or how it could ever reasonably lead to relevant evidence. In several cases, the Supreme Court has held that statements by legislators who voted in opposition to a challenged statute bear no relevance regarding the legislative intent of those legislators who voted in favor of the statute. *See Shell Oil Co. v. Iona Dept. Rev.*, 488 U.S. 19, 29 (1988); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482-83 (1981); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). Similarly, there is no logical correlation between an opinion expressed by a constituent, either for or against S.L. 2013-381, and the intent of the legislator who voted for the statute. Statements by the constituents may reflect the opinion of the constituent, but they say nothing about the opinion or the motive of the legislator.[3] *Cf. Sigmon Coal Company v. Apfel*, 226 F.3d 291, 306 (4th Cir. 2000) ("A brief comment from the floor by a single legislator, albeit one of the Act's sponsors, is not conclusive evidence of what the entire legislative body believes."); *United States Dep't of State v. Washington Post Co*., 456 U.S. 595, 600 (1982) ("Passing references and isolated phrases are not controlling when analyzing a legislative history."); *Florida v. United States*, 885 F. Supp. 2d 299,

[3] The Order below assumes that emails between legislators and third parties are relevant, or potentially relevant, because the District Court and the Fourth Circuit discussed certain emails between legislators and the State Board of Elections during the preliminary injunction proceedings. Order, at 7 n.2. However, these courts cited to these emails in addressing arguments made by plaintiffs. Plaintiffs, not the Court, inserted the emails into the case. Neither plaintiffs nor the Magistrate Judge has explained why *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 (4th Cir. 1995) is not controlling on the issue of the relevance or potential relevance of evidence outside of the legislative record.

354 (D.D.C. 2012) (the "purpose of a single legislator is normally too slim a reed upon which to rest a determination regarding the legislature as a whole").

Second, regarding the possibility of intimidation, requiring legislators to produce all responses to constituents raises the probability of "timidity" by those legislators in any future communication with a constituent. If the Magistrate Judge's order is allowed to stand, these legislators will be encouraged, if not instructed by counsel, to provide nothing more than perfunctory form responses to constituent inquiries. Moreover, requests from legislators to constituents with special expertise are just as much of the legislative fact-finding process as communications by legislators with staff. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (protecting the information-gathering process, including lawmakers' sources of information); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983) (legislator's receipt of "information pertinent to potential legislation or investigation" is protected part of the legislative process); *see also Gravel v. United States*, 408 U.S. 606, 625 (1972) (defining broad scope of "legislative acts"). Requiring legislators to produce all communications with constituents with special expertise will undoubtedly result in legislators ceasing such communication and relying exclusively on staff or attorneys for advice or information.[4]

[4] The Magistrate Judge's Order contends that communications between legislators and third parties are not "legislative acts" that the privilege protects. Order at 8. However, the Order does not address the numerous cases, including those cited above, stating that a legislator's inquiry to third parties in the process of researching potential legislation or investigating the effect of existing legislation is itself legislative in nature and therefore protected. Moreover, the Orders' reference to waiver cases in which legislators shared

More importantly, should plaintiffs in this case be permitted to obtain communications from constituents, there is the distinct possibility of unwanted publicity, retaliation, or intrusion into the life of the communicating constituent. If constituents understand that these communications with the legislators are subject to public disclosure, they will stop writing their legislators out of fear that these opinions will be published in newspapers or that they themselves could be subject to subpoenas or depositions – just because they voiced an opinion to a legislator.[5]

This result will undoubtedly chill the right of any citizen to petition his government in the redress of grievances, all in violation of the First Amendment. *See NAACP v. Ala. ex. rel. Patterson*, 357 U.S. 449, 460-61 (1958). In *NAACP*, the Court denied defendants the right to discover membership or contributor lists because the possibility of retaliation could chill the First Amendment rights of members or contributors. *Id.* at 462-66. The concerns in *NAACP* are no different from those in this case.[6]

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otherwise protected communications with third parties is erroneous. With respect to constituent communications, the communication itself is protected and therefore cannot possibly be the subject of a waiver of the privilege.

[5] The General Assembly's non-partisan staff has consistently taken the position that letters from constituents are not public records. See attached Exhibit 1 (Memorandum to Senate President Pro Tempore from North Carolina General Assembly Staff Attorney O. Walker Reagan of December 19, 2008 opining that correspondence from a constituent is not a public record under Chapter 132 of the North Carolina General Statutes).

[6] The Magistrate Judge's Order states that the First Amendment issues have "not been presented as part of the Motion to Quash or discovery objections presently before the Court." Order at 11 n.5. Respectfully, that is incorrect. These issues have been raised repeatedly by defendants and the legislative movants. Case No. 13-cv-658 (ECF 85 at 2, 5; ECF 97 at 12; ECF 133 at 9-10; ECF 150 at 7 n.4).

Indeed, plaintiffs themselves have asserted First Amendment privileges in responses to discovery requests served by the defendants. *See* NAACP Plaintiffs' Responses & Objections to Defendants' Request for Production of Documents, Responses to Requests 1 through 3 and General Objections and Conditions No. 4 (attached as Exhibit 2); Responses to Defendants' First Set of Requests for Production of Documents to the League of Women Voters of North Carolina Plaintiff Group, General Responses and Objections No. 3 and Responses to Requests 1 through 3 and Request 46 (attached as Exhibit 3). Third parties have also asserted First Amendment privileges to subpoenas that have been served by the defendants. *See* Non-Party Blueprint North Carolina's Objections to Subpoena, General Objections No. 1 and Response to Document Requests 1, 2, and 16 (attached as Exhibit 4); Non-Party Democracy North Carolina's Objection to Defendants' Subpoena Duces Tecum, General Objections No. 1, and Responses to Document Requests 1, 2, and 16 (attached as Exhibit 5). Plaintiffs cannot have it both ways – if plaintiffs truly believed that the defendants and legislative movants must produce communications they have had with constituents, then plaintiffs would not have objected to producing communications they have had with members of the General Assembly.[7]

Finally, the Magistrate Judge did not correctly evaluate "the availability of other evidence" as applied to communications between constituents and legislators. The cases

[7] The argument for producing communications between plaintiffs and members of the General Assembly who have waived legislative privilege by giving testimony in this case is, of course, much stronger than plaintiffs' motion to compel production by legislators who have not waived legislative privilege.

where legislators have been compelled to produce documents pursuant to a balancing test have largely involved redistricting cases or cases in which the legislature was performing some other type of function, such as the function of being an employer. *See, e.g., Florida Ass'n of Rehab Facs. v. State of Fla. Dep't of Health & Rehab. Servs*., 164 F.R.D. 257 (N.D.Fla. 1995) (involving employees of Social Security Estimating Conference on which legislative and non-legislative members served); *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y 2012) (redistricting commission containing legislator and non-legislator members). Plaintiffs have not cited a circuit court opinion ordering the production of constituent emails in voting rights cases other than the redistricting challenges. This is because evidence related to legislative intent may be found in the extensive legislative record, the type of evidence referenced by the Supreme Court in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 268 (1977). Moreover, to the extent that plaintiffs seek constituent communications to argue that the General Assembly had notice of allegedly illegal impacts resulting from S.L. 2013-381, as plaintiffs have repeatedly argued, the legislative record itself (including statements in the legislative record by plaintiffs or Democrat legislators) is sufficient for plaintiffs to make such an argument and is the type of already public information that the Court in *Arlington Heights* contemplated as being instructive regarding legislative intent.

CONCLUSION

An opinion expressed by a constituent has no relevance to the motive of any legislator who voted for S.L. 2013-381, nor is it reasonably likely to lead to any other relevant evidence. Instead, compelling the production of these communications will

make legislators far less likely to engage in candid exchanges with constituents and will make constituents far less likely to raise concerns with their legislators. Further, compelling production of these documents is inequitable in light of similar First Amendment objections made by plaintiffs and allied third parties in this litigation to producing their own documents related to communications with legislators. Plaintiffs' efforts to compel the production of these communications should be denied.

This the 8th day of December, 2014.

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CERTIFICATE OF SERVICE

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