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

DEFENDANTS' AND LEGISLATORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' JOINT PARTIAL OBJECTION TO THE MAGISTRATE JUDGE'S NOVEMBER 20, 2014 ORDER ON LEGISLATIVE PRIVILEGE

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"), and Defendants, by and through undersigned counsel, and submit this Response in Opposition to Plaintiffs' Joint Partial Objection to the Magistrate Judge's November 20, 2014 Order on Legislative Privilege. *NAACP* D.E. 214 (hereinafter "Obj.").[1]

INTRODUCTION

Plaintiffs' Joint Partial Objection to the Magistrate Judge's ruling on legislative privilege amounts to nothing more than a second guessing of the Magistrate Judge's careful analysis of and application of well-established and controlling precedent on the intrusion on state sovereignty and legislative independence that would result from ordering logging and production of internal legislative communications. Plaintiffs continue to ignore how highly protective of the privilege the Fourth Circuit precedent has been and rely on unpublished and non-controlling legal authorities. This Court should reject plaintiffs' invitation to intrude on the state sovereignty of North Carolina's legislative branch on the basis of inapplicable, out-of-state precedent, especially where,

[1]Pleadings cited herein were filed in all three of the related cases. Citations are to documents filed in *NAACP v. McCrory*, 1:13-CV-658.

as here, plaintiffs have been provided all the materials to which the United States Supreme Court and the Fourth Circuit would allow them on the issue of alleged discriminatory intent by the legislature. Accordingly, plaintiffs' Joint Partial Objection should be overruled.[2]

ARGUMENT

I. The Objection Should Be Overruled Because the Communications It Seeks Production of are Either Not Responsive to Plaintiffs' Discovery Requests or Relevant to Plaintiffs' Claims.

Plaintiffs' Joint Objection is unclear as to the internal legislative communications it contends the Magistrate Judge erred in failing to order defendants to produce. In one section of their Objection, plaintiffs ask the district court to order production of a privilege log for all internal legislative communications and production of documents held by legislators that allegedly fall outside the scope of legislative privilege, "including internal legislative communications relating to activities that are not integral steps in the legislative process." Obj. at 1. As examples of activities supposedly not integral to the legislative process, plaintiffs recite "communications that occurred after the passage of" S.L. 2013-381. Obj. at 1 n.3. Later, plaintiffs ask the Court to order production of internal legislative communications "relating to the North Carolina General Assembly's consideration and passage of" S.L. 2013-381, with no mention of communications occurring after the passage of that law. Obj. at 18.

[2] Without waiving their objections to whether legislative immunity or privilege applies, defendants have agreed to produce, and have produced, a privilege log for attorney-client communications prior to the initiation of these actions as well as legislator communications with outside state government agencies.

To the extent that plaintiffs are now contending that the legislators should be required to log or disclose communications "relating to the North Carolina General Assembly's consideration and passage of" S.L. 2013-381, plaintiffs have conceded that such documents are protected by legislative privilege. Obj. at 8. Plaintiffs' concession is appropriate as it would be frivolous to argue that communications related to the consideration and passage of the very act at issue were not "legislative acts" or legislative in nature and therefore not worthy of protection.

To the extent that plaintiffs are now contending that the legislators should be required to log or disclose communications *not* relating to the consideration and passage of S.L. 2013-381, then such documents are not responsive to their discovery requests and not relevant to these lawsuits, and therefore the burden of producing such communications would clearly outweigh any possible value these communications would add to these actions.

First, documents that occurred after the passage of S.L. 2013-381 are not responsive to plaintiffs' document requests. For instance, plaintiffs attached to their Objection the subpoena directed to Sen. Bob Rucho. That subpoena propounded seventeen document requests, all of which are substantially similar to the requests propounded on the other legislators and defendants. *NAACP* D.E. 214-1. These requests are focused on documents and communications that legislators would have created during the legislative process leading up to the enactment of SL 2013-381. Such requests are about quintessentially legislative matters and are clearly protected.

To the extent plaintiffs' requests seek communications *unrelated* to the process of enactment of S.L. 2013-381, the Magistrate Judge correctly concluded that such documents would not be relevant to this case.[3] The Magistrate Judge's order concluded that regardless of plaintiffs' requests, "legislative communications relevant to the present suit would be within the scope of legislative privilege." *NAACP* D.E. 207 at 13 n.6. The Magistrate Judge also explained that attempting to distinguish between communications that were or were not part of the legislative process would "require substantial details, which would intrude into legislative affairs and impose a significant burden on legislators." *Id.* The Magistrate Judge was clearly correct on this point and nothing in plaintiffs' Objection is to the contrary.

Moreover, the Magistrate Judge recognized that even if there were a chance that a few communications were relevant, the marginal chance of such a communication being present that was not also protected by legislative privilege was too low to impose the

[3] As argued previously by defendants, even as to communications by individual legislators that *are* related to the enactment process, offhand statements by legislators outside of the legislative record have no relevance whatsoever to the intent of the legislature as a whole. 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. Iowa Dept. Revenue*, 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). *Cf. Sigmon Coal Co. 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."); *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, 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").

significant burden on legislators to log all of their communications. This conclusion was obviously correct. Significantly, plaintiffs' Objection does not address this conclusion by the Magistrate Judge. Accordingly, the Objection should be overruled.

II. The Objection Should Be Overruled Because it Fails to Acknowledge the Important State Sovereignty Interests Protected By Legislative Privilege.

Plaintiffs' Objection focuses on only one side of the analysis this Court directed the Magistrate Judge to follow in assessing the legislators' claim of legislative privilege. They claim that the burden on the legislators is minimal (it is not) and complain that this is an important case.

However, plaintiffs continue to ignore the threat the document requests pose to state sovereignty and the integrity of the legislative process. The Fourth Circuit has clearly recognized the chilling effect that intrusion into the legislative process through discovery requests can wreak on the legislative process. For instance, the Fourth Circuit 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. *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (hereinafter "*WSSC*"). Document requests impermissibly divert the legislators from their duties. Plaintiffs do not and cannot dispute that if this Court requires the production or logging of these records, the legislators and their staff will have to spend countless hours reviewing, categorizing, and/or logging each one of these communications. This alone will divert them from important legislative

work that occurs on a weekly basis, both while the legislature is in session and when it is not in session but its committees are engaged in legislative work.

More importantly, however, the protection of the privilege prevents the chilling and deterring of legislative activity in the future, which, of course, the Fourth Circuit has recognized is sometimes the endgame of litigation in the first place. *WSSC*, 631 F.3d at 181 (legislative privilege shields legislators "from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box"). Presently, legislators communicate with each other and their staff and constituents with an expectation of privacy that fosters and allows candor and honest deliberations. A ruling by this Court that such communications are subject to discovery anytime a citizen sues the State for an alleged constitutional violation will clamp down on these deliberations and seriously impede the work of the sovereign state legislature. Nothing in plaintiffs' Objection addresses this reality. On the other hand, this Court has recognized that other courts have refused to intrude on the privilege "in respect for the sovereignty of the legislature." *NAACP* D.E. 105 at 21-22 (citing *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992) (three-judge panel)).

Plaintiffs also continue to rely on unpublished or non-controlling cases to support their analysis without acknowledging the authority in this circuit that this Court has described as "highly protective" of the privilege. *Id.* at 24. This Court has also noted that unlike other courts, the Fourth Circuit opinions "have often described the legislative privilege as one that is broadly construed." *Id*. at 24 n.14. Moreover, the Fourth Circuit has cited with approval cases from the District of Columbia Circuit which have also

broadly construed the privilege. In this regard, the Fourth Circuit views the protection of the legislative immunity that legislative privilege provides much like the District of Columbia Circuit, not a district court in Texas or New York. Thus, in *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), that Court held that a party is "no more entitled to compel [federal 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 from suit itself. *Id.* Unlike plaintiffs, the Magistrate Judge gave due consideration to this precedent and concluded that plaintiffs' document requests seeking internal legislative communications would intrude too much on the sovereignty and independence of the North Carolina state legislature.[4] Under the controlling authority, the Magistrate Judge was plainly correct.

III. The Objection Should Be Overruled Because it is Nothing More Than an Improper Second Guessing of the Magistrate Judge's Analysis.

The Magistrate Judge analyzed the privilege claim using the factors this Court had noted other courts have often used. This Court stated that the Magistrate Judge should also take into account "the purpose of the legislative privilege" and "evidence that the legislators' compliance would divert them from their legislative duties and/or impose an

[4] While the Magistrate Judge correctly protected internal legislative communications, the Magistrate Judge erred in carving out from that protection communications between legislators and constituents. Those communications raise unique and important issues touching on the First Amendment and legislative activity that are addressed in a partial objection to the Magistrate Judge's Order filed by defendants. *NAACP* D.E. 217.

impermissible burden upon them." *NAACP* D.E. 105 at 25 (citations omitted). The Magistrate Judge analyzed all of these factors.[5]

In assessing the production of internal legislative communications the Magistrate Judge considered the fact that such a production "raises serious concerns regarding the direct intrusion into internal legislative affairs and the potential to inhibit full and frank deliberations in legislative activity." *NAACP* D.E. 207 at 11 (internal quotations and citations omitted). This analysis by the Magistrate Judge speaks directly to the concerns the Fourth Circuit in *WSSC* and other courts have expressed regarding the caution that courts should exercise in intruding on the legislative process. Based on evidence presented by defendants the Magistrate Judge found that even the creation of a privilege log would "itself significantly intrude into the legislative sphere, and would also place a heavy burden on the legislators in contravention of one of the aims of the legislative privilege." *Id.* at 12.[6]

[5] 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. *NAACP* D.E. 207 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. *NAACP* D.E. 133 at 7. (explaining an interpretation of *WSSC* 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.

[6] In challenging this analysis by the Magistrate Judge, plaintiffs continue to rely on redistricting cases, criminal cases, and cases in which documents were sought from legislators who were not acting in a legislative capacity. *NAACP* D.E. 214 at 14-18. Defendants have explained previously why plaintiffs' reliance on these authorities is misplaced. *NAACP* D.E. 150 at 6-10; *NAACP* D.E. 85 at 9-12.

In weighing these legitimate legislative concerns against the need for the evidence in the case, the Magistrate Judge noted that the plaintiffs had not demonstrated that the value of a privilege log would outweigh those concerns. Plaintiffs complain that this analysis by the Magistrate Judge "assumes that no document in the log would ever be subject to production," *NAACP* D.E. 214 at 13, but this is incorrect. The Magistrate Judge specifically explained that even if there might possibly be a relevant communication that would be disclosed by the log, such a possibility of discovering relevant evidence would not "outweigh the significant burden and intrusion involved in preparing a privilege log." *NAACP* D.E. 207 at 13 n.6.

Plaintiffs' Objection does not address this analysis by the Magistrate Judge. Instead, plaintiffs say that the Magistrate Judge's order never "squarely" finds that the legislative concerns outweighed plaintiffs' arguments for disclosure. *NAACP* D.E. 214 at 13. This overlooks the Magistrate's careful weighing of all of the relevant factors which is directly reflected in the order. It is instead a second guessing of the Magistrate Judge's analysis which should be rejected by this Court.

CONCLUSION

For the foregoing reasons, the Court should overrule plaintiffs' Joint Partial Objection to the Magistrate Judge's November 20, 2014 Order on Legislative Privilege.

This the 18th day of December, 2014.

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CERTIFICATE OF SERVICE

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