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 the Governor of North Carolina, et al., Defendants.	**PLAINTIFFS' JOINT OPPOSITION TO DEFENDANTS' AND THE STATE LEGISLATORS' PARTIAL OBJECTION TO THE MAGISTRATE JUDGE'S NOVEMBER 20, 2014 ORDER ON LEGISLATIVE PRIVILEGE** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 13-cv-861

Plaintiffs oppose Defendants' and the State Legislators' partial objection to the Magistrate Judge's November 20, 2014 order on legislative privilege. *See* ECF No. 204, 13-cv-861 (Dec. 8, 2014) ("Defs.' Partial Obj."); Order, ECF No. 194, 13-cv-861 (Nov. 20, 2014) ("Nov. 20 Order").[1] The portion of the November 20 order addressing Defendants' and the State Legislators' obligation to produce documents reflecting communications between legislators and outside third parties was neither clearly erroneous nor contrary to law. Accordingly, this Court should affirm this portion of the November 20 order.[2]

I. BACKGROUND AND PROCEDURAL HISTORY[3]

Plaintiffs have filed legal challenges pursuant to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, regarding provisions of North Carolina House Bill 589 ("HB 589"). Plaintiffs allege that HB 589 was enacted with the purpose, and will have the result, of denying or abridging the right of minority voters to vote on account of race, color, or language minority status. The three related cases will require the Court to undertake a fact-intensive "appraisal of the design and impact" of HB 589's challenged provisions. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Plaintiffs seek documents

[1] Pleadings cited herein were filed in all three of the related cases. Citations are to documents filed in *United States v. North Carolina*, 13-cv-861.

[2] The Duke intervenors also support this opposition brief.

[3] Plaintiffs' Joint Partial Objection, filed on December 4, 2014, includes a thorough discussion of the relevant background and procedural history. *See* Pls.' Joint Partial Obj. to the Magistrate Judge's November 20, 2014 Order on Legislative Privilege at 2-6, ECF No. 201 (December 4, 2014). Plaintiffs incorporate that discussion by reference here.

from Defendants and 13 North Carolina legislators (the "State Legislators")[4] relating to the drafting, consideration, and implementation of HB 589, including documents reflecting legislative purpose; communications among state legislators and between state legislators and individuals outside the North Carolina General Assembly; and factual data and reports relating to, for example, rates of possession of DMV-issued photo identification among North Carolina voters, and the costs and other impacts of HB 589.

Defendants have steadfastly resisted this discovery, repeatedly arguing that the doctrine of legislative immunity categorically bars Plaintiffs from seeking *any* discovery of documents in the possession of state legislators. *See, e.g.*, Mem. in Support of Mot. to Quash, ECF No. 45 (Jan. 20, 2014); Objection to Order of 27 March 2014, ECF No. 83 (April 2, 2014); Br. on the Issue of Legislative Immunity and Legislative Privilege, ECF No. 119 (June 11, 2014). The Court has repeatedly and consistently rejected this argument. *See* Order at 3, ECF No. 79 (March 27, 2014) ("March 27 Order"); Memorandum Order at 24-25, ECF No. 93 (May 15, 2014) ("May 15 Order"); Nov. 20 Order at 5.

The dispute over production of legislator documents has now dragged on for nearly a year. In the November 20 order Defendants challenge here, the Magistrate Judge addressed three categories of documents. First, the Magistrate Judge rejected Defendants' contention that legislative privilege shields communications between legislators and outside third parties, Nov. 20 Order at 8-11, and ordered Defendants to

[4] For purposes of this brief, Plaintiffs refer to Defendants and the State Legislators collectively as "Defendants."

produce documents reflecting such communications, *id.* at 15. Second, the Magistrate Judge found that legislator communications with outside counsel prior to the commencement of litigation on August 12, 2013, were not protected by legislative privilege. *See id.* at 13-14. For documents falling into this second category, Defendants were ordered to produce a privilege log of documents they contend are protected by any other privilege, such as attorney-client privilege. *Id.* at 15. Third, the Magistrate Judge held that Defendants need not produce documents, or even a privilege log, reflecting communications among legislators or between legislators and legislative staff. *Id.*

On December 8, 2014, Defendants objected to the portion of the November 20 order that addressed the first category of documents described above: communications between legislators and outside third parties.[5] *See* Defs.' Partial Obj. at 3. Defendants' brief states that their partial objection is limited to "the issue of constituent communications." *Id.* at 2-3. However, since filing their objection, Defendants have indicated that their objection is aimed at more than just correspondence to and from voters in a legislator's district. During a telephonic status conference with the Magistrate Judge on December 12, 2014, Defendants stated that their objection is broad and covers communications between state legislators and *any* outside third parties, except state

[5] On December 8, 2014, Defendants produced a privilege log of documents falling into the second category of documents: legislator communications with outside counsel prior to the commencement of litigation. And, as noted above, on December 4, 2014, Plaintiffs jointly objected to the portion of the November 20 order addressing the third category of documents. *See supra* n.3.

agencies.[6] Thus, although not apparent on its face, Defendants' objection apparently extends to legislator communications with lobbyists, consultants, political party representatives, public interest groups, voters outside a legislator's district, members of the press, and many others, along with communications with constituents of the State Legislators.[7]

II. LEGAL STANDARD

Where, as here, a magistrate judge issues an order resolving an issue that is "not dispositive of a party's claim or defense," a district court may "modify or set aside any part of" the order only if it is "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a).

"[B]ecause '[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence,' any such privilege 'must be strictly construed.'" *United States v. Squillacote*, 221 F.3d 542, 560 (4th Cir. 2000) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Even privileges with "venerable pedigree[s]," like the attorney-client privilege, are "inconsistent with the general duty to disclose and impede[] the investigation of the

[6] On December 15, 2014, Defendants produced 170 documents that they represent reflect responsive communications between the State Legislators and state agencies. Plaintiffs are in the process of reviewing these documents.

[7] Because Defendants have refused to produce a privilege log of documents they claim are protected by state legislative privilege, Plaintiffs do not know the identities of the individuals with whom the State Legislators corresponded regarding HB 589 and whom Defendants characterize as "constituents."

truth" and "must be strictly construed." *United States v. Under Seal,* 748 F.2d 871, 875 (4th Cir. 1984).

III. ARGUMENT

The Magistrate Judge correctly found that documents reflecting communications between legislators and outside third parties must be produced in this litigation. Such communications are outside the scope of state legislative privilege, which covers only confidential communications relating to legislative acts. To the extent state legislative privilege could even arguably reach these external communications, the relevant balancing factors weigh in favor of disclosure in this case. Finally, Defendants' contention that the interests of unidentified members of the public favor non-disclosure is unavailing.

A. Communications Between Legislators and Outside Third Parties Fall Outside the Scope of State Legislative Privilege.

State legislative privilege is a qualified evidentiary privilege, governed by Rule 501 of the Federal Rules of Civil Procedure. *See* May 15 Order at 11, 24-25. As the parties resisting discovery, Defendants and the State Legislators bear the burden of proving their claim of privilege. *See N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011); *see also* Fed. R. Civ. P. 45(e)(2)(A)(i), (ii); 26(b)(5)(A)(i), (ii).

Defendants have failed to establish that "the information sought [by Plaintiffs] falls within the scope of the privilege." *Perez v. Perry*, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge court); May 15 Order at 25 ("Whether Plaintiffs' requests seek a document or group of documents that implicates the legislative privilege will be

for the Magistrate Judge to determine. . . ."). The qualified state legislative privilege does not cover every act or communication of a legislator, *see*, *e.g.*, May 15 Order at 24-25; *EEOC v. Washington Suburban Sanitary Comm'n* (*WSSC*), 631 F.3d 174, 184 (4th Cir. 2011), yet Defendants claim privilege over all communications between legislators and all outside third parties except state agencies.[8]

The Magistrate Judge correctly concluded that communications between legislators and outside third parties are not privileged. *See* Nov. 20 Order at 8-9. State legislative privilege only covers "integral steps in the legislative process." *WSSC*, 631 F.3d at 184 (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)); *see also* May 15 Order at 24-25. Legislative acts, to which the privilege may apply, "generally bear the outward marks of public decisionmaking, including the observance of formal legislative procedures." *WSSC*, 631 F.3d at 184; *see also Doe v. Nebraska*, 788 F. Supp. 2d 975, 984 (D. Neb. 2011) (legislative privilege protects "only the legislative decision making process"); *Favors v. Cuomo* (*Favors I*), 285 F.R.D. 187, 210 (E.D.N.Y. 2012) (to same effect). Even under the Constitution's Speech and Debate Clause, which grants members of Congress significantly more protections than common law state legislative privilege affords state lawmakers, *see United States v. Gillock*, 445 U.S. 360, 369 (1980),[9] an act must be "an integral part of the deliberative and communicative processes by which

[8] To the extent Defendants continue to argue that state legislative privilege is absolute, *see* Defs.' Partial Objection at 4 n.2, this argument is foreclosed by the Court's May 15 order, which held to the contrary. *See* May 15 Order at 24-25; *see also* March 27 Order at 3.

[9] The Speech and Debate Clause does not apply to state legislators; state legislators must rely on federal common law. *See* May 15 Order at 11.

Members participate in committee and House proceedings[,]" in order to be protected, *Gravel v. United States*, 408 U.S. 606, 625 (1972).

Courts applying state legislative privilege have frequently concluded that communications between legislators and outside third parties, including constituents, consultants, and lobbyists, are not "legislative acts" and "thus documents relating to them are not subject to protection under the legislative privilege." Mem. and Order at 16-17, *Favors v. Cuomo* (*Favors II*), 11-cv-5632 (E.D.N.Y. Feb. 8, 2013) (unpublished) (Ex. 1); *see also Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 663-64 (E.D. Va. 2014); *Almonte v. City of Long Beach*, 2005 WL 1796118, at *3 (E.D.N.Y. Jul. 27, 2005); *Doe*, 788 F. Supp. 2d at 987. This includes efforts to educate the public about lawmakers' activities, responses to constituent concerns and media criticisms, and other "communication with those outside the legislative forum." *Favors II*, at 15-16, Ex. 1.

That a lawmaker may communicate with an outsider who has "special expertise," Defs.' Partial Obj. at 6, does not by itself render the communication an "integral step" in the legislative process, *WSSC*, 631 F.3d at 184. Courts have long recognized that conversations between legislators and "knowledgeable outsiders" are not protected by the qualified state legislative privilege. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *see also Almonte*, 2005 WL 1796118, at *3. Indeed, many courts have held that even communications between legislators and retained consultants are not privileged. *See Baldus v. Wisc. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011); *Page*, 15 F. Supp. 3d at 664; *cf.*

Favors I, 285 F.R.D. at 212 (recognizing that legislative privilege carries less weight when applied to communications between legislators and "technical employees who provide information to legislators collectively") (internal quotation marks omitted).

Further, as the Magistrate Judge correctly found, *see* Nov. 20 Order at 9, when legislators share information that otherwise might be protected by legislative privilege with outside parties, they waive whatever legislative privilege would otherwise attach to that information. To be privileged, communications must be confidential, and the "law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations." *Favors I*, 285 F.R.D. at 212. Courts therefore routinely hold that documents and communications exchanged between legislators and non-legislators (other than their personal legislative staff), and communications made in the presence of non-legislators, are not protected by state legislative privilege. *See, e.g.*, *id.* at 213 n.26; *Balanced Map*, 2011 WL 4837508, at *10; *Perez*, 2014 WL 106927, at *2; *Almonte*, 2005 WL 1796118, at *3. This is true even when the "outsiders are consummate insiders" in a practical sense, such as lobbyists or political operatives. *Rodriguez*, 280 F. Supp. 2d at 101 (internal quotation marks omitted); *Balanced Map*, 2011 WL 4837508, at *10.

B. The Five-Factor Balancing Test Weighs in Favor of Disclosure.

Even if communications between legislators and outside third parties might in some instances fall within the scope of state legislative privilege, they should be produced in this litigation because the balance of interests weighs in favor of disclosure. State legislative privilege is qualified, not absolute. *See* Nov. 20 Order at 5; May 15

Order at 25. Defendants' reliance on cases applying the Constitution's Speech and Debate Clause is therefore misplaced. *See* Defs.' Partial Obj. at 6 (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) and *Miller v. Transam. Press, Inc.*, 709 F.2d 524 (9th Cir. 1983)). "In contrast to the privilege enjoyed by members of Congress under the Speech or Debate Clause, there is no absolute evidentiary privilege for state legislators for their legislative acts." *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906, 920 (W.D. Va. 2012) (internal quotation marks omitted); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304-05 (D. Md. 1992) (three-judge court) (opinion of Murnaghan, C.J., and Motz, D.J.) (noting that "testimonial legislative immunity [for state lawmakers] is not an absolute"); *Perez*, 2014 WL 106927, at * 2; May 15 Order at 25. Courts considering claims of state legislative privilege typically apply a five-factor balancing test, considering (1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees. *See* May 15 Order at 22 n.11.

Here, the balance of factors weighs in favor of disclosing legislator communications, including communications between legislators and outside third parties. First, it is undisputed that the voting rights cases currently before the Court involve serious issues "of great importance" (factor 3), and that the State is directly involved in the litigation (factor 4). Defs.' Partial Obj. at 4; *see also* Nov. 20 Order at 7-8; *Veasey v. Perry*, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014).

Second, the Magistrate Judge correctly found that legislative documents are relevant to Plaintiffs' claims in this case, and are the sort of evidence that courts commonly consider in Voting Rights Act cases (factor 1). *See* Nov. 20 Order at 6-7. The voting rights cases presently before the Court involve precisely the context in which judicial inquiry into legislative purpose is appropriate. *See* Pls.' Joint Partial Obj. to the Magistrate Judge's November 20, 2014 Order on Legislative Privilege at 14-15, ECF No. 201 (December 4, 2014) ("Pls.' Joint Partial Obj.") (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Marylanders*, 144 F.R.D. at 304; *Page*, 15 F. Supp. 3d at 665). Indeed, as the district court considering a Section 2 challenge to Texas' photo voter identification law found, the "motive and intent of the state legislature when it enacted [the law] is the crux of this Voting Rights Act case." *Veasey*, 2014 WL 1340077, at *2. The Fourth Circuit itself has emphasized that race discrimination cases are among the "limited exceptions to the principle that judicial inquiry into legislative motive is to be avoided." *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259 & n.6 (4th Cir. 1989). In this very case, the Fourth Circuit found relevant to the Section 2 inquiry the fact that "North Carolina rushed to pass House Bill 589" and that the "legislative leadership likely knew [the full bill] could not have gotten past federal preclearance in the pre-*Shelby County* era." *League of Women Voters v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014); *see also id.* at 246-47. Although the Fourth Circuit highlighted these facts in the context of discussing the totality of the circumstances, legislative motive is also directly relevant to Plaintiffs' claims that a discriminatory purpose was one of the motivations for the State's adoption

of these restrictions on voting. *See, e.g., United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009); *Arlington Heights*, 429 U.S. at 265-66.

Defendants are wrong to contend that opinions expressed by outside parties to legislators cannot have "any relevance whatsoever to the intent of the legislature" or "lead to relevant evidence," Defs.' Partial Obj. at 5. That contention mischaracterizes the nature of the purpose inquiry in voting rights cases. "[A]ssessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) (quoting *Arlington Heights*, 429 U.S. at 266). Communications from constituents, public interest groups, lobbyists and others will reveal factual information legislators considered in the process of drafting and passing HB 589. *See, e.g.*, *Page*, 15 F. Supp. 3d at 666. Furthermore, legislators' communications with third parties relating to HB 589 are likely to reveal lawmakers' contemporaneous statements and viewpoints, including how lawmakers responded to evidence of disproportionate racial impact. *See, e.g.*, *Arlington Heights*, 429 U.S. at 266-68; *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046-47 (5th Cir. 1984); *Page*, 15 F. Supp. 3d at 666; *Veasey*, 2014 WL 1340077, at *2.

Third, as the Magistrate Judge recognized, the legislative evidence Plaintiffs seek is not reasonably obtainable elsewhere (factor 2). *See* Nov. 20 Order at 7; *Veasey*, 2014 WL 1340077, at *3; *Favors I*, 285 F.R.D. at 219. Notwithstanding Defendants' argument to the contrary, *see* Defs.' Partial Obj. at 9, Plaintiffs are not required to make their case based exclusively on the public legislative record. *See* Pls.' Joint Partial Obj. at 14-16;

United States' Response to the State Legislators' and Defs.' Br. on the Issue of Legislative Immunity and Legislative Privilege at 3-5, ECF No. 142 (Jun. 25, 2014) ("United States' June 25 Response"). Reliance on public statements alone is inadequate because "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982); *see also Veasey*, 2014 WL 1340077, at *2. This is particularly true here because, as in challenges to legislative redistricting plans under Section 2 of the Voting Rights Act or the 14th and 15th Amendments, the challenged legislation—HB 589—effectively resets the rules by which the democratic process operates, which "[i]nevitably . . . directly involves the self-interest of the legislators themselves." *Marylanders*, 144 F.R.D. at 304. *See also* Pls.' Joint Partial Obj. at 17.

Fourth, concerns about intrusion into the legislative process and the possibility of future timidity by government employees (factor 5) are minimal where communications with outsiders are at issue. *See Rodriguez*, 280 F. Supp. 2d at 101; *Marylanders*, 144 F.R.D. at 305. Legislators have no reasonable expectation of confidentiality in communications they exchange with individuals outside the General Assembly because third party non-legislators are under no obligation to keep such communications confidential. *Cano v. Davis*, 193 F. Supp. 2d 1177, 1179 (C.D. Cal. 2002) (three-judge court). Moreover, communications about legislation between legislators and members of the public are generally public records subject to disclosure under the North Carolina Public Records Act, as the North Carolina Attorney General's office had formally

advised the director of the General Assembly's Research Division. *See* Attorney General Legal Op., 2002 WL 544469, at *1-2 (Feb. 14, 2002); United States' June 25 Response at 9-10.[10] Requiring production of legislator communications with outside third parties thus "will not add measurably to the inhibitions already attending legislative deliberations." *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989); *see also Rodriguez*, 280 F. Supp. 2d at 101; *Marylanders*, 144 F.R.D. at 304-05 (allowing non-legislator members of a redistricting committee to be deposed concerning the committee's deliberations).

Finally, Defendants' contention that third party interests favor non-disclosure in these cases is unavailing. *See* Defs.' Partial Obj. at 7. As an initial matter, disclosure of legislator communications through the discovery process in these cases does not constitute public disclosure. Under the consent protective order entered in these cases, Defendants may designate sensitive information as "confidential" or "highly confidential," thereby preventing its public release. *See* ECF Nos. 36 & 37 (Protective Order and Supp. Protective Order).

In addition, Defendants lack standing to assert purported First Amendment rights of unidentified members of the public who have communicated with legislators or

[10] Defendants contend that constituent communications are exempt from disclosure under the North Carolina Public Records Act. *See* Defs.' Partial Obj. at 7 n.5. But Defendants' current position appears to be inconsistent with the North Carolina Attorney General's 2002 Advisory Opinion cited above. In any event, federal common law, not state law, governs the scope of state legislative privilege in these cases. *See* Fed. R. Evid. 501; *United States v. Gillock*, 445 U.S. 360 368 (1980); *Virmani v. Novant Health Inc.*, 259 F.3d 284, 286 (4th Cir. 2001). Federal courts have not shied away from overruling state confidentiality laws or privileges "found to be in conflict with the enforcement of federal civil rights laws." *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989) (citing cases).

legislative staff. *See* Defs.' Partial Obj. at 7-8. Typically, "parties [must] rely only on constitutional rights which are personal to themselves." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958); *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998); *Hewett v. City of King*, 2014 WL 3109800, at *11 n.10 (M.D.N.C. July. 8, 2014) (Slip Op.). Defendants have not shown that they have third-party standing to assert the rights of unidentified members of the public with whom they corresponded or from whom they received correspondence.

Furthermore, Defendants have not shown the existence of the constitutional right they purport to advance. Defendants claim, in essence, that the First Amendment guarantees members of the public the right to petition, or communicate with, the government in secret. *See* Defs.' Partial Obj. at 7. The only case they cite in support of this proposition, *NAACP v. Alabama*, is about the associational rights of members of a group organization, not about the rights of individual constituents to petition their legislators. In *NAACP v. Alabama*, the Supreme Court recognized the NAACP's right to resist compelled disclosure of its membership list so that its members could continue to "engage in lawful association in support of their common beliefs" without undue interference by the state. 357 U.S. at 460. The Court in *NAACP* did not hold, or even suggest, that individual members of the public have a constitutional right to communicate with state legislators in secret. *Cf. Doe v. Public Citizen*, 749 F.3d 246, 271 (4th Cir. 2014) (concluding that although the First Amendment right to petition the government "secures meaningful access to federal courts . . . [i]t does not provide for a right to

petition the courts in secret").[11] In addition, the breadth of Defendants' privilege assertion belies their argument: the State Legislators, who presumably corresponded with or received correspondence from third parties, including constituents, who did not share their policy objectives, as well as with constituents who did, cannot reasonably claim a group association in furtherance of "common beliefs" with *every* individual with whom they communicated about HB 589.

More generally, nothing in the record suggests that members of the public have been subject to "unwanted publicity [or] retaliation" for expressing views on HB 589. Defs.' Partial Obj. at 7. *See NAACP v. Alabama*, 357 U.S. at 462. In short, Defendants have not shown that members of the public will be burdened—or that their potential future communications with legislators will be chilled— by discovery of legislators' third party communications in these cases. *Cf. Marylanders*, 144 F.R.D. at 305 n.23.

C. All Responsive Documents in the Possession of State Legislators Should Be Produced Without Further Delay.

Given the gravity of the issues at stake in this case, including allegations of intentional racial discrimination in voting, Plaintiffs contend that all responsive documents in the possession of the State Legislators should be produced, and have objected to that portion of the Magistrate's Order that held otherwise. *See generally* Pls.' Joint Partial Obj. In light of upcoming discovery deadlines, and the many delays in Defendants' production of legislative documents, Plaintiffs respectfully request that the

[11] The private plaintiffs' objection to producing documents that are protected by their First Amendment associational rights is thus not akin to Defendants' claim of privilege over communications with unidentified constituents and other outside parties. *See* Defs.' Partial Obj. at 8.

Court order Defendants and the State Legislators to produce all responsive legislative documents, including documents reflecting communications between legislators and outside third parties, as well as certain documents reflecting communications among legislators, and between legislators and legislative staff, by January 9, 2015.[12]

IV. CONCLUSION

For all the foregoing reasons, the Court should affirm the November 20 order to the extent that it that required Defendants and the State Legislators to produce documents reflecting communications between legislators and all outside third parties.

[12] As discussed in Plaintiffs' Joint Partial Objection, some legislator-to-legislator and legislator-to-legislative staff communications are outside the scope of state legislative privilege and should be produced. *See generally* Pls.' Joint Partial Obj. at 7-11. Other documents, which may be subject to the qualified state legislative privilege, should be identified on a privilege log. *See id.* at 1, 18-19. Contrary to Defendants' representations in their response brief filed on December 18, ECF No. 207 at 4, Plaintiffs have not conceded that any group of documents is categorically protected by legislative privilege.

Dated: December 18, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on December 18, 2014, I electronically filed the foregoing **Plaintiffs' Joint Opposition to Defendants' and the State Legislators' Partial Objection to the Magistrate Judge's November 20, 2014 Order on Legislative Privilege,** using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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