

**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.

LEAGUE OF WOMEN VOTERS OF
NORTH CAROLINA, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

UNITED STATES OF AMERICA,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

**PLAINTIFFS' JOINT MOTION TO
ENFORCE AND REQUEST FOR
TELEPHONIC STATUS
CONFERENCE**

Case No.: 1:13-CV-658

Case No.: 1:13-CV-660

Case No.: 1:13-CV-861

PLAINTIFFS' JOINT MOTION TO ENFORCE
AND REQUEST FOR STATUS CONFERENCE

Plaintiffs respectfully request that the Court hold a brief telephonic status conference to discuss an outstanding discovery issue related to the Court's November 20, 2014 Order on legislative privilege and the production of documents responsive to Plaintiffs' discovery requests, and hereby move to enforce that Order and require that Defendants produce responsive legislative documents by Thursday, February 12, 2015. The parties have met and conferred (and will continue to confer) in an effort to resolve this ongoing discovery issue. Defendants oppose this Motion to Enforce and Request for a Telephonic Status Conference.

On December 5, 2013, Plaintiffs served subpoenas on certain non-party state legislators (hereinafter, "State Legislators") seeking communications relating to the drafting, consideration, and implementation of North Carolina House Bill 589, including communications between state legislators and individuals outside the North Carolina General Assembly. For well over a year, Defendants and State Legislators 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.*, Jan. 20, 2014 Mem. in Support of Mot. to Quash, Doc. 45; April 2, 2014 Objection to Order of 27 March 2014, Doc. 83; June 11, 2014 Br. on the Issue of Legislative Immunity and Legislative Privilege, Doc. 119. This Court has repeatedly and

consistently rejected this argument. *See* Mar. 27, 2014 Order at 3, Doc. 79; May 15, 2014 Memorandum Order at 24-25, Doc. 93.

Recently, on November 20, 2014, this Court rejected Defendants' and State Legislators' argument that legislative privilege precluded the production of communications between legislators and third parties, including communications between legislators and their constituents.¹ *See* Nov. 20, 2014 Memorandum Order at 11, Doc. 207 ("November 20 Order"). Although the Court ordered production of all communications between legislators and third parties, Defendants and State Legislators' filed an objection with the District Court only to the portion of the Order overruling their objection to legislative privilege as to communications between legislators and constituents. *See* Defendants' Objection at 2, Doc. 204.

On February 4, 2015, the District Court overruled that objection, concluding that "the Magistrate Judge's determination that communications between State legislators and their constituents are not protected from disclosure by the legislative privilege is neither clearly erroneous nor contrary to law." Feb. 4, 2015 Order at 23-24, Doc. 231.

Thus, on February 5, 2015, Plaintiffs sought immediate production of all remaining responsive communications between State legislators and third parties, including constituents, by Monday, February 9, 2015. Defendants and the State

¹ Notably, as this Court recognized in its November 20 Order, "all of the communications are in the possession of counsel for Defendants, and it appears that the documents can be sorted electronically by sender and recipient to retrieve and produce communications with third parties without substantially burdening the legislators." November 20 Order at 11. Thus, nothing prevents Defendants from reviewing and preparing the documents for immediate production.

Legislators, for their part, have refused to produce any of the requested communications by February 9th, or at any point, while they are considering their options for appeal. Defendants have not provided any legal support for the contention that Judge Schroeder's February 4 Order is immediately appealable. Defendants must produce the responsive legislative documents without further delay. But even if the February 4 Order is immediately appealable, Defendants would not be prejudiced by producing responsive legislative documents now as they are required.

Indeed, nothing prevents Defendants from labelling responsive documents as "confidential" or "highly confidential," pursuant to the protective order, and producing them at this time, without waiving any assertion of privilege or work-product protection, so that Plaintiffs can use them to prepare their case. If Defendants are successful in an appeal, then they are free to claw back any documents deemed privileged and request an order prohibiting Plaintiffs from using or disclosing documents containing privileged material. And if Defendants lose their appeal, Plaintiffs would not have been prejudiced by any further delay in the production of responsive documents. Such an approach would enable the parties to move forward with discovery and without prejudice to any party.

Accordingly, Plaintiffs now request a status conference, at the earliest available date, to discuss the remaining dispute concerning responsive communications between State legislators and third parties in the custody and control of the Defendants that this Court, and the District Court, ordered Defendants and the State Legislators to produce. Additionally, in light of upcoming discovery deadlines, and the many delays in

Defendants' production of legislative documents, Plaintiffs respectfully request that the Court order Defendants and the State Legislators to produce all responsive legislative documents, including documents reflecting communications between legislators and third parties, including their constituents, by February 12, 2015.

Dated: February 9, 2015

Respectfully submitted,

Penda D. Hair
Edward A. Hailes, Jr.
Denise D. Lieberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
Phone: (202) 728-9557
phair@advancementproject.com

Irving Joyner (N.C. State Bar #
7830)
P.O. Box 374
Cary, NC 27512
Phone: (919)319-353
ijoyner@nccu.edu

By: /s/ Adam Stein

Adam Stein (N.C. State Bar # 4145)
Of Counsel
TIN FULTON WALKER & OWEN, PLLC
312 West Franklin Street
Chapel Hill, NC 27516
Phone: (919) 240-7089
astein@tinfulton.com

/s/ Daniel T. Donovan

Thomas D. Yannucci
Daniel T. Donovan
Susan M. Davies
Bridget K. O'Connor
K. Winn Allen
Kim Knudson
Jodi Wu
Christopher J. Maner
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
Phone: (202) 879-5000
tyannucci@kirkland.com

Attorneys for Plaintiffs in North Carolina Conference of NAACP, et al. v. McCrory, et al.

Laughlin McDonald*
ACLU VOTING RIGHTS PROJECT
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
Phone: (404) 500-1235
lmcDonald@aclu.org
* *appearing pursuant to Local Rule
83.1(d)*

Christopher Brook (State Bar # 33838)
ACLU of North Carolina Legal Foundation
P.O. Box 28004
Raleigh, NC 27611-8004
Phone: (919) 834-3466
cbrook@acluofnc.org

/s/ Allison J. Riggs
Anita S. Earls (State Bar # 15597)
Allison J. Riggs (State Bar # 40028)
Clare R. Barnett (State Bar # 42678)
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 Highway 54, Suite 101
Durham, NC 27707
Phone: (919) 323-3380 ext. 115
anita@southerncoalition.org

Dale Ho*
Julie A Ebenstein*
ACLU Voting Rights Project
125 Broad Street
New York, NY 10004
Phone: (212) 549-2693
dale.ho@aclu.org
* *appearing pursuant to Local Rule
83.1(d)*

Attorneys for Plaintiffs in League of Women Voters of North Carolina, et al. v. North Carolina, et al.

/s/ Marc E. Elias
Marc E. Elias
John M. Devaney
Elisabeth C. Frost
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Phone: (202) 654-6200
melias@perkinscoie.com

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr. (State Bar # 4112)
John W. O'Hale (State Bar # 35895)
Caroline P. Mackie (State Bar # 41512)
POYNER SPRUILL LLP
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Phone: (919) 783-6400
espeas@poynerspruill.com

Attorneys for Plaintiff-Intervenors in League of Women Voters of North Carolina, et al. v. North Carolina, et al.

/s/ Gill P. Beck

Gill P. Beck (State Bar # 13175)
Special Assistant United States Attorney
OFFICE OF THE UNITED STATES ATTORNEY
United States Courthouse
100 Otis Street
Asheville, NC 28801
Phone: (828) 259-0645
gill.beck@usdoj.gov

/s/ John A. Russ IV

T. Christian Herren, Jr.
John A. Russ IV
Catherine Meza
David G. Cooper
Spencer R. Fisher
Elizabeth Ryan
J. Garrett
Avner Shapiro
Attorneys, Voting Section
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE
Room 7254-NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Phone: (800) 253-3931
john.russ@usdoj.gov

Attorneys for Plaintiffs in United States v. North Carolina, et al.

CERTIFICATE OF SERVICE

I, Daniel T. Donovan, hereby certify that, on February 9, 2015, I filed a copy of the foregoing Plaintiffs' Joint Motion to Enforce and Request for Telephonic Status Conference using the CM/ECF system, which on the same date sent notification of the filing to the following:

**Counsel for Plaintiffs in North Carolina
State Conference of the NAACP, et al. v.
McCrary, et al.**

Adam Stein
TIN FULTON WALKER & OWEN, PLLC
312 West Franklin Street
Chapel Hill, NC 27516
Telephone: (919) 240-7089
Facsimile: (919) 240-7822
E-mail: astein@tinfulton.com

Penda D. Hair
Edward A. Hailes
Denise Lieberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
Telephone: (202) 728-9557
E-mail: phair@advancementproject.com

Irving Joyner
PO Box 374
Cary, NC 27512
E-mail: ijoyner@ncu.edu

Daniel T. Donovan
Thomas D. Yannucci
Susan M. Davies
Bridget K. O'Connor
K. Winn Allen
Kimberly D. Rancour
Jodi K. Wu
Christopher J. Maner
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
Telephone: (202) 879-5174
Facsimile: (202) 879-5200
E-mail: daniel.donovan@kirkland.com

**Counsel for Plaintiffs in League of
Women Voters of North Carolina, et al. v.
North Carolina, et al.**

Anita S. Earls (State Bar # 15597)
Allison J. Riggs (State Bar # 40028)
Clare R. Barnett (State Bar #42678)
SOUTHERN COALITION FOR SOCIAL
JUSTICE
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: (919) 323-3380 ext. 115
Facsimile: (919) 323-3942
E-mail: anita@southerncoalition.org

Christopher Brook (State Bar #33838)
ACLU of NORTH CAROLINA LEGAL
FOUNDATION
P.O. Box 28004
Raleigh, NC 27611-8004
Telephone: (919) 834-3466
Facsimile: (866) 511-1344
E-mail: cbrook@acluofnc.org

Dale Ho*
Julie A. Ebenstein*
ACLU VOTING RIGHTS PROJECT
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2693
E-mail: dale.ho@aclu.org
**appearing pursuant to Local Rule 83.1(d)*

Laughlin McDonald*
ACLU VOTING RIGHTS PROJECT
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
Telephone: (404) 500-1235
E-mail: lmcDonald@aclu.org
**appearing pursuant to Local Rule 83.1(d)*

**Counsel for Plaintiffs in US v. North
Carolina, et al.**

T. Christian Herren, Jr.
John A. Russ IV
Catherine Meza
David G. Cooper
Spencer R. Fisher
Elizabeth Ryan
J. Garrett
Avner Shapiro
Attorneys, Voting Section
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE
Room 7254-NWB

950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (800) 253-3931
Facsimile: (202) 307-3961
E-mail: john.russ@usdoj.gov
E-mail: catherine.meza@usdoj.gov

Gill P. Beck (State Bar # 13175)
Special Assistant United States Attorney
OFFICE OF THE UNITED STATES
ATTORNEY
United States Courthouse
100 Otis Street
Asheville, NC 28801
Telephone: (828) 259-0645
E-mail: gill.beck@usdoj.gov

**Counsel for Plaintiff-Intervenors in
League of Women Voters of North
Carolina, et al. v. North Carolina, et al.**

Marc E. Elias
John M. Devaney
Elisabeth C. Frost
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
E-mail: melias@perkinscoie.com
E-mail: jdevaney@perkinscoie.com
E-mail: efrost@perkinscoie.com

Edwin M. Speas, Jr. (State Bar # 4112)
John W. O'Hale (State Bar # 35895)
Caroline P. Mackie (State Bar # 41512)
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075
E-mail: espeas@poynerspruill.com
E-mail: johale@poynerspruill.com

E-mail: cmackie@poynerspruill.com

Telephone: (919) 787-9700

Facsimile: (919)783-9412

Counsel for Defendant Patrick McCrory

E-mail: thomas.farr@ogletreedeakins.com

E-mail: phil.strach@ogletreedeakins.com

Karl S. Bowers, Jr.

BOWERS LAW OFFICE LLC

P.O. Box 50549

Columbia, SC 29250

Telephone: (803) 260-4124

Facsimile: (803) 250-3985

E-mail: butch@butchbowers.com

Robert C. Stephens

General Counsel

OFFICE OF THE GOVERNOR OF

NORTH CAROLINA

20301 Mail Service Center

Raleigh, North Carolina 27699

Telephone: (919) 814-2027

Facsimile: (919) 733-2120

E-mail: bob.stephens@nc.gov

Of Counsel

**Counsel for Defendants State of North
Carolina and Members of the State Board
of Elections**

Alexander Peters, Esq.

NC DEPARTMENT OF JUSTICE

PO Box 629

Raleigh, NC 27602

Telephone: (919) 716-6913

Facsimile: (919) 716-6763

E-mail: apeters@ncdoj.gov

Thomas A. Farr, Esq.

Phillip J. Strach, Esq.

OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C

4208 Six Forks Road

Raleigh, NC 27609

Respectfully Submitted,

/s/ Daniel T. Donovan

Daniel T. Donovan
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
Telephone: (202) 879-5174
Facsimile: (202) 879-5200
E-mail: daniel.donovan@kirkland.com

/s/ Adam Stein

Adam Stein (N.C. State Bar #4145)
TIN FULTON WALKER & OWEN, PLLC
312 West Franklin Street
Chapel Hill, NC 27516
Telephone: (919) 240-7089
E-mail: astein@tinfulton.com