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

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL

INTRODUCTION

In one of the leading cases in the Fourth Circuit recognizing and applying legislative immunity, the Fourth Circuit put it plainly: state legislators are often subjected to "political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). Plaintiffs' desire in this case to subject state legislators to enormously burdensome discovery clearly shows the wisdom of the Fourth Circuit's adoption of broad legislative immunity.

VIVA

Plaintiffs filed three separate actions challenging the legality of 2013 N.C. Sess. Laws 381, known as the "Voter Information Verification Act, or "VIVA" (sometimes referred to by its bill designation, HB 589): *United States v. North Carolina*, No. 1:13-cv-861 (M.D.N.C.) (hereinafter "*United States*"); *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.) (hereinafter "*NAACP*"); and *League of Women Voters of North Carolina v. North Carolina*, No. 1:13-cv-660 (M.D.N.C.) (hereinafter "*LWV*"). The instant consolidated response relates to separately filed but nearly identical motions to compel by the Plaintiffs on the issue of legislative immunity. *United States* D.E. 54; *NAACP* D.E. 68; *LWV* D.E. 70.[1]

[1] For ease of reference, when referring to the Motions to Compel in this response, Defendants will refer to the motion filed by the NAACP plaintiffs at DE 68.

Plaintiffs' claims focus on VIVA's elimination of practices adopted by the General Assembly within the last decade. For instance, in 2000, the General Assembly allowed voters to cast "no-excuse" in-person absentee ballots at county sites prior to election day – one-stop absentee voting. Later that decade, the General Assembly adopted same-day registration – allowing first time voters to register to vote (after normal registration had closed twenty-five days before an election) during one-stop voting. Finally, during the past decade, the General Assembly allowed out-of-precinct voting – where voters may vote on Election Day at a precinct other than the precinct to which they have been assigned (provided it is within the same county as his or her assigned precinct).

VIVA reduced the number of days for one-stop in-person absentee voting from 17 to 10 while mandating that the total hours of one-stop voting in each county be at least the same in 2014 as the number of hours available in 2010, and that the number of hours available in presidential elections be at least the same as the number of hours available in each county for the 2012 election. This change takes effect in 2014.

VIVA also eliminated same-day registration and out-of-precinct voting effective in 2014. In making this change, North Carolina has returned to prior, long-standing practices, which are consistent with the majority of the states which do not allow out-of-precinct voting or same-day registration.

VIVA also establishes a photo ID requirement for one-stop voting and in-person voting on Election Day. Except for first-time voters who are registering by mail and voting for the first time, mail-in absentee voters are not required to submit an ID when they make their application for an absentee ballot or return their marked ballot to the

county board of elections. Unlike the other provisions challenged by Plaintiffs, the photo ID requirement does not go into effect until 2016.[2]

VIVA also eliminates a recently enacted program that allowed 16-year-olds to "pre-register." In making this change, VIVA returned North Carolina to prior practices consistent with the vast majority of other states. Moreover, even under VIVA, 17-year-olds are still able to register and vote provided they will turn 18 years old prior to the general election. This change is effective in 2014.

STATEMENT OF THE RELEVANT FACTS

On 20 December 2013, Plaintiffs served requests for production on Defendants. As noted in Plaintiffs' Motion to Compel, these document requests related to "the information available to legislators and the circumstances surrounding the passage of HB 589." (DE 68 at p. 2) As of the date of the instant response, no legislators have waived their immunity to the production of the documents requested by Plaintiffs, and to Defendants' knowledge, no legislators have produced documents to Plaintiffs.

ARGUMENT

I. Legislative Immunity Broadly Protects Legislators From Discovery in Civil Cases Regarding Their Legislative Activities.

Plaintiffs purport to seek information from members of the North Carolina General Assembly, their staffs, and others who communicated with these legislators and their staffs in the performance of legislative activities. There is no question that Plaintiffs

[2] North Carolina's photo ID requirement is less restrictive than other such requirements which have been held constitutional by the United States Supreme Court. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

cannot seek this information from legislators, who are entitled to absolute legislative immunity. [3]

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 v. Brandhove*, 341 U.S. 367, 372 (1951) (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. As the Fourth Circuit has emphasized:

> 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.

Wash. Suburban Sanitary Comm'n, 631 F.3d at 181.

[3] Chapter 120, Article 17 of the North Carolina General Statutes addresses legislative confidentiality, which is distinct from the common law protection of legislative immunity afforded to legislators. The North Carolina Supreme Court has found that Article 17 was enacted as an aspect of the North Carolina General Assembly's internal operations to protect certain defined legislative communications from disclosure. *Dickson v. Rucho*, 366 N.C. 332, 343, 737 S.E.2d 362, 370 (2013).

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 absolute. The United States Supreme Court has mandated that legislative immunity, and privileges flowing from it, must be interpreted "broadly to effectuate its purposes." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). Unlike many privileges, it does not simply attach to the content of communications. Rather, it encompasses all aspects of the legislative process and forbids plaintiffs from seeking *any* production at all from the legislators. "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).

The law is therefore clear that the Defendants are not required and cannot be required to comply with document requests that seek the information sought by Plaintiffs. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. Legislative immunity provides legislators with absolute protection from the discovery sought by plaintiffs. For this reason, the Court should deny Plaintiffs' motions to compel.[4]

II. Plaintiffs' Arguments Regarding Legislative Immunity and Privilege are Without Merit.

In their Motions to Compel, Plaintiffs claim that legislative immunity is inapplicable – a position clearly at odds with controlling United States Supreme Court and Fourth Circuit precedent. Indeed, Plaintiffs' asserted need for this information demonstrates why they their motion is without merit. Plaintiffs cite *Vill. of Arlington*

[4] In any event, Plaintiffs' production requests served pursuant to Rule 34, Fed. R. Civ. P. are not sufficient to compel individual legislators to produce documents in this action absent a validly served subpoena pursuant to Rule 45, Fed. R. Civ. P. No individual legislators are a named party in this action. Indeed, the General Assembly itself is not a named party in the action. Simply serving "the State of North Carolina" with a document request cannot compel legislators, who as independently elected officials are the custodians of their own documents, to produce documents in a civil action of which they are not a party.

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) and claim that this discovery is warranted because that case supposedly authorizes discovery on "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." (DE 68 at p. 6 (citing *Arlington Heights*, at 267-68))

Significantly, *all* of the information purportedly made relevant by *Arlington Heights* that Plaintiffs claim they could glean from rifling through legislative email accounts *has already been provided to Plaintiffs*. In their Initial Disclosures and subsequent productions, Defendants provided the "specific sequence of events" leading up to the enactment of VIVA. Any supposed "departures" could be ascertained by Plaintiffs simply reviewing the Standing Rules of each chamber of the General Assembly and reviewing the history of other enacted legislation which is fully available on the website of the General Assembly. Finally, Defendants have also provided transcripts from all floor and committee debates regarding VIVA, from which Plaintiffs may ascertain any "contemporary statements by members of the decisionmaking body" regarding VIVA. Thus, even under Plaintiffs' supposed rationale for disrupting the centuries-established precedent of legislative immunity and privilege, Plaintiffs have already been provided with all of the information they claim to need.

Next, Plaintiffs claim that there is no "absolute evidentiary privilege for state legislators." (DE 68 at p. 7) Plaintiffs' claim is in complete contravention of *Tenney* where the United States Supreme Court clearly extended the privilege to state legislators

in federal civil actions. In civil actions, the immunity is absolute and Plaintiffs have cited no case to the contrary from the United States Supreme Court.

Instead, Plaintiffs continue to rely erroneously on *United States v. Gillock*, 445 U.S. 360, 373 (1980), and other cases relying on *Gillock*. *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 here, particularly in the face of *Tenney*.

Plaintiffs also attempt to characterize the immunity as "qualified" but again the authority they cite misses the mark. (DE 68 at pp. 9, 14-15) For instance, *Ala. Educ. Ass'n v. Bentley*, 2013 WL 124306 (N.D. Ala. Jan. 3, 2013), relies on *Small v. Hunt*, 152 F.R.D. 509 (E.D.N.C. 1994), also cited by Plaintiffs. However, *Small* was a prison overcrowding case where the magistrate judge was deciding whether documents held by a "Settlement Committee", which happened to have as members some legislators, could be discovered in an action by the defendants to modify a prior settlement agreement. *Small* itself relied on *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992), which involved a party seeking discovery from a statewide redistricting committee appointed by the Governor and including as members both legislators and private citizens. None of these cases involved an attempt to seek discovery from legislators for actions taken by them directly related to quintessentially legislative conduct – voting in their legislative capacities on the floors of the legislative chambers on bills duly introduced and debated in the halls of a state legislature.

Moreover, both *Small* and *Marylanders for Fair Representation* pre-date the controlling Fourth Circuit authority here: *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181.

Plaintiffs also cite *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y 2012) and *Rodriguez v. Pataki*, 293 F.Supp.2d 302 (S.D.N.Y. 2003). Both *Favors* and *Rodriguez* rely, however, on *In re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987), which considered legislative immunity as applied in the context of a *criminal prosecution*. While the scope of legislative immunity may or may not be "qualified" in the context of a criminal indictment or prosecution, nothing in *Tenney* or *Wash. Suburban Sanitary Comm'n*, where the privilege was considered in civil cases such as this one, is so limited. The same is true for the other cases cited by Plaintiffs. *Perez v. Perry*, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (not citing *Tenney* and instead relying on *Gillock*); *Baldus v. Members of Wis. Gov't Accountability Bd*., 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011) (relying on cases that rely on *Gillock* and not *Tenney*).

Indeed, in a case cited by Plaintiffs, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), the court acknowledged that in *Gillock*, the U.S. Supreme Court "carved out an exception from *Tenney*" in cases involving "federal criminal liability." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *6. The Supreme Court has never carved out any other exceptions from *Tenney* and this Court should decline to do so here.

Moreover, Plaintiffs' claim that the privilege is "waived with regard to documents shared with third parties" (DE 68 at p. 10) is a gross overstatement. Plaintiffs completely ignore that the United States Supreme Court has included within the privilege anything

that is legislative in nature, including all communications engaged in as preparation for and deliberation over legislative issues. *Gravel*, 408 U.S. at 625. Other courts have recognized that the privilege applies to efforts to gather and process information for possible legislative action. *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*, 709 F.2d at 530-31 (legislator's receipt of "information pertinent to potential legislation or investigation" is protected part of the legislative process). The cases cited by Plaintiffs are not to the contrary. *Baldus*, and *Comm. for a Fair & Balanced Map* involved communications with outside experts for drawing redistricting maps. No such communications are at issue in this case. In fact, no communications with experts are involved at all. Instead, Plaintiffs seek quintessentially legislative communications by legislators attempting to do their job to research, formulate and then enact election law reforms. Accordingly, Plaintiffs' motion should be denied.

III. Because the Applicability of Legislative Immunity is So Clear, a Privilege Log Should Not be Required.

Finally, in cases involving privileges analogous to legislative immunity, courts often recognize that preparing a privilege log is not necessary where the communications are plainly protected from disclosure. *Ryan Investment Corp. v. Pedregal De Cabo San Lucas*, 2009 WL 5114077, at *3 (N.D. Cal. Dec. 18, 2009) ("counsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log"); *Capitol Records, Inc. v. MP3Tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. 2009); *United States v.*

Bouchard Transportation, 2010 WL 1529248, at *2 (E.D.N.Y. Apr. 14, 2010) ("privilege logs are commonly limited to documents created before the date litigation was initiated. This is due to the fact that, in many situations, it can be assumed that all documents created after charges have been brought or a lawsuit has been filed and withheld on the grounds of privilege were created 'because of' that pending litigation"); *Frye v. Dan Ryan Builders, Inc.*, 2011 WL 666326, at *7 (N.D. W. Va. Feb. 11, 2011).

In fact, creation of a privilege log can itself erode the inviolate protections afforded by the legislative immunity. *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 339 (S.D.N.Y 1969) ("even the identification of a communication between attorney and client in terms of the date and subject might well tend to defeat the very purpose of the privilege"). Accordingly, no privilege log should be required.

The cases cited by Plaintiffs again are not to the contrary. To the extent that courts have required privilege logs in those cases, it was because the court erroneously characterized the privilege as "qualified" in reliance on cases involving federal criminal liability and not in the civil context. As described above, those cases are unhelpful to this Court in deciding the issue before it under established United States Supreme Court and Fourth Circuit authority affirming a broad legislative immunity in federal civil cases.[5]

[5] Plaintiffs also cite N.C. Gen. Stat. § 120-132(c) (2010) for the proposition that North Carolina state law "presumes some areas of disclosure by legislative employees." (DE 68, p. 14) What Plaintiffs fail to emphasize is that the statute they cite specifically instructs that it is "[s]ubject to . . . the common law of legislative privilege and legislative immunity" and therefore it is irrelevant to the issues before the Court.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motions to Compel should be denied.

This the 18th day of February, 2014.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL** 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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