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

LEGISLATIVE MOVANTS' REPLY IN SUPPORT OF THEIR MOTION TO QUASH SUBPOENAS TO STATE LEGISLATORS

INTRODUCTION

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*").

STATEMENT OF THE RELEVANT FACTS

On 4 December 2013, Plaintiffs gave notice pursuant to Rule 45(a)(4) of the Federal Rules of Civil Procedure of their intent to serve subpoenas on various persons and organizations, including the legislative movants. These subpoenas request information generally regarding the information available to legislators and the circumstances surrounding the passage of VIVA. As of the date of this Reply, 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 continue to ignore the leading United States Supreme Court precedent bearing directly on the matter at issue in the Motion to Quash. In *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), the Court recognized a broad right of state legislators "to be free from arrest or *civil process* for what they do or say in legislative proceedings." *Tenney*, 341 U.S. at 372 (emphasis added). This right is absolute as to actions within the "sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 377. *Accord EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (legislative immunity is important to protect state legislators from "political wars of attrition" through litigation).

Plaintiffs also continue to ignore that the United States Supreme Court has mandated that legislative immunity, and privileges flowing from it, 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. 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 Court should therefore quash the subpoenas.

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

Plaintiffs continue to advance two fundamentally flawed arguments about legislative immunity and privilege. First, Plaintiffs cite *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) and claim that the subpoenas are 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." *Arlington Heights*, at 267-68.

Plaintiffs' reliance on *Arlington Heights* is misplaced. First, *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. 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. In particular, Defendants have provided the following information regarding VIVA to Plaintiffs:

- All public versions of VIVA, including all filed bills, introduced committee or floor amendments (introduced and passed, introduced and failed or introduced and withdrawn), committee substitutes and enrolled and ratified versions, as well as voting results and fiscal notes on the bill
- Transcripts and Audio Files of all committee hearings, committee debates and floor debates on VIVA
- Available voting records and minutes for committee consideration of VIVA
- Notices of committee meetings or hearings on VIVA
- House Journal entries on VIVA
- Senate Journal entries on VIVA
- House Principal Clerk's Log entries on VIVA
- Senate Principal Clerk's Log entries on VIVA

- Public sign-up sheets for committee meetings on VIVA; and
- Documents and information provided by members of the public testifying at legislative hearings on 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.

Second, and perhaps more importantly, Plaintiffs' reliance on *Arlington Heights* is putting the motive cart before the immunity horse. Even if inquiry into legislative motive generally is appropriate under *Arlington Heights*, a debatable proposition in this case, such an inquiry does not trump legislative immunity. *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 n.12 (D. Md. 1992). As the court in *Marylanders* put it:

> Plaintiffs cannot, however, inquire into legislative motive if such an inquiry would necessitate an abrogation of legislative immunity. Contrary to plaintiffs' assertions, the immunity enjoyed by state legislators is *absolute.* Where an inquiry into legislative motive "would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force." *Schlitz v. Commonwealth of Virginia,* 854 F.2d 43, 45 (4th Cir.1988) (because the Commonwealth would have been unable to defend itself unless the legislators testified as to their motives for declining to reelect former state judge plaintiff, the doctrine of legislative immunity barred the suit). *See also Hollyday v. Rainey,* 964 F.2d 1441, 1443 (4th Cir.1992). Thus, legislative immunity, if found, *would* bar inquiry into legislative motive regarding alleged Section 2 violations, just as it would prohibit certain discovery regarding plaintiffs' other claims.

Id. (emphasis in original).[1]

Next, 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*. 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.

Similarly, Plaintiffs' reliance on *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) is in error. Both *Favors* and *Rodriguez* rely 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,

[1] Moreover, nothing in *League of Women Voters of Florida v. Florida House of Representatives*, 2013 WL 6570903 (Fla. Dec. 13, 2013), cited by Plaintiffs, is to the contrary. That case involved a state court considering a state immunity under state law and a Complaint limited to state claims. None of those circumstances are present in the instant cases.

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*).

Plaintiffs' characterization of the immunity as "qualified" is also misplaced. 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. 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, to the extent that Plaintiffs claim that the privilege is waived with regard to documents shared with third parties, they are wrong. 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, the subpoenas should be quashed.

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

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 from the legislative movants.

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.[2]

CONCLUSION

For the foregoing reasons, the legislative movants' Motion to Quash Subpoenas to State Legislators should be granted.

[2] 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." 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.

This the 20th day of February, 2014.

ROY COOPER
ATTORNEY GENERAL OF NORTH CAROLINA

By: /s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants North Carolina and State Board of Election Defendants.

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

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants North Carolina and State Board of Election Defendants.

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(d)
Counsel for Governor Patrick L. McCrory

By: /s/ Robert C. Stephens
Robert C. Stephens (State Bar #4150)
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
Counsel for Governor Patrick L. McCrory

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

***Counsel for United States of America*:**

T. Christian Herren, Jr.
John A. Russ IV
Catherine Meza
David G. Cooper
Spencer R. Fisher
Elizabeth M. Ryan
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7254-NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Gill P. Beck
Special Assistant United States Attorney
Office of the United States Attorney
United States Courthouse
100 Otis Street
Asheville, NC 28801

Counsel for NCAAP Plaintiffs:

Penda D. Hair
Edward A. Hailes, Jr.
Denise D. Liberman
Donita Judge
Caitlin Swain
ADVANCEMENT PROJECT
Suite 850
1220 L Street, N.W.
Washington, DC 20005
phair@advancementproject.com

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Adam Stein
TIN FULTON WALKER & OWEN
312 West Franklin Street
Chapel Hill, NC 27516
astein@tinfulton.com

Thomas D. Yannucci
Daniel T. Donovan
Susan M. Davies
K. Winn Allen
Uzoma Nkwonta
Kim Knudson
Anne Dechter
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
tyannucci@kirkland.com

Counsel for League of Women Voter Plaintiffs:

Anita S. Earls
Allison J. Riggs
Clare R. Barnett
Southern Coalition for Social Justice
1415 Hwy. 54, Suite 101
Durham, NC 27707
anita@southerncoalition.org

Laughlin McDonald
ACLU Voting Rights Project
2700 International Tower
229 Peachtree Street, NE
Atlanta, GA 30303
lmcdonald@aclu.org

Dale Ho
Julie A. Ebenstein
ACLU Voting Rights Project
125 Broad Street
New York, NY 10004
dale.ho@aclu.org

Christopher Brook
ACLU of North Carolina Legal Foundation
PO Box 28004
Raleigh, NC 27611-8004
cbrook@acluofnc.org

***Counsel for the Intervening Plaintiffs*:**

John M. Davaney
jdevaney@perkinscoie.com
Marc E. Elias
melias@perkinscoie.com
Kevin J. Hamilton
khamilton@perkinscoie.com
PERKINS COIE, LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960

Edwin M. Speas, Jr.
espeas@poynerspruill.com
John W. O'Hale
johale@poynerspruill.com
Caroline P. Mackie
cmackie@poynerspruill.com
POYNER SPRUILL, LLP
301 Fayetteville St., Suite 1900
Raleigh, NC 27601

This, the 20th day of February, 2014.

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

/s/ Thomas A. Farr
Thomas A. Farr

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