**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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| NORTH CAROLINA STATE CONFERENCE OF THE NAACP, EMMANUEL BAPTIST CHURCH, NEW OXLEY HILL BAPTIST CHURCH, BETHEL A. BAPTIST CHURCH, COVENANT PRESBYTERIAN CHURCH, CLINTON TABERNACLE AME ZION CHURCH, BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC., ROSANELL EATON, ARMENTA EATON, CAROLYN COLEMAN, BAHEEYAH MADANY, JOCELYN FERGUSON-KELLY, FAITH JACKSON, MARY PERRY, and MARIA TERESA UNGER PALMER<br><br>Plaintiffs,<br><br>v.<br><br>PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, KIM WESTBROOK STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections, JOSHUA B. HOWARD, in his official capacity as Chairman of the North Carolina State Board of Elections, RHONDA K. AMOROSO, in her official capacity as Secretary of the North Carolina State Board of Elections, JOSHUA D. MALCOLM, in his official capacity as a member of the North Carolina State Board of Elections, PAUL J. FOLEY, in his official capacity as a member of the North Carolina State Board of Elections and MAJA KRICKER, in her official capacity as a member of the North Carolina State Board of Elections,<br><br>Defendants. | **PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS**<br><br>**Case No.: 1:13-CV-658** |

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| LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, A. PHILIP RANDOLPH INSTITUTE, UNIFOUR ONESTOP COLLABORATIVE, COMMON CAUSE NORTH CAROLINA, GOLDIE WELLS, KAY BRANDON, OCTAVIA RAINEY, SARA STOHLER, and HUGH STOHLER,<br><br>Plaintiffs,<br><br>v.<br><br>THE STATE OF NORTH CAROLINA, JOSHUA B. HOWARD in his official capacity as a member of the State Board of Elections, RHONDA K. AMOROSO in her official capacity as a member of the State Board of Elections, JOSHUA D. MALCOLM in his official capacity as a member of the State Board of Elections, PAUL J. FOLEY in his official capacity as a member of the State Board of Elections, MAJA KRICKER in her official capacity as a member of the State Board of Elections, and PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina,<br><br>Defendants. | **Case No.: 1:13-CV-660** |

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| UNITED STATES OF AMERICA,<br><br>Plaintiffs,<br><br>v.<br><br>THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and KIM W. STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections,<br><br>Defendants. | **Case No.: 1:13-CV-861** |

## INTRODUCTION

No federal court has ever recognized or applied legislative immunity as broadly as Defendants' request from this Court. The principle of "legislative immunity" does not extend as broadly, such that it could immunize Defendants from producing *all* documents in the custody of a legislator and from producing a privilege log for the documents withheld. Rather, the case law clearly establishes that any legislative privilege is limited in at least two respects. *First*, many categories of documents sought by Plaintiffs categorically fall outside of any applicable privilege, including documents disclosed by legislators to third parties (thus waiving privilege). *Second*, any privilege is at best qualified, and requires this Court to apply a balancing test that, in this voting rights case, would militate in favor of disclosure.

## ARGUMENT

### I. No Federal Court has Held that State Lawmakers May Categorically Evade Any and All Document Requests Based on an Absolute Legislative Immunity or Privilege

Defendants are incorrect as a matter of law that legislative immunity "forbids plaintiffs from seeking any production at all from the legislators" as Defendants claim. Resp. in Opp'n to Pls.' Mots. to Compel, Dkt. No. 79 ("Defs.' Opp'n"), at 6. None of the cases cited by Defendants recognize an absolute evidentiary privilege allowing state lawmakers to categorically evade any and all document requests.

The cases that Defendants cite for the proposition that immunity "forbids plaintiffs from seeking any production at all from the legislators" speak only to *testimonial* privilege and only as it applies to *federal* legislators who are subject to the Speech and Debate clause. *See Gravel v. United States*, 408 US 606 (1972) (denying absolute testimonial privilege, and allowing grand

jury to require that an aide to a federal legislator testify)[1]; *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (upholding order to deny the motion to compel deposition testimony of a federal legislator); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491 at, 494-97 (1975) (determining in a private bank's suit to enjoin enforcement of a Congressional subpoena that the subpoena was within the legislative sphere). Indeed, one of the cases that Defendants principally rely on, *Washington Suburban Sanitary Commission*, 631 F.3d 174, 182 (4th Cir. 2011), actually *allowed* the disclosure of documents by legislators serving on a quasi-legislative body.

## II. Legislative Privilege is Inapplicable to Categories of Documents, Such as Documents Disclosed to Third Parties

Defendants do not seriously contest that several categories of documents sought by Plaintiffs categorically fall outside applicable legislative privilege, including documents disclosed to third parties; non-deliberative documents; and post-enactment documents that were not part of the deliberative process. *See* Pls.' Mot. to Compel Production of Documents, Dkt. No. 70 ("Pls.' Mot."), at 10-11; United States' Br. in Opp'n to Mot. to Quash Subpoenas to State Legislators, Dkt. No. 74 ("DOJ Br.") at 16-18.

[1] Defendants severely overstate *Gravel*, 408 U.S. 606, 625 (1972), for the proposition that legislative privilege includes "anything that is legislative in nature, including all communications engaged as preparation for and deliberation over legislative issues." Defs.' Opp'n at 11. *Gravel* related to immunity from liability and grand jury questioning for a U.S. Senator for acts at a Congressional sub-committee hearing, i.e. reading classified documents (the Pentagon Papers) to the sub-committee, then placing the remainder of the documents on the record. In regard to legislative immunity and testimonial privilege, *Gravel* held that based on the Speech and Debate Clause "a Member's conduct *at legislative committee hearings* . . . may not be made the basis for a civil or criminal judgment against a Member" (emphasis added). *Gravel*, 408 U.S. at 625. The Court goes on to note that "Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Id.* Defendants' assertion of an all-encompassing evidentiary privilege for acts outside of federal legislative debate is not consistent with *Gravel*.

Most significantly, a clear line of authority establishes that any applicable legislative privilege is waived with regard to documents that legislators have shared with third parties. "As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) (citing *ACORN v. Cnty. of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007); *see also Almonte v. City of Long Beach*, No. CV 04-4192, 2005 WL 1796118, at *3-4 (E.D.N.Y. July 27, 2005). Thus, "the legislative privilege does not apply" to any matter legislators discussed with those outside the Legislature, including "consultants," "experts," "members of Congress," or "lobbyists." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10 (citing *ACORN*, 2007 WL 2815810, at *4, *6; *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003)); *see also Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11–CV–562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) ("The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services"); *Rodriguez*, 280 F. Supp. 2d at 101 ("conversation[s] between legislators and . . . outsiders" are ones "for which no one could seriously claim privilege"); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011) (deliberative privilege does not apply to documents shared with non-legislative members); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) ("[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations").

Defendants cite no contrary authority on the issue of waiver, and instead attempt to draw meaningless distinctions between the cases cited above and the facts here. First, Defendants note that several of the cases cited above involved disclosure of legislative materials to outside

"experts," and that no communications with experts was involved in this case. Defs.' Opp'n at 11. The cases cited above, however, hold that legislative privilege is waived through disclosure to third parties generally, and are not limited to communications with experts.[2] Defendants articulate no reason why, for purposes of waiver, a legislator's disclosure to outside experts should be treated differently from a disclosure to lobbyists or group of constituents. Moreover, Plaintiffs have no way of ascertaining with whom legislators exchanged information – *i.e.*, whether legislative documents were or were not disclosed to outside experts or other third parties – because the Defendants have not provided and refuse to provide a privilege log. Defendants also cite several cases indicating that the privilege may in some cases protect the sources of information *received* by legislators in the deliberative process – but that does not refute the basic principle that documents *disclosed* by a party are subject to waiver. Privilege with respect to any such documents has been waived.

## III. Federal Courts Routinely Balance the Interests of a Party Seeking Information Against Legislative Claims of Privilege

Federal courts routinely weigh the interests of the individual seeking the information against the interests of the legislator asserting legislative privilege and order production when an important federal interest is at stake. *See* Pls.' Mot. at 14-18. Plaintiffs in voting rights cases routinely access and rely on documents from legislators related to legislative intent. *Id.* Legislative privilege is regularly qualified and balanced, particularly in cases brought under the

[2] The Court in *Baldus* found the argument for legislative privilege with regard to documents shared with outside experts "disingenuous" because any privilege had been waived by sharing the documents, but also held that "even without that waiver, the Court would still find that legislative privilege does not apply in this case," adding that "[l]egislative privilege is a qualified privilege that can be overcome by a showing of need." *Baldus*, 2011 WL 6122542, at *2. In *Committee for a Fair and Balanced Map*, the Court held that legislators had waived privilege in communicating with non-legislators, including "lobbyists, members of Congress and the Democratic Congressional Campaign Committee," and noted that legislative privilege did not apply to these groups despite their "heightened interest in the outcome of the redistricting process." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10.

Voting Rights Act. *See* Pls.' Mot. at 14-18; *see also Favors*, 285 F.R.D. at 209 (explaining that "the legislative privilege for state lawmakers is, at best, one which is qualified" and "a court must balance the interests of the party seeking the evidence against the interests of the individual claiming privilege") (internal quotation marks omitted); *Rodriguez*, 293 F. Supp. 2d at 104 (affirming magistrate's analysis of legislative privilege, including that it is not absolute and determined by a balancing of interests).

Defendants make irrelevant distinctions between this case from the slew of cases in which Courts have applied a balancing test to the qualified evidentiary privilege of state legislators. First, Defendants attempt to distinguish *Alabama Education Ass'n v. Bentley* (denying a motion to quash and ordering state legislators to provide responses to subpoenas) because it relies on *Small v. Hunt*, 152 F.R.D. 509 (E.D.N.C. 1994). *See Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306, at *12-13 (N.D. Ala. Jan. 3, 2013). *Alabama* does not, in fact, rely on *Small*, but relies on *Doe v. Nebraska*, 788 F. Supp. 2d 975, 984 (D. Neb. 2011). *See Alabama*, 2013 WL 124306, at *12 ("Even when the doctrine of legislative immunity applies, state legislators still may be 'required to supply evidence in a federal civil case where, like the instant case, there is no threat of personal liability'" (quoting *Nebraska*, 788 F. Supp. 2d at 984 n.2)). *Alabama* also cites *Nebraska* (citing *Small v. Hunt*) for the proposition that state and local officials are not necessarily exempt from producing documents. *Alabama*, 2013 WL 124306, at *12 (citing *Nebraska*, 788 F. Supp. 2d at 984). Defendants fail to explain how the *Alabama* Court's citation negates or limits its holding that state legislators must comply with a subpoena and produce documents in a civil case.

Unable to find contrary authority, Defendants would have this Court simply discount any decisions finding only a qualified legislative privilege in the civil context as wrongly decided.

Defendants argue that *Favors* and *Rodriguez* are wrongly decided because they cite *In re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987), which applied legislative immunity in the context of a criminal prosecution. Defs.' Opp'n at 10. First, Defendants are simply incorrect with *Favors*, which does not cite or rely on *In re Grand Jury*. *See generally Favors*, 285 F.R.D. 187. Second, *Rodriguez* cited *In re Grand Jury*, among other cases, for the general proposition that, in any context, legislative "privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides." *In re Grand Jury*, 821 F.2d at 957; *see Rodriguez*, 280 F. Supp. at 95. Defendants offer no explanation why that general rule should be inapplicable in a civil context.

## IV. An Analysis Under *Arlingon Heights* Requires More Than Just the Legislative Record

Unable to cite any authority establishing an absolute immunity from document production, Defendants argue that discovery of legislative documents is unnecessary because such documents are purportedly irrelevant to the *Arlington Heights* inquiry regarding circumstantial evidence of discriminatory purpose. Defs' Opp'n. at 7-8; *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Defendants cite no authority for that sweeping proposition.

Legislators obviously have first-hand information regarding their motives, as well as the development and passage of HB 589. Inquiring into the sequence of events leading up to the challenged decision can encompass more than just a review of the formal legislative record, and can include information that was available to a legislator at the time of enactment, can include origin of specific provisions of the legislation. DOJ Br. at 5-6 (citing Op. at 6, *Perez v. Perry*, 5:11-cv-360 (W.D. Tex. Mar. 19, 2012), Ex. 5 to DOJ Br., Dkt. No. 74-5; Texas v. United States, 887 F. Supp. 2d 133, 161 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 133 S.

Ct. 2885 (2013)). Defendants cite no authority for the proposition that the *Arlington Heights* analysis must be limited solely to the formal legislative record and publicly-available documents.

## CONCLUSION

For the foregoing reasons, the LWV Plaintiffs respectfully request that the Court grant their motion to compel production of documents.

Dated: February 20, 2014

Respectfully submitted,

By: */s/ Julie A. Ebenstein*


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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 37.1**

In accordance with Middle District of North Carolina Local Rule 37.1, Plaintiffs certify that the parties were not able to reach agreement on these matters after personal consultation and diligent attempts to resolve their differences. The parties have discussed these issues via email, including emails on January 9 and 16, 2014. The parties also held two meet-and-confer telephone conferences on these matters, on January 7, 2014, and on January 23, 2014. In attendance at the most recent conference were, among others, Bridget K. O'Connor, counsel for the NAACP Plaintiffs; Dale Ho, counsel for the LWV Plaintiffs; John Russ, counsel for the DOJ; and Tom Farr and Amy Pocklington, counsel for Defendants. During that meeting, the parties were unable to reach agreement on the issues discussed in this motion, save for that the Defendants' commitment to produce the databases at issue by January 31, 2014.

**CERTIFICATE OF SERVICE**

I hereby certify that on February 20, 2014, I served **Plaintiffs' Reply in Support of Motion to Compel Production of Documents** with the Clerk of Court using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which on the same date sent notification of the filing to the following:

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