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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,	)	
Plaintiffs,	)	
v.	)	1:13CV658
PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, *et al.*,	)	
Defendants.	)	
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*,	)	
Plaintiffs,	)	
and	)	
LOUIS M. DUKE, *et al.*,	)	1:13CV660
Plaintiffs-Intervenors,	)	
v.	)	
THE STATE OF NORTH CAROLINA, *et al.*,	)	
Defendants.	)	
UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	1:13CV861
THE STATE OF NORTH CAROLINA, *et al.*,	)	
Defendants.	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF LEGISLATIVE IMMUNITY AND LEGISLATIVE PRIVILEGE

INTRODUCTION

The practical import of legislative immunity and legislative privilege cannot be overstated. That message was sent by the Fourth Circuit on this issue just a few years ago, and the underlying doctrine is centuries old; neither Plaintiffs' passion nor the passage of time dilutes its strength. Nor should it. Legislative immunity and privilege are blind to the politics of the party in power; they transcend electoral majorities. The reason immunity and privilege are absolute and enduring, as demonstrated below, is because a qualified immunity—one where legislators, regardless of party, work knowing that their quiet study and contemplation is liable to exposure for all the world to see—stifles legislative deliberation generally. It stifles the give and take of negotiation among legislators. It stifles legal research and likely rules out the employment of professional, non-partisan staff. It stifles constituent and stakeholder input.

The adverse effect on the quality of legislative output of an uncertain privilege would be no different from the burden on the judiciary were litigants losing at trial to have access on appeal to communications between the trial court and its law clerks. The doctrines of separation of power and federalism are premised on the bedrock principle that the people act through their legislature convened. Plaintiffs seek to delve into the minds of *individual* legislators and extrapolate from that the legislative *body's* reasoning. Legislative immunity is merely a long-standing recognition that such an effort is futile and indeed harmful because no one legislator speaks for the body convened but

all legislators—regardless of party—need the freedom to deliberate privately on the weighty policy choices they face.

ARGUMENT

I. The Importance of Legislative Immunity and Privilege.

The doctrines of absolute legislative immunity and legislative privilege have withstood the test of time. The reason for their longevity lies in the chilling effect a qualified immunity would have in civil cases challenging duly enacted laws by the State's legislature.

Put simply, anything less than absolute immunity and privilege in civil cases challenging legislative action would amount to a plaintiffs' veto. If state legislators considering and deliberating over important public policies must worry that their political adversaries through civil litigation will be able to discover their confidential deliberations, they will decline to engage in the robust discussion and research necessary for the enactment of laws important to the entire State. Thus, having lost at the ballot box, having lost in legislative committees, and having lost a floor vote on a particular policy choice, political adversaries of the legislative majority may be empowered to effectively inhibit legislators—the direct representatives of the people—from making public policy decisions they deem to be in the best interests of the State. As stated by the Supreme Court, "[t]he claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377

(1951). Legislative immunity exists to preclude what amounts to a veto by those on the losing end of public policy decisions. Legislative immunity "prevents those who were defeated in elections from waging political war through litigation." *McCray v. Md. Dep't of Transp.*, 2014 WL 323272, at *4 (4th Cir. Jan. 30, 2014).

The Fourth Circuit has repeatedly and recently recognized that political losers should not be able to chill or deter the enactment of legislative policy:

> 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.

EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011); *McCray*, 2014 WL 323272, at *4.

Just as a judge is allowed to research and craft judicial opinions without fear of discovery by others of his or her deliberative process, the deliberative process of legislators must be protected to ensure the smooth functioning of our system of government. Legislators must be allowed to deliberate more thoughtfully and with greater autonomy about the "tough decisions" the Fourth Circuit has recognized they are charged with making for the State. If every e-mail and document in the possession of a

legislator became subject to public scrutiny simply because someone filed a civil lawsuit and requested it in discovery, the State would have a very difficult time enacting laws. Legislative immunity and privilege protects the majority and the minority, the legislators central to moving legislation and those on the periphery, and even those ordinary citizens who choose to participate in the process by petitioning their legislator, but who might be deterred from doing so if they thought their communications with their legislators could end up as evidence in a court proceeding.

Undermining the bedrock democratic policies necessitating the immunity and privilege is particularly inappropriate where, as here, a civil litigant has already been provided all of the information he needs to challenge the legislative motive of a duly enacted law. Defendants have provided thousands of pages of documents to Plaintiffs here constituting the entire legislative record of the challenged law, including the following:

- All public versions of the bill, 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 the bill;
- Available voting records and minutes for committee consideration of the bill;

- Notices of committee meetings or hearings;
- Relevant House Journal entries;
- Relevant Senate Journal entries;
- Relevant House Principal Clerk's Log entries;
- Relevant Senate Principal Clerk's Log entries;
- Public sign-up sheets for committee meetings on the bill; and
- Documents and information provided by members of the public testifying at legislative hearings on the bill.

The legislature acts as one body and not as individual members. Each member of the House of Representatives and of the Senate may have a different motivation for voting for or against any particular piece of legislation; it is the intent of the General Assembly as a whole, then, and not the motivation of any particular legislator that is relevant to the purpose of a law. Every document that could possibly shed light on the legislature's motive as a body has been provided to Plaintiffs.

Full recognition of absolute immunity and privilege here will not harm Plaintiffs' ability to prepare their case or seek injunctive relief. To the extent that *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), provides any basis for discovery on legislative intent, it is limited to the legislative and public record. While Plaintiffs repeatedly refer to *Arlington Heights'* statement that "contemporary statements" by legislators may be relevant, they fail to note the context of that statement. The Supreme Court explained that "[t]he *legislative or administrative history* may be

highly relevant, *especially where* there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268 (emphasis added). Thus, the "contemporaneous statements" language was used expressly in the context of the legislative history, not in a discussion of rifling through public servants' private files or electronic correspondence. Moreover, the Court noted in the context of the same discussion on legislative history that the legislative history may, in some "extraordinary circumstances" require testimony "at trial" regarding the purpose of official action. *Id.* Nothing in *Arlington Heights* suggests the right to conduct any discovery against legislators outside of the available legislative record.[1] Moreover, Plaintiffs have not cited any cases in which *Arlington Heights* is used as a basis for overruling legislative immunity or privilege in cases under the Voting Rights Act.

II. Legislative Immunity is Absolute. The *Only* Exception is Criminal Cases.

Except where the Supreme Court or the Fourth Circuit have carved out an exception, the default rule is that legislative immunity is broad and absolute for state legislators on matters involving their legislative activity. *Tenney*, 341 U.S. at 372, 377 (recognizing broad right of state legislators to absolute immunity for actions within the

[1] Indeed, other courts in North Carolina have recognized this very point. In *Waste Industries USA, Inc. v. State of North Carolina*, 725 S.E.2d 875 (N.C. App. 2012), the North Carolina Court of Appeals considered whether a legislative enactment unconstitutionally discriminated against out-of-state business interests. Plaintiffs in *Waste Industries* attempted to admit stray comments by legislators purporting to support their claims using the same argument Plaintiffs here make – that *Arlington Heights* makes such statements relevant to determining legislative motive. The North Carolina court flatly rejected the argument. Because the alleged statements were "not part of any legislative history or any other official reporting of legislators' positions and views" they were not relevant under *Arlington Heights*. *Waste Industries*, at 883.

"sphere of legitimate legislative activity"); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975) (mandating that legislative immunity, and the privileges flowing from it, be interpreted "broadly to effectuate its purposes"); *accord Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181.

The only exception that has been carved out of the broad legislative immunity recognized by *Tenney* is for criminal cases. *United States v. Gillock*, 445 U.S. 360, 373 (1980). *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*. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) (acknowledging that in *Gillock*, the U.S. Supreme Court "carved out an exception from *Tenney*" in cases involving "federal criminal liability"); *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989) (erroneously failing to rely on or even cite *Tenney*, but acknowledging that *Gillock* "plainly does not control" a civil discovery question).

The Supreme Court has never carved out any other exceptions from *Tenney*. The Fourth Circuit has never carved out any other exceptions from the right recognized in *Tenney*. Instead, as to matters involving legislative activity, the Fourth Circuit continues to recognize and enforce absolute legislative immunity. *McCray*, 2014 WL 323272, at *4. Where the Supreme Court and the Fourth Circuit have mandated that legislative immunity is broad except in criminal cases, this Court must decline Plaintiffs' invitation to create a new exception to legislative immunity for election law cases.

A. No Exception Exists for Redistricting Cases.

Plaintiffs have cited cases in the redistricting context and implied that courts have carved out an exception to legislative immunity, in effect creating a qualified immunity, for redistricting cases. That is not accurate. In North Carolina legislators have routinely invoked legislative immunity to avoid testifying and other discovery obligations in redistricting cases. In the 2011 cycle of redistricting, two Republican legislators, Rep. David Lewis and Sen. Bob Rucho, voluntarily waived their immunity in order to testify about the redistricting plans and one other Republican legislator, Rep. Ruth Samuelson, waived her immunity to testify on one issue at trial. In addition, two Democratic legislators, Sen. Dan Blue and Rep. Larry Hall, also waived their immunity to testify at trial. However, no other legislator waived immunity in that case. Moreover, in *Cromartie v. Hunt*, No. 4:96-CV-104-BO, a redistricting case out of the 1990 redistricting cycle involving allegations of intentional discrimination because of race, legislators used legislative immunity to block certain testimony. For instance, then-Senator Roy Cooper agreed to waive his personal legislative immunity to testify in a deposition and then asserted the immunity during the deposition when asked questions that might cause him to reveal statements made by other legislators to Sen. Cooper. Excerpts from the deposition during which this immunity was asserted are attached as Exhibit 1.[2]

[2] The Attorney General has also previously instructed General Assembly staff attorneys to not answer questions about their conversations with General Assembly members who had not waived their legislative immunity. Excerpts from a deposition in the *Cromartie* case where such an instruction was given are attached as Exhibit 2.

Moreover, none of the cases cited by Plaintiffs hold that redistricting cases are an exception to the broad immunity legislators enjoy under *Tenney*. In *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011), the issue was whether an outside expert the General Assembly had hired to draw its redistricting plans could avail himself of legislative immunity, not an actual legislator. The court held that immunity did not apply because the legislature waived it to the extent it used an outside expert to draw its plans. *Baldus*, 2011 WL 6122542, at *2. The court did not purport to consider, and did not hold, that redistricting cases are an exception to the general rule of *Tenney*. Similarly, in *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), the court simply erroneously relied on *Gillock* to impose a qualified immunity. That court did not cite any authority other than *Gillock* justifying or supporting its opinion on the immunity issue. In *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y 2012), the court considered the immunity issue in the context of a redistricting commission containing legislator and non-legislator members. Obviously, service by a legislator on a commission with non-legislators is not an inherent legislative function such as the enactment of legislation. The *Favors* court found that legislative immunity was, in fact, absolute but, relying on cases interpreting the privilege in the criminal context, found that legislative *privilege* was qualified. *Favors*, 285 F.R.D. at 209. The *Favors* court's approach directly conflicts with the Fourth Circuit's precedent, discussed below, that the legislative privilege is as extensive as the legislative immunity and, like *Comm. for a Fair & Balanced Map*, cites no

controlling authority for its decision to import a rule applying only in criminal cases into the civil context.

B. No Exception Exists for Voting Rights Act Cases.

Plaintiffs have cited no relevant authority for their breathtaking and unprecedented argument that the Voting Rights Act operates as a waiver of legislative immunity or privilege or otherwise constitutes an exception carved out from *Tenney*. In fact, to the contrary, the court in *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 n.12 (D. Md. 1992) refused to recognize any such exception.[3] Moreover, despite Plaintiffs' suggestion, not even Section 5 of the Voting Rights Act has been used to justify such an enormous departure from the immunity mandated by *Tenney*. For instance, in *Texas v. United States*, 279 F.R.D. 24 (D.D.C. 2012), a Section 5 case, the court found that legislative immunity or privilege did not apply because it had been *waived*. *Texas*, 279 F.R.D. at 31. Moreover, inexplicably, the *Texas* court did not discuss or even cite *Tenney* in its decision. Plainly, the court was not creating an exception to *Tenney*. Nor was the court in *Perez v. Perry*, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014) (three-judge court) doing so – it, like almost all of the other cases cited by Plaintiffs, simply erroneously removed *Gillock* from the criminal indictment context it addresses to conclude that the federal legislative immunity or privilege is qualified in

[3] As noted during the hearing on this matter on 21 February 2014, two judges on the three-judge panel wrote a concurring opinion urging a "less categorical" approach to the immunity issue. However, even those two judges were willing to allow only non-legislator members of the redistricting commission at issue in that case to be deposed. The concurring opinion also made it clear that they would "flatly prohibit" any depositions of legislators regarding the actual enactment of the bill.

civil actions. No authority supports Plaintiffs' argument that this Court should create a new exception to *Tenney*. In the absence of such an exception, *Tenney* controls.[4]

III. In the Fourth Circuit, Legislative Immunity and Legislative Privilege are Co-Extensive and Both Absolute.

The Fourth Circuit has made it clear that legislative privilege exists to safeguard legislative immunity.[5] Legislative immunity would be nearly useless if private litigants could initiate civil actions and harass legislators with civil process and other discovery actions. As that Court has put it: "Legislative *privilege* against compulsory evidentiary process *exists to safeguard* this legislative *immunity* and to further encourage the republican values it promotes." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 (emphasis added). The Court also cited with approval *MINPECO, S.A. v. Conticommodity Servs., Inc*., 844 F.2d 856, 859 (D.C. Cir. 1988) for the proposition that "[d]iscovery procedures can prove just as intrusive" as being named as a party to a suit.

[4] The Court would be wading into a complicated thicket if it attempts to rank the "importance" of federal statutes in assessing whether one statute or the other justifies imposition of a qualified instead of absolute privilege. In *Wash. Suburban Sanitary Comm'n*, the Fourth Circuit has already decided that discrimination claims under Title VII do not warrant undermining absolute legislative immunity or privilege.

[5] Neither legislative immunity nor legislative privilege, which are grounded in the common law, should be confused with legislative confidentiality required, subject to criminal penalties, of legislative employees by N.C. GEN. STAT. § 120-129 *et seq*. This statutory imposition of confidentiality exists to safeguard legislative immunity by protecting communications between legislators and "legislative employees," whether those employees work for one legislator or whether as part of a central staff they work at different times for different legislators. Like legislative immunity and legislative privilege, this statutory confidentiality can only be waived by the legislator involved. Notably, while N.C. GEN. STAT. § 120-132(c) allows a court to compel testimony that otherwise would be confidential if "the disclosure is necessary for the proper administration of justice," the ability of a court to do so is specifically made subject to "the common law of legislative privilege and legislative immunity."

Wash. Suburban Sanitary Comm'n, 631 F.3d at 181. Finally, the Court made it clear that if the EEOC had sought "to compel information from legislative actors about their legislative activities, they would not need to comply." *Id.*

The Fourth Circuit's approach is consistent with the U.S. Supreme Court's approach in *Eastland*, 421 U.S. at 501. There the Court held that any "interference" from civil litigation is barred by legislative immunity. 421 U.S. at 503. Accordingly, the Court quashed a subpoena to federal legislators holding that they were "completely immune" from it. *Id.* at 506. Other circuit courts have held similarly. In *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995), the Court held that a party is "no more entitled to compel [legislators'] testimony – *or production of documents* – than it is to sue [legislators]." *Id.* at 421 (emphasis added). Rather, there is no "difference in the vigor" with which the privilege deriving from the immunity protects document production and testimony versus protection against the suit itself. *Id.*

IV. Rule 34 Production Requests to the State are Insufficient to Compel Legislators to Produce Documents.

Plaintiffs seek to compel individual legislators to produce documents by serving a Rule 34 production request on the State of North Carolina. However, each legislator is a constitutionally elected and separate office and therefore the custodian of his or her own records. The State of North Carolina does not have the authority to compel any legislator to produce documents.

Indeed, General Assembly policy recognizes that legal possession of each member's electronic and other records rests with the member only. In a policy entitled

"Custodianship of Legislator E-mail and other Electronic Documents", attached hereto as Exhibit 3, the General Assembly recognizes that "the member shall be the custodian of documents that are made or received by the member or the personnel in the member's office and that are contained in the General Assembly's computer system under their accounts." Thus, each individual legislator has the exclusive legal right to access and produce his or her own documents. No legislators have been named as parties in any of the cases consolidated in this matter and the "State of North Carolina" is not the custodian of their documents. Accordingly, to the extent Plaintiffs seek to compel documents from legislators pursuant to a Rule 34 production request, such request should be denied.

CONCLUSION

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

This the 26th 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 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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