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.	**UNITED STATES' SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION TO QUASH SUBPOENAS TO STATE LEGISLATORS** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 13-cv-861

The United States respectfully submits this supplemental brief responding to questions posed by the Court, during the February 21, 2014 hearing on the Motion to Quash filed by the State Legislators, regarding the doctrines of legislative immunity and legislative privilege, and incorporates by reference its prior arguments. *See* United States' Brief in Opposition to Motion to Quash Subpoenas to State Legislators ("United States Opp'n Br."), ECF No. 58, 1:13-cv-861. As outlined in the United States' prior brief and below, in voting rights cases, courts routinely consider documents created and testimony provided by legislators.

I. The Doctrine of Legislative Immunity Does Not Include An Absolute Evidentiary Privilege For State Legislators

The State Legislators in this matter improperly conflate "legislative immunity," which refers to state legislators' immunity from civil liability, with "legislative privilege," which, where it exists, provides only a qualified evidentiary privilege. *Compare Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (holding that state legislators "acting in the sphere of legitimate legislative activity" are immune from suit under the Civil Rights Act of 1871) *with United States v. Gillock*, 445 U.S. 360, 373 (1980) (declining to recognize an absolute "evidentiary privilege for state legislators for their legislative acts"). "While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, 'at best, one which is qualified.'" *Perez v. Perry* (*Perez III*), 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge court) (citations omitted); *Favors v. Cuomo*, 285 F.R.D. 187, 209 (E.D.N.Y. 2012) ("Legislative privilege is related to, but distinct from, the concept of legislative

immunity."). Indeed, in *Washington Suburban Sanitary Comm'n*, which the State Legislators cite in support of their overly expansive reading of legislative immunity, Reply Br. at 3-4, ECF No. 65, 1:13-cv-861, the Fourth Circuit recognized that legislative privilege and legislative immunity are distinct concepts. *See EEOC v. Washington Suburban Sanitary Comm'n* (*WSSC*), 631 F.3d 174, 180 (4th Cir. 2011) (noting that to properly understand "legislative privilege," one must "examine the parallel concept of legislative immunity").

That state legislators are immune from civil liability in many cases does not mean that they have an absolute privilege to refuse to respond to otherwise valid requests for documents or testimony in voting rights cases, whether served by third party subpoena or under Rules 30 and 34 of the Federal Rules of Civil Procedure.[1] The United States

[1] In considering legislative immunity, the Fourth Circuit has not distinguished between cases in which discovery requests were served through subpoena and through the party discovery process. *See McCray v. Maryland Dep't of Transp.*, 2014 WL 323272 (4th Cir. Jan. 30, 2014) (involving party discovery); *WSSC*, 631 F.3d 174 (involving an administrative subpoena). This is consistent with the general rule that the scope of discovery under Rule 45 is the same as under Rule 26. *See Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 240 (M.D.N.C. 2010). Therefore, whether discovery in this voting rights case is sought through a subpoena or through a request for production, legislative immunity does not apply.

In a footnote in its opposition to the *League of Women Voters* Plaintiffs' motion to compel, Defendants argue that the League's requests for production "are not sufficient to compel individual legislators to produce documents in this action" because "no individual legislators are a named party." Defs.' Opp'n Br. at 7 n.4, ECF No. 62, 1:13-cv-861. The United States notes that Defendants have taken inconsistent positions in this case, however, as to who qualifies as a party in this case and who is represented by defense counsel. In an earlier brief, Defendants asserted that defense counsel represented "the State of North Carolina and all of its agencies and officials" in this action. Defs.' ESI Br. at 6, ECF No. 34, 1:13-cv-861.

Supreme Court has expressly declined to recognize an absolute "evidentiary privilege for state legislators for their legislative acts." *Gillock*, 445 U.S. at 373; *see also* United States' Opp'n Br. at 7-8.[2] Moreover, the Court has acknowledged that legislative evidence is highly relevant to "[d]etermining whether invidious discriminatory purpose was a motivating factor" in a decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *see also* United States' Opp'n Br. at 5, 8-9. Accordingly, courts in the Fourth Circuit and around the country have recognized that although state and local legislators may be immune from civil liability, any evidentiary privilege they possess is at best qualified. *See Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906, 920 (W.D. Va. 2012) ("In contrast to the privilege enjoyed by members of Congress under the Speech or Debate Clause, there is no absolute 'evidentiary privilege for state legislators for their legislative acts.' Nor has the Court recognized an absolute testimonial privilege for state or local legislators in civil cases.") (quoting *Gillock*, 445 U.S. at 373, and citing *Arlington Heights*, 429 U.S. 252); *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (three-judge court) (opinion of Murnaghan, C.J., and Motz, D.J.) (concluding that "[t]he doctrine of

[2] The cases the State Legislators' cite in support of their argument that legislative immunity and legislative privilege are "co-extensive and both absolute," Defs.' Supp. Br. at 12-13, ECF No. 70, 1:13-cv-861 (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, (1975), and *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995)), address the privilege accorded to members of Congress under the Speech and Debate Clause of the United States Constitution. As the Supreme Court has recognized, the Speech and Debate Clause does not apply to state legislators, and any protection afforded state lawmakers under the federal common law is "far less than the legislative privilege created by the Federal Constitution." *Gillock*, 445 U.S. at 366 n.5, 368.

legislative immunity (both in its substantive and testimonial aspects) . . . does not . . . necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy") (citing *Arlington Heights*, 429 U.S. 252); *id.* (noting that "testimonial legislative immunity is not an absolute"); *see also* United States' Opp'n Br. at 6, 9, 12-14.

Because "racial discrimination is not just another competing [policy] consideration," the voting rights cases under Section 2 of the Voting Rights Act currently before this Court are precisely the context in which judicial inquiry into legislative purpose is appropriate. *Arlington Heights*, 429 U.S. at 265. The Fourth Circuit itself has emphasized that race discrimination cases are among the "limited exceptions to the principle that judicial inquiry into legislative motive is to be avoided." *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259 & n.6 (4th Cir. 1989).[3] Indeed, courts routinely look to legislative evidence—including documents and testimony obtained from legislators—in voting rights cases, including cases arising under Sections 2 and 5 of the Voting Rights Act. *See* United States' Opp'n Br. at 4; *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 292 (D.S.C. 2003), *aff'd* 365 F.3d 341 (4th Cir. 2004) (Section 2); Op. at 6, *Perez v. Perry* (*Perez II*), 5:11-cv-360 (W.D. Tex. Mar. 19, 2012) (three-judge court) (unpublished) (ECF No. 58-5, 13-cv-861) (Section 2); *Texas v. United States*, 887

[3] *McCray* is not to the contrary. *See McCray*, 2014 WL 323272, at *4 (noting that "a legislator is immune from discrimination lawsuits when she makes budget decisions based on improper animus"). As discussed *infra*, the court's reasoning in *McCray* is limited to a narrow category of employment discrimination cases in which plaintiffs challenged legislative budgetary action that resulted in the elimination of their positions. It does not apply to the voting rights cases currently before this Court. *See infra* Part II.

F. Supp. 2d 133, 154-56, 161 & n.32 (D.D.C. 2012) (three-judge court) (Section 5), *vacated on other grounds*, 133 S. Ct. 2885 (2013); *South Carolina v. United States*, 898 F. Supp. 2d 30, 44-45 (D.D.C. 2012) (three-judge court) (Section 5); *Busbee v. Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982) (Section 5), *aff'd* 459 U.S. 1166 (1983); *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (challenge to North Carolina's congressional redistricting plan under the Fourteenth Amendment). This evidence is not limited to direct evidence of individual motive. The document requests at issue here seek additional, circumstantial evidence that is highly relevant to Plaintiffs' claims alleging intentional racial discrimination.[4] *See Reno v. Bossier Parish*, 520 U.S. 471, 488 (1997) ("[A]ssessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'") (quoting *Arlington Heights*, 429 U.S. at 266); United States' Opp'n Br. at 1-2, 5.

II. The Fourth Circuit's Employment Discrimination Cases Are Distinguishable and Do Not Justify Restricting the Scope of Discovery in these Voting Rights Cases

Voting rights cases are materially different from the employment cases in which the Fourth Circuit has applied legislative immunity broadly. Both *McCray v. Maryland*

[4] Defendants insist that they have provided the entire legislative record for HB 589. *See* Defs.' Supp. Br. at 5. As stated by counsel for Plaintiffs during the February 21, 2014 hearing, data and analyses introduced by senators during floor debate on HB 589 and moved into the permanent legislative record were not included with the legislative materials produced by Defendants to date. In addition, Defendants claim to have provided audio files of all hearings and debates concerning HB 589; however, no audio files were included with the materials Defendants produced.

Dep't of Transportation, — F.3d —, No. 13-1215, 2014 WL 323272 (4th Cir. Jan. 30, 2014), and *WSSC*, 631 F.3d 174, involved an entirely different substantive context: employment discrimination claims challenging budget-making decisions of legislative bodies. The concerns that drove the Fourth Circuit in those cases have no bearing on whether plaintiffs in Section 2 cases alleging intentional racial discrimination in voting should be entitled to discovery regarding legislative motivation and the legislative process.

The complainants in both *McCray* and *WSSC* were government employees who sought to use federal antidiscrimination law to challenge legislative budgetary decisions that adversely affected their employment. *See McCray*, 2014 WL 323272, at *1; *WSSC*, 631 F.3d at 176-77. Because these cases targeted facially neutral legislative budget acts, they were not ordinary employment discrimination cases. In this distinctive context, involving quintessentially legislative decisions about how to allocate governmental resources, the Fourth Circuit has concluded that the doctrine of legislative immunity, which at its core prevents plaintiffs from obtaining relief in certain cases, even when impermissible legislative motivations are involved, *see Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998), also justifies denying plaintiffs discovery into legislative motivations. *See WSSC*, 631 F.3d at 181 ("Legislative immunity thus reinforces representative democracy, fostering public decisionmaking by public servants for the right reasons. Legislative privilege against compulsory evidentiary process exists to safeguard this legislative

immunity and to further encourage the republican values it promotes.").[5] The Fourth Circuit's decisions in these cases are animated by the underlying notion that, to the extent the plaintiffs were really challenging the quintessentially legislative act of passing a budget—or, in *Schlitz*, of deciding whether to reappoint a state court judge, *see Schlitz v. Virginia*, 854 F.2d 43, 45 (4th Cir. 1988)—they had no cause of action.

The court's reasoning in *McCray* illustrates this point. There, the court explained that legislative immunity would have precluded a Title VII claim challenging the elimination of the plaintiff's position as the result of budget cuts mandated by the legislature because "enacting a budget is a legislative act." *McCray*, 2014 WL 323272, at *4. Because the court in *McCray* concluded that the plaintiff's Title VII claim against the DOT alleged "discriminatory conduct that occurred *before* any legislative activity," *id.*, at *1 (emphasis added), her claim was a straightforward Title VII claim challenging

[5] Even in this limited context, legislative privilege does not sweep as broadly as the State Legislators contend. The Fourth Circuit cases that actually apply the privilege have only shielded lawmakers from having to provide deposition testimony about their motives or intentions in making the challenged decision. *See, e.g., Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (holding that the plaintiff could not compel testimony from local lawmakers "as to their motives in abolishing [his] job and establishing the new job."); *Schlitz v. Virginia*, 854 F.2d 43, 45-46 (4th Cir. 1988), *overruled in part by Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 303 (4th Cir. 1995) (en banc) (holding that the doctrine of legislative immunity precluded state legislators from being compelled to "testify as to their motives for declining to reelect" a state judge). These courts did not squarely address whether legislative privilege should apply to block document discovery, or testimony not directed at individual legislators' motives. In *Marylanders for Fair Representation*, a case under the Voting Rights Act, a three-judge court concluded that legislative immunity did not protect requested documents from disclosure. *Marylanders*, 144 F.R.D. at 302 n.20. *But see WSSC*, 631 F.3d at 181 (stating in dicta in an employment case that "if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply").

executive-branch public action. The court held that because the lawsuit did not challenge protected legislative activity, it could proceed. *See id.* at *6.[6]

The same reasoning guided the court in *WSSC*, in which the panel stated that it would have quashed the EEOC's subpoena on legislative immunity grounds if the EEOC had targeted the county council's approval of the sanitary commission's budget, "a 'quintessentially legislative' act." *WSSC*, 631 F.3d at 183 (quoting *Bogan*, 523 U.S. at 55). Because the court in *WSSC* concluded that the subpoena targeted "unprivileged administrative personnel decisions," however, it held that the subpoena did not implicate legislative immunity. *Id.*

These Fourth Circuit employment discrimination cases do not address the scope of legislative privilege in voting rights cases, where legislation is precisely and properly the target of the statutory or constitutional claim. As Judges Murnaghan and J. Frederick Motz explained in *Marylanders for Fair Representation*, courts "should not simply rely

[6] The court's discussion of what actions by the legislature and the DOT *would* have been shielded by legislative immunity *if* the plaintiff had attempted to challenge those actions is dicta based on a hypothetical scenario. *See McCray*, 2014 WL 323272, at *4-6. As the court acknowledged in a footnote, the legislature actually played no role in the decision-making process at issue in *McCray*; the budget cuts were carried out by the Governor and the Board of Public Works. *Id.* at *4 n.3. The court concluded that although "[o]ne could argue that the budget cuts were therefore executive in nature, not legislative[,]" it "need not decide this thorny question . . . because" it determined that the plaintiff's "lawsuit targets discrimination that occurred before any legislative activity occurred" – that is, the lawsuit did not actually implicate legislative immunity.

upon bright line tests which have been developed in other contexts to bar virtually all discovery of relevant facts." 144 F.R.D. at 305.[7]

First, the nature of voting rights cases dictates a narrow role—if any—for assertions of legislative evidentiary privilege. Because voting rights cases "seek to vindicate public rights[,]" they are, in some respects, "akin to criminal prosecution" such that, "as in *Gillock*, 'recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government.'" *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011) (quoting *Gillock*, 445 U.S. at 373); *see also United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989) ("[T]he federal interest in enforcement of the Voting Rights Act weighs heavily in favor of disclosure."). Notwithstanding the general rule that judicial inquiry into legislative motive is usually to be avoided, courts have repeatedly held that intentional discrimination in voting gives rise to a cause of action that plaintiffs can prove through circumstantial (or direct) evidence under *Arlington Heights*. *See supra* at 3-4. Indeed, because Plaintiffs in these cases seek relief under

[7] Indeed, counsel for the State Legislators recognized the differing treatment given to voting cases during the February 21, 2014 argument on the motion to quash, when he characterized the many Section 2 redistricting cases in which courts held that state legislative privilege was qualified, as representing an exception to or "carve out" from the doctrine of legislative immunity. *See, e.g.*, *Perez III*, 2014 WL 106927, at *2; *Favors*, 285 F.R.D. at 218-19; *Baldus v. Wisc. Gov't Accountability Bd.* (*Baldus I*), 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011) (three-judge court); *Marylanders*, 144 F.R.D. at 304-05; *see also* United States' Opp'n Br. 12-13. The cases currently pending before this Court fall squarely within the scope of this "carve out."

Section 3 of the Voting Rights Act, an inquiry into legislative intent is required; to prevail, Plaintiffs must prove that HB 589 was enacted for a discriminatory purpose.

Second, like cases challenging redistricting plans under Section 2 of the Voting Rights Act, the vote denial cases before this Court also arise under Section 2 and challenge the legislature's effort to reset the rules by which the democratic process operates. Much like redistricting, North Carolina's HB 589 at issue here "involves the establishment of the electoral structure by which the legislative body becomes duly constituted." *Marylanders*, 144 F.R.D. at 304. For example, under HB 589, only individuals who possess certain narrowly defined types of photo identification will be eligible to vote in person in North Carolina. *See* N.C.G.S. § 163-166.13 (added by HB 589 § 2.1). North Carolina voters who fail to register sufficiently in advance will no longer be able to register and vote during the early voting period, because the State has eliminated same-day registration during the early voting period. *See* N.C.G.S. § 163-82.6A (as amended by HB 589 §§ 16.1-16.1A). "Inevitably," this kind of legislation "directly involves the self-interest of the legislators themselves." *Marylanders*, 144 F.R.D. at 304. HB 589 sets obstacles in the path of voters attempting to cast a ballot, thereby impacting who will be able to vote for the legislators in the first place. In this context, non-disclosure of legislative evidence does not promote "republican values." *WSSC*, 631 F.3d at 181. Rather, it obscures potential "intentional or negligent government misconduct." *Irvin*, 127 F.R.D. at 174; *see also Baldus v. Wisc. Gov't Accountability Bd.* (*Baldus II)*, 843 F. Supp. 2d 955, 958 (E.D. Wis. 2012) ("[T]he

Legislature has taken action that affects the voting rights of Wisconsin's citizens and now attempts to cloak the record of that action behind a charade masking as privilege.").

CONCLUSION

For all the foregoing reasons, the Court should deny the State Legislators' motion to quash the *NAACP* Plaintiffs' document subpoenas, deny their request for a waiver from Rule 45(e)(2)(A)'s privilege log requirement, and grant the *League of Women Voters* Plaintiffs' motion to compel.

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Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on February 26, 2014, I electronically filed the foregoing **United States' Supplemental Brief in Opposition to Motion to Quash Legislative Subpoenas,** using the CM/ECF system in case numbers 1:13- cv-658, 1:13- cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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