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

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 Plaintiffs, v. 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, Defendants.	**SUPPLEMENTAL BRIEFING IN SUPPORT OF PLAINTIFFS' OPPOSITION TO MOTION TO QUASH SUBPOENAS TO STATE LEGISLATORS AND IN SUPPORT OF MOTION TO COMPEL** **Case No.: 1:13-CV-658**

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, Plaintiffs, v. 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, Defendants.	**Case No.: 1:13-CV-660**

UNITED STATES OF AMERICA, Plaintiffs, v. 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, Defendants.	**Case No.: 1:13-CV-861**

INTRODUCTION

Following the hearing on the Motion to Quash and Motion to Compel on February 21, 2014, this court requested supplemental briefing on two issues:

1. Whether state legislators enjoy absolute immunity, whether that may be used to preclude any response to a subpoena, whether it constitutes immunity from suit or immunity from any court action, such as issuance of a subpoena; and whether this is different than responding to requests for production of documents; and

2. How the 4th Circuit's decisions in *Equal Employment Opportunity Commission* ("EEOC") *v. Washington Suburban Sanitary Commission* and *McCray v. Maryland Department of Transportation* may be distinguished, including whether Title VII cases are different from cases under the Voting Rights Act ("VRA"); and whether redistricting cases under the VRA are different from vote denial cases under the VRA.

2/21/14 Hrg. Tr. at 4-5 (Draft).

Racial discrimination in voting contaminates the electoral process, and strikes at the heart of our democracy. The VRA protects citizens against states tinkering with election laws to exclude voters from full and equal participation in the electoral process based on their race. Legislative immunity cannot be extended beyond all precedent to allow a state legislature to exclude particular voters from the electoral process, and to do so in secret, or with the select input from third parties.

Legislative immunity is not absolute. Even immunity from suit, the most comprehensive protection flowing from the doctrine, is not wholly absolute. Similarly, courts have found that privileges flowing from legislative immunity are qualified and have ordered legislators to respond to subpoenas and requests for documents in cases like this one where the balance of interests weighs in favor of disclosure. In VRA cases challenging the rules by which legislators are elected, legislators' self-interest is at its height. By establishing inquiry into legislative motive as permissible, and even crucial, to cases challenging race discrimination under the

VRA, courts have implicitly acknowledged that the legislative intrusion resulting from this inquiry yields to the courts' constitutional mandate to assess the constitutionality of statutes and enforce civil rights laws. This conclusion is consistent with the law in the Fourth Circuit, the Supreme Court and other federal circuits, none of which have recognized legislative immunity as wholly absolute.

ARGUMENT

I. Legislative Immunity Is Not Absolute

Legislative immunity is not absolute, and does not provide blanket protection from every judicial inquiry into legislative purpose. Legislative immunity applies to members of Congress through the Speech or Debate Clause of the Constitution, which primarily protects legislators from liability or questioning related to their legislative actions. U.S. Const. art. I, § 6, cl. 1. Its purpose is to "insure that the legislative function may be performed independently without fear of outside interference." *Sup. Ct. of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 731 (1980); *see Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). Various protections have been found to flow from the Speech or Debate Clause, including a near-absolute protection against personal liability, and to a lesser extent, a qualified privilege against compelled testimony about legislative actions. [1]

While many states have incorporated similar Speech or Debate clauses in their state

[1] It is important to distinguish the various privileges flowing form the Speech or Debate Clause. "Legislative privilege [against compelled disclosure of documentary and testimonial evidence] is related to, but distinct from, the concept of legislative immunity." *Favors v. Cuomo*, 285 F.R.D. 187, 209 (E.D.N.Y 2012). Specifically, "while 'common law legislative immunity for state legislators is absolute,' the legislative privilege for state lawmakers is, 'at best, one which is qualified.'" *Id.* (quoting *Rodriguez v. Pataki*, 280 F. Supp 2d 89, 95, 100 (S.D.N.Y. 2003)) (internal citations omitted).

constitutions, North Carolina has no such constitutional provision. And while the Supreme Court has held that state legislators enjoy legislative immunity, *Tenney*, 341 U.S. at 373 (1951), the Court has never held that it is absolute as to state lawmakers. *See U.S. v. Gillock*, 445 U.S. 360, 369 (1980). But even among members of Congress, who enjoy a more expansive immunity than state lawmakers, the Court has recognized that *complete* legislative independence must yield where necessary to check congressional action. *See U.S. v. Gillock*, 445 U.S. 360, 374 (1980) (there is no absolute evidentiary privilege for state legislators for their legislative acts). The Supreme Court has clearly contemplated the doctrine is not broadly absolute, by recognizing that "[i]n some extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

Courts in the Fourth Circuit have recognized that immunity is not absolute. In discussing the scope of legislative protection, the District Court in *EEOC v. Washington Suburban Sanitary Commission* rejected the argument that "legislative immunity, and its derivative evidentiary privilege, is an impenetrable shield that completely insulates any disclosure of its documents from the EEOC's investigatory authority." 666 F. Supp. 2d 526, 532 (D. Md. 2009), *aff'd*, *EEOC v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174 (4th Cir. 2011). Rather, the court explained, the protection is "one of non-evidentiary use [of legislative acts against a legislator], not one of non-disclosure." 666 F. Supp. 2d at 532 (quoting *In re Grand Jury*, 821 F.2d 946, 958 (3rd Cir. 1987)) (internal quotations omitted). *See also Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994) ("The primary purpose of legislative immunity is not to protect the

confidentiality of legislative communications, nor is it to relieve legislators of the burdens associated with document production. The privilege is intended only to shield legislators from "'the harassment of hostile questioning.'")

Similarly, the panel in *Marylanders for Fair Representation, Inc. v. Schaefer* agreed that legislative immunity is not all-encompassing, and adopted a qualified view of lawmakers' protections. 144 F.R.D. 292, 302 n.20 (D. Md. 1992) (acknowledging that legislative immunity can include personal immunity from liability as well as an evidentiary and testimonial privilege but does not extend wholesale to any type of documentation). Other courts have also read *Marylanders* as adopting a qualified view of legislators' protections, and allowing for legislators' compelled production of documents. *See e.g. Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306 (N.D. Ala. Jan. 3, 2013); *Lindley v. Life Ins. Co. of Am.*, No. 08–CV–379, 2009 WL 2245565, at *9 (N.D. Okla. Jul. 24, 2009); *Rodriguez v Pataki*, 280 F. Supp. 89, 98 - 99 (S.D.N.Y. 2003) (explaining that in *Marylanders* "all three judges apparently agreed that the documentation prepared by the committee was subject to disclosure unless it was shielded by a privilege other than the legislative privilege." (citation omitted)). In discussing the *Marylanders* ruling in the context of a recent case under Section 2 of the VRA, the court in *Favors v. Cuomo* described "[t]he spirit of *Marylanders*," as being "that a legislator's evidentiary privilege is a qualified one." 285 F.R.D. 187, 213 n.27 (E.D.N.Y. 2012). The *Favors* court explained that "the legislative privilege for state lawmakers is, at best, one which is qualified" and depends on a "balance [of] the interests."[2] 285 F.R.D. at 209. This view was

[2] This view is supported by other federal courts as well: *See, e.g., Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306, at *13 (N.D. Ala. Jan. 3, 2013) (explaining that the "legislative privilege is not absolute" and thus courts must "balance the various competing

articulated by the concurring justices in *Marylanders*, who noted that the doctrine "does not . . . necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding . . . public policy." 144 F.R.D. at 304. The court also acknowledged this in Footnote 12, noting that "Plaintiffs are correct in asserting that there are exceptions to this general rule [that placing a decision-maker on the stand is usually to be avoided], for example in race and sex discrimination cases." *Id.* at 297 n.12. And, even though "proof of legislative motive is no longer one of the three required elements for proving a Section 2 violation, proof of motive nevertheless may be relevant." *Id.*

Courts have deemed legislative motive to be relevant in cases arising under the 14th and 15th Amendments and the VRA where allegations of intentional discrimination justify inquiry into legislative intent. The Supreme Court has made clear that "racial discrimination is not just another competing consideration" of the sort that is typically entitled to judicial deference. *Arlington Heights*, 429 U.S. at 265. "When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Id.* at 265-66. In this regard, courts in a number of voting rights cases have concluded that the privileges flowing from legislative immunity should cede to disclosure. *See* Sec. II., infra.; *see e.g. Baldus v. Brennan*, No. 11-cv-562, 2011 WL 6122542, at *1 - 2 (E.D. Wis. Dec. 8, 2011) (case brought under Section 2 of the VRA, finding "any documents or testimony relating to how the Legislature reached its decision on the 2011 redistricting maps are relevant to the plaintiffs' claims as proof of discriminatory intent" and concluding that "legislative privilege is a qualified

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interests" to determine if the legislative privilege applies) (internal quotation marks omitted); *see also Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 304 (S.D.N.Y. 2003) (affirming magistrate's analysis of legislative privilege, including that it is not absolute and is determined by a balancing of interests).

privilege that can be overcome by a showing of need."). The District Court affirmed the interests advanced by the legislative immunity doctrine ceded in the balance: "no public good suffers by denial of privilege in this case," finding on balance disclosure is favored because it "is extremely important to the public, whose political rights stand significantly affected by the efforts of the Legislature." *Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012); *see also United States v. Irvin*, 127 F.R.D. 169, 173-4 (C.D. Cal. 1989) ("privilege must yield . . . to the need for disclosure" because "the federal interest in enforcement of the VRA weighs heavily in favor of disclosure"); *League of Women Voters of Fla. v. Fla. House of Representatives*, No. SC13-949, 2013 WL 6570903, at *18 (Fla. Dec. 13, 2013) (finding that state legislative privilege must yield in favor of the important government interests in ascertaining legislative intent in voting challenge brought under the State's recent constitutional amendment prohibiting political gerrymandering). This case is no different.

In this case, which raises claims of intentional discrimination based on race, the compelling interest in discerning legislative motive is at its apex. Moreover, the nature of intrusion is minimal. The U.S. District Court for the Eastern District of North Carolina has noted that document requests are less intrusive to the legislative process (and thus less likely to frustrate the goals of legislative immunity), than compelled testimony or civil liability. *See Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994). In *Small v. Hunt*, the court rejected the defendants' arguments that "[t]he production of documents is as disruptive as an the act [sic] of giving testimony," as "not supported by the caselaw" and out of step with the purpose of legislative immunity. *Id.* (noting that the primary purpose of legislative immunity is not to protect the confidentiality of legislative communications, nor to relieve legislators of the

burdens associated with document production). The court distinguished document requests pursuing civil claims against legislators or seeking to compel testimony of legislators, noting that plaintiffs, "[we]re merely requesting documents relating to the deliberations of the Committee, such as minutes of the meetings and data considered by the Committee during their deliberations." *Id.* Plaintiffs' document requests here similarly will not frustrate legislators' ability to do their jobs.

Legislative immunity promotes the separation of powers by promoting an independent legislative branch, but the privileges flowing from the immunity are not absolute and differ based on the nature of the case, the nature of the intrusion, the nature of the evidence sought. The Supreme Court has recognized that the evidentiary privileges flowing from the doctrine are to be strictly construed due to the public interest in discovery ("the public . . . has a right to every man's evidence," *Trammel v. United States*, 445 U.S. 40, 50 (1980)) and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principal of utilizing all rational means for ascertaining truth," *id.* at 50; *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011) (citations omitted). Those opposing disclosure bear the burden of burden of demonstrating privilege with respect to the documents they seek to withhold.[3]

As one commentator noted in the North Carolina Law Review: "An examination of the proper role of the speech or debate clause within a tri-partite system of separation of powers

[3] *Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 763 (S.D. Tex. Apr. 29, 2011) ("A party asserting a privilege exemption from discovery bears the burden of demonstrating its applicability.") (quoting *In re Santa Fe Int'l Corp*, 272 F.3d 705, 710 (5th Cir. 2001).

reveals that even it should not provide absolute protection from judicial inquiry into legislative motive." Louis S. Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena For Your Thoughts?* 63 N.C. L. Rev. 879, 882 (1985). The historic rationales and current application of the Speech or Debate clause that underscores the legislative immunity doctrine make clear that it was not intended to prevent the courts from obtaining needed evidence to review discriminatory intent. "Rather, the use of such evidence, including the compelled testimony of legislators, should overcome the privilege when failure to do so would defeat the court's obligation to judge the constitutionality of the challenged legislation." *Id.* This is particularly true in cases, like this, involving intentional race discrimination under the VRA and U.S. Constitution, where such intrusion is implicit in the laws' standards of review and the government's interest in enforcing civil rights mandates is at its highest. Here, understanding how and why H.B. 589 was proposed and enacted is critical to Plaintiffs' claims that the legislation was designed to deny or abridge the right to vote on account of race.

Quashing NAACP Plaintiffs' subpoenas in their entirety or denying LWV Plaintiffs' Motion to Compel would run afoul of the boundaries of privilege afforded by the immunity doctrine, and more importantly, undermine the strong federal interest courts have in enforcing civil rights statutes.

II. The Cases Relied Upon by Defendants Are Inapplicable In This VRA Challenge

Congress has created a cause of action under Section 2 of the VRA against state and local jurisdictions for passing discriminatory election laws. By its nature, this remedy often requires an inquiry into state legislative intent; it would contravene the purpose of the statute to prohibit

document discovery from state legislators. As set forth in LWV Plaintiffs' Motion to Compel and NAACP Plaintiffs' Opposition to Defendants' Motion to Quash, because Section 2 of the VRA necessitates an inquiry into the legislature's intent, Courts have routinely compelled the disclosure of documents from legislators in Section 2 cases, notwithstanding assertions of legislative privilege. *See Rodriguez*, 280 F. Supp. 2d at 101; *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011); *Favors*, 285 F.R.D. at 212; *Baldus*, 2011 WL 6122542, at *2; *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *10; *ACORN v. Cnty. of Nassau*, No. CV 05-2301, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007); *Almonte v. City of Long Beach*, No. CV 04-4192, 2005 WL 1796118, at *3-4 (E.D.N.Y. July 27, 2005).

Although Defendants suggest that these cases are inapposite because they are redistricting cases, there is no authority for the proposition that Section 2 challenges to ballot access barriers should be treated differently than challenges to state redistricting plans for purposes of legislative immunity. Section 2 equally prohibits discriminatory redistricting plans and discriminatory barriers to the ballot. *Cf. Johnson v. Governor of State of Fla*., 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) ("Two types of discriminatory practices and procedures are covered by section 2: those that result in 'vote denial' and those that result in 'vote dilution'"). No less than a redistricting challenge, this case involves a challenge to the "establishment of the electoral structure by which the legislative body becomes duly constituted. Inevitably, it directly involves the self-interest of the legislators themselves." *Marylanders*, 144 F.R.D. at 304 (Murnaghan, J., concurring). The purpose of the VRA is to protect against discrimination in voting. This is true regardless of whether that discrimination takes the form of unfair redistricting plans or ballot access barriers.

In any intent-based VRA claim, whether involving a redistricting plan or a barrier to accessing the ballot, the purpose of the legislature is at issue. For example, in a vote dilution claim, a court may consider evidence that a legislature was aware that a particular redistricting plan could fracture or weaken minority voting power as probative of discriminatory intent. *See, e.g.*, *Texas v. United States*, 887 F. Supp. 2d 133, 163-65 (D.D.C. 2012) (finding discriminatory purpose where "there [wa]s little question that [Texas's state Senate redistricting plan] had a disparate impact on racial minority groups" and emails among legislative staff revealed improprieties in the sequence of events leading up to adoption of the plan), *vacated on other grounds*, 133 S. Ct. 2885 (2013). In this context, evidence that legislators were aware that strict voter ID requirements, a reduction in early voting, a prohibition on same day registration, and other challenged provisions would disproportionately affect minority voters is similarly probative of intent here. In either case, the issue of what information was available to legislators and when bears heavily on the issue of discriminatory intent.

To be sure, requiring legislators to produce documents in the course of federal litigation may require some intrusion into the state legislative process. But the VRA authorizes such intrusion. The VRA protects the right to vote—the most "fundamental political right, because [it is] preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)—and also seeks to prevent racial discrimination, which is "constitutionally suspect and subject to the most rigid scrutiny," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216 (1995) (internal quotation marks and citation omitted). When Congress seeks to combat racial discrimination in voting, as it did in enacting the VRA, it acts at the apex of its power, thus permitting greater federal intrusion into state legislative processes than might be permissible in the context of other federal

statutes. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 561-63 (2004) (Scalia, J., dissenting) ("Giving [Congress's enforcement powers] more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the [Reconstruction Amendments] a priority of attention that [the Supreme] Court envisioned from the beginning, and that has repeatedly been reflected in [the Court's] opinions.").

In making their broad assertions of legislative privilege, Defendants rely entirely on inapposite cases concerning employment discrimination challenges pursuant to different federal statutes. The VRA is different. Racial discrimination in voting contaminates the electoral process, and strikes at the heart of our democracy. In interpreting legislative immunity (against personal liability), the Supreme Court has indicated that legislative immunity is justified in some contexts because "voters must be the ultimate reliance for discouraging or correcting [legislative] abuses." *Tenney*, 341 U.S. at 378. However, in voting rights cases, this underlying justification for legislative immunity is not served by prohibiting disclosure. Where the claim is that the electoral process itself has been tainted by racial discrimination, the challenged law prevents voters from using the normal mechanism to correct legislative abuses – voting the abusers out of office. Although immunity in some contexts "reinforces representative democracy," *Washington Suburban Sanitary Comm'n*, 631 F.3d at 181, Defendants are not entitled to an absolute shield in VRA cases, where the integrity of the democratic process itself has been called into question because it may have been tainted by improper racial considerations.

Congress has designed a specific system of accountability under the VRA that differs

from the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e. If a state legislator participates in racial discrimination in voting, Congress has created a specific cause of action under the VRA that protects the legislator from being sued directly, but makes the State and its implementing agencies subject to a remedy for the legislature's bad intent. Thus, in voting rights cases, the courts are virtually unanimous in applying a balancing test to assertions of legislative privilege.

III. Many of Plaintiffs' Document Requests Do Not Implicate Legislative Immunity

Even if legislative immunity is applicable here, no federal court has applied legislative immunity as broadly Defendants request and allowed parties to evade *all* disclosure of relevant documents simply because those documents are in the custody of legislators. Legislative immunity does not extend to non-legislative acts or to communications with third parties who are not covered by the privilege, and therefore documents related to these categories, which comprise a number of documents responsive to Plaintiffs' requests, are categorically not privileged and do not require the Court to make a qualified immunity balancing test.

The Supreme Court has made clear that not all acts of a legislator are legislative in nature. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. . . . Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House."). Whether an act is legislative turns on the nature of the act itself. *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). Even when the official is a legislator, local legislators are only immune for their "legislative, as distinct from ministerial, duties." *Id.*

at 51.

Thus, in *Washington Suburban Sanitary Commission*, the Court *compelled* the disclosures by Washington Suburban Sanitation Commission members serving in a quasi-legislative capacity of documents related to re-hiring decisions following the budgetary decision. 631 F.3d at 182, 184. Similarly, in *McCray v. Maryland Department of Transportation*, --- F.3d ----, No. 13–1215, 2014 WL 323272 (4th Cir. Jan. 30, 2014), the Court *allowed* discovery from the Maryland Department of Transportation and Maryland Transit Administration because McCray alleged that she was subject to discriminatory employment action taken prior to any legislative decision. In both instances, the documents requested did not implicate the "legislative activity" of the defendant government agency.

Many of the documents Plaintiffs request are materials not related to legislative acts. The Fourth Circuit in *Washington Suburban Sanitary Commission* upheld the subpoena because "the investigation was aimed at discriminatory behavior prior to and after these legislative actions." *McCray*, 2014 WL 323272, at *5 (describing *Washington Suburban Sanitary Comm'n*). Plaintiffs' requests include at least some categories of documents that are, by definition, related to non-legislative acts and thus fall outside of any possible assertion of immunity. First, post-enactment documents are clearly non-legislative in nature because they were created after the deliberative process leading to the enactment of H.B. 589 or otherwise relate to post-enactment implementation issues. Defendants should therefore be required to immediately produce documents created after enactment and any documents that are responsive to requests that relate

to post-enactment matters.[4] *See, e.g.*, Ex. A to Pls.' Mot. to Compel Produc. of Docs., Dkt. No. 70-1, (LWV Requests for Production ("RFPs") 5, 6, 7, 8, 10, 16, 17, 18). Plaintiffs request certain non-deliberative pre-enactment documents which similarly fall outside of any possible assertion of immunity. Documents completely unrelated to the deliberative process itself should therefore be produced immediately. *See* LWV RFPs 9, 12, 13, 14, 15.

As set forth in LWV Plaintiffs' Motion to Compel, Dkt. No. 70, and NAACP Plaintiffs' Opposition to Motion to Quash, Dkt. No. 71, federal courts have held that any applicable legislative privilege is waived with regard to documents shared with third parties who are not covered by the privilege. These are categorically non-privileged communications and the Court should compel Defendants to produce those documents without applying a qualified privilege balancing test.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant LWV Plaintiffs' motion to compel and deny movants' motion to quash.

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[4] Defendants cite no authority for the proposition that LWV Plaintiffs' Rule 34 production requests are insufficient to compel document production from their clients. If Defendants seek to resist discovery on the grounds that the LWV Plaintiffs' document requests are improper, then they must file a motion for a protective order pursuant to Rule 26(c), which they have not done. In any event, this issue is moot, given that the NAACP Plaintiffs have served third party document subpoenas to the individual legislators. In other words, if this court finds for plaintiffs on the issue of legislative immunity and privilege, the documents at issue must be produced to plaintiffs, regardless of the formal propriety of the LWV Plaintiffs' Rule 34 document requests. And, should the Court find that subpoenas pursuant to Rule 45 are required, the LWV Plaintiffs hereby request leave to join NAACP Plaintiffs' document subpoenas.

Dated: February 26, 2014

Respectfully submitted,

By: */s/ Adam Stein*

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CERTIFICATE OF SERVICE

I, Daniel T. Donovan, hereby certify that on February 26, 2014, I served **Plaintiffs' Supplemental Brief in Opposition to Motion to Quash Subpoenas to State Legislators and In Support of Motion to Compel** 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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