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' BRIEF IN OPPOSITION TO STATE LEGISLATORS' OBJECTION TO MAGISTRATE JUDGE'S ORDER ON LEGISLATIVE PRIVILEGE** 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 opposes the State Legislators' objection to Magistrate Judge Peake's March 27, 2014 order on legislative privilege. Because Judge Peake's order is not clearly erroneous or contrary to law, *see* Fed. R. Civ. P. 72(a), this Court should affirm the order. In particular, in light of the upcoming preliminary injunction motions due on May 5, 2014, this Court should require, consistent with Judge Peake's order, that Defendants produce third party communications between legislators and outside individuals and agencies.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs, including the United States, have filed legal challenges pursuant to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, regarding provisions of North Carolina House Bill 589 ("HB 589"). Plaintiffs allege that HB 589 was enacted with the purpose, and will have the result, of denying or abridging the right of minority voters to vote on account of race, color, or language minority status.

On December 11 and 19, 2013, Plaintiffs in *NAACP v. McCrory*, 1:13-cv-658 ("*NAACP* Plaintiffs"), served subpoenas seeking documents from 13 North Carolina legislators (the "State Legislators" or "Movants"). The *NAACP* Plaintiffs' subpoenas seek documents relating to the consideration and implementation of HB 589, including documents reflecting legislative purpose; documents received by State Legislators from individuals and groups outside the North Carolina General Assembly, such as constituents, lobbyists, public interest groups, and the North Carolina State Board of Elections (SBOE); and factual data and reports relating to, for example, rates of

possession of photo identification among North Carolina voters, and the costs and other impacts of HB 589. *See*, *e.g.*, Ex. 1 (Subpoena to Senator Rucho).

On January 20, 2014, the State Legislators filed a joint motion to quash the 13 document subpoenas, arguing that the doctrine of legislative immunity categorically bars Plaintiffs from seeking *any* discovery from the State Legislators. ECF No. 44, 13-cv-861. On February 10, 2014, Plaintiffs in *League of Women Voters v. North Carolina*, 13-cv-660 ("*LWV* Plaintiffs"), filed a motion to compel the production of documents that Defendants had withheld from discovery on the same basis.[1] On March 27, 2014, after extensive briefing and a hearing, Judge Peake held that the doctrine of legislative "immunity does not preclude all discovery in the context of this case; instead, claims of legislative immunity or privilege in the discovery context must be evaluated under a flexible approach that considers the need for the information in the context of the particular suit presented, while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process." Order at 3, ECF No. 79, 13-cv-861.

To that end, Judge Peake concluded that legislator communications with outside parties, and other documents that are considered public records under state law, could be produced without overly burdening legislators or intruding on the legislative process, while "other categories of documents may require further scrutiny in balancing the

[1] The United States' own requests for production seek some of the same categories of information as the *NAACP* Plaintiffs' Rule 45 subpoenas and the *LWV* Plaintiffs' document requests under Rule 34. In their responses to the United States' document requests, Defendants lodged the same objection set forth in the motion to quash the legislative subpoenas, asserting that document discovery from the State Legislators is categorically barred. *See* Ex. 2

competing interests." *Id.* at 7. Judge Peake ordered the parties to meet and confer as to the specific categories of documents that would be produced or withheld on legislative privilege grounds, and to "present any narrowed remaining disputes with respect to particular categories and types of documents for further resolution by the Court." *Id.* at 8. On April 2, 2014, the State Legislators objected to Judge Peake's March 27 order and moved to stay the order. ECF Nos. 83 & 84, 13-cv-861. On April 4, 2014, Judge Peake granted the motion to stay, pending resolution of the objections. Defendants have since declined to meet and confer on these issues.

LEGAL STANDARD

Where, as here, a magistrate judge issues an order resolving an issue that is "not dispositive of a party's claim or defense," a district court may "modify or set aside any part of" the order only if it is "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *Everett v. Prison Health Servs.*, 412 F. App'x. 604, 605 n.2 (4th Cir. 2011); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 792 (E.D. Va. 2008); *Stonecrest Partners, LLC v. Bank of Hampton Roads*, 770 F.Supp.2d 778, 782 (E.D.N.C. 2011) (magistrate judge's decisions relating to discovery disputes "accorded greater deference").

ARGUMENT

The three related cases challenging HB 589 pursuant to Section 2 of the Voting Rights Act will require the Court to undertake a fact-intensive "appraisal of the design and impact" of HB 589's challenged provisions. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Plaintiffs' discovery requests are directed at legislators who by the very nature of their jobs have first-hand knowledge relating to the development and passage of HB 589,

and are therefore likely to shed light on the process leading up to its passage, the facts and issues considered in enacting the bill, and the bill's likely impact on voters.

The State Legislators' assertion of a blanket privilege "encompass[ing] all aspects of the legislative process and forbid[ding] plaintiffs from seeking *any* production at all from the legislative movants," Movants' Obj. at 10-11, is wrong as a matter of law. Although state legislators enjoy immunity from civil liability, any evidentiary privilege they possess is qualified, at best. As Judge Peake recognized, this qualified privilege does not apply to legislator communications with outside parties, a substantial portion of the documents and communications at issue here. With respect to purely internal legislative documents, it was not clearly erroneous for Judge Peake to conclude that whether such documents should be shielded from disclosure must be determined on a case-by-case basis, taking into account the particular context of these Voting Rights Act cases. Finally, Judge Peake correctly held that Defendants must identify legislators on whom they will rely in responding to any preliminary injunction motions with ample time for Plaintiffs to conduct meaningful discovery of those individuals.

I. No Absolute Legislative Privilege Categorically Shields Legislative Documents from Discovery in These Cases

Judge Peake correctly held that any legislative privilege accorded to state lawmakers in these voting rights cases is qualified. *See* Order at 3. The State Legislators 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. *See Perez v. Perry* (*Perez II*), 2014 WL 106927, at *2

(W.D. Tex. Jan. 8, 2014) (three-judge court) ("While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, 'at best, one which is qualified.'" (citations omitted)); *Favors v. Cuomo* (*Favors I*), 285 F.R.D. 187, 209 (E.D.N.Y. 2012) ("Legislative privilege is related to, but distinct from, the concept of legislative immunity.").[2]

That state legislators are immune from civil liability does not mean that they have an absolute privilege to refuse to respond to otherwise valid requests for documents or testimony. In *Tenney v. Brandhove*, the Supreme Court recognized that state legislators are immune from civil liability for "legitimate legislative activity." 341 U.S. 367, 376 (1951). *Tenney* does not, however, "stand for the proposition that state legislators are never required to supply evidence in a federal civil case where, like the instant case, there is no threat of personal liability to any of the state legislators." *Doe v. Nebraska*, 788 F. Supp. 2d 975, 984 n.2 (D. Neb. 2011); *see also Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) ("The Supreme Court in *Gillock* rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege."); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95-96 (S.D.N.Y. 2003) ("[N]otwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions.").

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[2] Federal common law governs questions of privilege in this federal question case. *See* Fed. R. Evid. 501; *Virmani v. Novant Health Inc.*, 259 F.3d 284, 286 (4th Cir. 2001). In addition, "because '[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence,' any such privilege 'must be strictly construed.'" *United States v. Squillacote*, 221 F.3d 542, 560 (4th Cir. 2000) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

In *United States v. Gillock*, the Supreme Court declined to recognize an absolute "evidentiary privilege for state legislators for their legislative acts." 445 U.S. 360, 373 (1980). The Court rejected the argument that the common law provided state legislators an absolute evidentiary privilege analogous to that enjoyed by members of Congress under the Speech and Debate Clause. *Id.* at 367.[3] The Court also rejected the notion that principles of federalism compelled it to construct such a privilege. The Court reasoned that, because "in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power[,]" the separation of powers concerns animating the Speech and Debate Clause gave "no support to the grant of a privilege to state legislators in federal criminal prosecution." *Id.* at 370. Thus, although it recognized that "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function," the Court concluded that "the legitimate interest of the Federal

[3] Most of the cases the State Legislators' cite for their claim that legislative immunity and legislative privilege are "co-extensive and both absolute," Movants' Obj. at 18-19 (citing *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988), *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 federal common law is "far less than the legislative privilege created by the Federal Constitution." *Gillock*, 445 U.S. at 366 n.5; *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.'") (quoting *Gillock*).

Government in enforcing its criminal statutes" outweighed the "speculative benefit to the state legislative process" of allowing the evidentiary privilege.[4] *Id.*

Moreover, the Court has acknowledged that legislative evidence is highly relevant to "[d]etermining whether invidious discriminatory purpose was a motivating factor" in a legislative decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In *Arlington Heights*, the Court set forth a non-exhaustive list of evidentiary factors for courts to consider in cases alleging intentional racial discrimination. *Id.* at 266-68. In evaluating discriminatory purpose under *Arlington Heights*, this Court must assess, among other things, the historical background of the passage of HB 589; the sequence of events leading up to passage of the bill; whether passage of the bill departed, either procedurally or substantively, from the normal practice; and the legislative history, including contemporaneous statements and viewpoints held by the decision makers. *Id.* The Supreme Court recognized that in "extraordinary instances" legislators could be required to testify as to legislative purpose. *Id.* at 268.

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. *Id.* at 265. The Fourth Circuit itself has emphasized that race

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[4] Although *Gillock* involved a criminal prosecution, the Court did not limit its holding to criminal cases. The Court's reasoning applies equally to Section 2 enforcement actions, which involve "important federal interests," *Gillock*, 445 U.S. at 373, and which, like criminal prosecutions, "seek to vindicate public rights[,]"*Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *6 (N.D. Ill. Oct. 12, 2011). *See also* United States' Opp'n to Mot. to Quash at 10-11, ECF No. 58, 13-cv-861.

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). As Judges Murnaghan and Frederick Motz noted in *Marylanders for Fair Representation v. Schaefer*, a case challenging Maryland's state legislative redistricting plan under Section 2 of the Voting Rights Act, "[t]he doctrine of 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." 144 F.R.D. 292, 304 (D. Md. 1992) (three-judge court) (opinion of Murnaghan, C.J., and Motz, D.J.).[5] *See also Veasey v. Perry*, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014) (in a Section 2 case challenging Texas' photo voter identification law, finding that the "motive and intent of the state legislature when it enacted [the law] is the crux of this Voting Rights Act case[,]" and ordering production of legislators' documents).

Two recent decisions in Voting Rights Act cases challenging the State of Texas' 2011 redistricting plans demonstrate the importance of legislative document discovery

[5] Judge Peake's reliance on *Marylanders* is not, as Movants suggest, improper. *See* Movants' Obj. at 15-18. First, neither the Supreme Court nor the Fourth Circuit has recognized an absolute evidentiary privilege for state lawmakers. *See supra* at 5-7; *infra* at 16-17. Second, as discussed in more detail below, the current vote denial cases implicate the very same issues counseling against broad application of legislative privilege as the redistricting matter in *Marylanders*, *see infra* at 18-19, and courts have routinely considered legislative evidence in voting rights cases, *see infra* at 8-9 (citing cases). Finally, notwithstanding Movants' argument to the contrary, the court in *Marylanders*, like Judge Peake here, did not decide but left open the possibility that legislators could be deposed as to certain matters. *See Marylanders*, 144 F.R.D. at 305.

and testimony. In *Perez v. Perry*, after declining to grant a blanket protective order blocking legislative depositions, the court relied on legislators' testimony to find that the Texas legislature "may have focused on race to an impermissible degree" when crafting its House redistricting plan. Op. at 6, *Perez v. Perry* (*Perez I*), 5:11-cv-360 (W.D. Tex. Mar. 19, 2012) (three-judge court) (Ex. 3). Similarly, in *Texas v. United States*, the court relied in part on email exchanged among state legislative staff and consultants to conclude that Texas' congressional redistricting plan "was motivated, at least in part, by discriminatory intent." 887 F. Supp. 2d 133, 161 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 133 S. Ct. 2885 (2013); *id* at 154-56, 161 n.32. Indeed, courts routinely look to legislative evidence—including documents and testimony obtained from legislators (and their staff) —in voting rights cases, including cases arising under Sections 2 and 5 of the Voting Rights Act. *See 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); *Garza v. Cnty. of Los Angeles*, 756 F. Supp. 1298, 1314-18 (C.D. Cal. 1990), *aff'd* 918 F.2d 763, 769 (9th Cir. 1990) (Section 2); *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), *aff'd* 459 U.S. 1166 (1983) (Section 5); *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (challenge to North Carolina's congressional redistricting plan under the Fourteenth Amendment).

Accordingly, courts hearing voting rights cases 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 qualified at best. *See e.g.*,

Marylanders, 144 F.R.D. at 304 (noting that "testimonial legislative immunity is not an absolute"); *Veasey*, 2014 WL 1340077, at *1 (same); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011) ("Under the federal common law, legislative privilege is qualified, not absolute, and may be overcome by a showing of need."); United States' Opp'n to Mot. to Quash at 9, ECF No. 58, 13-cv-861.

II. Legislator Communications With Third Parties Are Not Protected By Legislative Privilege

In the March 27 order, Judge Peake correctly noted that "many of the documents requested by the subpoenas and discovery requests involve communications with outside parties or are other documents that are considered public records under state law. Requiring production of those documents is not unduly burdensome or invasive of the legislative process." Order at 7. These documents should be produced immediately.

Courts routinely hold that documents and communications exchanged between legislators and non-legislators (other than their staff members) are not protected by state legislative privilege. In *Favors v. Cuomo*, for example, the court found that state legislators could not "reasonably claim a privilege" over documents that were "made public or were shared with individuals outside the legislative process." *Favors I*, 285 F.R.D. at 213 n.26; *Balanced Map*, 2011 WL 4837508, at *10 ("Communications between [state legislators] and outsiders to the legislative process" are not privileged.). This is true even when the "outsiders are consummate insiders[,]" such as lobbyists or representatives of public interest groups. *Rodriguez*, 280 F. Supp. 2d at 101 (noting that

"no one could seriously claim privilege" over a "conversation between legislators and knowledgeable outsiders, such as lobbyists"); *Balanced Map*, 2011 WL 4837508, at *10 (same); *Almonte v. City of Long Beach*, 2005 WL 1796118, at *3 (E.D.N.Y. Jul. 27, 2005) (consultation with outside "political operative[s]" was not privileged).

Several of the document requests at issue here seek information that falls squarely into this category. *See*, *e.g.*, Ex. 1, RFP No. 6 (requesting documents reflecting "communications between [the State Legislators] and any lobbyists, political organizations, or public interest groups regarding any provision in H.B. 589"); *id.*, RFP No. 2 (requesting documents reflecting "communications between you and your constituents regarding any provision in H.B. 589").[6] Indeed, each request that seeks documents and communications "received by" any of the State Legislators encompasses information received from outside parties, which would fall beyond the scope of any legislative privilege.

Communications between legislators and staff at the SBOE also fall into this category and are not protected by legislative privilege. The SBOE is not part of the General Assembly, and its staff members are not legislative staff. Like constituent mail and other communications with outsiders, legislator communications with the SBOE are

[6] As noted in the March 27 order, these documents would also be subject to disclosure under North Carolina's Public Records Act. *See* N.C.G.S. §§ 132-1; Attorney General Legal Op., 2002 WL 544469, at *1 (Feb. 14, 2002). It is therefore disingenuous for the State Legislators to contend that producing such communications in this case would undermine "bedrock democratic principles" and deter "ordinary citizens" from petitioning their legislators. Movants' Obj. at 12. To the extent a document contains sensitive, non-public information, it can be designated "confidential" or "highly confidential" under the Court's Protective Order in this case. ECF No. 36, 13-cv-861.

subject to North Carolina's Public Records Act. *See* N.C.G.S. §§ 132-1; Attorney General Legal Op., 2002 WL 544469, at *1 (Feb. 14, 2002). Indeed, in the past, the SBOE has posted on its public website emails exchanged among legislators, legislative staff, and SBOE staff, some of which are plainly responsive to Plaintiffs' document requests regarding HB 589 in this case. *See*, *e.g.*, Ex. 4 at 7 (legislator requests by supporters of HB 589 for information about the number, ethnicity, and party identification of North Carolina voters who lack DMV-issued photo identification).[7] Nevertheless, in this litigation, Defendants assert legislative privilege as to these types of documents.[8]

Plaintiffs' discovery requests seek information and communications exchanged between legislators or legislative staff and the SBOE. For example, legislator requests for reports or data relating to rates of possession of photo identification among North Carolina voters, and the racial demographics of voters using early voting and same-day-registration, would fall into this category, as would SBOE responses to such requests. *See*, *e.g.*, Ex. 1, RFP Nos. 9, 10, 11, 12, 15. In addition to being third party communications that are beyond the scope of legislative privilege, such documents are discoverable because they reveal the "objective facts upon which lawmakers relied" in the decision-making process. *Balanced Map*, 2011 WL4837508, at *11; *Arlington*

[7] ftp://alt.ncsbe.gov/Requests/Materials/2013IDEmails.pdf (last visited Apr. 9, 2014).

[8] Although Defendants have produced privilege logs for some SBOE documents withheld on the basis of attorney-client privilege and the work product doctrine, they have not produced any log of documents withheld on the basis of legislative privilege.

Heights, 429 U.S. at 270 n.20 (plaintiffs were permitted "to question [legislators] fully about materials and information available to them at the time of decision"); *Nebraska*, 788 F. Supp. 2d at 984-86 (excluding "documents containing factually based information used in the decision-making process or disseminated to legislators or committees" from the scope of legislative privilege).[9]

III. For Documents That May Be Subject To A Qualified Legislative Privilege, It Is Not Clearly Erroneous To Adopt A Flexible Approach That Considers The Need For Information In The Specific Context Of These Voting Rights Cases

Judge Peake held that in these cases, "claims of legislative immunity or privilege in the discovery context must be evaluated under a flexible approach that considers the need for the information in the context of the particular suit presented." Order at 3. This determination is neither clearly erroneous nor contrary to law. Fed. R. Civ. P. 72(a).[10] Courts have frequently applied a flexible, balancing test to determine whether legislative privilege must yield to the need for documentary evidence from state and local legislators, and commonly consider the following factors: (1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the seriousness of the litigation

[9] To the extent such communications relate to post-enactment implementation of HB 589, they are also outside the scope of legislative privilege because post-enactment implementation is not a "legislative act" or an "integral step[] in the legislative process." *EEOC v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 184 (4th Cir. 2011) (declining to quash subpoena that sought information about events occurring after a legislative act).

[10] The United States believes it is entitled to internal communications between and among legislators, and legislators and staff, in this Section 2 case alleging intentional racial discrimination in voting. *See, e.g.*, *Veasey*, 2014 WL 1340077. Under the "flexible approach" adopted by Judge Peake, the Court will have the opportunity to evaluate the applicability of legislative privilege with respect to specific documents (or categories of documents) based on a more developed record, including a privilege log.

and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees. *See, e.g.*, *Veasey*, 2014 WL 1340077, at *2.

Applying this test, courts adjudicating Section 2 cases routinely order the production of documents over which defendants claim state legislative privilege. In *Veasey v. Perry*, for example, the court held that the balance of factors weighed in favor of disclosure and ordered the State of Texas to produce legislative documents and communications concerning the passage of Texas' photo voter identification law. The court found that the requested evidence was "highly relevant" to the United States' Section 2 claim "because it bears directly on whether state legislators, contrary to their public pronouncements, acted with discriminatory intent in enacting SB 14." *Id.* "The federal government's interest in enforcing voting rights statutes is, without question, highly important," and "the state government's role is direct." *Id.* The court also rejected Texas' contention that the United States should rely exclusively on public documents (*e.g.*, floor debate) to make its case. *Id.* at 3.

The same factors apply here. First, the requested documents are likely to contain evidence that is highly probative of Plaintiffs' claims that HB 589 violates Section 2 because of a discriminatory purpose. *See Dillard v. Baldwin Cnty. Bd. of Elections*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988) (to prove discriminatory intent under Section 2, plaintiffs must show that racial discrimination was a motivating factor "behind the enactment or maintenance" of a challenged electoral system). 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. As the Supreme Court has recognized, "assessing 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.'" *Reno v. Bossier Parish*, 520 U.S. 471, 488 (1997) (quoting *Arlington Heights*, 429 U.S. at 266); *see also* Mem. and Order at 23-34, *Favors II*, 11-cv-5632 (E.D.N.Y. Feb. 8, 2013) (unpublished) (Ex. 5); *id.* at 34 ("[W]here documents reveal an awareness that the Senate Plan may dilute minority votes, legislative privilege is overcome."). Second, the importance of the litigation and the issues involved—eliminating racial discrimination in voting—"cannot be overstated;" and third, North Carolina's role is direct. *Veasey*, 2014 WL 1340077, at *2.

Furthermore, as the court recognized in *Veasey*, reliance on public statements alone undercuts the inquiry into legislative purpose because "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). Moreover, in this particular case, the legislative process was so severely truncated that the public legislative record is very limited. *See* Compl. ¶¶ 57-66, ECF No. 1, 13-cv-861. In *United States v. Irvin*, the paucity of the public record was one factor that led the court to conclude that legislative privilege "must yield in this instance to the need for disclosure." 127 F.R.D. 169, 173-74 (C.D. Cal. 1989) (balancing factors and granting the United States' motion to compel discovery of communications between county supervisors and

their staff in Voting Rights Act case). That court later found that the county supervisors' redistricting plan intentionally discriminated against Hispanic voters. *See Garza*, 756 F. Supp. at 1318; *Baldus v. Wisc. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011) (three-judge court) (concluding that "given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans," the "highly relevant and potentially unique nature of the evidence" plaintiffs sought outweighed the "minimal future 'chilling effect'" that disclosure might have on the state legislature).[11]

To the extent the State Legislators argue that the Fourth Circuit's employment discrimination cases compel this Court to recognize an absolute privilege of state lawmakers to categorically withhold otherwise discoverable documents, *see* Movants' Obj. at 9-10, 18-19, they misread those cases, which are distinguishable and do not justify restricting the scope of discovery in these voting rights cases. The complainants in both *McCray v. Maryland Department of Transportation*, 741 F.3d 480 (4th Cir. 2014), and *EEOC v. Washington Suburban Sanitary Comm'n* (*WSSC*), 631 F.3d 174 (4th Cir. 2011), were government employees who sought to use federal antidiscrimination law to

[11] Recognizing the "sensitive nature of the documents sought and the importance of preserving confidential communications among legislators," the court in *Veasey* ordered Texas to produce such documents under seal, pursuant to the protective order in that case, and reserved for trial the question of admissibility of specific documents. *Veasey*, 2014 WL 1340077, at *3. A similar procedure could protect the confidentiality of sensitive legislator-to-legislator documents in this case, including for use in the preliminary injunction motions. *See* ECF Nos. 36 & 37 (Protective Order and Supp. Protective Order). The United States notes, however, that such an approach should not apply to third-party communications with legislators; production of these documents is not "unduly burdensome or invasive of the legislative process." Order at 7.

challenge legislative budgetary decisions that adversely affected their employment. *See McCray*, 741 F.3d at 481; *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.[12] 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.

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. In this context, courts "should not simply rely upon bright line tests which have been developed in other contexts to bar virtually all discovery of relevant facts." *Marylanders*, 144 F.R.D. at 305.[13]

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[12] Even in this limited context, legislative privilege does not sweep as broadly as the State Legislators contend. *See* United States' Supp. Br. in Opp'n to Mot. to Quash at 7 n.5, ECF No. 72, 13-cv-861.

[13] 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

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 prosecutions" 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.'" *Balanced Map*, 2011 WL 4837508, at *6 (quoting *Gillock*, 445 U.S. at 373); *see also Irvin*, 127 F.R.D. at 174 ("[T]he federal interest in enforcement of the Voting Rights Act weighs heavily in favor of disclosure."). The Supreme Court has long recognized that the Fourteenth and Fifteenth Amendments "are to a degree restrictions of State power," *Ex Parte Virginia*, 100 U.S. 339, 346 (1879), and acting under the Civil War Amendments," Congress is empowered to intrude "into the judicial, executive, and legislative spheres of autonomy previously reserved to the States[,]" *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

Like cases challenging redistricting plans under Section 2 of the Voting Rights Act, the vote denial cases before this Court challenge the legislature's effort to reset the rules by which the democratic process operates—to the disadvantage of a class of citizens based on race. Much like redistricting, North Carolina's HB 589 "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

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characterized the many Section 2 redistricting cases in which courts held that state legislative privilege was qualified, as representing an exception to the doctrine of legislative immunity. *See* United States' Opp'n to Mot. to Quash at 12-13 (citing cases). These cases challenging HB 589 fall squarely within the scope of this exception.

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 of an election will no longer be able to register and vote during the early voting period, because the State has eliminated same-day registration during early voting. *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 disproportionately sets obstacles in the path of African-American 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. "[T]he Legislature has taken action that affects the voting rights of [North Carolina's] citizens and now attempts to cloak the record of that action behind a charade masking as privilege." *Baldus v. Wisc. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 958 (E.D. Wis. 2012) (three-judge court). The State Legislators should not be permitted to do so.

IV. Defendants Must Identify Legislators Who Will Waive Legislative Privilege

Legislative privilege is personal to each legislator and may be waived. *See Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995). Whatever else is true of legislative privilege, defendants cannot use the privilege as a shield to prevent Plaintiffs from conducting critical *and timely* discovery, and subsequently rely on legislative evidence to rebut Plaintiffs' case. *See* Order at 9. The deadline for serving initial expert reports was April 11; the deadline for filing preliminary injunction motions is May 5; and

Defendants have yet to produce a single document from any legislator's possession, or a privilege log identifying the documents they claim are protected by legislative privilege. Judge Peake's order set an April 14, 2014 deadline for Defendants to identify legislators on whom they will rely in response to any preliminary injunction motions, whether by affidavit, testimony, or documentary evidence they otherwise contend is subject to legislative privilege. This deadline allowed Plaintiffs a bare minimum of time in which to conduct written discovery and depositions of such legislators before filing preliminary injunction motions, but Defendants seek to delay discovery even further.

To avoid undue prejudice to Plaintiffs, the United States respectfully requests that if Defendants fail to provide timely notice of legislators who will provide evidence in support of HB 589, they be precluded from relying on non-public legislative evidence in opposition to any preliminary injunction motion. Alternatively, if Defendants identify such legislators after April 21, 2014, Plaintiffs should be permitted to conduct discovery of those legislators in time for any hearing on the preliminary injunction motions, and be provided the opportunity to cross examine the legislators, and offer other relevant responsive evidence, at such a hearing.

CONCLUSION

For all the foregoing reasons, the Court should affirm Judge Peake's March 27, 2014 order on legislative privilege and order Defendants to produce immediately legislators' communications with third-parties. The Court should further order Defendants to identify any legislators who will provide evidence in support of HB 589 during the preliminary injunction hearing.

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Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on April 14, 2014, I electronically filed the foregoing **United States' Brief in Opposition to State Legislators' Objection to Magistrate Judge's Order on Legislative Privilege,** 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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