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 Governor of North Carolina, *et al.*, Defendants.	)	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al.*, Plaintiffs, *and* LOUIS M. DUKE, *et al.*, Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	)	1:13CV861

DEFENDANTS' AND LEGISLATORS' RESPONSE BRIEF ON THE ISSUE OF LEGISLATIVE IMMUNITY AND LEGISLATIVE PRIVILEGE PURSUANT TO JOINT STATUS REPORT

NOW COME Senator Phil Berger, Senator Tom Apodaca, Senator Thom Goolsby, Senator Ralph Hise, Senator Bob Rucho, Representative Thom Tillis, Representative James Boles, Jr., Representative David Lewis, Representative Tim Moore, Representative Tom Murry, Representative Larry Pittman, Representative Ruth Samuelson and Representative Harry Warren (collectively "the legislative movants"), and Defendants, by and through undersigned counsel, and submit this Response Brief on the Issue of Legislative Immunity and Legislative Privilege pursuant to the parties' Joint Status Report (*US* D.E. 114).

INTRODUCTION

Plaintiffs' and the United States' (collectively, "Plaintiffs") briefs on the legislative immunity and privilege issues would have this Court ignore Fourth Circuit precedent protective of these privileges while relying on unpublished and non-controlling legal authorities which do not even squarely address the specific issues remaining before the Court. This Court should reject Plaintiffs' invitation to intrude on the state sovereignty of North Carolina's legislative branch on the basis of inapplicable, out-of-state precedent, especially where, as here, Plaintiffs have been provided all the materials to which the United States Supreme Court and the Fourth Circuit would allow them on the issue of alleged discriminatory intent by the legislature. Accordingly, to the extent disputed

issues remain, Plaintiffs' motion to compel should be denied, and the legislative movants' motion to quash should be allowed.

As reflected in the Joint Status Report, Defendants agreed to produce certain documents in the custody of state agencies such as the State Board of Elections, Department of Transportation, and the Governor's Office ("agency-controlled documents"). By producing the agency-controlled documents, neither Defendants nor legislative movants waived any arguments or defenses or claims that such documents are nonetheless protected by legislative immunity or privilege. The parties were unable to agree on the remaining following categories of documents: (a) legislator to third-party communications (such as constituents, lobbyists, public interest groups, etc.), (b) legislator to legislator communications, and (c) legislator to legislative staff (besides personal aides)[1] communications. In addition, the parties could not agree on the category of legislator communications with outside counsel prior to the commencement of litigation on August 12, 2013.[2] None of these remaining categories of documents is discoverable or subject to a privilege log requirement.[3]

[1] Plaintiffs have still not defined the difference between a "personal aide" versus "legislative staff."

[2] To the extent this latter category implicates legislative immunity or privilege, it is addressed by the arguments below. To the extent that such category implicates attorney-client privilege or the work product doctrine, it is not discussed directly in this brief.

[3] In addition, Defendants have agreed not to contest the use of certain documents that were published on the website of the State Board of Elections but have not conceded that such documents are not subject to legislative immunity or privilege or that any such immunity or privilege has been waived.

ARGUMENT

I. The Invasiveness of the Document Requests on Legislative Sovereignty and the Legislative Process.

The Fourth Circuit has clearly recognized the chilling effect that intrusion into the legislative process through discovery requests can wreak on the legislative process. For instance, the Fourth Circuit cited with approval *MINPECO, S.A. v. Conticommodity Servs., Inc*., 844 F.2d 856, 859 (D.C. Cir. 1988) for the proposition that "[d]iscovery procedures can prove just as intrusive" as being named as a party to a suit. *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) ("*WSSC*"). In this regard, the Fourth Circuit views the protection of the legislative immunity that legislative privilege provides much like the District of Columbia Circuit. Thus, in *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), that Court held that a party is "no more entitled to compel [federal legislators'] testimony – *or production of documents* – than it is to sue [legislators]." *Id.* at 421 (emphasis added). Rather, there is no "difference in the vigor" with which the privilege deriving from the immunity protects document production and testimony versus protection from suit itself. *Id.*

There are good reasons for this "vigor." First, as is the case here, document requests impermissibly divert the legislators from their duties. As noted in connection with Plaintiffs' earlier Motion to Compel in this matter, when Defendants gathered the electronic communications of the subpoenaed legislators and their staff using the search terms requested by Plaintiffs, 283,461 records were collected. (*US* D.E. 60, p.8) If this Court requires the production or logging of these records, these thirteen legislators and

their staff will have to spend countless hours reviewing, categorizing, and/or logging each one of these communications. This alone will divert them from important legislative work that occurs on a weekly basis, both while the legislature is in session and when it is not in session but its committees are engaged in legislative work.

In their brief, Plaintiffs take the remarkably naïve and untenable position that categorizing and logging nearly 300,000 communications will not burden the legislators because the logging will be done by *counsel* for the legislators. (*US* D.E. 121, p. 13) This ignores completely that the legislator and his staff who actually created the communications must be intimately involved in providing information and context to assist counsel in determining what is and what is not subject to being logged. It also ignores completely that legislative counsel for the legislators will also have to be involved in this process, diverting them from their normal duty of advising legislators on legislative matters.

Second, the "vigor" of the protection of the privilege prevents the chilling and deterring of legislative activity in the future, which, of course, the Fourth Circuit has recognized is sometimes the endgame of litigation in the first place. *WSSC*, 631 F.3d at 181 (legislative privilege shields legislators "from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box"). Presently, legislators communicate with each other and their staff and constituents with an expectation of privacy that fosters and allows candor and honest deliberations. A ruling by this Court that such communications are subject to discovery anytime a citizen sues

the State for an alleged constitutional violation will clamp down on these deliberations and seriously impede the work of the sovereign state legislature.

II. Legislator-to-third-party communications (such as constituents, lobbyists, and public interest groups) should not be produced.

The Fourth Circuit has never addressed this category of documents. Instead, it has been highly protective of legislative privilege as a means of preserving legislative immunity.

Nor has the Fourth Circuit ever adopted any "qualified" privilege, as Plaintiffs would have this Court do under the supposed authority of *United States v. Gillock*, 445 U.S. 360 (1980). As the District Court explained, "*Gillock's* holding is confined to criminal cases, and any suggestion otherwise is *dicta*." (*US* D.E. 105, p. 13 n.4) Instead, the Fourth Circuit has focused on whether the communications being sought were related to legislative activity as opposed to administrative action or political activity. *See WSSC*, at 179. In addition, courts within the Fourth Circuit have focused on the availability of documents from non-legislative sources. Thus, as the District Court pointed out, the three-judge panel in *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992), "in respect for the sovereignty of the legislature" only permitted discovery from the private citizens on the redistricting committee because "where the evidence was discoverable from a non-legislator source," the plaintiffs would be required "to pursue that before seeking to impinge upon the privilege." (*US* D.E. 105, p. 21-22)

The vast majority of the cases relied on by Plaintiffs are not to the contrary. These cases typically deny the privilege where the legislature relies on retained or appointed

outsiders to perform legislative work. For instance, in *Page v. Virginia State Board of Elections*, 2014 WL 1873267 (E.D. Va. May 8, 2014), the court refused to apply legislative privilege to a third-party legislative consultant independently contracted by a political party. *Page*, 2014 WL 1873267, at *5-*6. While the individual seeking legislative privilege in *Page* considered himself "effectively" a legislative aide, the court found that state law provided otherwise. *Id.* The court found that those encompassed by the privilege are individuals who (1) "are an integral part of the deliberative and communicative process by which legislators participate in legislative proceedings" and (2) are "directly employed and paid by an individual legislator, a legislative committee, or the legislature as a whole." *Id.* This, the court thought, would prevent legislators from "enveloping lobbyists and outside experts in a cloak of invisibility" by foreclosing the ability of these non-legislative individuals from cloaking themselves with legislative privilege. *Id.*

Of course, no such circumstances face this Court here. Plaintiffs have not claimed that an independent contractor or retained or appointed expert of Defendants is trying to cloak himself with legislative privilege, as the independent contractor attempted to in *Page*. Nor have Plaintiffs complained that individual lobbyists, constituents, or others are resisting discovery by claiming the cloak of legislative privilege.[4] Instead, at issue in the pending motions are documents held solely by legislators and legislative staff

[4] Plaintiffs have served subpoenas on various outside groups seeking information those groups provided to the legislature during its consideration of H.B. 589. Several of the outside groups have resisted such discovery. *See* Exhibit 1 (December 12, 2013 Objection Letter). To date, Plaintiffs have failed to follow up on these objections through a motion to compel or otherwise.

employed by the legislature. Plaintiffs have made no serious attempt to argue that legislative staff employed and paid by the legislature are not "an integral part of the deliberative and communicative process by which legislators participate in legislative proceedings" and nor could they. Staff members hired by legislators are obviously an integral part of the each legislator's legislative machinery. Similarly, non-partisan staff tasked with helping members from both the majority and minority caucuses are integral – indeed, they are bound by statutory legislative confidentiality requirements designed to protect the very integrity of the legislative process. N.C. GEN. STAT. § 120-129 *et seq*. This statutory imposition of confidentiality exists to safeguard legislative immunity by protecting communications between legislators and "legislative employees," whether those employees work for one legislator or whether as part of a central staff they work at different times for different legislators. Like legislative immunity and legislative privilege, this statutory confidentiality can only be waived by the legislator involved.

In fact, none of the cases cited by Plaintiffs actually compel a legislator to produce documents in his possession from lobbyists, constituents, or outside groups. While the court in *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) made the off-hand comment that a session "between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation" would be one "for which no one could seriously claim privilege", that particular issue was not before the court and the court offered no comment on whether legislators themselves or the lobbyists involved could be forced to produce documents regarding any such session. The only entity in *Rodriguez* that the

court ordered to produce documents was a task force consisting of several non-legislators. *Id.* at 103. Again, no such entity is at issue in this case.

The cases cited by Plaintiffs also involve instances in which a legislator has disclosed communications to a retained or appointed outsider, such as the redistricting committee in *Marylanders* or the task force in *Rodriguez*. Similarly, *Florida Ass'n of Rehab Facs. v. State of Fla. Dep't of Health & Rehab. Servs*., 164 F.R.D. 257 (N.D.Fla. 1995) involved an entity known as the Social Security Estimating Conference, on which legislative staff members served.[5] Likewise, In *Baldus v. Members of Wis. Gov't Accountability Bd*., 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011), the issue was whether an outside expert the General Assembly had hired to draw its redistricting plans could avail himself of legislative immunity, not an actual legislator. The court held that immunity did not apply because the legislature waived it to the extent it used an outside expert to draw its plans. *Baldus*, 2011 WL 6122542, at *2. In *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y 2012), the court considered the immunity issue in the context of a redistricting commission containing legislator and non-legislator members. Obviously, service by a legislator on a commission with non-legislators is not an inherent legislative function such as the enactment of legislation.

No such retained or appointed outsiders are involved in the instant case. Plaintiffs are not seeking documents from an independent consultant retained by the legislature to

[5] The *Florida Ass'n of Rehab Facs.* court described that case as "unique" because the "subject matter of this case, as defined by federal law, is in part the legislative process itself." *Florida Ass'n of Rehab Facs.*, 164 F.R.D. at 268. Moreover, the court described its ruling as "tentative." *Id.* The court in that opinion did not require or order any production of documents.

assist in the drafting of election legislation.[6] They are not seeking documents from a non-legislative committee or a legislative committee which contained non-legislator members. Instead, Plaintiffs are seeking quintessentially legislative documents from the legislators themselves and their staff.

III. Legislator-to-legislator communications, and legislator-to-legislative staff documents should not be produced or logged.

Plaintiffs have cited no cases requiring the production of legislator to legislator communications. Similarly, they have cited no cases requiring the production of documents between legislators and staff. As noted above, Plaintiffs have failed to specify what they mean by "personal aides." Moreover, they have failed to explain who would be covered by their exclusion given the non-partisan staff model of the North Carolina General Assembly.

In light of the lack of authority, controlling or otherwise, requiring the production of legislator to legislator communications, or legislator to staff communications, these categories of communications can be easily excluded from production without intruding on the sovereignty of the legislature further by production of a log. Cases in the context of the attorney-client privilege are extremely relevant to the issue of legislative privilege. As with attorney-client privilege, disclosing the nature of the communication may very well reveal the legislative message that is protected by the privilege.

Courts often recognize that preparing a privilege log is not necessary where the communications are plainly protected from disclosure. *Ryan Investment Corp. v.*

[6] Advice from lawyers on legal issues related to the legislation is, of course, a different question not addressed by this brief.

Pedregal De Cabo San Lucas, 2009 WL 5114077, at *3 (N.D. Cal. Dec. 18, 2009) ("counsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log"); *Capitol Records, Inc. v. MP3Tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. 2009); *United States v. Bouchard Transportation*, 2010 WL 1529248, at *2 (E.D.N.Y. Apr. 14, 2010) ("privilege logs are commonly limited to documents created before the date litigation was initiated. This is due to the fact that, in many situations, it can be assumed that all documents created after charges have been brought or a lawsuit has been filed and withheld on the grounds of privilege were created 'because of' that pending litigation"); *Frye v. Dan Ryan Builders, Inc.*, 2011 WL 666326, at *7 (N.D. W. Va. Feb. 11, 2011).

In fact, creation of a privilege log can itself erode the inviolate protections afforded by the privilege at issue. *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 339 (S.D.N.Y 1969) ("even the identification of a communication between attorney and client in terms of the date and subject might well tend to defeat the very purpose of the privilege"). Accordingly, no privilege log should be required.

Finally, a document-by-document review as to these categories is not necessary because Plaintiffs' discovery requests seek only documents that are indisputably legislative in nature. Thus, any documents that are not legislative in nature would not, in any event, be responsive to Plaintiffs' requests. Accordingly, it is appropriate for the Court to dispense with the privilege log on a document-by-document basis for these categories of documents.

CONCLUSION

Legislative immunity would be nearly useless if private litigants could initiate civil actions and harass legislators with civil process and other discovery actions. As the Fourth Circuit has explained: "Legislative *privilege* against compulsory evidentiary process *exists to safeguard* this legislative *immunity* and to further encourage the republican values it promotes." *WSSC*, 631 F.3d at 181 (emphasis added). For the foregoing reasons, the Court should reject Plaintiffs' request for further production from the Defendants or legislative movants as to the remaining disputed documents.

This the 25th day of June, 2014.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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