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.	**PLAINTIFFS' OPPOSITION TO BRIEF ON THE ISSUE OF LEGISLATIVE IMMUNITY AND LEGISLATIVE PRIVILEGE PURSUANT TO JOINT STATUS REPORT** **Case No.: 1:13-CV-658**
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**Case No.: 1:13-CV-660**
UNITED STATES OF AMERICA, Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al, Defendants.	**Case No.: 1:13-CV-861**

INTRODUCTION

In seeking to withhold from production and the privilege log requirement every category of document in dispute, movants argue that any type of disclosure, no matter how limited, will intrude upon the legislative process. This is simply not true. Movants conflate Plaintiffs' request for production with their request for a privilege log, a distinction that is important in evaluating whether the requests at issue actually intrude upon the legislative process. To be clear, Plaintiffs request that only one category of documents be immediately produced: legislator communications with third parties, a category of documents that is plainly outside the scope of the legislative privilege. With respect to the remaining categories of documents at issue, including (1) legislator-to-legislator communications, (2) legislator-to-legislative staff communications (excluding personal aides), and (3) legislator communications with counsel before the onset of litigation, Plaintiffs request that the legislators produce a privilege log, consistent with their discovery obligations under the Federal Rules. *See* 5/22/14 Joint Status Report at 3 [ECF No. 126]; *see* 6/11/14 Pls.' Br. at 2 [ECF No. 135].

In opposing Plaintiffs' requests in their entirety, movants make two principal arguments: (1) that producing documents *or* a privilege log will intrude upon the legislative process, and (2) that the communications Plaintiffs request are irrelevant to Plaintiffs' claims. Neither argument is compelling and both should be rejected by this Court.

First, neither of Plaintiffs' requests—to produce third party communications or a privilege log—will intrude upon the legislative process. Judge Peake has already found that production of "communications with outside parties . . . is not unduly burdensome or invasive of the legislative process." 3/27/14 Order at 7 [ECF No. 94]. But movants ignore the reasoned guidance and clear findings of Judge Peake in asking this Court to hold otherwise. Nor would it be invasive of the legislative process to require a privilege log, the purpose of which is to ascertain whether the privilege actually applies "*without revealing information itself privileged or protected*." Fed. R. Civ. P. 26(b)(5)(A) (emphasis added). In other words, the privilege log is designed to protect those communications that are actually privileged, and thus, could not intrude upon the deliberative process of the legislature.

Second, the documents Plaintiffs seek are highly relevant to their claims. Plaintiffs' requests are not limited in scope to communications bearing on intent, but movants focus their attention on these document requests and argue that individual legislative communications are irrelevant because they could not reflect the intent of the legislature as a whole. This ignores the breadth of what is considered relevant under the Federal Rules, and the various cases that have found these kinds of communications relevant to claims brought under the Voting Rights Act and Fourteenth and Fifteenth Amendments of the U.S. Constitution. Movants also contend that Plaintiffs have enough evidence, but the standard for what is relevant is not driven by what the opposing side deems enough. Nor should the legislators be permitted to avoid production of third-party

communications or production of a privilege log because by their own standard, Plaintiffs do not need any more evidence to prove their claims.

At the end of the day, movants cannot avoid the reasonable requests that Plaintiffs have made: to produce communications that are not protected by legislative privilege and to log those that require a closer assessment by the Court. For these reasons and the reasons that follow, Plaintiffs respectfully request that the Court reject movants' arguments and order the legislators to produce documents reflecting legislative communications with third parties and produce a privilege log with respect to all remaining categories of documents at issue.

ARGUMENT

I. Producing Third-Party Communications And Requiring A Privilege Log Will Not Intrude On The Legislative Process.

A. Plaintiffs' Requests Will Not Divert the Legislators from Their Duties.

Movants argue that Plaintiffs' "requests [will] impermissibly divert the legislators from their duties," 6/11/14 Movants' Br. at 9 [ECF No. 133], but to the extent the legislators would have been diverted at all, that diversion has already taken place. As movants explain in their brief, their counsel has already collected responsive documents from the subpoenaed legislators. While movants make the remarkable argument that the "legislators and their staff will have to spend countless hours reviewing, categorizing, and/or logging each one of these communications," 6/11/14 Movants' Br. at 9, that is not the way discovery works. Determining what should be produced versus what should be

logged on a privilege log are legal determinations that the legislators, as non-lawyers, are not allowed to make.

But even if the legislators had to play a role in this process, it would be minimal at best, and in any case, would not divert the legislators from their legislative duties. At most, the legislators (or their staff) would need to provide the names of those legislators, staff, or counsel with whom they claim to have had potentially privileged communications. Using this information, counsel could determine which communications were with third parties and subject to disclosure, and which communications were with legislators, staff, or counsel and subject to a privilege log, without any further action by the legislators themselves.

What is more, there is no reason to believe that this minimal involvement would "divert [the legislators] from important legislative work that occurs on a weekly basis." *Id.* at 9. Not only does North Carolina have a 60-day regular legislative session that is projected to conclude on July 1, 2014, many legislators maintain full time employment out of session, without interference with their legislative duties. As a practical matter, the burden in complying with Plaintiffs' discovery requests would be far less than a full time job, making it extremely unlikely that the legislators would be diverted from their legislative duties.

While movants make much of the fact that Plaintiffs' search terms resulted in a large number of responsive records, *id*. at 9, this number is exaggerated at best. For starters, this number likely reflects duplicative documents. And many of the documents

are undoubtedly responsive to more than one search term. By way of example, when Plaintiffs received documents from the State Board of Elections, a substantial number of documents were removed after accounting for duplicates. All told, the documents produced by the State Board of Elections (for initial review by Plaintiffs) contained more than 30,000 duplicates. A similar scenario is likely true here. Even if duplicates do not account for a large number of documents, Plaintiffs are more than willing to revisit the initial set of search terms—as they have done before—to narrow the scope of what is responsive. Simply put, this argument is unsupported.

The fact of the matter is that the issues movants have raised in their brief can be addressed through the meet and confer process or through a discovery order tailored to the parties' needs. There is no basis to deny Plaintiffs discovery of third-party communications or the benefit of a privilege log based on the number of documents that might be responsive. If anything, that there are so many responsive documents counsels in favor of requiring production of third-party communications and ordering a privilege log.

B. Granting Plaintiffs' Requests Will Not Chill or Deter Legislative Activity.

Next, movants argue that "producing these communications will chill and deter legislative activity in the future." 6/11/14 Movants' Br. at 9. More specifically, movants claim that legislators communicate with staff and constituents "with an expectation of privacy." *Id.* But movants cite no authority for this proposition. To the contrary, courts have recognized that communications with third parties are not protected by legislative

privilege and are discoverable.[1] *See, e.g.*, *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y.), ("conversation[s] between legislators and . . . outsiders" are ones "for which no one could seriously claim privilege"), *aff'd*, 293 F. Supp. 2d 302 (SDNY 2003); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) ("[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."). And while some communications inside the legislature may be protected by legislative privilege, that protection does not apply to every communication with a legislator or staff member. *See Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 267 (N.D. Fla. 1995) (explaining that there is "less reason" for a privilege for "legislative employees who provide information to legislators collectively" and "who do not advise a particular legislator as his or her personal staff").

Even more problematic, however, movants cite no authority for the notion that complying with the privilege log requirement will chill legislative activity. In this respect, movants' brief is noteworthy for what it does not say: movants fail to explain or justify their refusal to create a privilege log. Nor could they, given that the Federal Rules require the proponent of any privilege to "describe the nature of the documents . . . in a manner that, ***without revealing information itself privileged or protected***, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A) (emphasis added). In other

[1] Likewise, the email accounts the legislators use are not "private" as movants repeatedly claim. The North Carolina General Assembly website includes automatic links to each legislator's official email address, making it accessible to any visitor to the website. Nothing on the North Carolina General Assembly website implies that constituents, casual visitors to the website, or any other members of the public can expect confidentiality in those communications.

words, the mere creation of a privilege log cannot be said to impede any privileged communications.

Movants argue further that the deliberative process privilege "prevents inquiries that would chill legislative action," such as discovery requests. 6/11/14 Movants' Br. at 10. But the scope of the deliberative process privilege is far more refined, protecting at most only those communications that are truly part of the deliberative process. In practice this means that documents dating from before HB 589 was introduced, or after it was passed, fall squarely outside the protection of the privilege because the deliberative process had not yet begun or had concluded.[2] *See Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 300 (D. Md. 1992) (distinguishing, for purposes of determining privilege, communications occurring before a bill was introduced from those that occurred after it went to the floor of the legislature); *see also EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 184 (4th Cir. 2011) (compelling production of non-deliberative communications that were exchanged before legislative activity began). The deliberative process privilege also does not protect factual communications exchanged within the legislature, regardless of when those communications were made, because facts are independent of the deliberative process. *See Doe v. Nebraska*, 788 F. Supp. 2d 975, 985 (D. Neb. 2011) ("Objective facts will not be shielded from production by the deliberative process privilege."). Even under the deliberative process privilege,

[2] Because different provisions were introduced at different times, it bears noting that the deliberative process privilege would not apply to communications related to voter ID before April 4, 2013. With respect to communications related to early voting, out of precinct voting or same day registration, pre-registration, or challenger and observer provisions, the deliberative process would not have started until those amendments were introduced on July 23, 2013.

not every communication sent or received by a legislator would be shielded from disclosure by the privilege.

In an effort to further demonstrate the intrusiveness of discovery, movants point to two cases: *Washington Suburban Sanitary Commission*, 631 F.3d 174, and *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995). 6/11/14 Movants' Br. at 10. Neither is persuasive. In *Washington Suburban Sanitary Commission*, the Fourth Circuit noted that "[d]iscovery procedures can prove just as intrusive," but ultimately ordered discovery because the legislative process had not yet begun. 631 F.3d at 183-84 (citation and internal quotation marks omitted). In *Brown & Williamson*, the D.C. Circuit was concerned with the reach of the Speech or Debate Clause, not the reach of legislative privilege under the federal common law, which is what is at issue here. 62 F.3d at 421. What is more, while movants cite *Brown & Williamson* for its broad view of legislative privilege, various courts have rejected this view, finding that documents are not on par with legislative testimony, and thus not subject to the same degree of protection. *See, e.g.*, *Doe*, 788 F. Supp. 2d at 983-86 (discussing *Brown & Williamson* but concluding that "defendants arguments for a broad and absolute legislative privilege regarding the production of documents are unavailing"); *see also Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994) (explaining that the "primary purpose of legislative immunity" is not to "relieve legislators of the burdens associated with document production").

C. Plaintiffs Have Provided the Court with a Workable Standard that Strikes the Right Balance Between Disclosure and Privilege.

Finally, movants argue that "Plaintiffs have defined no standards to guide the Court as to which types of cases warrant intrusion into the legislative process." 6/11/14 Movants' Br. at 10-11. This is simply not true. As Plaintiffs have repeatedly urged, this Court need look no further for guidance than the five-part balancing test adopted by courts in various jurisdictions. See 6/11/14 Pls.' Br. at 7; *see also* 2/10/14 Pls.' Br. at 15 [ECF No. 69] (citing *Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306, *13 (N.D. Ala. Jan. 3, 2013); *Favors* 285 F.R.D. at 209; *Rodriguez v. Pataki*, 293 F. Supp. 2d at 304).

This test provides a flexible and workable standard that allows courts to make individualized determinations about the discoverability of information in the context of a particular case. In this case, the importance of the voting rights of countless North Carolinians outweighs the purported burden on the legislative process, particularly with respect to Plaintiffs' basic request for a privilege log, and should counsel in favor of granting Plaintiffs' requests.

II. Movants Have No Basis For Withholding Documents Reflecting Legislative Communications With Third Parties Or Documents That Qualify As Public Records.

A. Legislative Privilege Is Waived with Respect to Communications with Third Parties.

In refusing to produce documents that reflect legislative communications with third parties, movants argue that production of agency-controlled documents is

"[s]ufficient." 6/11/14 Movants' Br. at 16. But sufficiency is not the standard in discovery, particularly in federal court, where "[d]iscovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted." *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402 (4th Cir. 2003); *see also Chevron U.S.A. Inc. v. Laettner*, No. 1:09CV232, 2012 WL 2575478, at *2 (M.D.N.C. July 3, 2012) (same); *see also* Fed. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order . . . [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . .").

As Plaintiffs explain in their opening brief, legislative privilege does not protect communications with third parties. *See* 6/11/14 Pls.' Br. at 5-9. This is because the privilege does not exist or is waived when a communication or document is shared with an outside party. *See Doe*, 788 F. Supp. 2d at 986 (ordering production of documents that "were communicated to or shared with non-legislative members"); *see also Almonte v. City of Long Beach*, No. CV 04-4192(JS)(JO), 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005) (explaining that legislative privilege "does not mean [defendants] were entitled to discuss those matters with some outsiders but then later invoke the privilege as to others"). Outside parties include any non-legislative members, including but not limited to, consultants, experts, or lobbyists. *See, e.g.*, *Doe*, 788 F. Supp. 2d at 987 (deliberative privilege does not apply to documents shared with non-legislative members); *Favors*, 285 F.R.D. at 212 ("[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations.").

Because the privilege is waived when a legislator communicates with a third party, it makes no difference that Defendants produced some documents reflecting legislator communications with certain agencies. Producing *some* documents does not change the fact that *all* documents shared with third parties are discoverable and movants have no basis for withholding them.

Movants never address this issue, but instead argue that only those documents that are available through "non-legislator sources" should be subject to production. 6/11/14 Movant's Br. at 16. In making this argument, movants rely on *Marylanders for Fair Representation, Inc. v. Schaefer*, in which the court allowed depositions of private citizens, but deferred deciding whether to allow depositions of legislators. 144 F.R.D. at 304-05. The result reached in *Marylanders* is inapposite because Plaintiffs are seeking documents, not testimony, which courts have found to be far less burdensome on the legislative process. *See, e.g.*, *Small*, 152 F.R.D. at 513 (explaining that the "primary purpose of legislative immunity" is not to "relieve legislators of the burdens associated with document production," but "to shield legislators from the harassment of hostile questioning.") (citation and internal quotation marks omitted); *see also Doe*, 788 F. Supp. 2d at 984 (noting that "[w]hile a few such cases have held that state and local government legislators are immune from providing testimony in most civil cases, the evidentiary legislative privilege has not been extended to all document productions.") (footnote omitted).

The situation in *Marylanders* is also distinguishable because the plaintiffs could readily identify the non-legislator sources. In *Marylanders*, the plaintiffs sought discovery from a quasi-legislative committee that was composed of private citizens and legislators. 144 F.R.D. at 304-05. Thus, identifying the non-legislators was as simple as identifying the private citizens on the committee. Here, by contrast, there is no way for Plaintiffs to know or identify every constituent, lobbyist, or political organization with whom an individual legislator communicated on topics related to HB 589. That is not to say that Plaintiffs have not sought discovery, where possible, from non-legislator sources. For example, Plaintiffs have served discovery on the North Carolina Department of Transportation, North Carolina State Board of Elections, the John Locke Foundation, and the Civitas Institute. Critically, however, with respect to many of these requests, Plaintiffs have been met with similar objections and attempts to delay, leaving Plaintiffs with no other option but to seek documents from the legislators themselves.

More importantly, however, because movants have already collected documents from the legislators, the burden of producing legislative communications with third parties would be minimal at best. E-discovery tools provide various sorting methods, including sorting by sender and recipient. Thus, identifying materials shared with third parties is as simple as sorting the documents and identifying those that went to individuals outside of the legislature, a process that should require little to no time on the part of the individual legislator. Critically, even if movants had not already collected responsive documents from the legislators, Judge Peake already found that production of

"communications with outside parties . . . is not unduly burdensome or invasive of the legislative process." 3/27/14 Order at 7.

The takeaway is that movants have no basis for cherry picking the third-party communications they wish to produce. None of these materials are protected by legislative privilege and should be produced immediately.

B. Documents Considered Public Records Under North Carolina Law Are Discoverable.

Movants contend that none of the categories of documents at issue are discoverable under North Carolina's public records laws. 6/11/14 Movants' Br. at 11-12. The thrust of movants' argument is that none of North Carolina's statutes "unambiguously or explicitly waives the common law legislative immunity or privilege." *Id.* at 12. As an initial matter, federal common law governs the application of legislative privilege in this case, *see* 5/15/14 Order at 11 [ECF No. 105], and under federal common law, legislative privilege can be waived expressly, *see Marylanders*, 144 F.R.D. at 298 (legislative privilege "is a personal one and may be waived or asserted by each individual legislator"), or impliedly by sharing material with an outside party, *see Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995) (finding that "commissioners in this case clearly waived any such privilege" by "testif[ying] extensively as to their motives in depositions with their attorney present, without objection."); *see also supra* at 9-12.

But even if North Carolina law governed the discoverability of these categories of documents, movants cite no authority to suggest that North Carolina's public records statutes prohibit the production of legislator communications with outside parties or the

logging of legislator-to-legislator communications, legislator-to-staff communications, or legislator-to-attorney communications on a privilege log. *See* 6/11/14 Movant's Br. at 11-12. To the contrary, the only case movants rely on is *Dickson v. Rucho*, 737 S.E.2d 362 (N.C. 2013). In *Dickson*, the North Carolina Supreme Court was asked to resolve whether a specific section of the North Carolina General Statutes regarding redistricting waived the right of legislators to assert the attorney-client privilege or work-product doctrine. *Id.* at 365. Using canons of statutory construction, the court concluded that it did not, but this conclusion has no bearing on the disagreement here.

Indeed, insofar as Plaintiffs have argued that waiver requires the production of certain documents, the only category of documents for which Plaintiffs have requested immediate production are legislator communications with third parties. As to all other categories, Plaintiffs have asked for a privilege log whereby a determination can be made as to whether the communication is protected by legislative privilege at all.

But to the extent there are documents that would fall under North Carolina's public records laws that movants have not yet produced, Plaintiffs request the immediate production of these materials. In addition to being discoverable under North Carolina law, Judge Peake has already determined that production of these materials "is not unduly burdensome or invasive of the legislative process." 3/27/14 Order at 7.

III. The Documents Plaintiffs Seek Are Highly Relevant To Their Constitutional And Statutory Claims.

Finally, movants argue that the evidence Plaintiffs seek "is not relevant to the claims asserted." 6/11/14 Movant's Br. at 12. This is fundamentally false and wrong as a matter of law. Movants make the incredible claim that "no legal requirement makes the personal electronic and other communications of legislators relevant to actions claiming violations of the Voting Rights Act or the United States Constitution" and that "the law makes relevant only statements and documents in the public domain." *Id*. at 3. Movants are right about one thing: there is no law that "*makes*" certain information relevant. Under the Federal Rules of Civil Procedure, relevance in the discovery context is broad, encompassing any information that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1); *see Carefirst*, 334 F.3d at 402 ("Discovery under the Federal Rules of Civil Procedure is broad in scope and freely permitted."); *see also Kinetic Concepts, Inc. v. ConvaTec Inc.*, 268 F.R.D. 226, 239-40 (M.D.N.C. 2010) ("Moreover, the commentary to the Rules indicates that '[a] variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action.'") (alteration in original) (quoting Fed. R. Civ. P. 26 advisory committee's notes, 2000 Amendment, Subdivision (b)(1)).

In misapprehending how relevance works under the Federal Rules, movants argue that Plaintiffs "have already been provided all of the information they need to challenge the legislative motive of a duly enacted law." 6/11/14 Movant's Br. at 12-13 [ECF No. 133]. But the test for relevance is not sufficiency, and so whether Plaintiffs have all that

they "need" is not dispositive of whether the information sought is discoverable. *See Kinetic Concepts*, 268 F.R.D. at 238-39 ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.") (citation and internal quotation marks omitted).

Not only do movants misstate the standard for relevance under the Federal Rules, they are incorrect that the information Plaintiffs seek is irrelevant. As described in detail in prior briefing on this issue, the information plaintiffs seek is clearly relevant. For starters, movants mischaracterize the nature of Plaintiffs' discovery requests, implying that the only documents Plaintiffs seek are related to the legislature's intent in enacting HB 589. This is incorrect. While Plaintiffs have sought discovery related to intent because it is an element of their Fourteenth and Fifteenth Amendment claims and relevant to their claims under the Voting Rights Act, Plaintiffs have also sought evidence related to the implementation and administration of the law. *See, e.g.*, Ex. A, Request Nos. 11, 13, 15 (12/5/13 Subpoena to Sen. Rucho). Movants do not dispute the relevance of these requests. Nor could they, given that the manner in which the law is implemented bears directly on whether the law will have a discriminatory impact on voters in North Carolina, the key issue in this case. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464 (1979); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). And Judge Peake has already found that "good cause exists . . . to allow discovery on matters relevant to the subject matter of this suit with respect to the

application, implementation, or effects of the challenged legislation." 3/3/14 Order [ECF No. 92].

In targeting documents related to intent, movants argue that communications by individual legislators are irrelevant because they do not reflect the intent of the legislature as a whole. *See* 6/11/14 Movants' Br. at 13-14. This ignores the broad standard for relevance under the Federal Rules and assumes, without any basis, that communications between legislators could never reflect the will of the legislature. And, more importantly, that individual communications could never be probative of general intent.

In support of their argument, movants argue that to the extent the Supreme Court expressed approval for discovery of intent in *Arlington Heights*, it was limited to "the legislative and public record."[3] 6/11/14 Movants' Br. at 14. But nowhere in *Arlington Heights* does the Court state that legislators' communications are irrelevant to legislative intent. If anything, the Court's discussion of "contemporary statements by members of the decisionmaking body" and finding that "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action," suggests that individual communications are probative of intent. 429 U.S. at 268. Indeed, this is how various courts have interpreted *Arlington Heights*. *See*,

[3] Movants also rely on *Waste Industries USA, Inc. v. North Carolina*,725 S.E.2d 875 (N.C. Ct. App. 2012), a case in which North Carolina's Court of Appeals contemplated the persuasiveness of certain evidence of legislative purpose. *Id.* at 883. The statements at issue were second-hand accounts of what some legislators had said to other legislators. *Id.* The court found the statements irrelevant because it was unaware of any authority for ignoring "express statements of legislative purpose" based on "anonymous, secondhand statements made in unknown contexts and not contemporaneously with the challenged legislation." *Id.* Insofar as the documents Plaintiffs seek are contemporaneous and reflect first-hand accounts, *Waste* provides no basis for concluding that legislative communications regarding HB 589 are irrelevant.

e.g., *Doe v. Nebraska*, 788 F. Supp. 2d 975, 981-82 (D. Neb. 2011) (citing *Arlington Heights* as one of a "number of cases" in which courts "have allowed queries into legislators' motivations"); *see also United States v. Irvin*, 127 F.R.D. 169, 173-74 (C.D. Cal. 1989) (finding that "the withheld information is directly relevant to the validity of the redistricting plan" and citing *Arlington Heights*); *see also Favors v. Cuomo*, 285 F.R.D. 187, 217-19 (E.D.N.Y. 2012) (rejecting defendants' argument that communications and other documents related to the "'legislators' motivations, political or otherwise, are entirely irrelevant'" and citing *Arlington Heights*).

For example, in *Veasey v. Perry*, No. 2:13-CV-193, 2014 WL 1340077 (S.D. Tex. Apr. 3, 2014), a recent case concerning Texas's voter ID law, the state made the very same argument that movants make here: that "*Arlington Heights* requires the United States to look to publicly available sources." *Id.* at *3. In response, the court explained that "candid discussions among legislators may not be the only evidence that would allow the United States to prove its discriminatory intent claim," but "the practical reality [is] that officials 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." *Id.* (citation and internal quotation marks omitted). Given this reality, the court found that the unavailability of documents weighed in favor of disclosure. *See also Hobart v. City of Stafford*, 784 F. Supp. 2d 732, 766 (S.D. Tex. 2011) (finding that without access to testimony of city council members, "Plaintiffs would be forced to try to prove a heavily-

contested element of their civil rights claim without the benefit of all sources of potentially relevant information.")

While movants claim that the Fourth Circuit has expressed their same view of *Arlington Heights*, this is hardly the case. *See* 6/11/14 Movants' Br. at 15 [ECF No. 133]. In *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810 (4th Cir. 1995), the court recounted "[s]everal factors [that] have been recognized as probative of whether a decisionmaking body was motivated by a discriminatory intent" and cited to *Arlington Heights*. *Id.* at 819. While legislative communications are not listed among these factors, at no point did the court represent that the list was exhaustive, nor did it state that legislative communications would be irrelevant. Movants ask the Court to read more into this case than is stated and conclude that legislative communications are *per se* irrelevant without any basis for doing so.

Movants also argue that "Plaintiffs have not cited any cases in which *Arlington Heights* is used as a basis for overruling legislative immunity or privilege." 6/11/14 Movants' Br. at 14-15. This is incorrect. In *Veasey*, for example, the court considered *Arlington Heights* and found that "[i]t severely limited, but did not foreclose, the possibility of piercing the privilege for state legislators in discriminatory-intent claims." 2014 WL 1340077, at *1. While the court reserved judgment as to whether the privilege would be pierced for purposes of trial, the court ordered Texas "to produce to the United States, under seal, all of the documents in its possession, custody, or control that it has withheld on the basis of legislative privilege." *Id.* at *3.

At the end of the day, movants have no authority for their remarkable claim that legislative communications are irrelevant. Under the Federal Rules, relevance is broad in scope, and courts have routinely found that legislative documents fall under this standard. Plaintiffs do not seek immediate production of all categories of documents. Outside of legislative communications with third parties, Plaintiffs merely ask for the minimum to which they are entitled under the Federal Rules: a privilege log. *See* Fed. R. Civ. P. 45(e)(2). Only with a privilege log can Plaintiffs, and the Court, truly ascertain which documents are privileged.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reject movants' arguments and order the legislators to produce (1) any documents reflecting communications with third parties; and (2) a privilege log for any documents withheld on the basis of privilege that reflect (a) legislator-to-legislator communications, (b) legislator-to-staff communications, and (c) legislator communications with outside counsel before the onset of litigation on August 12, 2013. Plaintiffs also respectfully request that the Court order production of the first category of materials immediately and before the June 30 deadline for filing a reply in support of their motion for preliminary injunction.

Dated: June 25, 2014

Respectfully submitted,

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I, Daniel T. Donovan, hereby certify that, on June 25, 2014, I filed a copy of the foregoing Plaintiffs' Opposition to Brief on the Issue of Legislative Immunity and Legislative Privilege Pursuant to Joint Status Report using the CM/ECF system, which on the same date sent notification of the filing to the following:

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