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.	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. 1:13-CV-861

UNITED STATES' BRIEF IN OPPOSITION TO MOTION TO QUASH SUBPOENAS TO STATE LEGISLATORS

On December 11 and 19, 2013, Plaintiffs in *NAACP v. McCrory*, 1:13-cv-658 (hereinafter "*NAACP* Plaintiffs"),[1] served subpoenas seeking documents from 13 North Carolina legislators (the "State Legislators" or "Movants"). On January 20, 2014, the State Legislators moved to quash these subpoenas in their entirety. *See* ECF No. 44, 13-cv-861. The United States submits this brief in support of the subpoenas and in opposition to the motion to quash.

BACKGROUND AND PROCEDURAL HISTORY

In the final hours of the 2013 legislative session, the North Carolina General Assembly passed North Carolina House Bill 589 ("HB 589"), a sweeping overhaul of state election law. The United States, and numerous private plaintiffs, brought lawsuits under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, challenging certain provisions of HB 589 (collectively "Plaintiffs").[2] Plaintiffs in each of these cases alleged that HB 589 was enacted with the purpose of, and will have the result of, denying or abridging the right of minority voters to vote on account of race or color.

The *NAACP* Plaintiffs' subpoenas seek a range of documents relating to the consideration and implementation of HB 589, including, among other things, documents

[1] This Court has consolidated for purposes of discovery the NAACP's case with *League of Women Voters v. State of North Carolina*, 1:13-cv-660, and *United States v. State of North Carolina*, 1:13-cv-861. *See* ECF No. 30, 1:13-CV-861.

[2] The private plaintiffs also brought claims under the Fourteenth and Fifteenth Amendments of the United States Constitution. *See generally* Second Am. Compl., ECF No. 52, Case No. 13-cv-658; Compl., ECF No. 1, Case No. 13-cv-660.

reflecting legislative purpose; documents received by State Legislators from individuals and groups outside the North Carolina General Assembly, such as constituents, lobbyists and public interest groups; 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 Bob 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, and requesting an exemption from Rule 45(e)(2)(A)'s privilege log requirement. ECF No. 44, 13-cv-861. On February 3, 2014, the United States received Defendants' responses and objections to its first set of requests for the production of documents, which it served on the State of North Carolina, the North Carolina State Board of Elections ("SBOE"), and the Executive Director of the SBOE, on December 31, 2013. The United States' requests seek some of the same categories of information as the *NAACP* Plaintiffs' Rule 45 subpoenas. *See* Ex. 2. 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 generally* Ex. 3.

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). The *NAACP* Plaintiffs' subpoenas are directed at legislators who are likely to have first-hand knowledge relating to the development and passage of HB 589. These documents are crucial to evaluating the process leading up to the passage of HB 589, the facts and issues considered in enacting the bill, and the likely impact of the bill 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," Mem. in Supp. of Mot. to Quash 7, is not correct as a matter of law. Although state legislators enjoy immunity from civil liability, any evidentiary privilege for state lawmakers is qualified, at best, and must yield in this case, given the critical nature of the requested discovery and the important federal interest in enforcing the prohibition on intentional discrimination in voting. Moreover, even if some limited legislative privilege applied in this case, it could not categorically shield from disclosure all of the subpoenaed documents, many of which fall outside the scope of legislative privilege. Finally, to the extent the Court concludes that legislative privilege may shield certain responsive documents from disclosure, the State Legislators must comply with Rule 45(e)(2)(A)'s privilege log requirement so that the Court can determine the proper scope of the privilege's application in this case.

I. The State Legislators Must Produce the Subpoenaed Documents

A. The Requested Discovery Is Vital to Plaintiffs' Intentional Discrimination Claims

The subpoenaed 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); *see also United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 304 n.41 (D.S.C. 2003). Courts routinely rely on legislative evidence to resolve Section 2 intent claims. *See Brooks v. Miller*, 158 F.3d 1230, 1234, 1236 (11th Cir. 1998) (affirming district court's findings of fact based in part on testimony of state legislators and the governor); *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) (relying on, among other things, legislative correspondence and testimony of legislators); *see also Jones v. City of College Park*, 237 F.R.D. 517, 521 (N.D. Ga. 2006) (concluding that where "government intent is at the heart" of a cause of action, the plaintiff "has a compelling interest in discovery of evidence of such intent"). Legislative documents are necessary because "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 *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Reliance on public statements alone undercuts the inquiry 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).

In *Arlington Heights*, the Supreme Court set forth a non-exhaustive list of evidentiary factors for courts to consider in cases alleging intentional racial discrimination. 429 U.S. at 266-68. In order to "determin[e] whether invidious discriminatory purpose was a motivating factor" in the State's passage of HB 589, 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*. Many of the document requests at issue here seek precisely such information. *See generally* Ex. 1. Moreover, state lawmakers and other participants in the legislative process are likely to be the best source of such documentary evidence. *See*, *e.g.*, *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 202 (S.D.N.Y. 2003); *United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989). Defendants are also likely to articulate their own explanations for the changes adopted in HB 589, *see* Answer ¶ 79, ECF No. 19, 13-cv-861 (denying allegation in the United States' Complaint that proffered policy justifications were "tenuous and unsupported in the legislative record or by other evidence"), rendering access to legislative deliberations particularly important, *see* Mem. and Order at 27-28, *Favors v. Cuomo* (*Favors II*), 11-cv-5632 (E.D.N.Y. Feb. 8, 2013) (unpublished) (Ex. 4).

Two recent decisions in Voting Rights Act cases challenging the State of Texas' 2011 redistricting plans demonstrate the importance of legislative document discovery 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 II*), 5:11-cv-360 (W.D. Tex. Mar. 19, 2012) (three-judge court) (Ex. 5). Similarly, in *Texas v. United States*, the court relied in part on email exchanged among state legislators to conclude that Texas's 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. *See also South Carolina v. United States*, 898 F. Supp. 2d 30, 44-45 (D.D.C. 2012) (discussing legislative evidence in a declaratory judgment action reviewing the state's photo voter identification law under Section 5 of the Voting Rights Act).

B. Any Applicable State Legislative Privilege Is Qualified

State legislative privilege is a qualified common law doctrine that, when it applies, affords state legislators a limited evidentiary privilege. That is, in some circumstances, it shields legislators from having to produce certain documents or testify as to certain core legislative activities. *See Favors v. Cuomo* (*Favors I*), 285 F.R.D. 187, 209 (E.D.N.Y. 2012); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011); Order at 5, *Perez v. Perry* (*Perez I*), 5:11-cv-635 (W.D. Tex. Aug. 1, 2011) (three-judge court) (unpublished) (Ex. 6).[3]

[3] 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).

The fact that the State Legislators are immune from civil liability in these cases does not mean that they have an absolute privilege to withhold the requested documents. 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."); *Almonte v. City of Long Beach*, 2005 WL 1971014, at *3 (E.D.N.Y. Aug. 16, 2005) (same); *Rodriguez*, 280 F. Supp. 2d at 95-96 ("[N]otwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions.").

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.[4] The Court also rejected the notion that

[4] The Speech and Debate Clause generally grants federal lawmakers absolute immunity from civil suit and an evidentiary privilege. *See Rodriguez*, 280 F. Supp. 2d at 94. The Clause does not, however, apply to state legislators. *Gillock*, 445 U.S. at 366 n.5. The protection afforded state lawmakers by state legislative privilege is "far less than the

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. In addition, after noting that "principles of comity command careful consideration," the Court held that "where important federal interests are at stake . . . comity yields." *Id.* at 373; *see also id.* at 370 ("[F]ederal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch."). 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 Government in enforcing its criminal statutes" outweighed the "speculative benefit to the state legislative process" of allowing the evidentiary privilege. *Id.*[5]

The Supreme Court's decision in *Arlington Heights* also belies the notion that an absolute evidentiary privilege categorically shields the State Legislators from civil

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legislative privilege created by the Federal Constitution." *Id.* at 368; *see also Cano v. Davis*, 193 F. Supp. 2d 1177, 1180 (C.D. Cal. 2002) (three-judge court).

[5] Although *Gillock* involved a criminal prosecution, the Court did not limit its holding to criminal cases. Indeed, the Court's reasoning applies equally to Section 2 enforcement actions, which involve "important federal interests," *Gillock*, 445 U.S. at 373, and which, much like criminal prosecutions, "seek to vindicate public rights[,]" *Balanced Map*, 2011 WL 4837508, at *6. *See infra* Part I.C.

discovery in this case. In *Arlington Heights*, plaintiffs were permitted "to question [legislators] fully about materials and information available to them at the time of decision." 429 U.S. at 271 n.20. The Court further recognized that in "extraordinary instances" legislators could be required to testify as to legislative purpose. *Id.* at 268; s*ee also Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906, 920 (W.D. Va. 2012) ("In *Village of Arlington Heights*, the [Supreme] Court declined to declare all judicial inquiries into legislative motivation to be off-limits.") (citation omitted).

Accordingly, courts considering claims of state legislative privilege have routinely recognized that any such privilege is qualified. *See, e.g.*, *Pittsylvania Cnty.*, 842 F. Supp. 2d at 920 ("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*, 445 U.S. at 373); *Perez v. Perry* (*Perez III*), 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); *Balanced Map*, 2011 WL 4837508, at *7 ("Under the federal common law, legislative privilege is qualified, not absolute, and may be overcome by a showing of need."); *Baldus v. Wisc. Gov't Accountability Bd.* (*Baldus I*), 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011) (three-judge court) (same); *Irvin*, 127 F.R.D. at 173 (same).

Furthermore, where the privilege exists, it is personal to each legislator and may be waived, *see Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995), and it shields only those acts that are "integral steps in the legislative process," *EEOC v. Washington*

Suburban Sanitary Comm'n (*WSSC*), 631 F.3d 174, 184 (4th Cir. 2011); *cf. Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979) (federal Speech and Debate Clause protects speech that is "essential" to the legislative process).

C. Any State Legislative Privilege Should Yield In This Enforcement Action Alleging Intentional Racial Discrimination in Voting

As the Supreme Court recognized, "where important federal interests are at stake," state legislative privilege must yield. *Gillock*, 445 U.S. at 373. The federal interest in this Voting Rights Act case alleging intentional discrimination is "compelling." *Irvin*, 127 F.R.D. at 174; *see also Balanced Map*, 2011 WL 4837508, at *6. The Fourteenth and Fifteenth Amendments guarantee the right of citizens of the United States to vote free from discrimination on the basis of race. Section 2 of the Voting Rights Act protects this fundamental right by forbidding laws and practices that have the purpose or result of denying or abridging the right to vote on account of race or color. *See* 42 U.S.C. § 1973(a); *Pittsylvania Cnty.*, 842 F. Supp. 2d at 921 (recognizing the "very strong federal interest in the enforcement of civil rights statutes that provide remedies for violations of the Constitution" and rejecting lawmakers' legislative privilege claim). Because Section 2 enforcement actions "seek to vindicate public rights[,]" they are, in some respects, "akin to criminal prosecution" such that, "as in *Gillock*, 'recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government.'" *Balanced Map*, 2011 WL 4837508, at *6 (quoting *Gillock*, 445 U.S. at 373); *see also Irvin*, 127 F.R.D. at 174 ("[The Voting Rights Act] requires vigorous and searching federal enforcement.").

This important federal interest is heightened where, as here, the United States is a plaintiff. The power of the federal government is "at its maximum" when the Executive "acts pursuant to an express or implied authorization of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also Irvin*, 127 F.R.D. at 173 (recognizing the importance of the federal government's interest in enforcing federal law). Moreover, 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). Accordingly, "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). When Congress exercises this power, as it did in enacting Section 2 of the Voting Rights Act, "a State cannot deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted." *Ex Parte Virginia*, 100 U.S. at 346.

As discussed above, the requested documents are central to Plaintiffs' claims in this case. Indeed, the Court in *Arlington Heights* commended judicial inquiry into whole categories of information that would become largely unobtainable if the court were to recognize an absolute privilege "forbid[ding] plaintiffs from seeking *any* production at all from" state legislators. *Compare* Mem. in Supp. of Mot. to Quash 7, *with Arlington Heights*, 429 U.S. at 266-68. The Court should not categorically exempt such critical information from the fact-finding process.

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)). Evidentiary privileges, such as the one the State Legislators assert here, must be "accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotation marks and citation omitted). Here, the "public good" weighs sharply in favor of disclosure. These cases implicate the fundamental right to vote of millions of North Carolinians and challenge a statute that threatens the right of minority voters to participate equally in the political process. *See* 42 U.S.C. § 1973(b); *Baldus v. Wisc. Gov't Accountability Bd.* (*Baldus II)*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012) ("[N]o public good suffers by the denial of privilege in this [voting rights] case.").

In light of these considerations, courts adjudicating Section 2 cases have frequently held that legislative privilege must yield to the need for unique, contemporaneous, and candid documentary evidence from state and local legislators. For example, in *Baldus v. Brennan*, the court declined to quash a subpoena seeking legislative documents relating to Wisconsin's 2011 redistricting process. *See Baldus I*, 2011 WL 6122542, at *2. The court found 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. *Id.*

In *United States v. Irvin*, the court weighed various factors, including the strength of the federal interest and seriousness of the litigation issues, the plaintiffs' need for the requested evidence, and the potential future chilling effect on government employees, and held that county supervisors' legislative privilege "must yield in this instance to the need for disclosure." *Irvin*, 127 F.R.D. at 173-74. The court later found that the county supervisors' redistricting plan intentionally discriminated against Hispanic voters. *See Garza*, 756 F. Supp. at 1318. *See also*, *e.g.*, Mem. and Order at 23-34, *Favors II* (Ex. 4); *id.* at 34 ("[W]here documents reveal an awareness that the Senate Plan may dilute minority votes, legislative privilege is overcome."); *Balanced Map*, 2011 WL4837508, at *11 (holding that the seriousness of the issues involved outweighed a qualified legislative privilege with respect to "documents containing objective facts upon which lawmakers relied . . . [and] documents available to members of the General Assembly at the time the Redistricting Act was passed"). Similarly, in a case where the State of Texas sought preclearance of its photo voter identification law under Section 5 of the Voting Rights Act, the court allowed the United States to conduct some legislative document and deposition discovery. *See, e.g.*, Order at 14-16, *Texas v. Holder*, 1:12-cv-128 (D.D.C. June 5, 2012) (three-judge court) (unpublished) (Ex. 7) (ordering Texas to produce various documents over which it claimed legislative privilege, and requiring a state senator to re-sit for deposition).

With respect to documents and third party testimony in particular, some courts have held that state legislative privilege provides only a privilege of "nonevidentiary use, not of non-disclosure."[6] *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994) (quoting *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3rd Cir. 1978)). "This means that 'documents created by legislative activity can, if not protected by any other privilege, be disclosed and used in a legal dispute that does not directly involve those who wrote the document, i.e., the legislator or his aides.'" *Id.* (quoting *Corporation Insular de Seguros v. Garcia*, 709 F. Supp. 288, 297 (D.P.R. 1989)). *Cf. Benford v. ABC*, 98 F.R.D. 42, 46 (D. Md. 1983) (to same effect in context of federal Speech and Debate Clause). In *Small v. Hunt*, the court held that "agendas, schedules or other documents relating to meetings of [a quasi-legislative committee] and any documents provided to the . . . committee" were discoverable. *Small*, 152 F.R.D. at 513 (internal quotations omitted).

To the extent the State Legislators argue that *Schlitz v. Virginia*, 854 F.2d 43 (4th Cir. 1988), *overruled in part by Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 303 (4th Cir. 1995) (en banc), and *WSSC*, 631 F.3d 174, compel this Court to recognize an absolute privilege of state lawmakers to categorically withhold otherwise discoverable documents, *see* Mem. in Supp. of Mot. to Quash 7, they misread those cases. Neither case recognized an absolute evidentiary privilege for state or local legislators, nor established that lawmakers may, by invoking legislative immunity, categorically evade document discovery, the narrow question presented here. Indeed,

[6] In deciding this motion, the Court can elect to decide only the applicability of the legislative privilege to the documents at issue and to postpone deciding if and how the privilege could be invoked with respect to deposition testimony.

Schlitz is silent on whether state legislators must produce documents in response to a valid subpoena, *see Schlitz*, 854 F.2d at 45-46 (holding that the doctrine of legislative immunity precluded state legislators from being compelled to "testify as to their motives for declining to reelect" a state judge),[7] and in *WSSC*, the court affirmed the district court's order requiring the Sanitary Commission to *comply* with the challenged document subpoena, *WSSC*, 631 F.3d at 185. In *WSSC*, the court had no occasion to determine whether need for discovery into legislative activities outweighed "the only speculative benefit to the state legislative process" of recognizing an evidentiary privilege, *Gillock*, 445 U.S. at 373, because it concluded that the information the plaintiffs sought related to activities that were not "legislative." Like many of the document requests at issue here, the *WSSC* subpoena requested documents regarding events that pre- and post-dated the

[7] The Fourth Circuit's en banc decision in *Berkley* overruled *Schlitz* "to the extent that [it could] be read to confer legislative immunity on municipalities from suits brought under [42 U.S.C.] section 1983," 63 F.3d at 303, and called into doubt the continuing vitality of the testimonial privilege applied in *Schlitz*, *see id.* at 303 n.9 ("Under *Baker* and *Schlitz*, Charleston's council members may be privileged from testifying in federal district court as to their motives in enacting legislation. Because appellants do not challenge this testimonial privilege, except to the extent that such a privilege could be interpreted to afford municipalities immunity from liability under section 1983, we do not address herein the vitality of this privilege in the wake of *Owen* [*v. City of Independence*, 445 U.S. 622 (1980)] and today's holding."); *see also Alexander*, 66 F.3d at 68 n.4 (recognizing that the existence of a testimonial privilege remained an open question after *Berkley*). The Fourth Circuit later concluded, citing a decision that pre-dated *Berkley*, that the testimonial privilege was "still viable." *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (citing *Hollyday v. Rainey*, 964 F.2d 1441 (4th Cir. 1992)). It did not, however, hold that this privilege was absolute or that it shielded lawmakers from having to respond to document requests. To the contrary, the court merely held that in the individual employment discrimination case before it, the plaintiff could not compel testimony from local lawmakers "as to their motives in abolishing [his] job and establishing the new job." *Id.*

actual legislative process at issue, and therefore did not implicate legislative privilege. *See WSSC*, 631 F.3d at 183-84.

Furthermore, both cases are materially distinguishable on their facts. Unlike *Schlitz* and *WSSC*, which involved individual claims of age-based discrimination in employment, these cases seek to vindicate the fundamental right to vote of North Carolina voters. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) (describing the right to vote as a "fundamental political right" that is "preservative of all rights"); *Balanced Map*, 2011 WL 4837508, at *6 (recognizing that Section 2 cases "seek to vindicate public rights"). Finally, reading either of these cases as granting the sweeping absolute privilege that the State Legislators assert would place those cases in conflict with Supreme Court precedent. *See Gillock*, 445 U.S. at 370-73; *Arlington Heights*, 429 U.S. at 268-70.

D. Many of the Requested Documents Are Clearly Not Protected by Legislative Privilege

Even if some state legislative privilege applies to some of the requested evidence, the Court should deny the Movants' excessively broad motion to quash because many of the requested documents are plainly not covered by legislative privilege. *See* Order at 5, *Perez I* (Ex. 6) (concluding that because any state legislative privilege is qualified, "any sort of blanket protective order . . . would be inappropriate").

Courts routinely hold that documents and communications legislators share with 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; *id.* at 212 ("The law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."); *see also Balanced Map*, 2011 WL 4837508, at 10 ("Communications between [state legislators] and outsiders to the legislative process" are not privileged.). Moreover, sharing otherwise privileged information with non-legislators waives the privilege for the substantive contents of the communication. *See Perez III*, 2014 WL 106927, at *2. 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"); *see also Balanced Map*, 2011 WL 4837508, at 10 (concluding that communications between state legislators and "lobbyists, members of Congress and the Democratic Congressional Campaign Committee" were not privileged); *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).[8]

Several of the *NAACP* Plaintiffs' document requests to legislators 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");

[8] Such 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).

id., RFP No. 2 (requesting documents reflecting "communications between you and your constituents regarding any provision in H.B. 589"). 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.

In addition, communications and documents exchanged between legislators and the Executive are often not covered by legislative privilege. *See Jewish War Veterans of the U.S.A, Inc. v. Gates*, 506 F. Supp. 2d 30, 58-59 (D.D.C. 2007) (applying federal Speech and Debate Clause). As courts have recognized when applying the Speech and Debate Clause of the United States Constitution, "[m]embers of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct 'though generally done, is not protected legislative activity[,]'" *Doe v. McMillan*, 412 U.S. 306, 313 (1973) (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)). Accordingly, many documents relating to the State Legislators' communications with the Office of the Governor, or with state agencies such as the SBOE, are discoverable. *See, e.g.*, Ex. 1, RFP No. 4-5, 9.

Documents revealing the "objective facts upon which lawmakers relied" in the decision-making process are also beyond the scope of any qualified state legislative privilege. *Balanced Map*, 2011 WL 4837508, at *11; *see also Arlington Heights*, 429 U.S. at 271 n.20 (noting that 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). Reports, data, or studies relating to, for example, rates of possession of photo identification and use of early voting and same-day-registration among North Carolina voters, as well as the costs and other impacts of HB 589, would fall into this category. *See, e.g.*, Ex. 1, RFP Nos. 9, 10, 11, 12, 15. In addition, although some courts have extended a qualified privilege to "experts retained by [state legislators] to assist in their legislative functions[,]" *Favors I*, 285 F.R.D. at 212 (internal quotations omitted), other courts have found that sharing information with outside consultants waives legislative privilege, *see Baldus I*, 2011 WL 6122542, at *2; *Balanced Map*, 2011 WL 4837508, at *10.

Finally, documents addressing implementation of the provisions of HB 589 are likely to reflect post-enactment information and communications. *See, e.g.*, Ex. 1, RFP No. 1. Because post-enactment implementation is not a "legislative act" or an "integral step[] in the legislative process," documents relating to these matters are not protected by legislative privilege and should be produced. *WSSC*, 631 F.3d at 184 (declining to quash subpoena that sought information about events occurring prior to and after a legislative decision); *cf. Hutchinson*, 443 U.S. at 131 ("[O]nly acts generally done in the course of the process of enacting legislation" are protected by the Speech and Debate Clause.).

II. The Court Should Deny the State Legislators' Request to Withhold a Privilege Log

When a third party objects to discovery on the basis of privilege, the party must "expressly make the claim" in response to a particular discovery request and serve with

its discovery responses a privilege log. Fed. R. Civ. P. 45(e)(2)(A); 26(b)(5)(A); *see also Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 241 (M.D.N.C. 2010). The withholding party must, for each withheld document, set forth facts to establish the privilege. *See Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 71 (M.D.N.C. 1986).

If the Court concludes, as it should, that legislative privilege "does not apply in this case," *Baldus I*, 2011 WL 6122542, at *2, the State Legislators can still submit a privilege log for those documents for which they can properly assert other privileges, such as the attorney-client privilege. If, on the other hand, the Court concludes that a qualified legislative privilege may shield some of the subpoenaed documents, the parties may disagree about the bounds of the privilege and the documents to which it applies. A privilege log will be essential "to allow the parties to fully litigate and the court to properly determine, the validity of the privilege asserted." *Hughes v. Sears, Roebuck and Co.*, 2010 WL 4978996, at *6 (N.D. W.Va. Dec. 2, 2010); *see also Favors I*, 285 F.R.D. at 222-24 (finding defendants' privilege log insufficiently detailed to resolve legislative privilege dispute and ordering defendants to submit a revised log). Accordingly, the State Legislators must comply with their obligations under Rule 45(e)(2)(A).

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I electronically filed the foregoing **United States' Brief in Opposition to Motion to Quash Subpoenas to State Legislators** using the CM/ECF system in case numbers 1:13-CV-861, 1:13-CV-658, and 1:13-CV-660, which will send notification of such filing to all counsel of record.

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