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

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 Brief on the Issue of Legislative Immunity and Legislative Privilege pursuant to the parties' Joint Status Report (*US* D.E. 114).

INTRODUCTION

The remaining dispute regarding the applicability of legislative immunity and privilege involves categories of legislative communications that go to the very heart of the purpose behind the creation of those doctrines. Communications between legislators, between legislators and staff, and between legislators and their constituents and other non-agency third parties are at the core of legislators' ability to consider and enact legislation without fear of reprisal or undue burdens on their exclusive and sovereign duty to legislate on behalf of the citizens of this State. As recognized by the District Court, the Fourth Circuit has been highly protective of the immunity and privilege and has construed it broadly. An immunity or privilege which does not protect the remaining disputed documents in this case—one where legislators, regardless of party, work knowing that their quiet study and contemplation is liable to exposure for all the world to

see—would stifle legislative deliberation generally. It would stifle the give and take of negotiation among legislators, legal research and advice from non-partisan staff, and constituent and stakeholder input. Moreover, the remaining disputed documents are not public records under state law, and 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. Rather, to the contrary, the law makes relevant only statements and documents in the public domain. In light of the minimal relevance of these documents to the issues in these consolidated actions, and the significant burden on the legislative process and state legislative sovereignty, this Court should hold that legislative immunity and privilege does not require production of the remaining disputed documents.

NATURE OF THE MATTER BEFORE THE COURT AND PROCEDURAL HISTORY

The *NAACP* and *LWV* actions were filed on 12 August 2013, challenging various provisions of the Voter Identification Verification Act, 2013 N.C. Sess. Laws 381 ("VIVA"), also sometimes referred to as H.B. 589. (*NAACP* D.E. 1; *LWV* D.E. 1) The *NAACP* plaintiffs filed their First Amended Complaint on 13 November 2013. (*NAACP* D.E. 26) The United States filed its complaint on 30 September 2013. (*US* D.E. 1) On 13 December 2013, this Court consolidated these three cases for purposes of discovery and scheduling. (*NAACP* D.E. 39; *LWV* D.E.41; *US* D.E.30)[1]

[1] For ease of reference, references to pleadings filed in the consolidated cases will be only to docket entries in the case filed by the United States.

Throughout December 2013, Plaintiffs served the legislative movants with subpoenas purporting to require the production of documents and including what was designated as "Plaintiffs' First Set of Requests for Production" to each of the legislative movants. The document requests sought communications to and from legislators and others regarding the rationale, purpose, and reasons for the legislators' decisions to vote for H.B. 589, including all of the legislators' communications and research into the issues raised by the legislation.

On 27 March 2014, Magistrate Judge Joi Elizabeth Peake issued her order, by which she granted in part and denied in part the legislative movants' Motion to Quash and Plaintiffs' Motions to Compel and held that the application of legislative immunity or privilege to categories of documents would have to be considered on a case-by-case basis. The Magistrate Judge directed the parties to meet and confer regarding the possibility of reaching any agreements as to the scope or applicability of the immunity or privilege to particular categories of documents.

On April 2, 2014, the legislative movants raised several Objections to the Magistrate Judge's Order. (*US* D.E. 83) On April 4, 2014, the Magistrate Judge stayed her Order pending a ruling by the District Court on the Objections.

By Memorandum Order entered May 15, 2014, the District Court overruled in part and sustained in part the Objections. The Court directed the parties to meet and confer as directed by the Magistrate Judge.

On May 21, 2014, the parties conferred regarding the issues raised by the Court's orders of March 27, 2014 and May 15, 2014 (*US* D.E. 79, 93). On May 22, 2014, the

parties filed a Joint Status Report reflecting areas of agreement and disagreement. As reflected in the Joint Status Report, Defendants agreed to produce the requested documents if such documents were 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)[2] 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.[3]

ARGUMENT

I. The Importance of Legislative Immunity and Privilege in the Fourth Circuit.

The doctrines of absolute legislative immunity and legislative privilege have withstood the test of time. The reason for their longevity lies in the chilling effect a qualified immunity would have in civil cases challenging duly enacted laws by the people's elected representatives. If state legislators considering and deliberating over

[2] Plaintiffs have not defined the difference between what they mean by a "personal aide" versus "legislative staff."

[3] 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, it is not discussed directly in this brief.

important public policies must worry that their political adversaries through civil litigation will be able to discover their confidential deliberations, they will decline to engage in the robust discussion and research necessary for the enactment of laws important to the entire State. Thus, having lost at the ballot box, having lost in legislative committees, and having lost a floor vote on a particular policy choice, political adversaries of the legislative majority may be empowered to effectively inhibit legislators—the direct representatives of the people—from making public policy decisions they deem to be in the best interests of the State.

The District Court Order recognized that the Fourth Circuit has been "highly protective" of the legislative immunity and privilege. (*US* D.E. 105, p. 24) While the District Court could not say with certainty that the Fourth Circuit or United States Supreme Court has held explicitly that absolute legislative immunity or privilege applies to discovery requests, as opposed to civil suits, the Court noted that the Fourth Circuit itself in *EEOC v. Wash. Suburban Sanitary Comm'n* ("*WSSC*") predicted that "if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, *they would not need to comply*." *Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (emphasis added). The District Court noted that unlike other courts, the Fourth Circuit opinions "have often described the legislative privilege as one that is broadly construed." (*US* D.E. 105, p. 24 n.14) Moreover, the District Court specifically noted that 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)

While the District Court did not view the Fourth Circuit in *WSSC* as holding specifically that the legislative immunity and legislative privilege were absolute, the opinion may be interpreted more broadly. The District Court noted that the EEOC in *WSSC* ultimately withdrew its subpoena to the extent the subpoena sought records relating to the WSSC's internal deliberations. (*US* DE 105, p. 16) The District Court also noted that the court ultimately allowed the discovery sought because the modified subpoena "skirted" the potential issues implicating legislative actions and focused only on administrative actions. However, while the Fourth Circuit described as "premature" any need to quash the subpoena, that court's discussion of the scope and reach of the privilege was not *dicta* because its analysis was necessary to delineate the line the court was drawing between what was permissible under legislative immunity and privilege (the modified subpoena) versus what was not permissible (the original subpoena). The *WSSC* court had to draw that line in order to determine that it was "premature" in that case to actually quash the subpoena. Just because the court did not quash the modified subpoena does not mean that its discussion of the privilege was not necessary to its decision of the case.

The Fourth Circuit's broad view of immunity and privilege is consistent with the United States Supreme Court's long-held view that, "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private

indulgence but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Legislative immunity exists to preclude what amounts to a veto by those on the losing end of public policy decisions. Recently, the Fourth Circuit re-affirmed that legislative immunity "prevents those who were defeated in elections from waging political war through litigation." *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 485 (4th Cir. 2014).

The Fourth Circuit's broad view of immunity and privilege is also consistent with the United States Supreme Court's established recognition of a broad right "of legislators to be free from arrest *or civil process* for what they do or say in legislative proceedings." *Tenney*, 341 U.S. at 372 (emphasis added). Recognizing the broad reach of *Tenney*, the Fourth Circuit has emphasized:

> Legislative immunity's practical import is difficult to overstate. As members of the most representative branch, legislators bear significant responsibility for many of our toughest decisions, from the content of the laws that will shape our society to the size, structure, and staffing of the executive and administrative bodies carrying them out. Legislative immunity provides legislators with the breathing room necessary to make these choices in the public's interest, in a way uninhibited by judicial interference and undistorted by the fear of personal liability. It allows them to focus on their public duties by removing the costs and distractions attending lawsuits. It shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box . . . Legislative immunity thus reinforces representative democracy, fostering public decision making by public servants for the right reasons.

Wash. Suburban Sanitary Comm'n, 631 F.3d at 181.

This is the backdrop by which this Court must now determine whether the remaining disputed documents are covered by legislative immunity or privilege. The Fourth Circuit and courts within the Fourth Circuit do not treat this privilege lightly but

instead err on the side of respecting legislative sovereignty and recognizing the inherent burdens on the legislative process when legislators are forced to reveal private communications among themselves and with their aides and constituents.

II. The Remaining Disputed Documents are Inherently Intrusive of the Legislative Process and Legislative Sovereignty and are Not Discoverable Under the Fourth Circuit View of Legislative Immunity and Privilege.

The remaining disputed documents sought by Plaintiffs are quintessentially legislative in nature. Plaintiffs seek private emails exchanged between legislators and their staff and constituents regarding reasons for the enactment of legislation. These communications go to the very heart of the process of legislating and enacting laws for the benefit of the State and impose an impermissible burden on the legislators.

First, the 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.

Second, and perhaps more importantly, producing these communications will chill and deter legislative activity in the future. 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.

Indeed, many courts have recognized that a "deliberative process privilege" akin to legislative privilege protects legislative sovereignty and prevents inquiries that would chill legislative action. *See Doe v. Nebraska*, 788 F. Supp. 2d 975, 985-86 (D. Neb. 2011); *Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, No. 11-C-5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011). While not described as such, the Fourth Circuit in cases such as *WSSC* clearly recognized the chilling effect that intrusion into the legislative process through discovery requests can wreak on the legislative process. The Fourth Circuit also 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. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. In *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995), the Court held that a party is "no more entitled to compel [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 against the suit itself. *Id.*

The deliberative process is even more at risk where, as here, Plaintiffs have defined no standards to guide the Court as to which types of cases warrant intrusion into

the legislative process. Does every case alleging a violation of the United States Constitution warrant such intrusion and disruption? Is such disruption justified when suing the State merely on the basis of a purported violation of a federal statute? Should state legislators expect invasive discovery requests even when the constitutionality of a statute is challenged as applied to a litigant as opposed to on its face? Will discovery requests to legislators from prisoners challenging the constitutionality of their detention under various state statutes be allowed and commonplace? If the personal emails and other electronic communications of legislators are to be routinely discoverable because a litigant can, artfully or otherwise, place at issue the constitutionality of a state statute, the ability of the State to conduct its legislative business will be irreparably harmed.

III. The Remaining Disputed Documents are Not Public Records under State Law.

The Magistrate Judge suggested in the March 27 Order that "many of the documents requested by the subpoenas and discovery requests involve communications with outside parties or are other documents that are considered public records under state law." (*US* D.E. 79 p. 7). The Magistrate Judge order did not cite any state law authority for this assertion. Respectfully, it is incorrect. The North Carolina Supreme Court recently held in a case involving the common law attorney-client privilege that it will not infer the waiver of a common law privilege by the legislature unless the waiver is clear and unambiguous.

> The General Assembly can waive its common law rights in addition to its statutory rights, and whether it chooses to do so is not within the purview of this Court. Nevertheless, we will not lightly assume such a waiver by a coordinate branch of government. Therefore, without a clear and

> unambiguous statement by the General Assembly that it intends to waive its attorney-client privilege or work product doctrine, we are compelled to exercise judicial restraint and defer to the General Assembly's judgment regarding the scope of its legislative confidentiality. Such a clear and unambiguous statement is notably absent from section 120-133. Accordingly, we must conclude that the General Assembly did not intend to waive the attorney-client privilege or work-product doctrine with respect to redistricting litigation when it enacted section 120-133.

Dickson v. Rucho, 366 N.C. 332, 345, 737 S.E.2d 362, 371-72 (2013).

Nothing in the Public Records Act of North Carolina, N.C. Gen. Stat. §§ 132-1 *et seq.* or any other statute unambiguously or explicitly waives the common law legislative immunity or privilege enjoyed by members of the North Carolina General Assembly as officers of one of the three coordinate branches of government of the State of North Carolina. Thus, the private emails of legislators and their staff are not "public records" and there is no express authority to the contrary. Accordingly, the North Carolina Public Records Act is not a basis for dispensing with a legislative immunity and privilege that is highly protected by the Fourth Circuit.

IV. The Court Should Not Intrude on Legislative Sovereignty to Require Production of Documents That are Not Relevant to the Claims Asserted.

As noted by the District Court, some courts consider the "relevance of the evidence sought to be protected" in determining whether to abrogate the applicable immunity or privilege. (*US* D.E. 105 p. 22 n.11) Here, the evidence sought is not relevant to the claims asserted.

Undermining the bedrock democratic policies necessitating the immunity and privilege is particularly inappropriate where, as here, civil litigants have already been provided all of the information they need to challenge the legislative motive of a duly

enacted law. Defendants have provided thousands of pages of documents to Plaintiffs constituting the entire legislative record of the challenged law, including the following:

- All public versions of the bill, including all filed bills, introduced committee or floor amendments (introduced and passed, introduced and failed or introduced and withdrawn), committee substitutes and enrolled and ratified versions, as well as voting results and fiscal notes on the bill;
- Transcripts and audio files of all committee hearings, committee debates and floor debates on the bill;
- Available voting records and minutes for committee consideration of the bill;
- Notices of committee meetings or hearings;
- Relevant House Journal entries;
- Relevant Senate Journal entries;
- Relevant House Principal Clerk's Log entries;
- Relevant Senate Principal Clerk's Log entries;
- Public sign-up sheets for committee meetings on the bill; and
- Documents and information provided by members of the public testifying at legislative hearings on the bill.

The legislature acts as one body and not as individual members. Each member of the House of Representative and of the Senate may have a different motivation for voting for or against any particular piece of legislation; it is the intent of the General Assembly

as a whole, then, and not the motivation of any particular legislator that is relevant to the purpose of a law. Every document that could possibly shed light on the legislature's motive as a body has been provided to Plaintiffs.

Full recognition of immunity and privilege as applied to the remaining disputed documents will not harm Plaintiffs' ability to prepare their case or seek injunctive relief. To the extent that *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252 (1977), provides any basis for discovery on legislative intent, it is limited to the legislative and public record. While Plaintiffs repeatedly refer to *Arlington Heights'* statement that "contemporary statements" by legislators may be relevant, they fail to note the context of that statement. The Supreme Court explained that "[t]he *legislative or administrative history* may be highly relevant, *especially where* there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268 (emphasis added). Thus, the "contemporaneous statements" language was used expressly in the context of the legislative history, not in a discussion of rifling through public servants' private files or electronic correspondence. Moreover, the Court noted in the context of the same discussion on legislative history that the legislative history may, in some "extraordinary circumstances" require testimony "at trial" regarding the purpose of official action. *Id.* Nothing in *Arlington Heights* suggests the right to conduct any discovery against legislators outside of the available legislative record.[4] Moreover, Plaintiffs have not cited any cases in which *Arlington*

[4] Indeed, other courts in North Carolina have recognized this very point. In *Waste Indus. USA, Inc. v. North Carolina*, __ N.C. App. __, 725 S.E.2d 875 (N.C. App. 2012), the

Heights is used as a basis for overruling legislative immunity or privilege in any cases including those brought under the Voting Rights Act.

In addition, the Fourth Circuit has relied upon *Arlington Heights* and stated that relevant evidence in proving discriminatory intent is using "contemporary statements by decisionmakers on the record or in minutes of their meetings." (*US* D.E. 105 p. 14 n.6 (citing and quoting *Sylvia Dev. Corp. v. Calvert Cnty*., 48 F.3d 810, 819 (4th Cir. 1995)). Thus, under United States Supreme Court and Fourth Circuit precedent, Defendants, in providing Plaintiffs with the full legislative record, have already provided Plaintiffs with all of the evidence that is truly relevant to their claims. Plaintiffs' attempts to seek private emails of legislators and their staff and constituents is nothing more than a fishing expedition for irrelevant, non-dispositive remarks by a single legislator here or there which would not prove the intent of the full legislature even if it were discoverable. This Court should not intrude upon North Carolina's legislative sovereignty and impose significant time and resource burdens on state legislators so that Plaintiffs may pursue evidence that would ultimately prove inadmissible or at least irrelevant.

North Carolina Court of Appeals considered whether a legislative enactment unconstitutionally discriminated against out-of-state business interests. Plaintiffs in *Waste Industries* attempted to admit stray comments by legislators purporting to support their claims using the same argument Plaintiffs here make – that *Arlington Heights* makes such statements relevant to determining legislative motive. The North Carolina court flatly rejected the argument. Because the alleged statements were "not part of any legislative history or any other official reporting of legislators' positions and views" they were not relevant under *Arlington Heights*. *Waste Indus.*, 725 S.E.2d at 883.

V. Defendants' Agreement to Produce Agency-Controlled Documents is Sufficient in Light of the Relevant Authorities, the Purpose of the Privilege, and the Undue Burden of Additional Production by Legislators.

As noted above, Defendants have already agreed to produce documents from legislators and legislative staff in the custody of various state agencies. While Defendants believe these documents are protected by the immunity and privilege, in the spirit of compromise, they have agreed to produce such documents while reserving all rights with respect to them.

In its Memorandum Order, the District Court noted that the only case within the Fourth Circuit that appeared to require production to any extent – *Marylanders* – did so only to the extent of allowing discovery from "private citizens" on the redistricting committee which would not "directly impact[] legislative sovereignty." (*US* D.E. 105, p. 21)

Here, as in *Marylanders*, to the extent that documents could be produced that are available from non-legislator sources (such as agency-controlled documents) and also within the custody of Defendants, Defendants have agreed to produce such documents. Thus, Plaintiffs now have access to documents and communications by legislators to state agencies regarding the relevant provisions of the challenged legislation. While Defendants do not believe such evidence is relevant under *Arlington Heights* for the reasons described above, Plaintiffs now have more evidence than they need to make any case for an injunction in this matter. There is clearly no reason to impinge further on the legislative process or North Carolina's legislative sovereignty.

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." *Wash. Suburban Sanitary Comm'n*, 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 11th day of June, 2014.

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CERTIFICATE OF SERVICE

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