IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	**UNITED STATES' BRIEF REGARDING LEGISLATOR DOCUMENTS** Civil Action No. 1:13-CV-658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	Civil Action No. 1:13-CV-660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	Civil Action No. 13-cv-861

Pursuant to the Court's orders of March 27, 2014, and May 15, 2014, the United States submits this brief regarding Defendants' and the State Legislators' production of legislative documents. *See* Memorandum Order, ECF No. 93, 13-cv-861 (May 15, 2014); Order, ECF No. 79, 13-cv-861 (March 27, 2014); *see also* Joint Status Report Regarding Defendants' and the State Legislators' Document Production, ECF No. 114, 13-cv-861 (May 22, 2014).[1]

Both the Magistrate Judge and the District Court have rejected Defendants' and the State Legislators' arguments that legislative privilege is absolute in this case. *See* ECF No. 93 at 25; ECF No. 79 at 3. Although the parties have reached agreement regarding many documents in the custody or control of state agencies, a dispute remains regarding documents in the custody or control of legislators. *See* Joint Status Report, ECF No. 114.

Under the relevant case law, Defendants and the State Legislators must produce expeditiously the requested legislator to third party communications. Defendants and the State Legislators should produce a privilege log for all remaining responsive documents, including (a) legislator to legislator communications, (b) legislator to legislative staff communications (other than those involving communication between a legislator and his or her personal aides), and (c) legislator communications with outside counsel prior to the

[1] Pleadings cited herein were filed in all three of the related cases. The United States refers to documents filed in *United States v. North Carolina*, 13-cv-861.

commencement of litigation on August 12, 2013.[2] A privilege log will, among other things, allow the parties to narrow the scope of documents that remain in dispute.

I. BACKGROUND AND PROCEDURAL HISTORY

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

Plaintiffs seek documents from Defendants and 13 North Carolina legislators (the "State Legislators") relating to the drafting, consideration, and implementation of HB 589, including documents reflecting legislative purpose; communications between State Legislators and individuals and groups outside the North Carolina General Assembly, such as constituents, lobbyists, the North Carolina State Board of Elections ("SBOE"), and other state agencies; and factual data and reports relating to, for example, rates of possession of DMV-issued photo identification among North Carolina voters, and the costs and other impacts of HB 589. *See*, *e.g.*, Ex. 1 (Subpoena to Senator Rucho). Defendants and the State Legislators have resisted this discovery, arguing that the doctrine of legislative immunity categorically bars Plaintiffs from seeking *any* discovery from the State Legislators. *See*, *e.g.*, Mot. to Quash, ECF No. 44.

[2] The parties have agreed that, at this time, Plaintiffs are not seeking either production or a privilege log of communications solely between the State Legislators and their attorneys that were created after August 12, 2013, with the commencement of the first lawsuits challenging HB 589, or communications solely between a State Legislator and his or her personal aide. Joint Status Report ¶ 4(a)-(b).

On March 27, 2014, after extensive briefing and a hearing, the Magistrate Judge rejected the State Legislators' absolute legislative privilege argument. The March 27 order held that the doctrine of legislative "immunity does not preclude all discovery in the context of this case; instead, claims of legislative immunity or privilege in the discovery context must be evaluated under a flexible approach that considers the need for the information in the context of the particular suit presented, while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process." March 27 Order at 3, ECF No. 79. The March 27 order ordered the parties to attempt to reach agreement on categories of documents for production and to file a joint report outlining any remaining disputes for further resolution by the Court. *Id.* at 10.

On May 15, 2014, the District Judge affirmed the March 27 order, following an objection by the State Legislators. The May 15 order held that although legislative privilege "applies to a legislator's documents relating to legitimate legislative activity[,]" the privilege is not absolute. May 15 Order at 24-25, ECF No. 93. The May 15 order further concluded that the Magistrate Judge should determine in the first instance "[w]hether Plaintiffs' requests seek a document or group of documents that implicates the legislative privilege." *Id.* at 25. The May 15 order, accordingly, ordered the parties to complete the meet and confer process described in the March 27 order.[3] *Id.* at 28.

[3] The District Court denied the State Legislators' objections in all respects save one. He sustained their objection to a footnote in the March 27 order that suggested that the State Legislators had conceded that an exception to legislative privilege exists for redistricting cases. *See* May 15 Order at 26. The District Court also reset to May 19, 2014, the deadline by which Defendants were required to notify Plaintiffs of the identity of any

On May 22, 2014, the parties submitted a joint status report outlining their agreement with respect to particular categories of legislative documents and remaining areas of dispute. ECF No. 114. In an effort to narrow the scope of the dispute before the Court, Plaintiffs agreed, for the time being, to not seek production of communications solely between a State Legislator and his or her personal legislative aide, and communications solely between the State Legislators and their attorneys in connection with this litigation. Plaintiffs further agreed that Defendants and the State Legislators need not identify on a privilege log documents falling into these two categories. Joint Status Report ¶ 4(a)-(b). For their part, Defendants agreed to produce documents in the custody or control of state agencies that they had previously withheld on the basis of legislative privilege. *Id.* ¶¶ 1-2. However, Defendants and the State Legislators continue to refuse to produce *any* documents in the custody or control of the State Legislators, including documents reflecting communications with outside parties. They further refuse to produce a privilege log for purportedly privileged documents. *Id.* ¶ 5.

II. LEGAL STANDARD

"[B]ecause '[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 are accepted only where the public good associated with the exclusion of

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legislator on whom they would rely in response to any preliminary injunction motions. *Id.* at 28. On May 19, Defendants did not identify any such legislators.

relevant evidence overrides the general principle in favor of admission. *See Trammel*, 445 U.S. at 50; *Baldus v. Wisc. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012) (stating, in a voting rights case, that "[n]o public good suffers by the denial of privilege in this case"). "A party asserting privilege has the burden of demonstrating its applicability." *N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011). Moreover, "[a] conclusory assertion of privilege is insufficient to establish a privilege's applicability to a particular document." *Page v. Va. State Bd. of Elections*, 2014 WL 1873267, at *2 (E.D. Va. May 8, 2014). Rather, "the proponent of a privilege must 'demonstrate specific facts showing that the communications were privileged.'" *Id.* (quoting *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 751 (E.D. Va. 2007)); *see also Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 71 (M.D.N.C. 1986) (same).

III. ARGUMENT

These three related cases challenging HB 589 pursuant to Section 2 of the Voting Rights Act will require the Court to undertake a fact-intensive "appraisal of the design and impact" of HB 589's challenged provisions. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Plaintiffs' discovery requests are directed at legislators who by the very nature of their jobs have first-hand knowledge relating to that "design and impact," and are therefore likely sources to shed light on the process leading up to HB 589's passage, the facts and issues considered in enacting the bill, and the bill's likely impact on voters.

Although the State Legislators' absolute legislative privilege argument has now been twice rejected in this case, *see* May 15 Order at 25; March 27 Order at 3, Defendants and the State Legislators continue to resist production of *any* documents in

the custody or control of the State Legislators. As the Court has recognized, state legislative privilege does not protect legislator communications with outside parties, a substantial portion of the documents and communications at issue here. The State Legislators should produce without further delay all such documents, including communications between legislators and constituents, lobbyists, public interest groups, other outside groups or individuals, and legislator communications with state agencies.[4]

With respect to any remaining documents that the State Legislators contend are protected by legislative privilege, such as legislator to legislator communications, legislator to legislative staff communications (other than with his or her own personal aides),[5] and legislator communications with outside counsel prior to the commencement of litigation, the State Legislators must produce a privilege log that is sufficiently detailed to establish their claim of privilege with respect to each document or category of documents.

[4] Defendants have agreed to produce communications between legislators and agencies in the custody or control of state agencies, but have not agreed to produce such communications in the control of legislators. Joint Status Report ¶¶ 1-2. The United States is in the process of reviewing the produced agency documents, and has encountered some evidence of additional responsive email documents that existed at some point in time but were not produced by the agency. Requiring the State Legislators to produce communications with all third parties, including state agencies, is necessary to ensure that the complete universe of third-party documents has been produced.

[5] This category would include communications between a legislator and any legislative staff other than his or her personal aides, such as General Assembly or Committee staff and personal aides to another legislator. *See* Joint Status Report ¶ 4.

A. Legislator Communications With Third Parties Should Be Produced Now.

As the Court noted in its March 27 order, "many of the documents requested by the subpoenas and discovery requests involve communications with outside parties or are other documents that are considered public records under state law. Requiring production of those documents is not unduly burdensome or invasive of the legislative process." March 27 Order at 7. Any privilege that may have attached to the information in these communications was waived by the disclosure to non-legislators. These documents should be produced forthwith.

To be privileged, communications must be confidential, and the "law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations." *Favors v. Cuomo* ("*Favors I*"), 285 F.R.D. 187, 212 (E.D.N.Y. 2012). Courts therefore routinely hold that documents and communications exchanged between legislators and non-legislators (other than their personal staff), and communications made in the presence of non-legislators, 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." *Id.* at 213 n.26. *See also Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011) ("Communications between [state legislators] and outsiders to the legislative process" are not privileged.); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011); *Perez v. Perry*, 2014 WL 106927, at *2 (W.D.

Tex. Jan. 8, 2014) (three-judge court). This is true even when the "outsiders are consummate insiders" in a practical sense, such as lobbyists or representatives of public interest groups. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (noting that "no one could seriously claim privilege" over a "conversation between legislators and knowledgeable outsiders, such as lobbyists"); *Balanced Map*, 2011 WL 4837508, at *10 (same). Thus, sharing otherwise privileged information with non-legislators waives the privilege for the substantive contents of the communication. *See Perez*, 2014 WL 106927, at *2.

As noted in the March 27 order, such documents are also 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). Indeed, in the past, the SBOE has posted on its public website email correspondence exchanged among legislators, legislative staff, and SBOE staff, some of which are plainly responsive to Plaintiffs' document requests in this case. *See e.g.*, Ex. 2 at 7 (legislator requests by supporters of HB 589 for information about the number, ethnicity, and party identification of North Carolina voters who lack DMV-issued photo identification).[6]

Limiting production to legislative documents that are in the custody or control of state agencies, as Defendants propose, would exclude whole categories of relevant information from production in this case. In addition to requesting communications between legislators and state agencies, Plaintiffs seek legislator communications that would never have involved a state agency, such as communications between legislators

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

and constituents, lobbyists, and public interest groups, among others. *See, e.g.*, Ex. 1, RFP No. 6 (requesting documents reflecting "communications between [the State Legislators] and any lobbyists, political organizations, or public interest groups regarding any provision in H.B. 589"); *id.*, RFP No. 2 (requesting documents reflecting "communications between you and your constituents regarding any provision in H.B. 589"). Such communications are likely to shed light on the sequence of events leading up to passage of HB 589 and reveal contemporaneous statements and viewpoints held by the decision-makers, all highly relevant to the question of discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). The documents containing these communications are also not likely to be obtainable through other means. *See, e.g.*, *Favors I*, 285 F.R.D. at 219; *Rodriguez*, 280 F. Supp. 2d at 102.

Moreover, many of these documents are not subject to legislative privilege in the first place because they are not "integral steps in the legislative process." *EEOC v. Washington Suburban Sanitary Comm'n* (*WSSC*), 631 F.3d 174, 184 (4th Cir. 2011) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)). The United States Supreme Court has held that activities not "essential" to the legislative process are not protected under the Speech and Debate Clause of the United States Constitution.[7] *See, e.g.*, *Hutchinson v. Proxmire*, 443 U.S. 111, 130 (1979) (distributing newsletters and press releases); *Doe v. McMillan*, 412 U.S. 306, 313-15 (1973) (giving a speech in one's home district). Following this reasoning, courts applying state legislative privilege have

[7] Of course, the protections of the Speech and Debate Clause do not apply to state legislators; state legislators must rely on federal common law. *See* May 15 Order at 11; March 27 Order at 3.

concluded that many of lawmakers' regular activities are not legislative in nature, "and thus documents relating to them are not subject to protection under the legislative privilege." Mem. and Order at 16-18, *Favors v. Cuomo* (*Favors II*), 11-cv-5632 (E.D.N.Y. Feb. 8, 2013) (unpublished) (Ex. 3) (excluding from the scope of legislative privilege any "means of informing those outside the legislative forum"); *Almonte v. City of Long Beach*, 2005 WL 1796118, at *3 (E.D.N.Y. Jul. 27, 2005) (holding that, although there is "nothing inherently improper" in legislators consulting with outside "political operatives" such conversations are not part of the legislative process and therefore provide no "basis on which to invoke privilege"). Because legislative privilege applies only to "legitimate legislative activity[,]" May 15 Order at 24-25, many of the State Legislators' communications with outside third parties are beyond the scope of the privilege.

Finally, producing these documents will not unduly burden the State Legislators or interfere with the legislative process. *See* March 27 Order at 7. Counsel for Defendants have already searched for and collected responsive documents from the 13 State Legislators served with subpoenas, *see* Ex. 4 (Feb. 19, 2014, email from Defendants' counsel, Phillip J. Strach, to Plaintiffs' counsel, Bridget K. O'Connor, with attachment), and as early as February 2014, Defendants' counsel indicated that notwithstanding their legislative privilege objections, they would proceed with the review of the documents they collected from the State Legislators.

B. Defendants and the State Legislators Must Produce a Privilege Log for the Remaining Contested Documents

As the parties seeking to prevent discovery, the burden is on Defendants and the State Legislators to establish their claim of privilege. *See Interbake Foods, LLC*, 637 F.3d at 501; Fed. R. Civ. P. 45(e)(2)(A); 26(b)(5)(A). For each withheld document, they must set forth facts to establish that the privilege applies. *See Byrnes*, 111 F.R.D. at 71; *Kinetic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 241 (M.D.N.C. 2010). In addition, this Court has held that claims of legislative privilege "must be evaluated under a flexible approach that considers the need for the information in the context of" this Voting Rights Act lawsuit, "while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process." March 27 Order at 3. A detailed privilege log will assist the parties in narrowing the scope of documents still in dispute and the Court in balancing these interests. *See Favors I*, 285 F.R.D. at 221; *Doe*, 788 F. Supp. 2d at 987.

As an initial matter, Defendants and the State Legislators must establish that "the information sought falls within the scope of the privilege." *Perez*, 2014 WL 106927, at *2. Legislative privilege does not apply categorically to all documents in the custody of a state lawmaker. *See Doe*, 788 F. Supp. 2d at 987 (emphasizing that state legislators claiming legislative privilege "shall list [on a privilege log] only those documents which arguably fall within the scope of the privilege"); *see also* May 15 Order at 25 ("As with other privileges, the court cannot say that [state legislative privilege] is absolute."). For example, it does not protect communications made in the presence of non-legislators, or

documents "made public or . . . shared with individuals outside the legislative process." *Favors I*, 285 F.R.D. at 213 n.26; *see also supra* Section III.A.

Nor does state legislative privilege protect from discovery the "objective facts upon which lawmakers relied" in the decision-making process. *Balanced Map*, 2011 WL4837508, at *10; *accord Arlington Heights*, 429 U.S. at 270 n.20 (plaintiffs were permitted "to question [lawmakers] fully about materials and information available to them at the time of decision"). For example, from the limited document production Defendants and the State Legislators have allowed, it is clear that legislators received from the SBOE extensive data and other factual information—broken out by race and ethnicity—relating to North Carolina voters' possession of DMV-issued photo identification and use of early voting and provisional balloting. *See* Ex. 5. SBOE data showing that African Americans disproportionately lacked DMV-issued photo identification and disproportionately relied on early voting, same-day registration, and provisional voting were readily available to legislators while the General Assembly was considering HB 589. Without production of legislators' documents, however, the picture of what information legislators had before them remains incomplete. Evidence that the objective factual information the legislature considered in the process of drafting and passing HB 589 showed a likely discriminatory impact is highly relevant circumstantial evidence of discriminatory intent. *See McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1046-47 (5th Cir. 1984) (quoting Senate Report at 27 n.108); *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("[N]ormally the actor is presumed to have intended the natural consequences of his deeds."); *Page*, 2014 WL 1873267, at *7.

Documents containing such factual information are not protected by legislative privilege. *Doe*, 788 F. Supp. 2d at 987.

In addition, as discussed above, legislative privilege only covers "integral steps in the legislative process." *WSSC*, 631 F.3d at 184. The State Legislators cannot assert legislative privilege to shield activities and communications that are not legislative in nature. *See supra* Section III.A.[8] Thus, to withhold *any* document, the State Legislators must first establish that it relates to "legitimate legislative activity." May 15 Order at 25.

Defendants' production of a privilege log is therefore 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 Benford v. Am. Broad. Cos., Inc.*, 98 F.R.D. 42, 45 (D. Md. 1983) (ordering a privilege log for documents withheld under the Speech and Debate Clause). In setting forth specific facts to establish the elements of the privilege, Defendants and the State Legislators must describe each document or category of documents with enough specificity to allow other parties, and the Court, to assess the claim. *See Kinetic Concepts, Inc.*, 268 F.R.D. at 241. For example, in *Favors v. Cuomo*, a redistricting case under the 14th Amendment and Section 2 of the Voting Rights Act, the court found that privilege log entries that described legislative documents as relating to "redistricting issues" were "inadequate to allow either the plaintiffs or [the] Court to determine whether

[8] In addition to the activities discussed above, post-enactment communications are generally not considered "legislative" in nature because they postdate the legislative process. *See WSSC*, 631 F.3d at 184; *see also 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.).

a given privilege applies." *Favors I*, 285 F.R.D. at 223. Instead, after summarizing the topics that were "*specifically* at issue" in the lawsuit, *e.g.*, "whether the documents discuss race or ethnicity," *id.*, the court ordered the defendants to submit revised logs identifying into which, if any, of the broad categories each withheld document fell, *id.* at 224 n.36. The court later concluded that many of the documents were outside the scope of legislative privilege, and that the privilege must yield with respect to others. *See generally Favors II* (Ex. 3).

Only once the State Legislators have provided the basis for their claim that the withheld documents are subject to state legislative privilege can this Court engage in the flexible, "particularized determination of the extent of [the] privilege." March 27 Order at 6. As the Court recognized, the extent to which state legislative privilege shields information from discovery depends on the factual context of the case and the need for the particular information. *Id.* at 3; *see also Page*, 2014 WL 1873267, at *6-7; *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304-05 (D. Md. 1992) (three-judge court) (opinion of Murnaghan, C.J., and Motz, D.J.); *Veasey v. Perry*, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014). A detailed privilege log will assist the parties and the Court in determining the extent to which the qualified legislative privilege must yield to the need for disclosure in this case. *See, e.g.*, *Veasey*, 2014 WL 1340077, at *3 (finding that "the overall balance of factors weighs in favor of disclosure on a confidential basis"); *Page*, 2014 WL 1873267, at *7 (to same effect); *Favors II*, at 34 (Ex. 3) (holding that with respect to "documents reveal[ing] an awareness that the [redistricting plan] may dilute minority votes, legislative privilege is overcome").

IV. CONCLUSION

For all the foregoing reasons, the Court should order Defendants and the State Legislators to produce expeditiously documents within the State Legislators' custody or control that reflect legislators' communications with third parties. The Court should further order Defendants and the State Legislators to provide a detailed privilege log for all remaining documents over which they claim privilege, including legislator to legislator communications, legislator to legislative staff communications (other than with a legislator's own personal aide), and legislator to outside counsel communications prior to the commencement of litigation on August 12, 2013.

Dated: June 11, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on June 11, 2014, I electronically filed the foregoing **United States' Brief Regarding Legislator Documents,** using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

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