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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, et al., Defendants.	**PLAINTIFFS' BRIEF REGARDING OUTSTANDING DISCOVERY ISSUES RELATED TO LEGISLATIVE PRIVILEGE** 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

INTRODUCTION

Since December of last year, Plaintiffs have sought discovery from the State and certain legislators about the enactment and implementation of H.B. 589. At every turn, the State and the legislators have delayed and sought to avoid the production of materials that are plainly discoverable under the rules of discovery and not subject to legislative privilege. Notwithstanding orders from this Court that legislative privilege is not absolute and that discovery of certain materials would not intrude upon the legislative process, the legislators still refuse to produce documents to which Plaintiffs are entitled. This brief addresses two categories of materials about which the parties continue to disagree: (1) documents reflecting legislators' communications with third parties, which are not protected by legislative privilege and should be produced immediately; and (2) internal legislative documents, which should be described on a privilege log so that a particularized determination can be made with respect to their discovery.

Communications with Third Parties. Communications with third parties are not protected by legislative privilege and should be produced immediately. To the extent a communication is with a third party or otherwise has been shared with third parties, any applicable privilege—including legislative privilege—has been waived (to the extent it ever existed). Notwithstanding the non-applicability of privilege to communications with third parties or waiver of any applicable privilege, if this Court were to balance Plaintiffs' need for discovery against its potential intrusion on the legislative process, that balance would weigh in favor of disclosure. While Defendants have now produced documents reflecting legislators' communications with certain state agencies, all responsive

documents reflecting communications with *any* third party should be produced—not just selected third parties.

Privilege Log. Other documents, which may not be subject to immediate production, should be documented on a privilege log, including: (1) legislator-to-legislator communications, (2) legislator-to-legislative staff communications, and (3) legislator communications with outside counsel from before the onset of litigation. The legislators cannot seriously contend that any of these categories should be exempted wholesale from the privilege log requirement. Indeed, a privilege log is the only way for Plaintiffs, and the Court, to ensure that a valid claim of privilege has been asserted (and not waived). In a case that seeks to resolve infringement of the fundamental right to vote, it is imperative that Plaintiffs receive all relevant evidence in pursuit of their claims. The only way to ensure that this happens is to require the legislators to fulfill their obligations under the Federal Rules of Civil Procedure and produce a privilege log—as courts have required in numerous analogous cases.

Plaintiffs respectfully request that the Court order the legislators to produce documents reflecting communications with third parties as soon as possible and to produce a privilege log for documents reflecting: (1) legislator-to-legislator communications, (2) legislative-to-legislative staff communications, and (3) legislator communications with outside counsel from prior to the start of litigation.

BACKGROUND

In December 2013, NAACP Plaintiffs served certain North Carolina state legislators with subpoenas seeking production of documents related to the passage and

implementation of H.B. 589. On January 20, 2014, the day their responses were due, the legislators, represented by Defendants' counsel, moved to quash the subpoenas on the ground of legislative immunity. *See* 1/20/14 Mot. to Quash [ECF No. 56]. A few days later, LWV Plaintiffs moved to compel production of similar documents from the Defendants, to which Defendants also objected on the grounds of legislative immunity. *See* 1/24/14 Pls.' Mot. to Compel [ECF No. 58].

A hearing was held on both motions on February 21, 2014. *See* 2/3/14 Text Order. After extensive oral argument and supplemental briefing, Judge Peake issued an order holding that legislative privilege is not absolute and should be evaluated under a "flexible approach" that considers "the need for information in the context of the particular suit presented, while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process." 3/27/14 Order at 3 [ECF No. 94]. Judge Peake further ordered the parties to meet and confer to attempt to reach agreement regarding (1) categories of documents that will be produced, (2) categories of documents to be reflected on a privilege log so that individual review and challenges can be raised, and (3) categories of documents that could be excluded from the privilege log. *Id.* at 7.

On April 2, 2014, the legislators objected to Judge Peake's order. *See* 4/2/14 Obj. to Order of 27 March 2014 at 2 [ECF No. 97]. After careful deliberation and another round of oral argument, this Court issued an order on May 15, 2014, resolving the legislators' objections and holding that legislative privilege is not absolute. *See* 5/15/14 Order at 25 [ECF No. 105]. This Court also affirmed Judge Peake's order and further ordered that "the parties should resume their effort to meet and confer," instructing that:

> Whether Plaintiffs' requests seek a document or group of documents that implicates the legislative privilege will be for the Magistrate Judge to determine, keeping in mind the relevant authorities, the purpose of the legislative privilege, evidence that the legislators' compliance would divert them from their legislative duties and/or impose an impermissible burden upon them, and the possibility of waiver as to any documents, among other things.

See id. at 25.[1]

The parties met and conferred on May 21, 2014, and were able to reach an agreement in several key respects. *See* 5/22/14 Joint Status Report at 1 [ECF No. 126]. For example, Defendants agreed to produce documents in the custody of any state agency that reflected communications with legislators. *See id.* at 2-3. Plaintiffs agreed not to pursue any documents that reflected communications between legislators and their personal aides. *See id.* And Plaintiffs also agreed not to pursue any communications between legislators and their counsel that were created after August 12, 2013 in connection with this litigation. *See id.* The parties were unable, however, to reach any agreement with respect to the following categories of documents: (a) legislator-to-third party communications (outside of state agencies), (b) legislator-to-legislator communications, (c) legislator-to-legislative staff communications, and (d) legislator communications with outside counsel prior to the initiation of litigation on August 12, 2013. *See id.* at 3.

[1] Judge Schroeder also set a deadline for the Defendants to "notify Plaintiffs of the identity of any legislator on whom they intend to rely in response to any preliminary injunction motion, whether by affidavit, testimony, or documentary evidence otherwise subject to the legislative privilege, in order to allow Plaintiffs sufficient time to undertake additional discovery with respect to those legislators." 5/15/14 Order at 28 [ECF No. 105]. The Defendants did not identify any such witnesses and are therefore precluded from presenting any such evidence at the Preliminary Injunction hearing.

ARGUMENT

I. THE COURT SHOULD IMMEDIATELY COMPEL DISCLOSURE OF DOCUMENTS REFLECTING THIRD PARTY COMMUNICATIONS.

As Judge Peake already found, requiring production of legislative communications with third parties "is not unduly burdensome or invasive of the legislative process."[2] 3/27/14 Order at 7 [ECF No. 94]. Accordingly, Plaintiffs respectfully request that this Court compel the legislators to produce any documents reflecting communications with parties outside the legislature, or that were otherwise made publicly available, which have not already been produced.

A. Waiver Requires Immediate Production of Documents Shared with Third Parties.

Legislative privilege cannot apply to communications with third parties. As with any other privilege, legislative privilege is waived when a communication or document is shared with an outside party. *See Doe v. Nebraska*, 788 F. Supp. 2d 975, 986 (D. Neb. 2011) (ordering production of documents that "were communicated to or shared with non-legislative members"); *see also Almonte v. City of Long Beach*, No. CV 04-4192(JS)(JO), 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005) (explaining that legislative privilege "does not mean [defendants] were entitled to discuss those matters with some outsiders but then later invoke the privilege as to others.").

In the voting rights context, outside parties include non-legislative members, including, for example, consultants, experts, or lobbyists. *See Baldus v. Members of Wis.*

[2] Judge Peake similarly found that "[r]equiring production" of documents that are "considered public records under state law" would "not [be] unduly burdensome or invasive of the legislative process." 3/27/14 Order at 7 [ECF No. 94]. Thus, insofar as the legislators, or Defendants, have failed to produce such documents, Plaintiffs contend that these materials should also be produced.

Gov't Accountability Bd., Nos. 11-CV-562 & 11-CV-101, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011) ("The Legislature has waived its legislative privilege to the extent that it relied on such outside experts for consulting services."); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (SDNY 2003) ("conversation[s] between legislators and . . . outsiders" are ones "for which no one could seriously claim privilege"); *Doe v. Nebraska*, 788 F. Supp. 2d at 987 (deliberative privilege does not apply to documents shared with non-legislative members); *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) ("[A] legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations.").

Courts have routinely compelled legislators to produce documents exchanged with third parties in voting rights cases. *See, e.g., Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 1873267, at *9 (E.D.Va. May 8, 2014); *Baldus*, 2011 WL 6122542, at *2; *Rodriguez*, 280 F. Supp. 2d at 102. The result should be no different here and the State and legislators should produce as soon as possible documents responsive to Plaintiffs' discovery requests that reflect communications with third parties.

B. On Balance Plaintiffs' Need for Discovery Trumps the Applicability of Any Privilege to Third-Party Communications.

Even if this Court concludes that legislators' communications with third parties are subject to the legislative privilege, and disclosure to an outside party does not waive legislative privilege, documents reflecting such communications should be produced because the need for discovery outweighs any purported intrusion into the legislative process. *See, e.g., Page*, 2014 WL 1873267, at *6-7. In voting rights cases, courts

routinely apply a balancing test to determine the scope of the privilege and whether disclosure is warranted. In this respect, Judge Peake noted that "the Court must consider the context of this suit under the Voting Rights Act," 3/27/14 Order at 6 [ECF No. 94], and this Court acknowledged that "redistricting cases have applied a qualified privilege in the VRA context, considering the nature of the claims involved as one of the factors of the balancing test." 5/15/14 Order at 26 [ECF No. 105]. Indeed, courts routinely consider five factors in applying the balancing test, including:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of government in the litigation; and (v) the possibility of future timidity by government employees.

Page, 2014 WL 1873267, at *8.

In this case, all five of these factors weigh heavily in favor of disclosure. *First*, documents that reflect third-party communications with legislators may provide evidence of legislative intent, which is highly relevant to Plaintiffs' claims under the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the U.S. Constitution. *See Page*, 2014 WL 1873267, at *7; *United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989) (citing *Vill. of Arlington Heights v. Metro. House. Dev. Corp.*, 429 U.S. 252, 268 (1977)); *Rodriguez*, 280 F. Supp. 2d at 101-02 (citing *Arlington Heights*, 429 U.S. at 268). Discriminatory intent is not only an element of Plaintiffs' constitutional claims, it is evidence in cases brought under the Voting Rights Act. *See, e.g.*, *Baldus*, 2011 WL 6122542, at *1 ("[P]roof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in [Voting Rights Act] claims.").

Second, Plaintiffs cannot seek these communications from any other source because Plaintiffs have no way to independently determine which third parties the legislators communicated with on subjects related to H.B. 589. Even so, where practicable, Plaintiffs have sought documents from identifiable, non-legislative sources, including the State Board of Elections, before seeking communications from legislators directly. Critically, however, even where Plaintiffs have sought information from less intrusive sources, Plaintiffs were met with the very same claims of privilege and the very same efforts to delay.

Third, in this case, as in other voting rights cases, Plaintiffs claim that the electoral process itself has been tainted by racial discrimination. More specifically, Plaintiffs contend that the challenged law prevents voters from using the normal mechanism for correcting legislative abuses—voting the abusers out of office. *See Marylanders for Fair Representation, Inc. v Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (describing how, in the voting rights context, the exercise of legislative power "involves establishment of an electoral structure by which the legislative body becomes duly constituted," which "[i]nevitably, []directly involves the self-interest of the legislators themselves."). With denials of equal access to the franchise, Plaintiffs' recourse is through the judicial process, which provides them the right to full and fair discovery.

Fourth, the role of the legislature in enacting and implementing H.B. 589 is central to Plaintiffs' claims in this case. Plaintiffs allege not only that H.B. 589 will foreclose the ability of North Carolinians to vote, but also that the law itself was enacted with a discriminatory purpose. Thus, the "government's role in the events giving rise to the

present litigation is central to Plaintiffs' claims" and tilts the balance further in favor of disclosure. *Page*, 2014 WL 1873267, at *9.

Fifth, there is little, if any, reason to believe that disclosure of third-party communications will inhibit future legislative deliberations because the legislators could not expect privacy with respect to such communications in the first place. Indeed, to the extent the legislators were communicating with individuals outside of the General Assembly, those communications could not have been made in confidence. To this point, the Court has acknowledged that legislative privilege may have been waived as to documents made publically available. *See* 5/15/14 Order at 25, n.15 [ECF No. 105] ("[A]t the hearing the legislators acknowledged that some documents over which they assert legislative privilege were published on the State Board of Elections website . . . raising the issue whether any privilege has been waived as to those documents."). As a practical matter, this makes sense. Legislators should not be permitted to discuss legislative business with *anyone*, independent of their relationship to the legislative process, then selectively cloak those communications with legislative privilege.

II. THE LEGISLATORS HAVE NO BASIS FOR IGNORING THE FEDERAL RULES AND SHOULD BE COMPELLED TO PRODUCE A PRIVILEGE LOG FOR CERTAIN CATEGORIES OF DOCUMENTS.

Not only do the legislators seek to withhold plainly discoverable communications with third parties, they also seek to avoid producing a privilege log. The documents they refuse even to identify on a privilege log include: legislator-to-legislator communications, legislator-to-legislative staff communications, and legislator communications with outside counsel prior to the commencement of litigation. There is no basis in law or logic

for allowing the legislators to evade the privilege log requirement for any one of these categories.

It is well-established that in asserting privilege, "[t]he burden is on the proponent" to demonstrate its applicability. *See Atwood v. Burlington Indus. Equity, Inc.*, 908 F. Supp. 319, 322 (M.D.N.C. 1995); *N.LR.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011) ("A party asserting privilege has the burden of demonstrating its applicability."). This burden applies with equal force to claims of legislative privilege and attorney-client privilege. *See id*; *see also Favors*, 285 F.R.D. at 221 (explaining that for legislative privilege, "the proponent of the privilege bears the burden of establishing, for each document, those facts that are essential elements of the claimed privilege or privileges") (citations and internal quotation marks omitted); *Page*, 2014 WL 1873267 at *2 (similar); *Manzi v. DiCarlo*, 982 F. Supp. 125, 128 (E.D.N.Y. 1997) (similar). Even when properly asserted, privileges are disfavored and must be strictly construed. *See Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) ("Evidentiary privileges in litigation are not favored"); *U.S. v Nixon*, 418 U.S. 683, 709 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.")

It is because this burden exists that logging privileged documents is the *rule*, not the exception. *See* Fed. R. Civ. P. 26(b)(5)(A) (requiring privilege log for information withheld based on "claim[s] that the information is privileged"); Fed. R. Civ. P. 45(e)(2)(A) (requiring privilege log for subpoenaed information that is withheld "under a

claim that it is privileged"). And is why courts in various jurisdictions have ordered a privilege log for claims of legislative privilege:

- *Favors v. Cuomo*, 285 F.R.D. 187, 223-24 (E.D.N.Y. 2012) (ordering defendants to supplement descriptions in privilege log to support claim of legislative privilege);
- *Doe v. Nebraska*, 788 F. Supp. 2d 975, 986-87 (D. Neb. 2011) (ordering production or privilege log for documents withheld on privilege grounds, including legislative privilege, if parties could not reach agreement on discovery);
- *Young v. City & Cnty. of Honolulu*, Civil No. 07-00068 JMS-LEK, 2008 WL 2676365, at *2 (D. Haw. July 8, 2008) (noting that court ordered production of privilege log for any documents withheld on privilege grounds, including legislative immunity).
- *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 103-04 (S.D.N.Y. 2003) (ordering defendants to produce more detailed privilege log to evaluate legislative privilege claims).

As a practical matter, a privilege log is necessary to evaluate *any* claim of privilege because whether a privilege applies is a document-by-document inquiry. *See Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 18*, 230 F.R.D. 398, 408 (D. Md. 2005) (discussing "duty to provide a document-by-document explication of privileged status"); *see also Page*, 2014 WL 1873267, at *2 (explaining that the proponent "must demonstrate specific facts showing that the communications were privileged") (citation and internal quotation marks omitted). Without a privilege log, or *some* description of what is being withheld, there is no way to confirm that a valid claim of privilege has been made or that all discoverable information has been produced.

This is exactly the problem Plaintiffs are faced with here. The legislators make

the remarkable claim that "a privilege log is not necessary" because the documents at issue "are plainly protected from disclosure." 1/20/14 Mot. to Quash at 10 [ECF No. 57]. But aside from claiming that legislative privilege is absolute—an argument that has been squarely rejected by this Court, *see* 5/15/14 Order at 25 [ECF No. 105] ("As with other privileges, the court cannot say that it is absolute.")—at no point have the legislators provided any explanation as to why every document exchanged between legislators, their staff, or with outside attorneys prior to litigation would be privileged.[3] At best, the legislators have provided a "conclusory assertion of privilege," which is simply "insufficient to establish a privilege's applicability to a particular document." *Page*, 2014 WL 1873267, at *2.

Given what is at stake in this case—the voting rights of North Carolina voters—requiring the legislators to produce a privilege log for the categories of documents at issue is a modest request. To the extent the legislators argue that a privilege log will impose an undue burden or interfere with the legislative process, that burden will pale in comparison to the burden faced by Plaintiffs if they are deprived of relevant discovery in a case that seeks to resolve the deprivation of the fundamental right to vote. But, more importantly, any burden is exaggerated in scope. Unlike a corporate defendant that must

[3] While the legislators purport to rely on certain cases for the proposition that some documents may be exempt from the privilege log requirement, *see* Mot. to Quash at 10 [ECF No. 57], ***none*** of these cases involved a claim of legislative privilege. *See Frye v. Dan Ryan Builders, Inc.*, Civil Action No. 3:10-CV-39, 2011 WL 666326, at *7 (N.D. W.Va. Feb. 11, 2011) (not requiring privilege log for "file related to this litigation" because documents protected by attorney-client privilege and work product doctrine); *United States v. Bouchard Transp.*, No. 08-CV-4490, 2010 WL 1529248, at *2 (E.D.N.Y. Apr. 14, 2010) (discussing documents prepared in anticipation of litigation); *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 51 (not requiring defendant to log "any attorney-client communications or work product documents"); *Ryan Inv. Corp. v. Pedregal de Cabo San Lucas*, No. C 06-3219 JW (RS), 2009 WL 5114077, at *3 (N.D. Cal. Dec. 18, 2009) (finding that attorney-client communications and work product from after litigation commenced do not have to be logged). Moreover, Plaintiffs have already agreed that Defendants, and the legislators, do not have to log documents reflecting communications between legislators and their counsel after the initiation of litigation. 5/22/14 Joint Status Report at 1 [ECF No. 126].

collect documents from *every* custodian with relevant information, there is only one custodian to collect documents from in this case: the legislator himself. Once the collection is done, the burden is on the legislator's *counsel* to prepare a privilege log, not the legislator. Even then, a discovery order can be tailored in this case to alleviate any burden that does exist, including providing a reasonable time frame within which a privilege log must be produced. Thus, to the extent there is any burden, that burden will not interfere with the legislative process and should not provide a basis for absolving the legislators from the privilege log requirement altogether.

A privilege log should also be required because while at the same time the legislators are seeking to withhold some documents bearing on internal deliberations, some legislators have made statements to the press about their intent in enacting H.B. 589. Communications with the press are no different than communications with third parties, especially to the extent those statements reveal the intent of the legislator or communications with other legislators. Thus, if for no other reason, a privilege log should be produced so Plaintiffs are able to evaluate whether privilege was waived as to certain topics or communications by virtue of statements that were made to the press.

Even assuming that some categories of documents should be exempt from the privilege log requirement, such an exception would be ill-suited here because none of the categories at issue is categorically protected by legislative privilege. This Court has already held that legislative privilege is not absolute and Judge Peake found that "a particularized determination of the extent of any privilege, balancing the need for obtaining the information with the impact on legislative sovereignty" is required. *See*

3/27/14 Order at 6 [ECF No. 94]. For these reasons, the legislators should be compelled to produce a privilege log. But even on a closer inspection of each category of documents, there is good reason to believe that many of these documents are not protected by legislative privilege and thus, at a minimum, should be described on a privilege log.

Legislator to Legislator. Legislative privilege "only applies to activities *integral* to the legislative process." *Doe v. Pittsylvania Cnty., Va.*, 842 F. Supp. 2d 906, 916 (W.D. Va. 2012) (emphasis added); *see also EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 184 (4th Cir. 2011) (ordering compliance with modified subpoena because it did not involve "integral steps" of the legislative process) (citation and internal quotation marks omitted). It does not protect every activity by virtue of involving a legislator. *See Gravel v. United States*, 408 U.S. 606, 625 (1972) ("That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature.").

Thus, even to the extent communications are strictly between legislators, legislative privilege offers no protection where the communication "is in no [way] related to the due functioning of the legislative process." *Id.* at 625 (internal citation and quotation marks omitted). "Legislative acts are not all encompassing." *Id.* And have "consistently been defined as an act generally done in Congress in relation to the business before it." *United States v. Brewster*, 408 U.S. 501, 512-13 (1972). While broad on its face, this limitation is meaningful and necessarily excludes activities or communications made in a non-legislative capacity or that are more "political in nature." *Id.*; *see also*

Gravel, 408 U.S. at 624-25 (explaining that the privilege embodied in the Speech and Debate Clause "has not been extended beyond the legislative sphere"). To this end, insofar as some legislators are, or have been, involved in outside organizations—for example, organizations involved in the drafting of "model legislation" on issues including elections laws—there is reason to doubt that every communication sent between legislators was "integral" to the legislative process and should be exempt from the privilege log requirement.

Legislative privilege also does not necessarily protect communications made before legislation was introduced on the floor of the General Assembly or after the legislative activity in question. *See, e.g.*, *McCray v. Md. Transit Admin.*, 741 F.3d 480, 487 (4th Cir. 2014) (allowing discovery because the materials plaintiff sought were "aimed at discrimination that occurred before any legislative activity began."); *see also Marylanders*, 144 F.R.D. at 300 (distinguishing, for purposes of determining privilege, communications occurring before a bill was introduced from those that occurred after it went to floor of the legislature). Indeed, the Court recognized this distinction during oral argument, noting that in *Marylanders*, "they drew the line as to any action once the bill was introduced." *See* 5/9/14 Hr'g Tr. (Rough) 40:4-5. Likewise, it cannot be said that any activity or communication made *after* the passage of legislation is protected, because insofar as the deliberative process has ended, there is no intrusion into the legislative process. The upshot is that certain communications from before the introduction and after the passage of H.B. 589 may be discoverable and, at the very least, should be included on a privilege log.

In any case, documents reflecting communications with legislators should be logged because there remains the possibility that "after a particularized determination of the extent of any privilege, balancing the need for obtaining the information with the impact on legislative sovereignty," some of these documents will be discoverable. 3/27/14 Order at 6 [ECF No. 94]. But the only way to make this type of particularized inquiry is to require the legislators to produce a privilege log for the categories of documents requested by Plaintiffs, including communications between legislators.

Legislator to Legislative Staff. As an initial matter, Plaintiffs agreed that communications between legislators and their personal aides are exempt from the privilege log requirement. 5/22/14 Joint Status Report at 3 [ECF No. 126]. But in applying legislative privilege, general legislative staff are entitled to less deference than staff members who work exclusively for a particular legislator. *See Page*, 2014 WL 1873267, at *6 (explaining that there is "reason to question whether committee or general legislative staff members should receive the same deference as staff members who work exclusively for a particular legislator."); *see also Florida Ass'n of Rehab. Facs. v. State of Fla. Dep't of Health & Rehab. Servs.*, 164 F.R.D. 257, 267 (N.D. Fla. 1995) (explaining that there is "less reason" for a privilege for "legislative employees who provide information to legislators collectively" and "who do not advise a particular legislator as his or her personal staff"). Indeed, to the extent legislative privilege extends to staff of the General Assembly, the privilege only protects those aides who function, essentially, as "alter egos" of the legislator. *See Page*, 2014 WL 1873267, at *6 ("[F]ormal staff members should be treated as legislators for the purpose of legislative immunity and

legislative privilege" where "'[t]he day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos.'") (quoting *Gravel*, 408 U.S. at 616-17); *see also Florida Ass'n of Rehab. Facs.*, 164 F.R.D. at 267 (holding that "the privilege must be limited to communications between an elected legislative member and his or her personal staff members").

Moreover, to the extent communications with staff are protected at all, the protection only applies to functions that would be deemed legislative if performed by the legislator himself. *See Gravel*, 408 U.S. at 622 ("[T]he privilege available to the aide is confined to those services that would be immune legislative conduct if performed by the Senator himself."). Insofar as legislative privilege only applies to activities that are integral to the legislative process, the inquiry is more complicated than whether the recipient of the communication was a staff member. And thus, it is impossible to make a categorical determination about such communications.

Legislator to Outside Counsel. Finally, the legislators refuse to provide a privilege log for communications with outside counsel before the onset of litigation. In seeking to categorically exclude these communications, the legislators seek an application of the attorney-client privilege that stands in stark contrast to the narrow view extolled by the federal courts. *See, e.g.*, *U.S. v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996) (Because "the attorney-client privilege interferes with the truthseeking mission of the legal process," it "is to be strictly confined within the narrowest possible limits consistent with the logic of its principle.") (citations and internal quotation marks omitted).

Moreover, although the legislators bear the burden of demonstrating that the attorney-client privilege applies, *see N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir.2011) ("A party asserting privilege has the burden of demonstrating its applicability."), none of the legislators have made such a showing. The legislators have never even identified who their outside counsel was, let alone whether all of their communications were "for the purpose of securing a legal opinion or legal services." *Westchester Surplus Lines Ins. Co. v. Clancy & Theys Constr. Co.*, No. 5:12-CV-636-BO, 2013 WL 6058203, at *6 (E.D.N.C. Nov. 15, 2013); *see also Baldus*, 2011 6122542, at *1 (rejecting application of attorney-client privilege to communications between legislature and attorney where attorney was retained as consulting expert). Rather, the legislators ask for an exemption to the privilege log requirement on nothing more than their say so. *See Page*, 2014 WL 1873267 at *2 (explaining that a "conclusory assertion of privilege is insufficient to establish a privilege's applicability to a particular document."). This is insufficient. As the proponents of the privilege, the legislators should have to make some showing, and the way to do it is through a privilege log.

At the end of the day, the legislators have no basis for refusing to provide a privilege log for any one of these categories of documents. A privilege log is required under the Federal Rules, and the legislators have provided no basis for exempting them from this requirement. While the legislators will attempt to contend otherwise, none of these categories is categorically privileged, and thus a privilege log should be required. Only then can this Court make the "particularized determination" that this voting rights case deserves and decide what is truly privileged.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court order the legislators to produce (1) any documents reflecting communications with third parties and (2) a privilege log for any documents withheld on the basis of privilege that reflect (a) legislator to legislator communications, (b) legislator to staff communications, and (3) legislator communications with outside counsel before the onset of litigation on August 12, 2013. Plaintiffs also respectfully request that the Court order production of the first category of materials immediately (and before the June 30 deadline for filing a reply in support of their motion for preliminary injunction).

Dated: June 11, 2014

Respectfully submitted,

By: /s/ *Adam Stein*

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2014, I served Plaintiffs' Brief Regarding Outstanding Discovery Issues Related to Legislative Privilege with the Clerk of Court using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which on the same date sent notification of the filing to the following:

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