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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, EMMANUEL BAPTIST CHURCH, NEW OXLEY HILL BAPTIST CHURCH, BETHEL A. BAPTIST CHURCH, COVENANT PRESBYTERIAN CHURCH, CLINTON TABERNACLE AME ZION CHURCH, BARBEE'S CHAPEL MISSIONARY BAPTIST CHURCH, INC., ROSANELL EATON, ARMENTA EATON, CAROLYN COLEMAN, BAHEEYAH MADANY, JOCELYN FERGUSON-KELLY, FAITH JACKSON, MARY PERRY, and MARIA TERESA UNGER PALMER Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina, KIM WESTBROOK STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections, JOSHUA B. HOWARD, in his official capacity as Chairman of the North Carolina State Board of Elections, RHONDA K. AMOROSO, in her official capacity as Secretary of the North Carolina State Board of Elections, JOSHUA D. MALCOLM, in his official capacity as a member of the North Carolina State Board of Elections, PAUL J. FOLEY, in his official capacity as a member of the North Carolina State Board of Elections and MAJA KRICKER, in her official capacity as a member of the North Carolina State Board of Elections, Defendants.	**PLAINTIFFS' RESPONSE IN OPPOSITION TO OBJECTION TO ORDER OF 27 MARCH 2014 GRANTING IN PART AND DENYING IN PART MOVANTS' MOTION TO QUASH AND PLAINTIFFS' MOTION TO COMPEL** **Case No.: 1:13-CV-658**

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, A. PHILIP RANDOLPH INSTITUTE, UNIFOUR ONESTOP COLLABORATIVE, COMMON CAUSE NORTH CAROLINA, GOLDIE WELLS, KAY BRANDON, OCTAVIA RAINEY, SARA STOHLER, and HUGH STOHLER,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, JOSHUA B. HOWARD in his official capacity as a member of the State Board of Elections, RHONDA K. AMOROSO in her official capacity as a member of the State Board of Elections, JOSHUA D. MALCOLM in his official capacity as a member of the State Board of Elections, PAUL J. FOLEY in his official capacity as a member of the State Board of Elections, MAJA KRICKER in her official capacity as a member of the State Board of Elections, and PATRICK LLOYD MCCRORY, in his official capacity as the Governor of North Carolina,

Defendants.

Case No.: 1:13-CV-660

UNITED STATES OF AMERICA,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and KIM W. STRACH, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants.

Case No.: 1:13-CV-861

INTRODUCTION

These cases seek to protect the right to vote for millions of North Carolina citizens. The stakes could not be higher. The right to vote is "of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quotations omitted). Because voting rights make up the basic building blocks of our representative government, the Supreme Court has recognized that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Restrictions on the right to vote thus "strike at the heart of representative government" and warrant the closest attention from courts and lawmakers alike. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

H.B. 589—the statute at issue in this case—enacted a sweeping array of provisions that infringe on the fundamental right to vote and endanger the equal exercise of voting rights for African American and Latino citizens of North Carolina. As recently as 2000, North Carolina lagged far behind the national average in voter participation, with particularly low rates of participation among minority voters. To remedy that problem, the General Assembly enacted a number of provisions over the next decade to address minority voting rates and overall political activity in the state. Those new laws permitted same-day voter registration, and allowed voters who showed up at the wrong polling place to cast out-of-precinct provisional ballots and extended early voting periods. Each of those measures succeeded in expanding voting rights for all North Carolina citizens and were disproportionately used by minority voters. By 2012 North Carolina had

jumped to 11th in voter participation nationwide, from 37th in 2000. In particular, voter participation among African-Americans in North Carolina skyrocketed after the barriers were taken down—from 41.9% in 2000 to ***70.2%*** in 2012.

For some in North Carolina, efforts to expand voter participation were too successful. In 2013, legislators in the General Assembly introduced a number of measures designed to re-enact barriers and to roll back access to the franchise. The result was H.B. 589, which (among other things) drastically eliminated same-day registration and out-of-precinct voting, shortened the early voting period, increased the number and scope of poll watchers and ballot challengers, and imposed a photo identification requirement for voting. The legislature enacted H.B. 589 through a highly unusual legislative process, and it did so despite being presented with extensive evidence that the measures in question would have a severe disparate impact on minority voters.

The purported rationale for H.B. 589 was to prevent in-person voter fraud and strengthen confidence in elections. Based on those rationales, however, H.B. 589 is a solution in search of a problem. In-person voter fraud is virtually non-existent in North Carolina, as legislators recognized at the time they enacted the statute. Stated bluntly, the pretext of in-person voter fraud is simply not an adequate basis for sweeping restrictions on voting rights. Nor can stoking fears of voter fraud support vague notions of insufficient public "confidence in elections" when there was no evidence presented to the legislature that the public in North Carolina has suffered from a crisis of confidence in the electoral process. To the contrary, voter participation was on the rise.

These cases—brought by the U.S. Department of Justice and an array of civic groups representing a broad demographic cross section of North Carolina—challenge H.B. 589 on constitutional and statutory grounds. The Voting Rights Act of 1965 was enacted specifically to bar statutes such as this, which although facially neutral, nonetheless impose disproportionate burdens on racial minorities and interact with social and historical conditions to make it far more difficult for those groups to participate in the political process. In addition, Plaintiffs' claims assert that H.B. 589 violates the 14th, 15th, and 26th Amendments to the U.S. Constitution. In connection with these claims, Plaintiffs sought discovery from the members of the General Assembly that participated in the formulation of H.B. 589 and the abbreviated debate that resulted in the law's enactment.[1] That discovery was focused on obtaining materials that were not protected by legitimate claims of legislative privilege and that were instead (by any measure) subject to public or litigation disclosure. Despite those requests, Defendants objected to producing ***any*** documents in the possession of legislators and any documents created by or for legislators in the possession of other state employees, or to even creating the privilege log necessary to assess properly their claim of privilege.

Magistrate Judge Peake correctly recognized that these assertions of legislative privilege were far too sweeping and had no basis in law. After substantial briefing, lengthy oral argument, and supplemental briefing, Judge Peake concluded that legislative

[1] Plaintiffs also sought discovery from the State Board of Elections, North Carolina Department of Transportation, and Governor Patrick McCrory. *See* 12/2/13 Plaintiffs' First Set of Requests for Production to Defendant State Board of Elections; *see also* 11/29/13 Plaintiffs' First Set of Requests for Production to Defendant Patrick McCrory; *see also* 12/5/13 NAACP Plaintiffs' Subpoena to NCDOT.

privilege "does not preclude all discovery in the context of this case," and that "claims of legislative immunity or privilege in the discovery context must be evaluated under a flexible approach." 3/27/14 Order at 3. In that context, Judge Peake concluded that legislative privilege did not protect from disclosure "communications with outside parties" and "other documents that are considered public records under state law." 3/27/14 Order at 7. In other words, the Order concluded that legislative communications with third parties were not privileged, but recognized that other categories of documents might be, depending on a balancing "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." 3/27/14 Order at 3. The process for determining which categories of documents were actually protected by legislative privilege was also set forth in the Order. *See id.* at 7-8.

Despite Judge Peake's well-reasoned opinion, which strikes the proper balance between claims of legislative privilege and documents that are not subject to the privilege, Defendants still flatly refuse to produce ***any*** documents at all from ***any*** legislators, and now ask this Court to overrule Judge Peake's order. None of Defendants' arguments for overruling Judge Peake' order, however, has any merit. After months of briefing and lengthy oral argument, Judge Peake correctly recognized that the legislative privilege does not allow Defendants to withhold ***all*** documents in a legislator's possession, including, significantly, communications a legislator has with third parties or those available to non-litigants through state public records laws. Judge Peake's Order is

a thoughtful approach to this discovery request that balances the different interests as required by Supreme Court, Fourth Circuit and recent decisions by District Courts addressing substantially similar issues.

For all these reasons and the reasons that follow, Plaintiffs respectfully ask the Court to overrule movants' objection and affirm Judge Peake's order.

BACKGROUND

On August 12, 2013, Plaintiffs filed suit against the State of North Carolina, Governor Patrick McCrory, and the North Carolina State Board of Elections, challenging various provisions of H.B. 589 as violating the Voting Rights Act and the United States Constitution. Enacted into law as Session Law 2013-381 ("SL 2013-381"), H.B. 589 imposes sweeping changes on North Carolina's election laws that are designed to deny or abridge the right to vote of countless North Carolina voters on the basis of race or ethnicity. These sweeping changes include, in pertinent part, eliminating same-day registration, prohibiting the counting of out-of-precinct ballots, requiring photo identification to vote, reducing the length of early voting, increasing the number of poll observers at precincts, and eliminating pre-registration of 16 and 17 year-olds. Taken individually and together, these provisions will curtail the right to vote, violating the Fourteenth and Fifteenth Amendments of the U.S. Constitution and Section 2 of the Voting Rights Act.

Nearly four months ago, NAACP Plaintiffs served third party subpoenas on certain state legislators, and LWV Plaintiffs propounded discovery on the State of North

Carolina, requesting documents in the possession of certain state legislators relating to the rationale, development, and implementation of the provisions in H.B. 589. On January 20, 2014, the day Plaintiffs' responses were due, movants' counsel filed a motion to quash on behalf of every legislator served by Plaintiffs. Movants' motion sought to quash Plaintiffs' subpoenas or requests in their entirety, claiming that legislative immunity "forbids plaintiffs from seeking *any* production at all from legislative movants." *See* 1/20/14 Mem. in Supp. of Mot. to Quash ("Mot. to Quash") at 7. NAACP Plaintiffs opposed movants' motion to quash and LWV Plaintiffs moved to compel legislators' disclosure of documents, and filed briefs on February 10, 2014, setting forth the reasons why legislative privilege does not protect all legislative communications from disclosure. *See* Docket Nos. 69 (NAACP); 70 (LWV). On February 21, 2014, Magistrate Judge Peake held oral argument on movants' motion to quash and Plaintiffs' motion to compel. At the hearing, Judge Peake ordered supplemental briefing on two issues pertaining to legislative privilege, including whether state legislators enjoyed absolute immunity from any court action. *See* 2/21/14 Hrg. Tr. at 116:7-120:24. The parties submitted supplemental briefing on these issues on February 26, 2014. *See* Docket Nos. 85, 87-88 (NAACP); 88 (LWV).

On March 27, 2014, Magistrate Judge Peake issued an order, granting in part and denying in part movants' motion to quash and Plaintiffs' motion to compel. *See* 3/27/14 Order. Judge Peake's order concluded in pertinent part:

> [W]hile the judicially-created doctrine of "legislative immunity" provides individual legislators with absolute immunity from liability for their

> legislative acts, that 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.

Id. at 3. Guided by these principles, the Court found that production of legislative "communications with outside parties" and "other documents that are considered public records under state law" would "not [be] unduly burdensome or invasive of the legislative process."[2] *Id.* at 7. The Court noted, however, that production of "internal documents and communications that were created and circulated only by and between individual legislators and their staff," could present an "unwarranted intrusion and burdensomeness" that could potentially violate the principles of legislative privilege, which she found to be analogous to a "deliberative process privilege." *Id.* at 8. Importantly, the Court did not reach any definitive conclusions as to the categories of documents, if any, that would be protected from disclosure by legislative privilege. Instead, the Court said that "other categories of documents may require further scrutiny in balancing the competing interests," *id.* at 7, and ordered the parties to meet and confer as to the specific categories of documents that Plaintiffs sought and "in light of the Court's

[2] The limited discovery of communications with third parties and public documents to date has already shown that the requested documents are relevant and probative. The documents show that, prior to filing H.B. 589, the primary sponsors of the bill specifically requested race data from the State Board of Elections regarding the racial breakdown of registered voters who lack an acceptable photo ID and the racial breakdown on the number of one stop voters and provisional voters. In addition, the evidence shows that the legislature knew before they voted—because they had been provided statistical evidence—that the proposed provisions in H.B. 589 now being challenged would disproportionately impact African-American citizens, but still enacted these provisions in the face of this evidence. *See* Ex. A (Mar. 5, 2013 Email from Rep. H. Warren to G. Bartlett, copying Reps. T. Murry, D. Lewis, and R. Samuelson and Attached Reports (SBE-P-00058225 - 00058296)); Ex. B (2013 Spreadsheet of racial data prepared at the request of Rep. D. Lewis (SBE-P-00021669)).

general conclusions" attempt to reach an agreement with respect to the categories of documents that should be produced, logged on a privilege log, or withheld in their entirety. *Id.* at 7.

The parties were scheduled to meet and confer on these categories on April 4, 2014. But before the parties could meet and confer, the Court, at the request of movants, stayed its order pending resolution of movants' instant Objection. *See* Docket Nos. 97 (NAACP); 100 (LWV). Plaintiffs have since requested that the parties still meet and confer on the points identified in the March 27 Order, but movants have declined to engage in the meet-and-confer called for in the March 27 Order.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE COURT'S ORDER BECAUSE IT IS CORRECT—AND CERTAINLY NOT CONTRARY TO LAW.

On non-dispositive matters, it is well established that an order rendered by a magistrate judge should not be disturbed unless it is "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see also Hughes v. Research Triangle Inst.*, No. 1:11CV546, 2013 WL 5724522, *1 (M.D.N.C. Oct. 21, 2013) ("The district court may only reconsider a magistrate judge's order on a nondispositive pretrial matter if it is 'clearly erroneous or contrary to law.'"). Where—as here—the challenged portions of the magistrate's order turn purely on questions of law, the "contrary to law" standard applies, and the Court's review is plenary. *See U.S. v. Duke Energy Corp.*, No. 1:00CV1262, 2012 WL 1565228, at *1 (M.D.N.C. Apr. 30, 2012) (explaining that the "contrary to law standard permits plenary review of legal conclusions") (internal quotations omitted). Even so, an order is

only contrary to law "if the magistrate judge failed to apply or misapplied statutes, case law, or procedural rules." *High Voltage Beverages, LLC v. Coco-Cola Co.*, No. 3:08-CV-367, 2010 WL 2342458, at *1 (W.D.N.C. June 8, 2010).

A. Because Legislative Immunity Is Not Absolute, Judge Peake Did Not Err In Holding that Some Documents Are Discoverable.

Movants' principle objection to Judge Peake's order is that it fails to recognize that legislative immunity is absolute and forbids Plaintiffs from seeking any document production at all from the legislative movants. 4/2/14 Movants' Objection to 3/27/14 Order at 10; *see also id.* at 14. That objection is simply wrong as a matter of law. Neither the Supreme Court, nor the Fourth Circuit have held that legislative immunity is absolute under all circumstances. On the contrary, both courts have recognized that to the extent that legislative immunity functions as an evidentiary privilege, that privilege does ***not*** extend to any and all materials by virtue of the simple fact that they are in the possession of a legislator.[3]

Indeed, courts within the Fourth Circuit have ordered the production of documents notwithstanding the application of legislative privilege, fatally undermining movants' contention that legislative immunity is absolute and all-encompassing. For example, in *Small v. Hunt*, the court ordered the production of various documents, including documents related to "the deliberations of the Committee, such as minutes of the

[3] The Court correctly notes in its Order that legislative privilege is a "parallel concept" to legislative immunity by which legislative immunity "'functions as an evidentiary and testimonial privilege.'" 3/27/14 Order at 4 (quoting *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992). Because movants' objections focus on the evidentiary implications of the Court's Order, Plaintiffs' refer to this concept as "legislative privilege."

meetings and data considered by the Committee during their deliberations." 152 F.R.D. 509, 513 (E.D.N.C. 1994). These materials are analogous to what Plaintiffs have requested here. In holding that these materials were not protected by legislative privilege, the court explained that "[t]he primary purpose of legislative immunity is not to protect the confidentiality of legislative communications, nor is it to relieve legislators of the burdens associated with document production." *Id.*

Similarly, in *Marylanders for Fair Representation, Inc. v. Schaefer*, the Court ordered the production of certain materials, notwithstanding the application of legislative privilege. 144 F.R.D. 292, 300, 302 n.20 (D. Md. 1992). In *Marylanders*, plaintiffs challenged the constitutionality of the state's legislative redistricting plan. In holding that certain materials were discoverable, including "documents prepared by the Committee during the course of its deliberations," the concurring justices explained that legislative immunity "does not, however, necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy." *Id.* at 302 n.20, 304. Similarly here, the Court concluded in its Order that "where Congress has acted to place legislative motive directly at issue, the judicially-created doctrine of legislative privilege should not absolutely preclude all discovery, as long as sufficient protection for legislators and legislative independence is preserved." 3/27/14 Order at 6.

Tellingly, even in the cases most heavily relied upon by the movants themselves, the Fourth Circuit, while recognizing that legislative privilege might protect some

materials, nonetheless ordered the production of certain documents. In *EEOC v. Wash. Suburban Sanitary Commission*, the court ordered the production of documents because "[c]alling the activities that the modified subpoena seeks to investigate here 'integral steps in the legislative process,' would . . . expand legislative privilege beyond its proper bounds." 631 F.3d 174, 184 (4th Cir. 2011) (internal citation omitted). Similarly, in *McCray v. Maryland Dep't of Transportation*, the court found that plaintiff was entitled to discovery because the materials she sought were "aimed at discrimination that occurred before any legislative activity began." 741 F.3d 480, 487 (4th Cir. 2014). These cases recognized, as movants do not, that principles of legislative privilege do not protect any and all documents in the possession of a legislator. Instead, legislative privilege "only applies to activities that are ***integral*** to the legislative process." *Doe v. Pittsylvania*, 842 F. Supp. 2d 906, 916 (W.D. Va. 2012) (emphasis added). The Supreme Court itself has recognized as much.

In *Gravel v. United States*, the Court made clear that "[l]egislative acts are not all-encompassing," explaining:

> That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

408 U.S. 606, 625 (1972). Judge Peake's ruling—which found that communications with third parties and other public records are discoverable and not protected from disclosure

by legislative privilege—is fully consistent with the Supreme Court's admonitions in *Gravel*.

In arguing that legislative immunity is absolute, movants rely on the Supreme Court's opinions in *Tenney v. Brandhove* and *Dombrowski v. Eastland*. Neither case, however, holds that all documents in the possession of legislators are immune from discovery under any and all circumstances. In fact, in both cases the Court addressed legislative immunity from liability, not legislative privilege, and noted that legislative immunity is limited to conduct that falls within the "sphere of legitimate legislative activity." *Dombrowski v. Eastland*, 387 U.S. 82, 83 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

In subsequent cases, the Supreme Court made clear that claims to legislative privilege cannot sweep as broadly as movants contend. For example, in the criminal context, the Court has held that the "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process." *United States v. Gillock*, 445 U.S. 360, 373 (1980). More significantly, however, the Court has rejected an all-encompassing legislative privilege in cases involving questions of discriminatory intent. In *Village of Arlington Heights v. Metropolitan Housing Develop. Corp*., the Court explained that "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be

barred by privilege." 429 U.S. 252, 268 (1977). The Court's recognition that in some "extraordinary instances," legislative privilege may give way to the interests of discovery is consistent with the conclusions that legislative privilege is not absolute. *Id.*

Notably, the United States District Court for the Southern District of Texas recently considered *Arlington Heights* in the context of a challenge to the State's newly enacted voter ID law. *See Veasey v. Perry*, United States District Court, Southern District of Texas, Case No. 2:13-CV-193, Docket No. 226 (April 3, 2014), at 3. The court found "the existence of a state legislative privilege but decline[d] to adopt Texas's characterization of that privilege as absolute." *Id.* The significance of the *Veasey* case does not end there. The court evaluated the State's legislative privilege claims using a flexible approach—similar to that used by Judge Peake—in order to make a particularized determination about the extent to which any legislative privilege applied. In deciding whether legislative privilege shielded the State's legislators from discovery, the court weighed the importance of the privilege against the need for discovery and found that the production of documents was warranted, explaining:

> [B]ecause of the unique nature of this case, the significance of the subject matter of this litigation, and the importance of developing an accurate factual record, Texas is ordered to produce to the United States, under seal, all documents in its possession, custody, or control that it has withheld on the basis of legislative privilege.

Id. at 7; *see also id*. at 5. While the court reserved judgment on whether the privilege should actually be pierced, *see id.* at 4-5, the court's decision to order the disclosure of documents anyway only underscores the point that the evidence that plaintiffs sought in

Texas—and the evidence that Plaintiffs seek here—is relevant and highly probative in voting rights case like this one.

In the end, movants want legislative privilege to apply more broadly than Judge Peake's order, any courts' order, or the law permits. But the fact that movants do not like the outcome does not make the Court's Order contrary to law. Quite the opposite, Fourth Circuit and Supreme Court precedent suggests that legislative privilege is qualified and supports Judge Peake's finding that legislative privilege "does not preclude all discovery in the context of this case," and that at a minimum, Plaintiffs are entitled to "communications with outside parties" and "other documents that are considered public records under state law," and that a particularized determination of the extent of any privilege with regard to other categories of documents would be necessary. 3/27/14 Order at 6 - 7. Accordingly, Judge Peake's order is not contrary to law and should be affirmed.

B. The Court's Reliance on *Marylanders For Fair Representation, Inc. v. Schaefer* Was Proper and Not Contrary to Law.

Movants make several arguments against the Court's reliance on *Marylanders*, but none of these arguments shows that the Court's reliance was contrary to law. *First*, movants argue that to the extent *Marylanders* supports an "exception to otherwise absolute immunity," the law of the Supreme Court and the Fourth Circuit controls. 4/2/14 Objection at 15. That is true, but does nothing to undermine Judge Peake's ruling. As explained above, both the Supreme Court and the Fourth Circuit have recognized that

principles of legislative privilege do not protect from discovery each and every document that is in a legislator's possession. *See supra* pp. 9-14.

Second, and despite the similarity of the Voting Rights Act Section 2 and Fourteenth and Fifteenth Amendment claims asserted in *Marylanders*, movants argue that the approach set forth in *Marylanders* is limited to the redistricting context. *See* 4/2/14 Objection at 16. The analysis movants contest is the concurring, and controlling, opinion set forth by Judge Murnaghan and Judge Motz for the three-judge panel in the case, who found:

> [A] less categorical, more flexible approach should be taken to the question of testimonial legislative immunity in shaping the scope of discovery . . . The doctrine is a bulwark in upholding the separation of powers. It does not, however, necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy.

Id. Movants argue that this flexible approach is inapt here because it sought to address a concern that is specific to the redistricting context, namely "legislators' self-interest in re-election." 4/2/14 Objection at 16. Movants' position is untenable, however, because the court's concerns apply with equal force here. Whether a restriction on the franchise takes the form of a redistricting plan or the voting barriers inflicted by H.B. 589, both types of restrictions strike at the heart of who, where, and how individuals can vote. Because both types of voting laws invariably impact how a legislative body is constituted, voting laws are deeply entangled with legislative self-interest. More importantly, however, movants ignore the fact that both types of laws can be used as a means to abridge the right to vote. Absent some flexibility in determining the scope of legislative immunity, there is no way

to check legislative decisions that may result in the dilution or denial of the fundamental right to vote.

Third, movants argue that a "redistricting exception" to legislative immunity has not been recognized by state or federal courts in North Carolina. 4/2/14 Objection at 16. But *Marylanders* did not recognize any "redistricting exception." It applied the basic rule discussed above that legislative privilege does not protect each and every document in the possession of a legislator, and that a more flexible and nuanced approved should apply. *Marylanders* did nothing more than apply that well-settled law to the facts before it. Nonetheless, not only does North Carolina recognize a type of statutory "redistricting exception," *see Dickson v. Rucho*, 366 N.C. 332, 344 (2013) (explaining that N.C.G.S. § 120-133 permits documents prepared by legislative employees for legislators concerning redistricting to become public records), movants also overlook district court cases that have held that legislative privilege should yield to the significant federal statutory and constitutional interests at stake in cases brought under the Voting Rights Act. *See, e.g.*, *Baldus v. Brennan*, 843 F. Supp. 2d 955, 959 (E.D. Wis. 2012) (ordering defendants to produce documents and explaining that "no public good suffers by the denial of privilege in this case," while it "is extremely important to the public, whose political rights stand significantly affected by the efforts of the Legislature"); *see also United States v. Irvin*, 127 F.R.D. 169, 173-74 (C.D. Cal. 1989) (granting motion to compel production of documents and holding that "privilege must yield to the need for disclosure" because "the federal interest in enforcement of the Voting Rights Act weighs heavily in favor of

disclosure"). Like the court in *Marylanders*, these courts applied a more flexible approach to legislative immunity in light of the strong public policy concerns at issue in the voting rights context.

Finally, movants argue that Judge Peake erred in her order because not even the court in *Marylanders* "allow[ed] for discovery directly from legislators." 4/2/14 Objection at 18. What movants overlook, however, is that in *Marylanders*, the court found that legislative immunity "does not . . . extend to certain types of documentation." 144 F.R.D. at 302 n.20. In particular, the court ordered the production of "any documents prepared by the Committee," which included private citizens and legislators, "during the course of its deliberations which are requested by the plaintiffs, subject, of course, to the assertion of any other privilege on behalf of particular documents." *Id.* Judge Peake's order in this case is no different. It recognizes that certain categories of documents are discoverable, while acknowledging that other categories may be protected by legislative immunity.

The key takeaway is that *Marylanders* is consistent with the Fourth Circuit and the Supreme Court on the issue of legislative privilege.[4] Indeed, the flexible approach articulated by the court in *Marlyanders* is no different than the view expressed by the Supreme Court in *Arlington Heights*, that "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official

[4] Telling of this point is that defendants in *Marylanders* did not challenge the court's conclusions on appeal.

action." 429 U.S. at 268. Accordingly, Judge Peake's order should be affirmed because its reliance on *Marylanders* was proper and not contrary to law.

C. The Court's Order that Defendants Must Identify Legislators They Intend to Call as Rebuttal Witnesses Is Proper and Not Contrary to Law.

Incredibly, movants also object to Judge Peake's order insofar as it requires defendants to identify any legislator who intends to waive immunity or privilege by April 14, 2014. 4/2/14 Movants' Objection at 20. Movants argue that "it would be unduly prejudicial to defendants" to preclude them from identifying additional legislators that intend to waive immunity or privilege after this deadline. *Id.* Plaintiffs disagree. Movants' position amounts to nothing more than a request to use legislative immunity as a sword and a shield, a strategy that is inconsistent with basic principles of fairness and is contrary to law of this Court. *See U.S. v. Duke Energy Corp.*, 208 F.R.D. 553, 558 (M.D.N.C. 2002) ("A party may not use a privilege (or work product) as a shield during discovery and then hammer it into a sword for use at the trial"); *see also Powell v. Ridge*, 247 F.3d 520, 525 (3d Cir. 2001) (noting, likewise, that legislative immunity cannot be used as both shield and sword). Movants seek to avoid producing any legislative communications, while at the same time insisting that they maintain the right to call any legislator as a rebuttal witness. Movants cannot be allowed to pick and choose when they disclose discoverable information, especially when non-disclosure will prejudice Plaintiffs. If Defendants intend to rely on the testimony of any legislator in connection with their defense, they must be required to disclose the identity of that legislator now—

not at the time of the preliminary injunction hearing. As a matter of equity, and in compliance with Judge Peake's order, defendants should be required to disclose this information so that Plaintiffs have adequate time to depose and request documents from those legislators in advance of their preliminary injunction brief, which is currently due in less than one month, on May 5, 2014.

II. MOVANTS OBJECTIONS IGNORE THE STRONG PUBLIC POLICY INTERESTS AT STAKE IN THIS CASE.

In dedicating page after page of their brief to the importance of legislative immunity, movants seem to suggest that legislative immunity should trump the fundamental right to vote. Plaintiffs respectfully disagree and believe that Judge Peake's Order reflects a reasonable and balanced approach to these competing policy interests. It goes without saying that the right to vote is fundamental, underlying bedrock principles of democracy. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also Wexler v. Anderson*, 452 F.3d 1226, 1232 (11th Cir. 2006) ("The right to vote is fundamental, forming the bedrock of our democracy."); *see also Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."). To be sure, this is why federal courts have recognized time and time again that there is a strong federal interest in enforcing federal civil rights statutes that are designed to protect fundamental rights like the right to vote. *See Pittsylvania*, 842 F. Supp. 2d at 921 ("[T]here is a very strong federal interest in the enforcement of civil rights statutes that provide remedies for violations of the

Constitution."); *see also Hobart*, 784 F. Supp. 2d at 765 (similar); *see also Floren v. Whittington*, 217 F.R.D. 389, 391 (S.D.W.Va. 2003) (recognizing "the important federal interests in broad discovery and truth seeking as well as the interest in vindicating important federal substantive policy such as that embodied in section 1983"); *see also Wash. Suburban Sanitary Comm'n*, 631 F.3d at 185 (noting that granting the modified subpoena "advances [the] legislative intent" that Americans be able "to work without . . . discrimination"); *see also United States v. Irvin*, 127 F.R.D. 169, 173-74 (C.D. Cal. 1989) ("privilege must yield to the need for disclosure" because of "the federal interest in enforcement of the Voting Rights Act weighs heavily in favor of disclosure").

H.B. 589 contains various provisions that will deny or abridge the right to vote for countless citizens. As such, it is critical that Plaintiffs have access to the evidence they need to prove the claims they have alleged under the Fourteenth and Fifteenth Amendments of the U.S. Constitution and the Voting Rights Act. The important interests at stake in this case should not be curtailed for the sake of expanding legislative immunity. Instead, this Court should affirm Judge Peake's Order of March 27, 2014, which recognizes the importance of legislative immunity while ensuring that Plaintiffs are not denied the evidence they need to prove their claims and protect the right to vote.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the Order of March 27, 2014, granting in part and denying in part movants' motion to quash and Plaintiffs' motion to compel.

Dated: April 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel T. Donovan, hereby certify that on **April 14, 2014**, I served **Plaintiffs' Response In Opposition to Objection to Order of 27 March 2014 Granting in Part and Denying in Part Movants' Motion to Quash and Plaintiffs' Motion to Compel** 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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