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' JOINT PARTIAL OBJECTION TO THE MAGISTRATE JUDGE'S NOVEMBER 20, 2014 ORDER ON 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

Pursuant to Federal Rule of Civil Procedure 72, Plaintiffs jointly submit this partial objection to the Magistrate Judge's November 20, 2014 discovery order on legislative privilege; the Duke intervenors also support this partial objection. ECF No. 194, 13-cv-861 (Nov. 20, 2014) ("Nov. 20 Order").[1] Specifically, Plaintiffs object to the November 20 order to the extent that it granted in part the State Legislators' Motion to Quash and Defendants' discovery objections based on legislative privilege, holding that they need not produce, nor create a privilege log for, any documents reflecting communications among legislators or between legislators and legislative staff.[2]

The Court should reverse this portion of the November 20 order and require a detailed privilege log for documents reflecting communications among legislators and between legislative staff that Defendants and the State Legislators have withheld on the basis of a qualified legislative privilege. The court should also order the production of all documents in the possession of the State Legislators that fall outside the scope of the legislative privilege, including internal legislative communications relating to activities that are not integral steps in the legislative process.[3] In the alternative, if the Court is

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

[2] The Magistrate Judge's November 20 order also reaffirmed that legislative privilege is not absolute and concluded that "legislative privilege does not preclude the production of communications between legislators and third parties. In addition, the Court conclude[d] that legislative privilege does not preclude the creation of a privilege log for communications between legislators and outside counsel prior to the commencement of this litigation, if those communications are withheld based on a claimed privilege." Nov. 20 Order at 5, 2. Plaintiffs support these conclusions reached by the Magistrate Judge.

[3] For example, these documents would include legislator-to-legislator and legislator-to-legislative staff communications that occurred after the passage of House Bill 589.

concerned that creating a detailed privilege log would overly burden the State Legislators, the Court should order Defendants and the State Legislators to produce all responsive documents on a confidential basis and reserve for trial the ultimate question of whether the privilege protects specific documents the parties may wish to use at trial.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs have filed legal challenges pursuant to Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, 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. The three related cases 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 seek documents from Defendants and 13 North Carolina legislators (the "State Legislators")[4] relating to the drafting, consideration, and implementation of HB 589, including documents reflecting legislative purpose; communications among state legislators and between legislators and legislative staff; 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 have resisted this discovery, arguing that the

[4] For purposes of this brief, Plaintiffs refer to Defendants and the State Legislators collectively as "Defendants."

doctrine of legislative immunity categorically bars Plaintiffs from seeking *any* discovery from state legislators. *See, e.g.*, Mot. to Quash, ECF No. 44 (Jan. 20, 2014).

Defendants' absolute legislative privilege argument has been repeatedly rejected. First, on March 27, 2014, Magistrate Judge Peake 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." Order at 3, ECF No. 79 (March 27, 2014) ("March 27 Order").

The State Legislators objected, and on May 15, 2014, this Court affirmed the Magistrate Judge's ruling regarding legislative privilege, concluding that although the privilege "applies to a legislator's documents relating to legitimate legislative activity[,]" it is not absolute. Memorandum Order at 24-25, ECF No. 93 (May 15, 2014) ("May 15 Order"). The Court ordered the parties to attempt to reach agreement on categories of documents for production, and to present any remaining disputes to the Magistrate Judge for resolution.

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. *See* Joint Status Report, ECF No. 114 (May 22, 2014). 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 need not identify on a privilege log documents falling into these two categories. *Id.* ¶ 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, the parties were unable to reach agreement regarding documents in the custody or control of state legislators. Defendants continued to refuse to produce *any* such documents, including documents reflecting communications between legislators and outside third parties. Defendants also refused to produce a privilege log for purportedly privileged documents. *Id.* ¶ 5. Plaintiffs argued that communications between legislators and outside third parties were not privileged and should be produced immediately. In addition, Plaintiffs contended that because legislative privilege is not absolute, even internal legislative communications may be subject to production. Plaintiffs argued that Defendants should produce a detailed privilege log of documents withheld on the basis of legislative privilege to assist the parties and the Court in assessing Defendants' privilege claims and determining the extent to which the qualified privilege must yield to the need for disclosure in this case. *See, e.g.*, United States' Br. Regarding Legislator Documents, ECF No. 120 (June 11, 2014).[5]

[5] In the meantime, the Court considered Plaintiffs' motions for preliminary injunction without the benefit of any evidence in the possession of state legislators. The Court declined to enter a preliminary injunction but found that Plaintiffs' evidence of discriminatory purpose "raises suspicions and presents substantial questions." *See* Mem.

After additional briefing and a telephonic status conference, the Magistrate Judge issued an order addressing these remaining areas of dispute. *See* Nov. 20 Order. Again concluding that state legislative privilege is not absolute, the November 20 order first rejected Defendants' contention that legislative privilege shielded communications between legislators and outside third parties. The order concluded that such communications "are not ordinarily the type of legislative acts that the privilege is designed to protect[,]" and further that, to the extent it applied, legislative "privilege was waived when the communications were shared with non-legislative outside parties." *Id.* at 8-9. The Magistrate Judge ordered Defendants to produce documents reflecting communications between legislators and outside third parties. *Id.* at 15. Second, the November 20 order concluded that legislator communications with outside counsel prior to the commencement of litigation on August 12, 2013 were not protected by legislative privilege. *See id.* at 13-14. For documents falling into this narrow category, the Magistrate Judge ordered Defendants to produce a privilege log of documents they contend are protected by any other privilege, such as attorney-client privilege. *Id.* at 15.

Third, the November 20 order held that Defendants need not produce documents, or even a privilege log, reflecting communications among legislators or between legislators and legislative staff. *Id.* Although the order noted that "requiring production of communications solely among legislators raises serious concerns regarding the direct

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Op. and Order at 71, ECF No. 171 (Aug 8, 2014) ("Aug. 8 Order"). The Court also denied a motion for judgment on the pleadings filed by Defendants, holding that Plaintiffs' complaints stated plausible claims for relief under Section 2 and the Fourteenth Amendment. *See id.* at 5.

intrusion into internal legislative affairs and the potential to 'inhibit full and frank deliberations' in legislative activity[,]" *id.* at 11, it did not find that all documents falling into this category are necessarily protected by the privilege. Nevertheless, the Magistrate Judge concluded that a privilege log would not be required because it would "significantly intrude into the legislative sphere, and would also place a heavy burden on the legislators in contravention of one of the aims of the legislative privilege." *Id.* at 11-12 (internal citation omitted). Plaintiffs object to the portion of the November 20 order that addresses this third category of documents.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 72, this Court must modify or set aside any part of a magistrate judge's order on a non-dispositive matter "that is clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). "Contrary to law" permits plenary review of legal conclusions. *See* May 15 Order at 8.

III. ARGUMENT

Although the November 20 order recognized that courts must apply a "flexible approach" to questions of legislative privilege and weigh "the need for the information in the context of the particular suit presented," Nov. 20 Order at 5; March 27 Order at 3, the November 20 order failed to apply this legal standard to one of the categories of documents at issue. Instead, it bestowed categorical immunity from discovery on all

internal legislative documents without considering the countervailing interests in favor of disclosing such evidence *in this case*. This blanket immunity—extending so far as to include a waiver of the privilege log requirement—conflicts with both the Federal Rules of Civil Procedure and the law of state legislative privilege.

A. Waiver of the Privilege Log Requirement Improperly Extends Protection to Documents that Likely Fall Outside the Scope of State Legislative Privilege.

State legislative privilege is a qualified evidentiary privilege, governed by Rule 501 of the Federal Rules of Civil Procedure, not a discovery immunity. *See* May 15 Order at 11, 24-25. "[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)). Even privileges with "venerable pedigree[s]," like the attorney-client privilege, are "inconsistent with the general duty to disclose and impede[] the investigation of the truth" and "must be strictly construed." *United States v. Under Seal*, 748 F.2d 871, 875 (4th Cir. 1984).

The Federal Rules impose on Defendants and the State Legislators, as the parties resisting discovery, the burden of proving their claim of privilege, *see N.L.R.B. v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011); Fed. R. Civ. P. 45(e)(2)(A)(i); 26(b)(5)(A)(i), and the obligation to "describe the nature of the withheld documents . . . in a manner that . . . will enable the parties to assess the claim," Fed. R. Civ. P. 45(e)(2)(A)(ii); 26(b)(5)(A)(ii). As an initial matter, Defendants must establish that "the

information sought falls within the scope of the [legislative] privilege." *Perez v. Perry* (*Perez II*), 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge court); May 15 Order at 25 ("Whether Plaintiffs' requests seek a document or group of documents that implicates the legislative privilege will be for the Magistrate Judge to determine."). By categorically exempting all communications among legislators, and between legislators and staff, from production or a privilege log, the November 20 order wrongly assumes that all internal legislative communications are within the scope of legislative privilege. This is incorrect and has the effect of improperly expanding the scope of the privilege.

State legislative privilege only covers "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)). Even under the Speech and Debate Clause of the United States Constitution, which grants members of Congress significantly more protections than common law state legislative privilege affords state lawmakers, *see United States v. Gillock*, 445 U.S. 360, 366 n.5 (1980), "only acts generally done in the course of the process of enacting legislation [are] protected[,]" *United States v. Brewster*, 408 U.S. 501, 514 (1972); *see also id.* at 512-13 (distinguishing between activities that "are political in nature" and those that are "legislative"); *Hutchinson v. Proxmire*, 443 U.S. 111, 126-133 (1979) (reviewing cases).[6] Following this reasoning, courts applying state legislative privilege have concluded that many of lawmakers' regular activities are not legislative in nature, "and thus documents

[6] Of course, the Speech and Debate Clause does not apply to state legislators. *See* May 15 Order at 11; March 27 Order at 3.

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. 2); *see also Doe v. Nebraska*, 788 F. Supp. 2d 975, 987 (D. Neb. 2011) (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").

For example, even purely internal legislative documents and communications (*i.e.*, legislator-to-legislator or legislator-to-legislative staff) are not privileged if they relate to "communications with those outside the legislative forum" because such external communications are not part of the legislative process. *Favors II*, at 15-16 (Ex. 2). Lawmakers' efforts to educate the public about their activities or to respond to constituent concerns and media criticisms are "not ordinarily the type of legislative acts that the privilege is designed to protect." Nov. 20 Order at 8; *cf. Hutchinson*, 443 U.S. at 133. As such, documents relating to these activities, including internal documents "concerning the preparation of such public statements[,] fall outside the scope of the legislative privilege." *Favors II*, at 16 (Ex. 2).

Legislator communications that occurred after the passage of HB 589 are also likely outside the scope of legislative privilege because such communications are not "integral steps in the legislative process." *WSSC*, 631 F.3d at 184 (declining to quash subpoena that sought information about events occurring after a legislative act). Although post-enactment communications are not essential to the legislative process, they nevertheless can shed light on legislative purpose. *See Baldus v. Wisc. Gov't*

Accountability Bd. (*Baldus II*), 2013 WL 690496, at *2 (E.D. Wisc. Feb. 25, 2013) (three-judge court).[7]

Nor does state legislative privilege protect from discovery the "objective facts upon which lawmakers relied" in the decision-making process. *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011); *accord Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.20 (1977) (plaintiffs were permitted "to question [lawmakers] fully about materials and information available to them at the time of decision"). Data from the State Board of Elections 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 considered remains incomplete. *See, e.g.*, Aug. 8 Order at 62-64. Evidence that the objective factual information the legislature considered in the process of drafting and passing HB 589 showed a likely discriminatory impact would be 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)

[7] Moreover, the Magistrate Judge erred in exempting this material from the obligation to provide a privilege log on the assumption that it would be too burdensome. Segregating pre-introduction and post-enactment legislator communications from communications that occurred while HB 589 was before the General Assembly is not overly burdensome because documents can be sorted electronically by date. *Cf.* Nov. 20 Order at 11 (finding no undue burden where documents could be sorted electronically by sender and recipient to retrieve and produce communications with third parties).

("[N]ormally the actor is presumed to have intended the natural consequences of his deeds."); *Page v. Virginia State Bd. of Elections*, 2014 WL 1873267, at *7 (E.D. Va. May 8, 2014). Documents containing such factual information are not protected by legislative privilege. *Doe*, 788 F. Supp. 2d at 987.

Categorically exempting all communications among legislators and between legislators and legislative staff from production in this case thus "expand[s] legislative privilege beyond its proper bounds." *WSSC*, 631 F.3d at 184. Moreover, exemption from the privilege log requirement leaves to the State Legislators alone the determination of the scope of legislative privilege, with no possibility of judicial review. This approach conflicts with Rule 26, under which the withholding party must make an express claim of privilege and describe the nature of the documents withheld so other parties, and if necessary, the Court, may assess the claim. *See Johnson v. City of Fayetteville*, 2014 WL 3738310, at *5 (E.D.N.C. Jul. 29, 2014); *Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 71 (M.D.N.C. 1986).

Nothing about the nature of the privilege asserted here should relieve the Defendants of the obligation to provide a privilege log. Nothing in the case law suggests that a party asserting state legislative privilege has some special exemption. To the contrary, courts considering claims of state legislative privilege routinely order lawmakers to log purportedly privileged documents. *See Favors v. Cuomo* (*Favors I*), 285 F.R.D. 187, 223 (E.D.N.Y. 2012); *Balanced Map*, 2011 WL 4837508, at *11; *Doe*, 788 F. Supp. 2d at 987; *cf. 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).

B. The November 20 Order Failed to Properly Weigh Factors That Support Disclosure as to Internal Legislative Documents.

It is by now beyond dispute that state legislative privilege is qualified, not absolute. *See* Nov. 20 Order at 5; May 15 Order at 25; March 27 Order at 3. 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. *See* March 27 Order at 3; *see also 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.). Even documents otherwise qualifying for the privilege may be subject to disclosure. *See Veasey v. Perry* (*Veasey I*), 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014); *Perez II*, 2014 WL 106927, at *2; *Baldus v. Wisc. Gov't Accountability Bd.* (*Baldus I*), 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011) (three-judge court); *United States v. Irvin*, 127 F.R.D. 169, 174 (C.D. Cal. 1989).

Courts considering claims of state legislative privilege typically apply a five-factor balancing test, considering (1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees. *See* May 15 Order at 22 n.11. As this Court recognized, the purpose of the legislative privilege may also be relevant. *Id.* at 25.

Although the November 20 order recites this flexible, multi-factor standard, *see* Nov. 20 Order at 5-6, it does not consider these factors in the specific context of the internal legislative communications at issue in this case. The November 20 order found that requiring the State Legislators to create a privilege log would "significantly intrude into the legislative sphere" and "place a heavy burden on the legislators." *Id.* at 12. It then concluded that Plaintiffs had not "demonstrated [that] the value of the proposed privilege log outweighs these concerns." *Id.* at 13. But it is the value of the evidence withheld—and not the value of the privilege log—that the court is to balance against the potential intrusion into the legislative process. The Magistrate Judge's analysis assumes that no document in the log would ever be subject to production, but this begs the ultimate question, which cannot be answered accurately without there being a log and an opportunity for Plaintiffs to challenge a particular assertion of the privilege.

To be sure, the November 20 order noted "that requiring production of communications solely among legislators raises serious concerns regarding the direct intrusion into internal legislative affairs and the potential to inhibit full and frank deliberations in legislative activity." *Id.* at 11 (internal quotation marks omitted). But the November 20 order never squarely finds that these concerns outweighed the many factors counseling in favor of disclosing internal legislative communications. This portion of the order failed to consider countervailing factors particular to these voting rights cases and to the specific category of evidence at issue: legislator-to-legislator and legislator-to-legislative staff communications. In short, it does not reflect the flexible, case-specific analysis that is required to determine whether, in the particular context of the present

case, the interests of justice and the need for the evidence, on balance, outweigh the interests served by the privilege. *See, e.g.*, *Veasey I*, 2014 WL 1340077, at *2.

Here, the interests of justice and Plaintiffs' need for non-public legislative evidence outweigh any interests protected by the privilege. Voting laws that are enacted or maintained for a discriminatory purpose violate Section 2 of the Voting Rights Act. *See Dillard v. Baldwin Cnty. Bd. of Elections*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988). Internal legislative communications are highly relevant to Plaintiffs' claims in this case, and are the sort of evidence that courts commonly consider in Voting Rights Act cases. *See, e.g.*, Aug. 8 Order at 59-61; *Veasey v. Perry* (*Veasey II*), 2014 WL 5090258, at *20-21 (S.D. Tex. Oct. 9, 2014); *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 292 (D.S.C. 2003), *aff'd* 365 F.3d 341 (4th Cir. 2004); Op. at 6, *Perez v. Perry* (*Perez I*), 5:11-cv-360 (W.D. Tex. Mar. 19, 2012) (three-judge court) (Ex. 3); *Garza v. Cnty. of Los Angeles*, 756 F. Supp. 1298, 1314-18 (C.D. Cal. 1990), *aff'd* 918 F.2d 763, 769 (9th Cir. 1990). As explained by the district court that ordered legislative discovery over legislators' objections in *Veasey I*, a Section 2 case challenging Texas' photo voter identification law, internal legislative documents are "highly relevant to [Plaintiffs'] claim because [they] bear[] directly on whether state legislators, contrary to their public pronouncements, acted with discriminatory intent in enacting [the law]." 2014 WL 1340077, at *2; *see also Page*, 2014 WL 1873267, at *7. The evidence is also plainly not available elsewhere, and the state government's role in the litigation is direct. *See Veasey I*, 2014 WL 1340077, at *2-3.

Because "racial discrimination is not just another competing [policy] consideration," the voting rights cases currently before this Court involve precisely the context in which judicial inquiry into legislative purpose is appropriate. *Arlington Heights*, 429 U.S. at 265. The Fourth Circuit itself has emphasized that race discrimination cases are among the "limited exceptions to the principle that judicial inquiry into legislative motive is to be avoided." *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1259, 1259 n.6 (4th Cir. 1989). As the plurality held in the Section 2 case *Marylanders for Fair Representation*, "[t]he doctrine of legislative immunity (both in its substantive and testimonial aspects) . . . does not . . . necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy." 144 F.R.D. at 304. Here, "there is an overriding, free-standing public policy reflected in the Equal Protection Clause of the federal Constitution and the Voting Rights Act." *Page*, 2014 WL 1873267, at *6.

Moreover, it cannot be said in this case that Plaintiffs are on a mere fishing expedition. As this Court recognized, even on the existing record, "evidence that the General Assembly acted at least in part with discriminatory animus certainly raises suspicions and presents substantial question." Aug. 8 Order at 71. It is clear that legislators were confronted with evidence that certain provisions of HB 589 would likely have a disproportionate racial impact. *See id.* at 59-62. In addition, once freed from the obligation to secure preclearance for voting-related changes pursuant to Sections 4 and 5

of the Voting Rights Act, legislators moved rapidly to expand HB 589 from a limited photo voter identification bill into an omnibus elections overhaul. *See id.* at 8-10.

Because so much of the legislative process related to the omnibus bill occurred in private and is not reflected in the official, public legislative record, the complete picture, including how legislators responded to the evidence of disproportionate racial impact, remains obscured. By cloaking the legislative process in secrecy, the legislature essentially stripped the official record of meaning, which itself suggests an invidious purpose and undercuts claims to legislative privilege. In *United States v. Irvin*, for example, the paucity of the public record was one factor that led the court to conclude that legislative privilege "must yield in this instance to the need for disclosure." 127 F.R.D. at 173-74; *see also Veasey I*, 2014 WL 1340077, at *3. Reliance on the official record alone is inadequate because "officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982).

Documents that reveal legislators' awareness of the likely disproportionate racial impact of HB 589, or suggest that racial considerations played any role in legislators' deliberations, cannot be shielded from disclosure by the doctrine of legislative privilege. *Favors II*, at 33-34 (Ex. 2); *Rodriguez v. Pataki*, 2003 WL 22109902, at *3 (S.D.N.Y. Sept. 11, 2003). The purpose of state legislative privilege—to encourage "public decisionmaking by public servants for the right reasons," *WSSC*, 631 F.3d at 181—is

undermined when the privilege is used to hide potentially unlawful conduct. *Cf. Gravel v. United States*, 408 U.S. 606, 620 (1972).

Moreover, the vote denial cases before this Court challenge the legislature's effort to reset the rules by which the democratic process operates—to the disadvantage of a class of citizens based on race. Much like redistricting, HB 589 "involves the establishment of the electoral structure by which the legislative body becomes duly constituted." *Marylanders*, 144 F.R.D. at 304. For example, under HB 589, only individuals who possess certain narrowly defined types of photo identification will be eligible to vote in person in North Carolina. *See* N.C.G.S. § 163-166.13 (added by HB 589 § 2.1). "Inevitably," this kind of legislation "directly involves the self-interest of the legislators themselves." *Marylanders*, 144 F.R.D. at 304. HB 589 disproportionately sets obstacles in the path of African Americans attempting to cast a ballot, thereby impacting who will be able to vote for the legislators in the first place. In this context, non-disclosure of legislative evidence does not promote "republican values." *WSSC*, 631 F.3d at 181. Rather, it obscures potential "intentional or negligent government misconduct." *Irvin*, 127 F.R.D. at 174.

On balance, these factors far outweigh any "minimal future 'chilling effect'" that disclosure might have on the legislature. *Baldus I*, 2011 WL 6122542, at *2; *cf. Gillock*, 445 U.S. at 373. As the district court found in *Irvin*, "the occasional instance in which disclosure may be ordered in a civil context will [not] add measurably to the inhibitions already attending legislative deliberations." 127 F.R.D. at 174; *see also Veasey I*, 2014 WL 1340077, at *3 (finding that "the overall balance of factors weighs in favor of

disclosure on a confidential basis"); *Favors II*, at 34 (Ex. 2) (holding that with respect to "documents reveal[ing] an awareness that the [redistricting plan] may dilute minority votes, legislative privilege is overcome").

Accordingly, legislator documents, including communications among legislators and between legislators and legislative staff, relating to the North Carolina General Assembly's consideration and passage of HB 589 should be disclosed in this case. If the Court concludes that preparation of a traditional privilege log for purportedly privileged documents is overly burdensome or will be too time consuming, given upcoming discovery deadlines, the Court should order Defendants to produce all responsive documents on a confidential basis and reserve for trial the ultimate determination of whether the privilege protects specific documents the parties may wish to use at trial. *See Veasey*, 2014 WL 1340077, at *3; ECF Nos. 36 & 37 (Protective Order and Supp. Protective Order).

IV. CONCLUSION

For all the foregoing reasons, the Court should reverse the portion of the November 20 order that granted in part the State Legislators' Motion to Quash and Defendants' discovery objections based on legislative privilege, and held that they need not produce, nor create a privilege log for, communications solely among legislators or between legislators and legislative staff. The Court should order the production of all non-privileged documents in the possession of the State Legislators, including communications among legislators and between legislators and legislative staff. In addition, the Court should require a detailed privilege log for documents that Defendants

and the State Legislators withhold on the basis of the qualified legislative privilege, or alternatively, order Defendants to produce all responsive legislator documents on a confidential basis.

Dated: December 4, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE OF DISCOVERY

I hereby certify that on December 4, 2014, I electronically filed the foregoing **Plaintiffs' Joint Partial Objection to the Magistrate Judge's Order on Legislative Privilege,** 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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