

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs,

v.

PATRICK MCCRORY *et al.*,

Defendants

Case No. 1:16-CV-00236-TDS-JEP

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA *et al.*,

Defendants

Case No. 1:16-CV-00425-TDS-JEP

**MOTION FOR A PROTECTIVE ORDER BASED ON LEGISLATIVE  
PRIVILEGE BY INTERVENOR-DEFENDANTS SENATE PRESIDENT PRO  
TEMPORE PHIL BERGER AND HOUSE SPEAKER TIM MOORE AND  
DEFENDANTS GOVERNOR PATRICK L. MCCRORY, THE STATE OF  
NORTH CAROLINA, AND THE NORTH CAROLINA DEPARTMENT OF  
PUBLIC SAFETY**

Pursuant to Fed. R. Civ. P. 26(c), and the Court's Order of September 20, 2016 [Doc. #147 in 1:16-cv-236], Intervenor-Defendants Senate President pro tempore Phil Berger and House Speaker Tim Moore and Defendants Governor Patrick L. McCrory, the State of North Carolina, and the North Carolina Department of Public Safety move for the issuance of a protective order precluding the discovery of documents and the conducting of depositions on the basis of legislative privilege, for the reasons set forth in the accompanying memorandum of law and seeking the following relief:

1. That Plaintiffs be precluded from taking the depositions of President pro tempore Phil Berger, Speaker Tim Moore, and Governor Patrick L. McCrory and any members of their respective staffs;

2. That Plaintiffs be precluded from taking written discovery seeking any confidential documents and communications concerning the proposal, formulation, revisions, consideration, passage, signing, amendments, or possible repeal of the Public Facilities Privacy and Security Act ("H.B. 2") which fall within the sphere of legitimate legislative activity and are therefore protected by the doctrine of legislative privilege.

3. The documents and communications referenced in paragraph 2 include confidential communications between and among Senator Berger, Speaker Moore, and their respective staffs, as well as any of their confidential communications with:

- a. Any other member of the North Carolina General Assembly and his or her staff;
- b. Governor McCrory and his staff;

- c. Any North Carolina state agency and its staff;
- d. Any constituents, lobbyists, or public interest groups;
- e. Any expert or consultant;
- f. Any member of a state political party organization;
- g. Any member of the United States Senate or United States House of Representatives.

4. The documents and communications referenced in paragraph 2 include confidential communications between and among Governor McCrory and his staff.

5. The documents and communications referenced in paragraph 2 include any factual materials or data which may have been made available confidentially to Senator Berger, Speaker Moore, or their respective staffs, and which may have been pertinent to the proposal, formulation, revision, consideration, passage, signing, amendment, or possible repeal of H.B. 2.

6. The documents and communications referenced in paragraph 2 include any factual materials or data which may have been made available confidentially to Governor McCrory or his staff, and which may have been pertinent to the proposal, formulation, revision, consideration, passage, signing, amendment, or possible repeal of H.B. 2 or Executive Order 93.

7. Neither Senator Berger, Speaker Moore, nor Governor McCrory shall be required to produce a privilege log respecting the documents and communications referenced in paragraph 2.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

S. Kyle Duncan  
S. Kyle Duncan  
*Attorney for Intervenor-Defendants*

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUÍN CARCAÑO *et al.*,

Plaintiffs,

v.

PATRICK MCCRORY *et al.*,

Defendants

CASE NO. 1:16-CV-00236-TDS-JEP

---

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA *et al.*,

Defendants

CASE NO. 1:16-CV-00425-TDS-JEP

**[PROPOSED] ORDER**

Having reviewed the motion for a protective order based on legislative privilege filed by the State Defendants and Intervenor-Defendants, the motion is hereby GRANTED.

Dated: \_\_\_\_\_, \_\_\_\_ 2016

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Hon. Thomas D. Schroeder  
United States District Judge

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

|   |   |                       |
|---|---|-----------------------|
| UNITED STATES OF AMERICA                | ) |                       |
|   | ) |                       |
| Plaintiff,                              | ) |                       |
|   | ) |                       |
| v.                                      | ) | 1:16-CV-00425-TDS-JEP |
|   | ) |                       |
| STATE OF NORTH CAROLINA;                | ) |                       |
| PATRICK MCCRORY, in his official        | ) |                       |
| capacity as Governor of North Carolina; | ) |                       |
| NORTH CAROLINA DEPARTMENT               | ) |                       |
| OF PUBLIC SAFETY; UNIVERSITY            | ) |                       |
| OF NORTH CAROLINA; and BOARD            | ) |                       |
| OF GOVERNORS OF THE                     | ) |                       |
| UNIVERSITY OF                           | ) |                       |
| NORTH CAROLINA,                         | ) |                       |
|   | ) |                       |
| Defendants.                             | ) |                       |

**UNITED STATES' FIRST SET OF REQUESTS FOR PRODUCTION TO  
DEFENDANTS STATE OF NORTH CAROLINA, ET AL.**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff, the United States, requests that Defendants State of North Carolina, Governor Patrick McCrory, North Carolina Department of Public Safety, and the Intervenor North Carolina State Legislature produce the following documents within the timeframe set forth in this Court's Order dated July 25, 2016, ECF No. 108, by sending them **via Federal Express** to the following address:

Lori Kisch  
Employment Litigation Section  
Civil Rights Division  
United States Department of Justice

**INSTRUCTIONS**

1. The parties are scheduled to confer on the manner of discovery production. The Instructions included herewith are subject to change pending those conferences, and may be modified accordingly.
2. These requests apply to all documents in the possession, custody, or control of Defendants regardless of their location and regardless of whether such documents are held by Defendants' agents, employees, representatives, or attorneys.
3. All non-identical copies of every document whose production is sought shall be separately produced.
4. All documents produced in response to an individual request shall be segregated from documents produced in response to any other requests, and the request to which they are responsive shall be specifically identified. If a document is responsive to more than one request, please specify each of the requests to which the document is responsive.
5. All documents shall be individually marked or Bates stamped in order to facilitate the designation of documents as responsive to multiple requests, as contemplated by Paragraph 4 above.
6. In producing the documents, all documents that are attached to each other shall be left so attached. Documents that are segregated from other documents, whether by inclusion in binders, files, subfiles, or by use of dividers, tabs, or other methods, shall be left so segregated or separated. Documents shall be retained in the order in which they



were maintained in the file where found.

7. Requests for documents shall be deemed to include requests for any and all transmittal sheets, cover letters, exhibits, enclosures, or any other annexes or attachments to the documents, in addition to the documents themselves. If the requested documents are maintained in a file, the file folder is included in the request for production.

8. Any “electronically-stored information” (“ESI”) responsive to these requests shall be produced in native format. If ESI is produced, identify any software, program, or other information necessary to read the document. If the information is not accessible without proprietary software, the parties will need to confer regarding your obligation under Federal Rule of Civil Procedure 34(a)(1)(A) to translate the information in a reasonably useable form.

9. If you are unable to produce an item requested, state in writing why it cannot produce the item requested, and if its inability to produce the item is because it is not in its possession or in the possession of a person from whom you could obtain the item, state the name, address and telephone number of any person believed to have the original copy of any such item.

10. Identify all responsive documents that have been lost, discarded, or destroyed. In so doing, state the type of document, its date, the approximate date it was lost, discarded, or destroyed, the circumstances under which it was lost, discarded, or destroyed, and the identity of each person having knowledge of the contents thereof.

11. If you object to a portion or an aspect of any request, state the grounds of the objection with specificity and respond to the remainder of the request.

12. If you contend that any request is ambiguous, set forth the matter deemed ambiguous and the construction selected or used in responding to the request.
13. If you contend that it would be unreasonably burdensome to produce all of the documents called for in response to any request, then as to that request: (i) produce all documents that are available without unreasonable burden; and (ii) describe with particularity the burden that would be imposed by the production of all of the documents called for in response to the request.
14. Except as otherwise agreed to by the parties, if you object to producing a document or oral communication because of a privilege, you must nevertheless provide the following information, unless divulging the information would disclose the privileged information:
  - a. the nature of the privilege claimed (including work product);
  - b. if the privilege is being asserted in connection with a claim or defense governed by state law, the state privilege rule being invoked;
  - c. the date of the document or oral communication;
  - d. if a document: its type (correspondence, memorandum, facsimile, etc.), custodian, location, and such other information sufficient to identify the document for a subpoena *duces tecum* or a document request, including where appropriate, the author, the addressee, and, if not apparent, the relationship between the author and addressee;
  - e. if an oral communication: the place where it was made, the names of the persons present while it was made, and, if not apparent, the relationship of

the persons present to the declarant; and

f. the general subject matter of the document or oral communication.

15. You are under a continuous obligation to supplement your answers to these requests for production of documents under the circumstances specified in Fed. R. Civ. P. 26(e).

16. If any documents responsive to a request have already been provided, identify all such documents in a separately appended table/spreadsheet that shows the documents' titles, Bates Numbers, and the request(s) to which they respond as well as the information described in definition 8(B) below.

17. Unless otherwise specified, all requests relate to documents from January 2014 to the present.

### **DEFINITIONS**

The parties are scheduled to confer on the manner of discovery production. The Definitions included herewith are subject to change pending those conferences, and may be modified accordingly.

For the purposes of these requests, the following definitions apply:

1. The word and and the word or shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.
2. The term any means one or more but no less than all.

3. The terms communicate and communication refer to any disclosure, transfer, or exchange of information or opinion, whether by written, oral, electronic, or any other means.

4. Defendant, you, or your refers to Defendant State of North Carolina as well as its agents, employees, representatives, and any person or entity acting or purporting to act on its behalf, including, but not limited to, Governor Patrick McCrory, the North Carolina Department of Public Safety, University of North Carolina (UNC, as defined below), the North Carolina state legislature and the legislators who have intervened in this matter.

5. The term document includes, without limitation all originals or copies, if the originals are not in the possession of Defendants, its attorneys, agents, or other representatives, and all non-identical copies (whether by reason of alterations or of additional notations) of communications, correspondence (including emails), memoranda, notes, manuals, handbooks, logbooks, notebooks, minutes, photographs, video recordings, audio recordings, reports, records, diaries, chronologies, written statements, letters, studies, messages, analyses, invoices, bills, books, magazines, newspapers, booklets, tapes, voicemails, logs, calendars, circulars, bulletins, notices, instructions, questionnaires, policies, directives, contracts, agreements, surveys, charts, graphs and other communications or records, including drafts of any of the foregoing items.

6. The terms electronically-stored information (or “ESI”) and things have the same meaning as those terms when used in Rule 34 of the Federal Rules of Civil Procedure.

7. The term employee, supervisor and manager, refer to current and former employees, supervisors, and managers.
8. H.B. 2 refers to legislation passed by the North Carolina General Assembly on March 23, 2016 and signed into law by Governor McCrory the same day, entitled “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.”
9. Identify, identification, or identity means:
  - (a) When used in reference to a natural person, the person’s full name, date of birth, social security number, job title and dates of agency or employment (if applicable), the person’s current residence address and business address or, if unknown, the last known business address or residence address; and the person’s business and home telephone numbers;
  - (b) When used in reference to a document, the type of document (*e.g.*, letter, memorandum, telegram, chart, *etc.*), a brief description of the nature of the information in the document, its author and originator, its date or dates, all addresses and recipients, and its present location or custodian. If any such document was, but is no longer, in the Defendants’ possession or subject to Defendants’ control, state additionally the approximate date it was lost, discarded, or destroyed, the identity of the person with knowledge

of the destruction or loss, and the identity of each person having knowledge of the contents thereof;

(c) When used in reference to a business entity, the structure of the business (*e.g.*, corporation, partnership, sole proprietorship, *etc.*), a brief description of the nature of the business, the business address and telephone number; and the name, title, and job or position of a contact person at the business; and

(d) When used in reference to real property, the full address, the legal description of the property, the type of structure (*e.g.*, commercial, single-family residential, rental apartments, condominiums, cooperative apartments, *etc.*), and the number of units.

10. Including means including, but not limited to.

11. The term person refers to the plural, as well as the singular, and includes any natural person, government agency or board, organization, firm, association, partnership, joint venture, corporation or any other legal entity.

12. The term relating to means pertaining to, supporting, concerning, describing, referring to, evidencing, reflecting, showing, mentioning, discussing, constituting, contradicting, refuting, or in any way logically or factually connected to the matter discussed.

13. Relied upon shall broadly mean and include: any and all data or information that was considered, weighed, analyzed, reviewed, or depended upon.
14. The term sex means sex, sex assigned at birth, gender, and gender identity.
15. Single-Sex Facilities refers to H.B. 2's definition of "[m]ultiple occupancy bathroom or changing facility," including single-sex multiple occupancy restrooms, locker rooms, and changing facilities.
16. Transgender refers to a person whose gender identity does not align with the sex the person was assigned at birth. As used herein, transgender includes, but is not limited to the following: "transsexual," "transgendered," "gender dysphoric," "individuals with gender dysphoria," "gender identity disorder," "individuals with gender identity disorder."
17. UNC refers to the University of North Carolina, its Board of Governors, President, Chancellors, seventeen constituent institutions, as well as its agents, employees, representatives, and any person or entity acting or purporting to act on its behalf.
18. The use of a verb in any tense shall be construed as the use of the verb in all tenses and the singular form shall be deemed to include the plural, and vice versa.

## **REQUESTS FOR PRODUCTION**

1. All documents you rely upon to answer any interrogatories served on you in connection with this case.
2. All documents not protected from disclosure by operation of Fed. R. Civ. P. 26(b)(4), reviewed, received, or considered by any consultant, or organization that you retained or consulted in connection with this matter.
3. All documents reviewed, received, or considered in connection with the enactment and/or passage of Part I of North Carolina House Bill 2 (“H.B. 2”).
4. All documents received from or given to the Defendants and/or counsel for a Defendant by any person, other than a party to this lawsuit, whom you intend to call, or may call, as a witness in this lawsuit.
5. Any statement, not otherwise protected by the attorney work-product doctrine, of any person identified in the Defendant’s Fed. R. Civ. P. 26(a) disclosures relating to H.B. 2 and the claims in this lawsuit.
6. All documents that support, refute, are relevant to, or otherwise relate to each denial contained in your Answer to Plaintiff United States’ Complaint.
7. All documents that support, refute, are relevant to, or otherwise relate to each affirmative defense contained in your Answer to Plaintiff United States’ Complaint.
8. All documents that support, refute, are relevant to, or otherwise relate to each counterclaim contained in your Answer to Plaintiff United States’ Complaint.
9. All documents reflecting any medical or other basis supporting or otherwise pertaining to H.B. 2’s definition of “biological sex.”



10. All documents related to Governor McCrory's Executive Order 93.
11. All documents related to potential, planned, or actual compliance with or enforcement of Part I of H.B. 2 against individual persons.
12. All documents related to potential, planned, or actual compliance with or enforcement of Part I of H.B. 2 at and against public agencies, including UNC.
13. All statements by Defendants regarding Part I of H.B. 2.
14. All documents relating to or reflecting communications among or between any of the named Defendants named in this action, or among or between the named Defendants and current or former employees, agents, or representatives, regarding H.B. 2 or the instant lawsuit.
15. All documents relating to, supporting, or opposing the passage of, and/or the potential, planned, and actual compliance with or enforcement of Part I of H.B. 2.
16. All studies, data, reports, surveys, or similar documents, related to any privacy, safety, or any other justification or rationale underlying or supporting the passage or potential, planned, and actual enforcement of Part I of H.B. 2.
17. All documents related to the employment policies and practices of public agencies in North Carolina with regard to access to or use of multiple-occupancy bathrooms and changing facilities based on sex, both prior and after the passage of H.B. 2.
18. All documents reflecting North Carolina's policy, practice, or procedure for designating and changing the sex indicated on a North Carolina birth certificate.

19. All documents reflecting North Carolina's policy, practice, or procedure for designating and changing the sex indicated on a North Carolina driver's license or identification card.

20. All documents, including maps, reflecting locations of bathrooms at public agencies subject to H.B. 2, specifically indicating which bathrooms are single-occupancy and which are multiple-occupancy, as well as which are sex-segregated and which are gender-neutral.

21. All documents, including maps, reflecting locations of changing facilities at public agencies subject to H.B. 2, specifically indicating which are single-occupancy and which are multiple-occupancy, as well as which are sex-segregated and which are gender-neutral.

22. Defendants' employment policies limiting transgender individuals' access to or use of multiple-occupancy bathrooms or changing facilities, both prior to and after the passage of H.B. 2.

23. All documents related to complaints made to Defendants by or about access to, or the safety of, sex-segregated, multiple-occupancy bathrooms and changing facilities that Defendants may rely on in this matter.

24. All documents relating to or reflecting complaints in connection with a transgender individual's use or potential use of a bathroom or changing facility inconsistent with their gender identity on any UNC campus and UNC's responses thereto, including, but not limited to investigative, discipline, and resolution documents.

25. All documents related to accommodations granted to Defendant's employees regarding the safety or privacy in the use of bathroom or changing facilities.

26. All documents related to accommodations as referred to and made pursuant to Part I of H.B. 2.

Respectfully submitted, this 12th day of August, 2016.

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*Counsel for the Plaintiff United States*

**CERTIFICATE OF SERVICE**

I certify that on August 12, 2016, I served a copy of the United States' Request for

Production by email on the following counsel:

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*Counsel for the Plaintiff United States*

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

JOAQUÍN CARCAÑO, *et al.*,

*Plaintiffs,*

v.

PATRICK MCCRORY, *et al.*,

*Defendants,*

and

PHIL BERGER, *et al.*,

*Intervenor-Defendants.*

No. 1:16-cv-00236-TDS-JEP

**PLAINTIFFS' FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO  
INTERVENOR-DEFENDANTS PHILLIP BERGER AND TIM MOORE**

Plaintiffs request that Defendant produce the following documents for inspection and copying under Fed. R. Civ. P. 34 to the American Civil Liberties Union for North Carolina Legal Foundation, P.O. Box 28004, Raleigh, NC 27611, within 14 days of the date of service of this Request for Production.

**DEFINITIONS**

1. “You” or “Your” means Senator Phillip Berger and Representative Tim Moore, together with any and all employees of the North Carolina General Assembly.

2. “H.B. 2” refers to legislation passed by the North Carolina General Assembly on March 23, 2016 and signed into law by Governor McCrory the same day, entitled “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.”

3. “Charlotte Ordinance” refers to Charlotte Ordinance No. 7056, Ordinance Book 59, Page 743 (Feb. 22, 2016), [https://www2.municode.com/library/nc/charlotte/codes/code\\_of\\_ordinances](https://www2.municode.com/library/nc/charlotte/codes/code_of_ordinances).

4. “Transgender” refers to a person whose gender identity does not align with the sex the person was assigned at birth. As used herein, transgender includes, but is not limited to the following: “transsexual,” “transgendered,” “gender dysphoric,” “individuals with gender dysphoria,” “gender identity disorder,” “individuals with gender identity disorder.”

5. “Single-Sex Facilities” refers to H.B. 2’s definition of “[m]ultiple occupancy bathroom or changing facility,” including single-sex multiple occupancy restrooms, locker rooms, and changing facilities.

6. As used herein, the term “document” or “documents” shall be given the broadest construction permitted under the Rule, and shall include without limitation:

- a. all written, typed, printed, reproduced, graphic, filmed and recorded material;



b. all recordings, tapes, disks, drums, cassettes, electronic correspondence, computer files, or any other information that exists in electronic or magnetic form, including electronic mail messages, instant messages, text messages, calendar entries, voice mails, and social media messages, updates or posts (including, but not limited to, messages, updates, or posts on Facebook or Twitter or similar services), however stored or recorded (including, for electronic documents, those in active and inactive drive space, and for example, deleted files in the drive slack space and documents stored in recycle bins) and including all metadata;

c. all reports, data, information, articles, publications, agency findings, photographs, pictures, graphs, video tapes, maps, plans, calendars, or other presentations of anything concerning, describing, referring, or relating, directly or indirectly, in whole or in part, to the subject matter of the discovery request at issue;

d. originals and all non-identical copies different from the original by reasons or marginal notations and/or other markings; and

e. all drafts, summaries, attachments, and notes that are typed, handwritten, or otherwise made or prepared, whether used or not used.

7. “Pertaining to,” “relating to,” “related,” “concerning,” “regarding,” “reflect,” and “reflecting” shall broadly mean and include” referring to, relevant to, constituting, depicting, showing, describing, identifying, indicating, summarizing,

analyzing, explaining, evaluating, appraising, evidencing, justifying, supporting, contradicting, establishing, repeating, attempting to establish the existence or nonexistence of, or attempting to establish the truth or falsity thereof.

8. “Relied upon” shall broadly mean and include: any and all data or information that was considered, weighed, analyzed, reviewed, or depended upon.

9. “Including” shall mean “including, but not limited to.”

10. “And” and “or” shall be construed both conjunctively and disjunctively and shall mean whichever construction makes the request more inclusive. The singular form of a word shall be construed as also including the plural form of the word and vice-versa.

11. “Communication” or “communications” shall broadly mean and include any oral or written utterance, notation, or statement of any nature whatsoever, including, but not limited to: documents, as the word is defined herein, personal conversations, telephone calls, dialogues, discussions, interviews, consultations, telegrams, facsimiles, cables, electronic communications, agreements, and voice mail messages.

12. Any term not expressly defined herein shall be given its plain and ordinary meaning.

### **INSTRUCTIONS**

1. Unless otherwise indicated, the relevant time period shall mean that period beginning January 1, 2014, and continuing through the present. These Requests apply to documents created, reviewed, modified, annotated, relied upon, or used outside of the

relevant period of the extent they refer to or are relevant to events within the relevant period.

2. These Requests shall be considered continuing in nature and, therefore, responses should be modified or supplemented as you obtain further or different information as required by Rule 26(e) of the Federal Rules of Civil Procedure.

3. For each request, please produce all responsive documents that are available to you, including those in the possession of your attorneys or agents of your attorneys, and not merely those documents that are in your personal possession.

4. Subject to separate agreement of the parties, documents should be produced in the format in which they are currently or normally stored.

5. Where an electronic document has been printed to hard copy and is an exact duplicate of the electronic version, only the electronic version need be produced.

However, if a printed document contains any notations or markings that are not on the electronically stored document, both versions of the document should be produced.

6. To the extent that you object to the production of any document, or any portion of any document, on the basis of privilege, please provide the following information about each document to which an objection is asserted:

- a. the request to which the responsive material relates;
  - b. the nature of the privilege claimed, *e.g.*, attorney-client, work product, *etc.*;
- and

- c. sufficient information to describe the reason for the claim of privilege, *e.g.*, names of the sender of the document, names of the recipient, date of the document, a brief description of the subject matter of the document.

### **REQUESTS FOR PRODUCTION**

1. All Documents and Communications related to H.B. 2, including its drafting, passage, justifications, implementation, and effects, including Documents and Communications regarding the convening of a special session of the General Assembly to consider H.B. 2 and all minutes, agendas, hearing or session transcripts or recordings, notes, and any legislative record or history of any kind related to H.B. 2.
2. All Documents and Communications reflecting any medical or other basis supporting or otherwise pertaining to H.B. 2's definition of "biological sex."
3. All Documents and Communications related to any policy, practice, or procedure regarding access to or use of Single-Sex Facilities based on sex, however defined, both before and after the passage of H.B. 2.
4. All Documents and Communications reflecting or pertaining to any planned or undertaken enforcement of, implementation of, or compliance with H.B. 2 or of any provision thereof.
5. All Documents and Communications relating to policies or procedures for enforcing state law on the campuses of UNC, including the state and local agencies and police departments tasked with such enforcement.

6. All Documents and Communications regarding H.B. 2, including Communications with members of the General Assembly, their staff, or staff of the General Assembly or any Committee thereof, or members or leadership of the state Republican or Democratic political parties, and third parties; including any Documents reflecting Communications with members of the General Assembly, their staff, or staff of the General Assembly or any Committee thereof, members or leadership of the state Republican or Democratic political parties, and third parties; and including any Communications or Documents reflecting Communications referenced in the April 13, 2016 letter from Thomas C. Shanahan (1:16-cv-00236, ECF No. 50-3) (“The University advised the General Assembly through staff...”).

7. All Documents and Communications regarding the Charlotte Ordinance, and any prior efforts to add sexual orientation or gender identity to non-discrimination protection in Charlotte ordinances, including Communications with members of the General Assembly, members of the Charlotte City Council, members or leadership of the state Republican or Democratic political parties, and third parties.

8. All Documents and Communications regarding non-discrimination ordinances in North Carolina, including those that have a scope broader than North Carolina state non-discrimination statutes with respect to the characteristics on which discrimination is barred.

9. All Documents and Communications regarding the use of Single-Sex Facilities by Transgender individuals, including any complaints received, both before and after the enactment of H.B. 2.

10. All Documents and Communications concerning Title IX's application to Transgender individuals.

11. All Documents and Communications regarding the relationship, if any, between Part I of H.B. 2 and safety, privacy, or any other government interest that You contend supports Part I of H.B. 2.

12. All Documents and Communications regarding ways to promote or preserve privacy in Single-Sex Facilities, including the use of privacy partitions.

13. All Documents and Communications related to any accommodations requested or made under Part I of H.B. 2.

14. All Documents and Communications reflecting incidents in North Carolina in which the safety or privacy of individuals in Single-Sex Facilities was or may have been negatively affected (such as indecent exposure or other improper conduct whether criminal or not), including by the presence of Transgender individuals.

15. All Documents and Communications reflecting incidents of non-Transgender individuals in North Carolina utilizing Single-Sex Facilities inconsistent with their gender identity or sex assigned at birth.

16. All Documents and Communications regarding the relationship, if any, between Part II of H.B. 2 and uniformity, economic benefit, or any other government interest that You contend supports Part II of H.B. 2.

17. All Documents and Communications reflecting the effect of H.B. 2 on North Carolina's economy, including any loss of business, jobs, tourism, revenue, or reputation.

18. All Documents and Communications regarding the desirability of uniformity among North Carolina local jurisdictions with respect to non-discrimination laws, including any Communications received from businesses.

19. All Documents and Communications regarding Transgender, lesbian, gay, or bisexual individuals, including the rights of same-sex couples.

20. All Documents and Communications related to any of the Plaintiffs, including the American Civil Liberties Union of North Carolina.

21. All Documents and Communications related to any complaint against You alleging discrimination on the basis of gender identity, transgender status, or gender expression, including with respect to denial of equal access to facilities consistent with one's gender identity.

22. All Documents and Communications related to Executive Order No. 93.

23. All Communications between You and any person whom You intend to call, or may call, as a witness in any litigation regarding H.B. 2.

24. All Documents and Communications referenced in Your responses to interrogatories in any litigation regarding H.B. 2 or relied upon in preparing those responses.

25. All Documents referenced in Your opposition to Plaintiffs' Motion for a Preliminary Injunction in this case.

26. All Documents identified in Your Initial Disclosures in this case.

27. To the extent not produced in response to the foregoing, all Documents and Communications that relate to the statements made in Your Answer to Plaintiffs' First Amended Complaint, including denials and affirmative defenses.

28. To the extent not already produced in response to the foregoing, all Documents and Communications that You produce to any party in any litigation regarding H.B. 2.

\* \* \*



Dated: August 12, 2016

Respectfully submitted,

/s/ Scott B. Wilkens

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*Counsel for Plaintiffs*

\* Appearing by special appearance pursuant to L.R. 83.1(d).

**CERTIFICATE OF SERVICE**

I, Scott B. Wilkens, hereby certify that on August 12, 2016, I caused a copy of PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO INTERVENOR-DEFENDANTS PHILLIP BERGER AND TIM MOORE to be distributed via electronic mail to all parties of record in case numbers 1:16-cv-00236, 1:16-cv-00425, and 1:16-cv-00845.

/s/ Scott B. Wilkens

Scott B. Wilkens

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, *et al.*,

*Plaintiffs,*

v.

PATRICK MCCRORY, *et al.*,

*Defendants,*

and

PHIL BERGER, *et al.*,

*Intervenor-Defendants.*

No. 1:16-cv-00236-TDS-JEP

**PLAINTIFFS' FIRST SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO DEFENDANT PATRICK MCCRORY**

Plaintiffs request that Defendant produce the following documents for inspection and copying under Fed. R. Civ. P. 34 to the American Civil Liberties Union for North Carolina Legal Foundation, P.O. Box 28004, Raleigh, NC 27611, within 14 days of the date of service of this Request for Production.

**DEFINITIONS**

1. "You" or "Your" means Governor Pat McCrory and any part of the Executive Branch of North Carolina, including its officers and employees.
2. "H.B. 2" refers to legislation passed by the North Carolina General Assembly on March 23, 2016 and signed into law by Governor McCrory the same day,

entitled “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.”

3. “Charlotte Ordinance” refers to Charlotte Ordinance No. 7056, Ordinance Book 59, Page 743 (Feb. 22, 2016),

[https://www2.municode.com/library/nc/charlotte/codes/code\\_of\\_ordinances](https://www2.municode.com/library/nc/charlotte/codes/code_of_ordinances).

4. “Transgender” refers to a person whose gender identity does not align with the sex the person was assigned at birth. As used herein, transgender includes, but is not limited to the following: “transsexual,” “transgendered,” “gender dysphoric,” “individuals with gender dysphoria,” “gender identity disorder,” “individuals with gender identity disorder.”

5. “Single-Sex Facilities” refers to H.B. 2’s definition of “[m]ultiple occupancy bathroom or changing facility,” including single-sex multiple occupancy restrooms, locker rooms, and changing facilities.

6. As used herein, the term “document” or “documents” shall be given the broadest construction permitted under the Rule, and shall include without limitation:

a. all written, typed, printed, reproduced, graphic, filmed and recorded material;

b. all recordings, tapes, disks, drums, cassettes, electronic correspondence, computer files, or any other information that exists in electronic or magnetic form, including electronic mail messages, instant

messages, text messages, calendar entries, voice mails, and social media messages, updates or posts (including, but not limited to, messages, updates, or posts on Facebook or Twitter or similar services), however stored or recorded (including, for electronic documents, those in active and inactive drive space, and for example, deleted files in the drive slack space and documents stored in recycle bins) and including all metadata;

c. all reports, data, information, articles, publications, agency findings, photographs, pictures, graphs, video tapes, maps, plans, calendars, or other presentations of anything concerning, describing, referring, or relating, directly or indirectly, in whole or in part, to the subject matter of the discovery request at issue;

d. originals and all non-identical copies different from the original by reasons or marginal notations and/or other markings; and

e. all drafts, summaries, attachments, and notes that are typed, handwritten, or otherwise made or prepared, whether used or not used.

7. “Pertaining to,” “relating to,” “related,” “concerning,” “regarding,” “reflect,” and “reflecting” shall broadly mean and include” referring to, relevant to, constituting, depicting, showing, describing, identifying, indicating, summarizing, analyzing, explaining, evaluating, appraising, evidencing, justifying, supporting, contradicting, establishing, repeating, attempting to establish the existence or nonexistence of, or attempting to establish the truth or falsity thereof.

8. “Relied upon” shall broadly mean and include: any and all data or information that was considered, weighed, analyzed, reviewed, or depended upon.
9. “Including” shall mean “including, but not limited to.”
10. “And” and “or” shall be construed both conjunctively and disjunctively and shall mean whichever construction makes the request more inclusive. The singular form of a word shall be construed as also including the plural form of the word and vice-versa.
11. “Communication” or “communications” shall broadly mean and include any oral or written utterance, notation, or statement of any nature whatsoever, including, but not limited to: documents, as the word is defined herein, personal conversations, telephone calls, dialogues, discussions, interviews, consultations, telegrams, facsimiles, cables, electronic communications, agreements, and voice mail messages.
12. Any term not expressly defined herein shall be given its plain and ordinary meaning.

### **INSTRUCTIONS**

1. Unless otherwise indicated, the relevant time period shall mean that period beginning January 1, 2014, and continuing through the present. These Requests apply to documents created, reviewed, modified, annotated, relied upon, or used outside of the relevant period of the extent they refer to or are relevant to events within the relevant period.

2. These Requests shall be considered continuing in nature and, therefore, responses should be modified or supplemented as you obtain further or different information as required by Rule 26(e) of the Federal Rules of Civil Procedure.

3. For each request, please produce all responsive documents that are available to you, including those in the possession of your attorneys or agents of your attorneys, and not merely those documents that are in your personal possession.

4. Subject to separate agreement of the parties, documents should be produced in the format in which they are currently or normally stored.

5. Where an electronic document has been printed to hard copy and is an exact duplicate of the electronic version, only the electronic version need be produced. However, if a printed document contains any notations or markings that are not on the electronically stored document, both versions of the document should be produced.

6. To the extent that you object to the production of any document, or any portion of any document, on the basis of privilege, please provide the following information about each document to which an objection is asserted:

- a. the request to which the responsive material relates;
  - b. the nature of the privilege claimed, *e.g.*, attorney-client, work product, *etc.*;
- and
- c. sufficient information to describe the reason for the claim of privilege, *e.g.*, names of the sender of the document, names of the recipient, date of the document, a brief description of the subject matter of the document.

## **REQUESTS FOR PRODUCTION**

1. All Documents and Communications related to H.B. 2, including its drafting, passage, justifications, implementation, and effects, including Documents and Communications regarding the convening of a special session of the General Assembly to consider H.B. 2.
2. All Documents and Communications reflecting any medical or other basis supporting or otherwise pertaining to H.B. 2's definition of "biological sex."
3. All Documents and Communications related to any policy, practice, or procedure regarding access to or use of Single-Sex Facilities based on sex, however defined, both before and after the passage of H.B. 2.
4. All Documents and Communications reflecting North Carolina's policy, practice, or procedure for designating and changing the sex indicated on a North Carolina birth certificate.
5. All Documents and Communications reflecting North Carolina's policy, practice, or procedure for designating and changing the sex indicated on a North Carolina driver's license or identification card.
6. All Documents reflecting the number and location of gender-neutral and single occupancy restrooms and changing facilities owned or operated by any public agency subject to H.B. 2.
7. All Documents reflecting the number and location of Single-Sex Facilities owned or operated by any public agency subject to H.B. 2.



8. All Documents and Communications reflecting or pertaining to any planned or undertaken enforcement of, implementation of, or compliance with H.B. 2 or of any provision thereof.

9. All Documents and Communications relating to policies or procedures for enforcing state law on the campuses of UNC, including the state and local agencies and police departments tasked with such enforcement.

10. All Documents and Communications regarding H.B. 2, including Communications with members of the General Assembly, their staff, or staff of the General Assembly or any Committee thereof, or members or leadership of the state Republican or Democratic political parties or their staff, and third parties.

11. All Documents and Communications regarding the Charlotte Ordinance, and any prior efforts to add sexual orientation or gender identity to non-discrimination protection in Charlotte ordinances, including Communications with members of the General Assembly, members of the Charlotte City Council, members or leadership of the state Republican or Democratic political parties, and third parties.

12. All Documents and Communications regarding non-discrimination ordinances in North Carolina, including those that have a scope broader than North Carolina state non-discrimination statutes with respect to the characteristics on which discrimination is barred.

13. All Documents and Communications regarding the use of Single-Sex Facilities by Transgender individuals, including any complaints received, both before and after the enactment of H.B. 2.

14. All Documents and Communications concerning Title IX's application to Transgender individuals.

15. All Documents and Communications regarding the treatment of gender dysphoria, including with respect to individuals in the custody of the North Carolina Department of Public Safety.

16. All Documents and Communications regarding the relationship, if any, between Part I of H.B. 2 and safety, privacy, or any other government interest that You contend supports Part I of H.B. 2.

17. All Documents and Communications regarding ways to promote or preserve privacy in Single-Sex Facilities, including the use of privacy partitions.

18. All Documents and Communications related to any accommodations requested or made under Part I of H.B. 2.

19. All Documents and Communications reflecting incidents in North Carolina in which the safety or privacy of individuals in Single-Sex Facilities was or may have been negatively affected (such as indecent exposure or other improper conduct whether criminal or not), including by the presence of Transgender individuals.

20. All Documents and Communications reflecting incidents of non-Transgender individuals in North Carolina utilizing Single-Sex Facilities inconsistent with their gender identity or sex assigned at birth.

21. All Documents and Communications regarding the relationship, if any, between Part II of H.B. 2 and uniformity, economic benefit, or any other government interest that You contend supports Part II of H.B. 2.

22. All Documents and Communications reflecting the effect of H.B. 2 on North Carolina's economy, including any loss of business, jobs, tourism, revenue, or reputation.

23. All Documents and Communications regarding the desirability of uniformity among North Carolina local jurisdictions with respect to non-discrimination laws, including any Communications received from businesses.

24. All Documents and Communications regarding Transgender, lesbian, gay, or bisexual individuals, including the rights of same-sex couples.

25. All Documents and Communications related to any of the Plaintiffs, including the American Civil Liberties Union of North Carolina.

26. All Documents and Communications related to any complaint against You alleging discrimination on the basis of gender identity, transgender status, or gender expression, including with respect to denial of equal access to facilities consistent with one's gender identity.

27. All Documents and Communications related to Executive Order No. 93.

28. All Communications between You and any person whom You intend to call, or may call, as a witness in any litigation regarding H.B. 2.

29. All Documents and Communications referenced in Your responses to interrogatories in any litigation regarding H.B. 2 or relied upon in preparing those responses.

30. All Documents referenced in Your opposition to Plaintiffs' Motion for a Preliminary Injunction in this case.

31. All Documents identified in Your Initial Disclosures in this case.

32. To the extent not produced in response to the foregoing, all Documents and Communications that relate to the statements made in Your Answer to Plaintiffs' First Amended Complaint, including denials and affirmative defenses.

33. To the extent not already produced in response to the foregoing, all Documents and Communications that You or the State of North Carolina produce to any party in any litigation regarding H.B. 2.

\* \* \*

Dated: August 12, 2016

Respectfully submitted,

/s/ Scott B. Wilkens

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egill@aclunc.org  
cstrangio@aclu.org

*Counsel for Plaintiffs*

\* Appearing by special appearance pursuant to L.R. 83.1(d).

## CERTIFICATE OF SERVICE

I, Scott B. Wilkens, hereby certify that on August 12, 2016, I caused a copy of PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT PATRICK MCCRORY to be distributed via electronic mail to all parties of record in case numbers 1:16-cv-00236, 1:16-cv-00425, and 1:16-cv-00845.

/s/ Scott B. Wilkens

Scott B. Wilkens

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

|   |   |                       |
|---|---|-----------------------|
| UNITED STATES OF AMERICA                | ) |                       |
|   | ) |                       |
| Plaintiff,                              | ) |                       |
|   | ) |                       |
| v.                                      | ) | 1:16-CV-00425-TDS-JEP |
|   | ) |                       |
| STATE OF NORTH CAROLINA;                | ) |                       |
| PATRICK MCCRORY, in his official        | ) |                       |
| capacity as Governor of North Carolina; | ) |                       |
| NORTH CAROLINA DEPARTMENT               | ) |                       |
| OF PUBLIC SAFETY; UNIVERSITY            | ) |                       |
| OF NORTH CAROLINA; and BOARD            | ) |                       |
| OF GOVERNORS OF THE                     | ) |                       |
| UNIVERSITY OF                           | ) |                       |
| NORTH CAROLINA,                         | ) |                       |
|   | ) |                       |
| Defendants.                             | ) |                       |

**UNITED STATES' SECOND SET OF REQUESTS FOR PRODUCTION TO  
DEFENDANTS STATE OF NORTH CAROLINA, ET AL.**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff, the United States, requests that Defendants State of North Carolina, Governor Patrick McCrory, North Carolina Department of Public Safety (“DPS”), and the Intervenor North Carolina State Legislators produce the following documents within the timeframe set forth in this Court’s Order dated July 25, 2016, ECF No. 108, by sending them **via Federal Express** to the following address:

Lori Kisch  
Employment Litigation Section  
Civil Rights Division  
United States Department of Justice

601 D St., NW, Room 4605  
Washington, D.C. 20579

The Instructions and Definitions issued in the United's States August 12, 2016, First Requests for Production are hereby incorporated. Similarly, and for ease of reference, the United States continues the numbering of requests from the previously-issued requests.

### **REQUESTS FOR PRODUCTION**

27. All documents related to the use (including a description of which programs use the funds, a description of individuals who may participate in those programs, and a description of the bathroom and changing facilities available to those individuals consistent with the United States Requests for Production 20-21) of the grant funds awarded to DPS under the Violence Against Women Reauthorization Act of 2013 ("VAWA"), 42 U.S.C. § 13925(b)(13).

28. All documents relating to whether DPS has implemented expanded "Methods of Administration" as defined by the U.S. Department of Justice Office of Justice Programs on February 7, 2014, including but not limited to documents demonstrating whether DPS is implementing a policy for addressing discrimination complaints, notifying subrecipients regarding applicable VAWA nondiscrimination requirements, monitoring for compliance with VAWA nondiscrimination requirements, and training subrecipients on VAWA nondiscrimination requirements as they relate to nondiscrimination on the basis of sex and/or gender identity.



29. All documents obtained from, or reflecting communication with, third parties, including witnesses or potential witnesses, whether by subpoena or otherwise, in connection with this case.

30. All documents, excluding citations to legal authority, referenced in your filings in this case.

31. All documents identified in your initial disclosures.

32. All documents produced by you in Case No. 1:16-cv-236-TDS-JEP.

Respectfully submitted, this 27th day of August, 2016.

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*Counsel for the Plaintiff United States*

**CERTIFICATE OF SERVICE**

I certify that on August 27, 2016, I served a copy of the United States' Request for

Production by email on the following counsel:

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/s/ Candyce Phoenix

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*Counsel for the Plaintiff United States*

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

JOAQUÍN CARCAÑO, *et al.*,

*Plaintiffs,*

v.

PATRICK MCCRORY, *et al.*,

*Defendants,*

and

PHIL BERGER, *et al.*,

*Intervenor-Defendants.*

No. 1:16-cv-00236-TDS-JEP

**PLAINTIFFS' SECOND SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO  
INTERVENOR-DEFENDANTS PHILLIP BERGER AND TIM MOORE**

Plaintiffs request that Defendant produce the following documents for inspection and copying under Fed. R. Civ. P. 34 to the American Civil Liberties Union for North Carolina Legal Foundation, P.O. Box 28004, Raleigh, NC 27611, within 14 days of the date of service of this Request for Production.

**DEFINITIONS**

1. “You” or “Your” means Senator Phillip Berger and Representative Tim Moore, together with any and all employees of the North Carolina General Assembly.

2. “H.B. 2” refers to legislation passed by the North Carolina General Assembly on March 23, 2016 and signed into law by Governor McCrory the same day, entitled “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.”

3. “Charlotte Ordinance” refers to Charlotte Ordinance No. 7056, Ordinance Book 59, Page 743 (Feb. 22, 2016), [https://www2.municode.com/library/nc/charlotte/codes/code\\_of\\_ordinances](https://www2.municode.com/library/nc/charlotte/codes/code_of_ordinances).

4. “Transgender” refers to a person whose gender identity does not align with the sex the person was assigned at birth. As used herein, transgender includes, but is not limited to the following: “transsexual,” “transgendered,” “gender dysphoric,” “individuals with gender dysphoria,” “gender identity disorder,” “individuals with gender identity disorder.”

5. “Single-Sex Facilities” refers to H.B. 2’s definition of “[m]ultiple occupancy bathroom or changing facility,” including single-sex multiple occupancy restrooms, locker rooms, and changing facilities.

6. As used herein, the term “document” or “documents” shall be given the broadest construction permitted under the Rule, and shall include without limitation:

- a. all written, typed, printed, reproduced, graphic, filmed and recorded material;

b. all recordings, tapes, disks, drums, cassettes, electronic correspondence, computer files, or any other information that exists in electronic or magnetic form, including electronic mail messages, instant messages, text messages, calendar entries, voice mails, and social media messages, updates or posts (including, but not limited to, messages, updates, or posts on Facebook or Twitter or similar services), however stored or recorded (including, for electronic documents, those in active and inactive drive space, and for example, deleted files in the drive slack space and documents stored in recycle bins) and including all metadata;

c. all reports, data, information, articles, publications, agency findings, photographs, pictures, graphs, video tapes, maps, plans, calendars, or other presentations of anything concerning, describing, referring, or relating, directly or indirectly, in whole or in part, to the subject matter of the discovery request at issue;

d. originals and all non-identical copies different from the original by reasons or marginal notations and/or other markings; and

e. all drafts, summaries, attachments, and notes that are typed, handwritten, or otherwise made or prepared, whether used or not used.

7. “Pertaining to,” “relating to,” “related,” “concerning,” “regarding,” “reflect,” and “reflecting” shall broadly mean and include” referring to, relevant to, constituting, depicting, showing, describing, identifying, indicating, summarizing,

analyzing, explaining, evaluating, appraising, evidencing, justifying, supporting, contradicting, establishing, repeating, attempting to establish the existence or nonexistence of, or attempting to establish the truth or falsity thereof.

8. “Relied upon” shall broadly mean and include: any and all data or information that was considered, weighed, analyzed, reviewed, or depended upon.

9. “Including” shall mean “including, but not limited to.”

10. “And” and “or” shall be construed both conjunctively and disjunctively and shall mean whichever construction makes the request more inclusive. The singular form of a word shall be construed as also including the plural form of the word and vice-versa.

11. “Communication” or “communications” shall broadly mean and include any oral or written utterance, notation, or statement of any nature whatsoever, including, but not limited to: documents, as the word is defined herein, personal conversations, telephone calls, dialogues, discussions, interviews, consultations, telegrams, facsimiles, cables, electronic communications, agreements, and voice mail messages.

12. Any term not expressly defined herein shall be given its plain and ordinary meaning.

### **INSTRUCTIONS**

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relevant period of the extent they refer to or are relevant to events within the relevant period.

2. These Requests shall be considered continuing in nature and, therefore, responses should be modified or supplemented as you obtain further or different information as required by Rule 26(e) of the Federal Rules of Civil Procedure.

3. For each request, please produce all responsive documents that are available to you, including those in the possession of your attorneys or agents of your attorneys, and not merely those documents that are in your personal possession.

4. Subject to separate agreement of the parties, documents should be produced in the format in which they are currently or normally stored.

5. Where an electronic document has been printed to hard copy and is an exact duplicate of the electronic version, only the electronic version need be produced.

However, if a printed document contains any notations or markings that are not on the electronically stored document, both versions of the document should be produced.

6. To the extent that you object to the production of any document, or any portion of any document, on the basis of privilege, please provide the following information about each document to which an objection is asserted:

- a. the request to which the responsive material relates;
  - b. the nature of the privilege claimed, *e.g.*, attorney-client, work product, *etc.*;
- and

- c. sufficient information to describe the reason for the claim of privilege, *e.g.*, names of the sender of the document, names of the recipient, date of the document, a brief description of the subject matter of the document.

### **REQUESTS FOR PRODUCTION**

1. All Documents You intend to use or reserve the right to use as an exhibit at trial.
2. All Documents reviewed or relied upon, in relation to the subject matter of this lawsuit, by any non-party fact witnesses You intend to or reserve the right to call at trial.
3. All Documents reviewed or relied upon by any witness you intend to call as an expert witness in this Lawsuit, including any articles, texts, treatises, rules, policies, and regulations.

\* \* \*

Dated: August 26, 2016

Respectfully submitted,

/s/ Scott B. Wilkens

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*Counsel for Plaintiffs*

\* Appearing by special appearance pursuant to L.R. 83.1(d).

**CERTIFICATE OF SERVICE**

I, Scott B. Wilkens, hereby certify that on August 26, 2016, I caused a copy of PLAINTIFFS' SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO INTERVENOR-DEFENDANTS PHILLIP BERGER AND TIM MOORE to be distributed via electronic mail to all parties of record in case numbers 1:16-cv-00236, 1:16-cv-00425, and 1:16-cv-00845.

/s/ Scott B. Wilkens

Scott B. Wilkens

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

JOAQUÍN CARCAÑO, *et al.*,

*Plaintiffs,*

v.

PATRICK MCCRORY, *et al.*,

*Defendants,*

and

PHIL BERGER, *et al.*,

*Intervenor-Defendants.*

No. 1:16-cv-00236-TDS-JEP

**PLAINTIFFS' SECOND SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS TO DEFENDANT PATRICK MCCRORY**

Plaintiffs request that Defendant produce the following documents for inspection and copying under Fed. R. Civ. P. 34 to the American Civil Liberties Union for North Carolina Legal Foundation, P.O. Box 28004, Raleigh, NC 27611, within 14 days of the date of service of this Request for Production.

**DEFINITIONS**

1. “You” or “Your” means Governor Pat McCrory and any part of the Executive Branch of North Carolina, including its officers and employees.
2. “H.B. 2” refers to legislation passed by the North Carolina General Assembly on March 23, 2016 and signed into law by Governor McCrory the same day,

entitled “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.”

3. “Charlotte Ordinance” refers to Charlotte Ordinance No. 7056, Ordinance Book 59, Page 743 (Feb. 22, 2016), [https://www2.municode.com/library/nc/charlotte/codes/code\\_of\\_ordinances](https://www2.municode.com/library/nc/charlotte/codes/code_of_ordinances).

4. “Transgender” refers to a person whose gender identity does not align with the sex the person was assigned at birth. As used herein, transgender includes, but is not limited to the following: “transsexual,” “transgendered,” “gender dysphoric,” “individuals with gender dysphoria,” “gender identity disorder,” “individuals with gender identity disorder.”

5. “Single-Sex Facilities” refers to H.B. 2’s definition of “[m]ultiple occupancy bathroom or changing facility,” including single-sex multiple occupancy restrooms, locker rooms, and changing facilities.

6. As used herein, the term “document” or “documents” shall be given the broadest construction permitted under the Rule, and shall include without limitation:

- a. all written, typed, printed, reproduced, graphic, filmed and recorded material;
- b. all recordings, tapes, disks, drums, cassettes, electronic correspondence, computer files, or any other information that exists in electronic or magnetic form, including electronic mail messages, instant

messages, text messages, calendar entries, voice mails, and social media messages, updates or posts (including, but not limited to, messages, updates, or posts on Facebook or Twitter or similar services), however stored or recorded (including, for electronic documents, those in active and inactive drive space, and for example, deleted files in the drive slack space and documents stored in recycle bins) and including all metadata;

c. all reports, data, information, articles, publications, agency findings, photographs, pictures, graphs, video tapes, maps, plans, calendars, or other presentations of anything concerning, describing, referring, or relating, directly or indirectly, in whole or in part, to the subject matter of the discovery request at issue;

d. originals and all non-identical copies different from the original by reasons or marginal notations and/or other markings; and

e. all drafts, summaries, attachments, and notes that are typed, handwritten, or otherwise made or prepared, whether used or not used.

7. “Pertaining to,” “relating to,” “related,” “concerning,” “regarding,” “reflect,” and “reflecting” shall broadly mean and include” referring to, relevant to, constituting, depicting, showing, describing, identifying, indicating, summarizing, analyzing, explaining, evaluating, appraising, evidencing, justifying, supporting, contradicting, establishing, repeating, attempting to establish the existence or nonexistence of, or attempting to establish the truth or falsity thereof.

8. “Relied upon” shall broadly mean and include: any and all data or information that was considered, weighed, analyzed, reviewed, or depended upon.
9. “Including” shall mean “including, but not limited to.”
10. “And” and “or” shall be construed both conjunctively and disjunctively and shall mean whichever construction makes the request more inclusive. The singular form of a word shall be construed as also including the plural form of the word and vice-versa.
11. “Communication” or “communications” shall broadly mean and include any oral or written utterance, notation, or statement of any nature whatsoever, including, but not limited to: documents, as the word is defined herein, personal conversations, telephone calls, dialogues, discussions, interviews, consultations, telegrams, facsimiles, cables, electronic communications, agreements, and voice mail messages.
12. Any term not expressly defined herein shall be given its plain and ordinary meaning.

### **INSTRUCTIONS**

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2. These Requests shall be considered continuing in nature and, therefore, responses should be modified or supplemented as you obtain further or different information as required by Rule 26(e) of the Federal Rules of Civil Procedure.

3. For each request, please produce all responsive documents that are available to you, including those in the possession of your attorneys or agents of your attorneys, and not merely those documents that are in your personal possession.

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- a. the request to which the responsive material relates;
- b. the nature of the privilege claimed, *e.g.*, attorney-client, work product, *etc.*;  
and
- c. sufficient information to describe the reason for the claim of privilege, *e.g.*, names of the sender of the document, names of the recipient, date of the document, a brief description of the subject matter of the document.

## REQUESTS FOR PRODUCTION

1. All Documents You intend to use or reserve the right to introduce into evidence at a hearing, deposition, or trial.
2. All Documents reviewed or relied upon, in relation to the subject matter of this lawsuit, by any non-party fact witnesses You intend to or reserve the right to call at trial.
3. All Documents reviewed or relied upon by any witness You intend to call as an expert witness in this Lawsuit, including any articles, texts, treatises, rules, policies, and regulations.
4. All transcripts or recordings of testimony in a court, administrative, or legal proceedings by any witness You intend to call or reserve the right to call, including without limitation expert witnesses.
5. All Documents relating to the policy, practice, or procedure of copying, making available for inspection, or otherwise disclosing the information on a birth certificate issued by North Carolina, including by the North Carolina Department of Health and Human Services.

\* \* \*

Dated: August 26, 2016

Respectfully submitted,

/s/ Scott B. Wilkens

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lcooper@aclu.org

*Counsel for Plaintiffs*

\* Appearing by special appearance pursuant to L.R. 83.1(d).

**CERTIFICATE OF SERVICE**

I, Scott B. Wilkens, hereby certify that on August 26, 2016, I caused a copy of PLAINTIFFS' SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT PATRICK MCCRORY to be distributed via electronic mail to all parties of record in case numbers 1:16-cv-00236, 1:16-cv-00425, and 1:16-cv-00845.

/s/ Scott B. Wilkens  
Scott B. Wilkens

Friday, September 23, 2016 at 10:05:29 AM Central Daylight Time

**Subject:** Re: Legislative privilege meet and confer

**Date:** Friday, September 23, 2016 at 9:59:21 AM Central Daylight Time

**From:** Wilkens, Scott B.

**To:** Bowers, Karl

**CC:** Duncan, Kyle, Lori Kisch, Gore, John, Alyssa Lareau, Aria Vaughan, Benjamin Berwick, Stephens, Bob, Stewart, William, Candyce Phoenix, Christopher Brook, Pratt, Carolyn, Dalton, Caleb, chris@osbornconflictresolution.com, Corey Stoughton, Chase Strangio, Whitney Pellegrino, cynthia.robertson@pillsburylaw.com, David Cortman, Dewart, Deborah, Doug Wardlow, Dwayne Bensing, Elizabeth Gill, Nestler, Emily B. (CIV), Nager, Glen, Schaerr, Gene, The Law Firm of Curt C. Hartman, Lee, Jason (CIV), Campbell, James, Jon Davidson, James Esseks, La Rue, Joseph, Burnham, James, Jonathan Newton, Jeremy Tedesco, Connelley, Kenneth, Kerri Elliott, Kyle Palazzolo, Waggoner, Kristen, leahmcdowell@gmail.com, Platzer, Luke C., mark@sigmonlawfirm.com, Sharp, Matthew, nathaniel.smith@pillsburylaw.com, Nathaniel Bruno, Francisco, Noel, Peter Renn, Smith, Paul M., Robert Potter, Driscoll, Robert, Ripley Rand, Sean r. Keveney, Paul Stancil, Tara Borelli, Brooks, Tyler, Ziko, Thomas, Torey Cummings, Tim Shail, Carney, Chris (CRT)

All,

You asked us to let you know by noon whether we will accept the potential agreement on legislative privilege issues we have been discussing. We do not accept, for the reasons I expressed on yesterday's meet and confer.

In short, we do not believe that Defendants are offering to produce any materials that we would -- at a minimum -- be entitled to through litigation. And we cannot accept Defendants' request that we agree to forego the depositions and trial testimony of the legislative-intervenors, the governor, and their staff.

We appreciate the efforts of all parties to reach an agreement and we remain open to continuing to meet and confer next week once Defendants' protective order motion is filed.

Thanks much,  
Scott

On Sep 22, 2016, at 3:55 PM, Butch Bowers  
<[Butch@ButchBowers.com](mailto:Butch@ButchBowers.com)<<mailto:Butch@ButchBowers.com>>> wrote:

Scott – of course, no problem at all. Like you, I want today's discussion to be as productive as possible. Please see our responses below:

1. Governor McCrory and his staff were covered by the legislative privilege at all times that HB2 was initially discussed or considered, through its introduction and passage, upon signing the bill into law, and at any time thereafter regarding communications about the legislative process for HB2.
2. See response to #1. At this point I do not know the exact date on which HB2 was first discussed and considered within the context of the legislative privilege, but I would suggest that a good starting point might be Feb 22, 2016, the date on which the Charlotte City Council adopted Ordinance 7056.
3. See response to #1.

Thanks, and we'll talk to you in a few minutes. Best regards,

Butch

From: Wilkens, Scott B. [<mailto:SWilkens@jenner.com>]

Sent: Thursday, September 22, 2016 1:41 PM

To: Butch Bowers <[Butch@ButchBowers.com](mailto:Butch@ButchBowers.com)<<mailto:Butch@ButchBowers.com>>>; Duncan, Kyle <[KDuncan@Schaerr-Duncan.com](mailto:KDuncan@Schaerr-Duncan.com)<<mailto:KDuncan@Schaerr-Duncan.com>>>

Cc: Lori Kisch <[lori.kisch@usdoj.gov](mailto:lori.kisch@usdoj.gov)<<mailto:lori.kisch@usdoj.gov>>>; Gore, John <[jmgore@jonesday.com](mailto:jmgore@jonesday.com)<<mailto:jmgore@jonesday.com>>>; Alyssa Lareau <[alyssa.lareau@usdoj.gov](mailto:alyssa.lareau@usdoj.gov)<<mailto:alyssa.lareau@usdoj.gov>>>; Aria Vaughan <[aria.vaughan@usdoj.gov](mailto:aria.vaughan@usdoj.gov)<<mailto:aria.vaughan@usdoj.gov>>>; Benjamin Berwick <[Benjamin.L.Berwick@usdoj.gov](mailto:Benjamin.L.Berwick@usdoj.gov)<<mailto:Benjamin.L.Berwick@usdoj.gov>>>; Stephens, Bob <[bob.stephens@nc.gov](mailto:bob.stephens@nc.gov)<<mailto:bob.stephens@nc.gov>>>; Stewart, William <[bstewart@mgsattorneys.com](mailto:bstewart@mgsattorneys.com)<<mailto:bstewart@mgsattorneys.com>>>; Candyce Phoenix <[candyce.phoenix@usdoj.gov](mailto:candyce.phoenix@usdoj.gov)<<mailto:candyce.phoenix@usdoj.gov>>>; Christopher Brook <[cbrook@acluofnc.org](mailto:cbrook@acluofnc.org)<<mailto:cbrook@acluofnc.org>>>; Pratt, Carolyn <[ccpratt@northcarolina.edu](mailto:ccpratt@northcarolina.edu)<<mailto:ccpratt@northcarolina.edu>>>; Dalton, Caleb <[cdalton@ADFlegal.org](mailto:cdalton@ADFlegal.org)<<mailto:cdalton@ADFlegal.org>>>; [chris@osbornconflictresolution.com](mailto:chris@osbornconflictresolution.com)<<mailto:chris@osbornconflictresolution.com>>>; Corey Stoughton <[corey.stoughton@usdoj.gov](mailto:corey.stoughton@usdoj.gov)<<mailto:corey.stoughton@usdoj.gov>>>; Chase Strangio <[cstrangio@aclu.org](mailto:cstrangio@aclu.org)<<mailto:cstrangio@aclu.org>>>; Whitney Pellegrino <[Whitney.Pellegrino@usdoj.gov](mailto:Whitney.Pellegrino@usdoj.gov)<<mailto:Whitney.Pellegrino@usdoj.gov>>>; [cynthia.robertson@pillsburylaw.com](mailto:cynthia.robertson@pillsburylaw.com)<<mailto:cynthia.robertson@pillsburylaw.com>>>; David Cortman <[dcortman@adflegal.org](mailto:dcortman@adflegal.org)<<mailto:dcortman@adflegal.org>>>; Dewart, Deborah <[debcpalaw@earthlink.net](mailto:debcpalaw@earthlink.net)<<mailto:debcpalaw@earthlink.net>>>; Doug Wardlow <[dwardlow@adflegal.org](mailto:dwardlow@adflegal.org)<<mailto:dwardlow@adflegal.org>>>; Dwayne Bensing <[Dwayne.Bensing@usdoj.gov](mailto:Dwayne.Bensing@usdoj.gov)<<mailto:Dwayne.Bensing@usdoj.gov>>>; Elizabeth Gill <[egill@aclunc.org](mailto:egill@aclunc.org)<<mailto:egill@aclunc.org>>>; Nestler, Emily B. (CIV) <[Emily.B.Nestler@usdoj.gov](mailto:Emily.B.Nestler@usdoj.gov)<<mailto:Emily.B.Nestler@usdoj.gov>>>; Nager, Glen <[gdn\\_ager@jonesday.com](mailto:gdn_ager@jonesday.com)<[mailto:gdn\\_ager@jonesday.com](mailto:gdn_ager@jonesday.com)>>; Schaerr, Gene <[GSchaerr@Schaerr-Duncan.com](mailto:GSchaerr@Schaerr-Duncan.com)<<mailto:GSchaerr@Schaerr-Duncan.com>>>; The Law Firm of Curt C. Hartman <[hartmanlawfirm@fuse.net](mailto:hartmanlawfirm@fuse.net)<<mailto:hartmanlawfirm@fuse.net>>>; Lee, Jason (CIV) <[Jason.Lee3@usdoj.gov](mailto:Jason.Lee3@usdoj.gov)<<mailto:Jason.Lee3@usdoj.gov>>>; Campbell, James <[jcampbell@ADFlegal.org](mailto:jcampbell@ADFlegal.org)<<mailto:jcampbell@ADFlegal.org>>>; Jon Davidson <[jdavidson@lambdalegal.org](mailto:jdavidson@lambdalegal.org)<<mailto:jdavidson@lambdalegal.org>>>; James Esseks <[jesseks@aclu.org](mailto:jesseks@aclu.org)<<mailto:jesseks@aclu.org>>>; La Rue, Joseph <[jl\\_rue@adflegal.org](mailto:jl_rue@adflegal.org)<[mailto:jl\\_rue@adflegal.org](mailto:jl_rue@adflegal.org)>>; Burnham, James <[jmburnham@jonesday.com](mailto:jmburnham@jonesday.com)<<mailto:jmburnham@jonesday.com>>>; Jonathan Newton <[jonathan.newton@usdoj.gov](mailto:jonathan.newton@usdoj.gov)<<mailto:jonathan.newton@usdoj.gov>>>; Jeremy Tedesco <[jtedesco@adflegal.org](mailto:jtedesco@adflegal.org)<<mailto:jtedesco@adflegal.org>>>; Connelley, Kenneth <[kconnelly@ADFlegal.org](mailto:kconnelly@ADFlegal.org)<<mailto:kconnelly@ADFlegal.org>>>; Kerri Elliott <[kelliott@mgsattorneys.com](mailto:kelliott@mgsattorneys.com)<<mailto:kelliott@mgsattorneys.com>>>; Kyle Palazzolo <[kpalazzolo@lambdalegal.org](mailto:kpalazzolo@lambdalegal.org)<<mailto:kpalazzolo@lambdalegal.org>>>; Waggoner, Kristen <[kwaggoner@adflegal.org](mailto:kwaggoner@adflegal.org)<<mailto:kwaggoner@adflegal.org>>>; [leahdmcowell@gmail.com](mailto:leahdmcowell@gmail.com)<<mailto:leahdmcowell@gmail.com>>>; Platzer, Luke C. <[LPlatzer@jenner.com](mailto:LPlatzer@jenner.com)<<mailto:LPlatzer@jenner.com>>>; [mark@sigmonlawfirm.com](mailto:mark@sigmonlawfirm.com)<<mailto:mark@sigmonlawfirm.com>>>; Sharp, Matthew <[msharp@adflegal.org](mailto:msharp@adflegal.org)<<mailto:msharp@adflegal.org>>>; [nathaniel.smith@pillsburylaw.com](mailto:nathaniel.smith@pillsburylaw.com)<<mailto:nathaniel.smith@pillsburylaw.com>>>; Nathaniel Bruno <[nbruno@adflegal.org](mailto:nbruno@adflegal.org)<<mailto:nbruno@adflegal.org>>>; Francisco, Noel <[njfrancisco@jonesday.com](mailto:njfrancisco@jonesday.com)<<mailto:njfrancisco@jonesday.com>>>; Peter Renn <[prenn@lambdalegal.org](mailto:prenn@lambdalegal.org)<<mailto:prenn@lambdalegal.org>>>; Smith, Paul M.

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<[Chris.Carney2@usdoj.gov](mailto:Chris.Carney2@usdoj.gov)<<mailto:Chris.Carney2@usdoj.gov>>>  
Subject: RE: Legislative privilege meet and confer

Butch,

We look forward to discussing the Governor's legislative privilege assertions on today's call. It would be helpful if you could respond to the questions I sent by email earlier this week seeking clarity regarding the Governor's legislative privilege claims. See text below.

Thanks much,  
Scott

From the Carcano plaintiffs' perspective, the law is quite clear that the Governor may claim legislative privilege only when he is acting in a legislative capacity, such as signing a bill into law or vetoing a bill. In light of this, we have the following questions, the answers to which should help sharpen the issues to be addressed in the next meet and confer.

- 1 When was Governor McCrory acting in a legislative capacity with respect to H.B. 2?
- 2 During what time period was he acting in a legislative capacity as to H.B. 2? For example, the hours on March 23, 2016 between the legislature's passage of the bill and the Governor's signing the bill into law? If some other time periods, what periods and why?
- 3 Other than signing H.B. 2 into law, what if any actions or types of actions did the Governor take in a legislative capacity with respect to H.B. 2?

From: Butch Bowers [<mailto:Butch@ButchBowers.com>]  
Sent: Wednesday, September 21, 2016 3:04 PM  
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Subject: Re: Legislative privilege meet and confer

Lori and Scott - on behalf of the Governor and other state defendants, we are also still considering our proposal and look forward to exploring it further with you tomorrow. I also want to confirm that any compromise we reach must include an agreement from both the US and Carcano plaintiffs that no one from the Governor's office, including the Governor, will be deposed or called as a witness at trial. Thanks,



Butch

On Sep 21, 2016, at 12:18 PM, Kyle Duncan <[kduncan@schaerr-duncan.com](mailto:kduncan@schaerr-duncan.com)<<mailto:kduncan@schaerr-duncan.com>>> wrote:  
Scott and Lori,

We had promised to follow up by around noon today concerning whether a meet and confer on privilege issues would be productive at COB today, or whether we should wait until tomorrow afternoon. The short answer is that I think it would be better to wait until tomorrow afternoon, because of some technical issues we are having with document review. I believe those have now been largely resolved, which will allow us to more quickly assess the universe of documents included in the various categories we have been discussing and have more concrete information for you by tomorrow. Can we propose a 3pm meet and confer for tomorrow?

In the meantime, to keep everyone on the same page, and to give the plaintiffs something to consider before tomorrow's call, here's where the intervenor-defendants stand at present:

1. With respect to category 3 ("third parties"), we are still inclined to compromise by producing communications between our clients and third parties, such as constituents, lobbyists, and public interest groups. We are still considering your question about whether any other third parties (such as U.S. Senators or Representatives or state party officials) should be excluded from this category: at this point, we are not inclined to argue about this, because we are simply not finding any such communications. With respect to communications with "experts" or "consultants," however, we would take the position that such communications should be subject to the legislative privilege (as suggested in Judge Schroeder's Feb 4, 2015 voter ID order at n. 4); however, we are not finding any such communications, and so if that turns out to be a null set, then there will be nothing to argue about there, either.
2. With respect to category 4 ("state agencies"), subject to our ongoing review, we are also inclined to compromise by producing communications between our clients and state agencies.
3. With respect to category 5 ("purely factual materials"), we are still considering whether, in light of the case law you rely on, such materials are discoverable in this case (to the extent they exist at all). Before our meet and confer tomorrow, we would ask you to consider Judge Schroeder's Feb. 4, 2015 order in the voter ID litigation (pp. 17-19), in which he relies on precedent standing for the proposition that legislative privilege encompasses "objective facts" relied on by legislators in considering a proposed measure. See Order at 19 (relying on *Kay v. City of Rancho Palos Verdes*, 2003 U.S. Dist. LEXIS 27311, at \*33-34 (C.D. Cal. Oct. 9, 2003)). We will continue to consider the issue as well and we can address it tomorrow.
4. With respect to the time period covered by categories 3 and 4, we would agree to expand the time period from March 23, 2016 to April 23, 2016, and we have expanded our ongoing review accordingly. As predicted, this expanded time frame brings in a large volume of material and will increase the burdens on our clients of assessing matters such as attorney-client and work-product privilege, as well as legislative privilege.
  - a. Lori had asked whether we would be amenable to agreeing not to rely on documents outside this time period to support HB2. We would be willing to agree to that, with the understanding that such an agreement would obviously not pertain to documents already in the public domain, since all parties would have equal access to such documents. We didn't think you meant the agreement to cover such documents, but we wanted to be sure.
5. As I said, given technical difficulties with the review process, we can't provide more concrete

conclusions on these matters today, but hopefully will by tomorrow afternoon.

Finally, I wanted to emphasize the matters that are important to our clients' agreeing to a deal:

1. While we are making our best efforts to reach a compromise, we realize that the parties may fail to agree on everything by Friday. In that event, we will file a motion for protective order, as required by the Rule 26f report. However, we are willing to agree to allow negotiations to continue, by mutual agreement of the parties, so that if the parties reach complete agreement by, say, next week (or before your response to the motion is due), we can inform the Court.
2. For intervenor-defendants, any compromise is contingent on the following: (a) plaintiffs agree not to press any argument that the intervenor-defendants have "waived" legislative privilege by intervening in these cases to defend HB2 (or by anything they have since done or stated in the litigation following their intervention); (b) plaintiffs agree not to depose the intervenor-defendants or call them as witnesses at trial; (c) the United States joins in this agreement; (d) intervenor-defendants are not required to produce a privilege log for any internal legislative communications, including a log of any "objective facts" relied on by them in considering HB2 (as outlined in Judge Schroeder's Feb 4, 2015 voter ID order, at 17-19); we would also ask that this agreement not to require a privilege log would also extend to legislatively privileged communications falling within the additional period from March 23 to April 23, 2016.
3. Finally, as a general matter, the intervenor-defendants note that any agreement to produce materials is merely a compromise in the specific context of this litigation, and not a concession by them that the materials are not subject to legislative privilege. They also note that this compromise does not set a precedent for the existence of legislative privilege as to any other legislator, whether as to the production of documents or as to deposition.

We look forward to continuing this discussion tomorrow. Please let us know if 3pm works for a call.

Regards,  
Kyle

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On Sep 19, 2016, at 1:49 PM, Kyle Duncan <[kduncan@schaerr-duncan.com](mailto:kduncan@schaerr-duncan.com)<<mailto:kduncan@schaerr-duncan.com>>> wrote:

Thank you, Scott.

I should mention that our preliminary response below is, of course, contingent on what we discussed on the Thursday call—namely, that your clients would (1) agree not to press any argument that my clients waived legislative privilege by intervening as agents of the state to defend HB2; and (2)

agree not to depose my clients or call them as witnesses at trial.

In addition, we will want to discuss on the call the United States' position on these matters. Obviously, it is critical to us that the United States join in any agreement; an agreement with only one set of plaintiffs on these common issues would be of no value to my clients.

Thanks again for your consideration of these matters.

Kyle

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On Sep 19, 2016, at 1:29 PM, Wilkens, Scott B.  
<[SWilkens@jenner.com](mailto:SWilkens@jenner.com)<<mailto:SWilkens@jenner.com>>> wrote:

Kyle,

Thank you for the email. We look forward to speaking at 2. Here is dial in information:

Dial in: 1-877-211-3621  
Passcode: 245-055-5672.

Thanks,  
Scott

From: Kyle Duncan [<mailto:kduncan@schaerr-duncan.com>]  
Sent: Monday, September 19, 2016 11:34 AM  
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Subject: Re: Legislative privilege meet and confer

Scott,

In advance of our meet and confer on legislative privilege this afternoon, I wanted to send a response to the citations you sent last week, and in addition a preliminary response on behalf of the intervenor-defendants regarding the larger issue of a compromise on these issues.

First, with respect to the citations you sent regarding category 5 materials, we have carefully considered them, but they do not change our clients' position on legislative privilege. Many of those cases are voting and redistricting cases, which we have already explained implicate unique aspect of legislative self-dealing and entrenchment not implicated in these cases. Apart from redistricting cases, the handful of cases that do apply a balancing test appear to involve local challenges to the actions of relatively small governing boards and committees, and not discovery directed to state legislators over their personal motives for voting on a particular piece of legislation.

Indeed one of the cases you cite, *Bethune-Hill v. Virginia Board of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015), supports our view on this matter. It explains that legislative privilege is "the default common-law presumption" that protects against judicial inquiry into the motive of legislators except in "extraordinary circumstances." Legislative redistricting cases fall within this narrow category of extraordinary circumstances because of "the very real threat of legislative self-entrenchment." Thus, the legislative privilege "may become qualified based on the nature of the claim at issue." See *id.*, 114 F. Supp. at 336-37 (emphasis added). A similar rationale applies in criminal or fraud cases, because of the nature of self-dealing. E.g., *United States v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185 (1980).

We continue to believe that the general rule of legislative privilege—which applies with full force in these cases—protects these kinds of materials from disclosure. See, e.g., *Dyas v. City of Fairhope*, No. 08-0232-WS-N, 2009 U.S. Dist. LEXIS 92001, at \*30-31 (S.D. Ala. Sep. 24, 2009) ("Requiring testimony about communications that reflect objective facts related to legislation subjects legislators to the same burden and inconvenience as requiring them to testify about subjective motivations .... Creating an 'objective facts' exception to the legislative process privilege thus undermines its central purpose.") (citing *MLC Automotive, LLC v. Town of Southern Pines*, 2007 U.S. Dist. LEXIS 2841, 2007 WL 128945 at \*5-6 (M.D.N.C. 2007) (precluding inquiry into related non-legislative matters preceding the challenged legislative decision because otherwise "the testimonial privilege would effectively be eviscerated"); *Orange v. County of Suffolk*, 855 F. Supp. 620, 625 (E.D.N.Y. 1994) ("This Court notes that Legislator Binder's communicative activities, including his acquisition of information for the purpose of his legislative activities, fall within his legislative privilege.")).

Second, as we indicated on Thursday, however, we remain open to some kind of compromise on producing documents from certain categories you have identified—not because we believe such documents are outside legislative privilege, but in order to seek some reasonable compromise to avoid protracted litigation over the scope of the privilege.

To that end, we have discussed the issue with our clients over the weekend and are currently engaged in a review of documents already collected with an eye toward some possible compromise. Here is where we stand now:

1. With respect to communications between our clients and non-governmental third parties such as constituents, lobbyists, and public interest groups (which are some of the groups described in your category 3)—and subject to the ongoing review of such communications, which should be completed by Wednesday—we would be willing to produce such communications. Although we do not think the flexible approach to legislative privilege applied in the voter ID cases applies to these cases, if such a flexible approach were applied, we think it possible that this category of communications would be found subject to production (although we certainly reserve the right to argue to the contrary, in the event this issue is briefed to the court). Consequently, and only as a

compromise, we would be willing to produce those documents.

With respect to this category, we have not yet discussed any time frame for these communications. We believe that a reasonable time frame would be beginning on December 1, 2015 (well before passage of the Charlotte ordinance in February 2016) and extending to the date of the passage of HB2 on March 23, 2016.

2. With respect to communications between our clients and state agencies (your category 4), we are also engaged in ongoing review of such communications, if any exist, with an eye toward whether there are any subject to legislative privilege. As we explained on Thursday, courts take a functional approach to legislative privilege and it is certainly possible that some communications with state agencies regarding HB2 are subject to the privilege. However, with the caveat that our review of these communications, if any, is ongoing (and should also be completed by Wednesday), we will let you know whether our clients are willing to produce all communications with state agencies concerning HB2. If we agree to do so, we believe that would represent a significant concession on our clients' part, which again reflects only a desire to avoid protracted and time consuming litigation on the matter and does not reflect any waiver of legislative privilege.

3. With respect to "purely factual" materials available to our clients at the time of voting on HB2 (your category 5), as explained above, we do not think those materials are subject to disclosure in the context of these cases (as opposed to the unique context of voting and redistricting cases, where they may be subject to disclosure). Furthermore, even if the flexible approach to privilege in those cases applied here, which it does not, such "factual" materials would be so intertwined with protected deliberations and mental impressions of legislators that it would be impossible (or extremely burdensome) to disentangle the one from the other. Consequently, our clients are not willing to compromise on production of this category of documents.

4. Finally, with respect to your offer to engage in a limited "view" of internal privileged communications (your category 1) under FRE 502, our clients are not willing to agree to such a process. Among other reasons, we do not believe that rule applies to communications subject to legislative privilege, as opposed to attorney-client and work-product privilege. See FRE 502(g). Furthermore, we also do not believe that the purpose of that rule is to allow opposing parties a "free look" at privileged materials in order to determine whether there is anything "there." Rather, the purpose of the limited disclosure allowed by the rule is to allow parties to determine whether purportedly privileged materials are actually privileged. Finally, we continue to believe that legislative privilege is at its strongest with respect to these kinds of purely internal communications, and thus we are not in a position to compromise on that category of documents, even in the limited fashion you propose.

We look forward to continuing these discussions later today in hopes of finding a reasonable compromise on this issue.

Regards,

Kyle

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On Sep 15, 2016, at 2:15 PM, Wilkens, Scott B.  
<[SWilkens@jenner.com](mailto:SWilkens@jenner.com)<<mailto:SWilkens@jenner.com>>> wrote:

Kyle,

Thank you for sending your email of this morning, which contributed to a productive meet and confer today. We look forward to continuing our discussions on Monday at 2 p.m.

The purpose of this email is not to attempt to memorialize the meet and confer and the positions of the parties. Instead, I am writing to follow up on a specific point we discussed.

In response to your request, I stated on the call that I would provide legal authority indicating that documents covered by category 5 in my email below are not protected by legislative privilege. For ease of reference, category 5 is: “documents and information available to the legislators at the time they considered and voted on H.B. 2, including but not limited to documents containing factually based information used in the decision making process or disseminated to legislators or committees, such as committee reports or minutes of meetings.”

Below are legal authorities indicating that this category of documents is not protected by legislative privilege:

1. Committee for a Fair and Balanced Map v. Illinois State Board of Elections, Case No. 11 C 5065, 2011 WL 4837508, at \*9 (N.D. Ill. Oct. 12, 2011) (“By limiting privileged documents to those that contain ‘opinions, recommendations or advice,’ courts have allowed discovery of ‘documents containing factually based information used in the decision-making process or disseminated to legislators or committees, such as committee reports and minutes of meetings.’ [Doe v. Nebraska, 788 F. Supp. 2d 975, 984-85 (D. Neb. 2011)]. Courts have also required disclosure of ‘the materials and information available [to lawmakers] at the time a decision was made.’ [ACORN v. County of Nassau, No. 05-2301, 2007 WL 2815810, at \*3 (E.D.N.Y. Sept. 25, 2007)](citing Village of Arlington Heights [v. Metro Housing Dev. Corp., 429 U.S. 252 at n.20 (1977)].”
2. Doe v. Nebraska, 788 F. Supp. 2d 975, 984-85 (D. Neb. 2011) (“However, documents containing factually based information used in the decision-making process or disseminated to legislators or committees, such as committee reports and minutes of meetings, are not entitled to protection under the deliberative process privilege.”).
3. ACORN v. County of Nassau, No. 05-2301, 2007 WL 2815810, at \*3 (E.D.N.Y. Sept. 25, 2007) (“Although assertion of a legislative privilege may bar inquiry into deliberations, it would not bar inquiry regarding the materials and information available at the time a decision was made. See Arlington Heights, 429 U.S. at n. 20 (noting that plaintiffs ‘were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision’).”).
4. Bethune-Hill v. Virginia State Board of Elections, 114 F. Supp. 3d 323, 343 (E.D. Va. 2015) (“for the following kinds of documents or communications ‘internal’ to the House that were generated before the legislation’s date of enactment, the following disclosure rules apply: All documents or communications reflecting strictly factual information—regardless of source—are to be produced. This includes all ‘materials and information available to lawmakers at the time a decision was made.’ [quoting Committee for a Fair and Balanced Map].”
5. Hall v. Louisiana, Civil Action No. 12–657, 2014 WL 1652791, at \*10 (M.D. La. April 23, 2014) (“With respect to facts or information that were made available to lawmakers at the time of their decision, the Court concludes that these materials are not shielded.”)



6. *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 302 n.20 (D. Md. 1992) (“Legislative immunity is, as noted above, a personal immunity from liability as well as an evidentiary and testimonial privilege. It does not, however, extend to certain types of documentation. Thus, the defendants will be required to produce any documents prepared by the Committee 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.” (citations omitted)).

7. *Miles–Un–Ltd., Inc. v. Town of New Shoreham*, 917 F. Supp. 91, 100 (D.N.H. 1996) (“Although the doctrine of legislative immunity does apply in the personal testimony realm, the immunity does not extend to certain types of documentation requests. Accordingly, a defendant will be required to produce, at the request of a plaintiff, any documents that were prepared by a committee during the course of its deliberations.” (citation omitted))

8. *Fla. Ass’n of Rehab. Fac., Inc. v. State of Fla. Dep’t of Health and Rehab. Servs.*, 164 F.R.D. 257, 267 (N.D. Fla. 1995) (“Factual matter collected for the information and use of legislators should not be privileged, even if collected and communicated by a personal staff member. Factual summaries in an advisory communication, if severable from confidential portions, should also not be privileged.”)

9. *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994) (“The agendas or minutes of the committee meetings are . . . are discoverable, as such documents were in the *Marylanders* case. The documents provided to the settlement committee, on which they relied during their deliberations, also do not fall within the scope of legislative immunity.”).

If you have any questions, let me know. Also, if you are aware of any contrary authority on this point, please provide it.

Thanks much,  
Scott

From: Kyle Duncan [<mailto:kduncan@schaerr-duncan.com>]

Sent: Thursday, September 15, 2016 9:30 AM

To: Wilkens, Scott B.

Cc: Lori Kisch; Gore, John; Alyssa Lareau; Aria Vaughan; Benjamin Berwick; Stephens, Bob; Stewart, William; Bowers, Karl; Candyce Phoenix; Christopher Brook; Pratt, Carolyn; Dalton, Caleb; [chris@osbornconflictresolution.com](mailto:chris@osbornconflictresolution.com)<<mailto:chris@osbornconflictresolution.com>>; Corey Stoughton; Chase Strangio; Whitney Pellegrino;

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Subject: Re: Legislative privilege meet and confer

Scott,

We look forward to our call later this morning regarding privilege issues and, on behalf of the intervenor-defendants, provide this response at your request in advance of the meeting to try to

assist in the discussions.

First, with respect to waiver, I have previously relayed our clients' position and our clear disagreement with your clients' position on waiver. Regarding that position, I simply refer you to my email message of August 30.

Second, with regard to the privilege issue itself, as a preliminary matter our position is that, as compared to the recent voter ID cases, the privilege is on a different and far stronger footing in these cases. In voter ID and redistricting cases, the courts have taken a flexible approach to the privilege issue, given "[t]he unique nature" of such cases. *Marylanders for Fair Rep'n v. Schaefer*, 144 F.R.D. 292, 305 (D. Md. 1992). These cases, by contrast, present none of the unique features of legislative self-dealing presented in voting and redistricting cases. Consequently, we seriously doubt that the "flexible" approach to legislative privilege even applies in these cases.

Third, we have serious questions about why inquiry into individual legislators' motives is relevant to your clients' claims. Consequently, even if the court were to take the "flexible" approach to legislative privilege as it did in the voter ID cases, we fail to see how the discovery sought as to legislators' motives is even relevant here—and certainly not so relevant as to outweigh the enormous burden of retrieving and analyzing such materials before producing them.

Fourth, despite our position on the strength of legislative privilege in this case, we have already offered to compromise with respect to written discovery along the lines laid out in Magistrate Peake's and Judge Schroeder's orders in the voter ID cases. Those orders, although narrowly tailored to the specific claims in those cases, protected the production of communications among legislators and between legislators and their staffs (and required no production of privilege logs regarding those communications), while only compelling the production of communications between legislators and non-governmental third parties, such as constituents, lobbyists, and public interest groups. We remain open to discussing some kind of compromise along those lines, which would include some of the items in category (4) in your list.

We should note, however, that category (3) in your list presents some difficulties in negotiating in the abstract about the question of privilege. As you know, legislative privilege is a functional inquiry that asks, not simply whether a government official is in the legislative branch of government, but instead whether a government official is performing a legislative function. See *Marylanders*, 144 F.R.D. at 298 ("It is the function of the government official that determines whether or not he is entitled to legislative immunity, not his title."). Thus, it is difficult to say, in the abstract, whether our clients would claim a legislative privilege as to communications between legislators and state agencies. Perhaps we could discuss how to narrow this question with respect to the privilege issue.

Fifth, with regard to depositions, our clients strongly believe that the legislative privilege is at its height with respect to requests to depose legislators, and our clients will therefore not agree to be deposed.

Finally, because our collection of documents through electronic discovery is ongoing, we are unable at this time to identify any disputed documents that may be appropriate for limited disclosure to counsel only.

Regards,  
Kyle

Kyle Duncan  
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On Sep 12, 2016, at 10:19 PM, Wilkens, Scott B.



<[SWilkens@jenner.com](mailto:SWilkens@jenner.com)<<mailto:SWilkens@jenner.com>>> wrote:

All,

Following up on the Joint Rule 26(f) Report just filed, I'd like to schedule a meet and confer with all parties for this Wednesday concerning the legislative privilege that Defendants are asserting. Would 11 a.m., 1 p.m., or 4 p.m. work? Time is of the essence because we have only a week from tomorrow to meet and confer and narrow any disputes, before Defendants must file a protective order.

Per Magistrate Peake's Sept. 6 Order and the Joint Ruke 26(f) Report, we should discuss the proper standard to apply to the Defendants' claims of legislative privilege, the categories of documents at issue and any disputes regarding those categories, and any disputes regarding waiver of the privilege.

To get things rolling, it would be very helpful if, in advance of the call, the Defendants would identify each category of documents as to which they are asserting legislative privilege, such as, for example:

- (1) communications between or among legislators and their staff;
- (2) communications between or among legislators and the governor's office;
- (3) communications between or among legislators and state agencies;
- (4) communications between or among legislators and other third parties, including but not limited to constituents, lobbyists, national and state Republican political party committees and their members and staff, members of the U.S. Senate and House of Representatives and their staff, experts, and consultants; and
- (5) documents and information available to the legislators at the time they considered and voted on H.B. 2, including but not limited to documents containing factually based information used in the decision making process or disseminated to legislators or committees, such as committee reports or minutes of meetings.

These suggested categories are meant as a starting point for our discussions. There may well be other categories that we need to address.

We should also be prepared to address disputes regarding waiver of the privilege.

In addition, we should also discuss Magistrate Peake's suggestion that the parties "consider the possibility of limited disclosure of disputed documents only to counsel, without waiving any privilege or objection as provided in Federal Rule of Evidence 502(d), in order to try to resolve some issues of legislative privilege without Court involvement."

Thanks much,

Scott

---

Scott B. Wilkens

Jenner & Block LLP

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Biography<<http://www.jenner.com/people/ScottWilkins><<http://www.jenner.com/people/ScottWilkins>>>

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

UNITED STATES OF AMERICA )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 STATE OF NORTH CAROLINA; )  
 PATRICK MCCRORY, in his official )  
 capacity as Governor of North Carolina; )  
 NORTH CAROLINA DEPARTMENT )  
 OF PUBLIC SAFETY; UNIVERSITY )  
 OF NORTH CAROLINA; and BOARD )  
 OF GOVERNORS OF THE )  
 UNIVERSITY OF )  
 NORTH CAROLINA, )  
 )  
 Defendants. )

1:16-CV-00425-TDS-JEP

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**UNITED STATES’ NOTICE OF RULE 30(b)(6) DEPOSITION OF  
DEFENDANTS STATE OF NORTH CAROLINA, ET. AL**

Please take notice that, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, the United States will take the deposition of the Defendants State of North Carolina, Governor Patrick McCrory, North Carolina Department of Public Safety, and the Intervenor North Carolina State Legislators (collectively, the “Defendants”) on September 19, 2016, at the office of the United States Attorney for the Middle District of North Carolina, located at 101 South Edgeworth Street, 4th Floor, Greensboro, NC 27401, beginning at 9:00 a.m., and continuing for as long as necessary to complete the deposition or on additional dates to be promptly scheduled. Because of the consolidated nature of discovery in the above-captioned case, the United States is serving this notice of

deposition to the Defendants separately, but simultaneously. If one or more of the Defendants collectively designate the same witness(es) to respond on their behalf, the Defendants shall identify which parties are relying on which witness(es) in response to the inquiries below.

Pursuant to Rule 30(b)(6), the Defendants shall designate one or more officers, directors, managing agents, employees, or other person(s) who, consistent with a Rule 30(b)(6) deponent's "affirmative obligation to educate himself as to the matters regarding the corporation" and identified in the notice of deposition, shall consent to testify on its behalf, setting forth in its designation, for each person designated, the matters on which the person will testify relating to the following:

### **DEFINITIONS**

The parties are scheduled to confer on the manner of discovery production. The Definitions included herewith are subject to change pending those conferences, and may be modified accordingly.

For the purposes of these requests, the following definitions apply:

1. The word and and the word or shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.
2. The term any means one or more but no less than all.
3. The terms communicate and communication refer to any disclosure, transfer, or exchange of information or opinion, whether by written, oral, electronic, or any other means.

4. Defendant, you, or your refers to Defendant State of North Carolina as well as its agents, employees, representatives, and any person or entity acting or purporting to act on its behalf, including, but not limited to, Governor Patrick McCrory, the North Carolina Department of Public Safety, University of North Carolina, the North Carolina state legislature and the legislators who have intervened in this matter.

5. The term employee, supervisor and manager, refer to current and former employees, supervisors, and managers.

6. H.B. 2 refers to legislation passed by the North Carolina General Assembly on March 23, 2016 and signed into law by Governor McCrory the same day, entitled “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations.”

7. Including means including, but not limited to.

8. The term person refers to the plural, as well as the singular, and includes any natural person, government agency or board, organization, firm, association, partnership, joint venture, corporation or any other legal entity.

9. The term relating to means pertaining to, supporting, concerning, describing, referring to, evidencing, reflecting, showing, mentioning, discussing, constituting, contradicting, refuting, or in any way logically or factually connected to the matter discussed.

10. Relied upon shall broadly mean and include: any and all data or information that was considered, weighed, analyzed, reviewed, or depended upon.
11. The term sex means sex, sex assigned at birth, gender, and gender identity.
12. Single-Sex Facilities refers to H.B. 2's definition of "[m]ultiple occupancy bathroom or changing facility," including single-sex multiple occupancy restrooms, locker rooms, and changing facilities.
13. Transgender refers to a person whose gender identity does not align with the sex the person was assigned at birth. As used herein, transgender includes, but is not limited to the following: "transsexual," "transgendered," "gender dysphoric," "individuals with gender dysphoria," "gender identity disorder," "individuals with gender identity disorder."
14. The use of a verb in any tense shall be construed as the use of the verb in all tenses and the singular form shall be deemed to include the plural, and vice versa.

### **MATTERS**

1. The basis for Defendants' assertion that permitting transgender individuals to use the facilities consistent with their gender identity poses a public safety threat.
2. The basis for Defendants' assertion that permitting transgender individuals to use the facilities consistent with their gender identity poses a privacy threat.
3. How H.B. 2 is intended to, expected to, or has in fact applied in practice in public agencies in North Carolina as defined in the statute, including:

- a. The circumstances in which transgender people are permitted to use single-sex facilities in public agencies.
- b. The potential, planned, or actual consequences that a transgender employee of a public agency or participant in a program subject to VAWA may, can, or has faced as a result of using a single-sex facility consistent with their gender identity, but inconsistent with the gender marker on their birth certificate.
- c. The availability of single-sex facilities in public agencies subject to H.B. 2 where employees work or where a program subject to VAWA is held.
- d. The entities with authority to enforce H.B. 2 against public agencies, the methods of enforcement available, planned, or currently in use, and the potential, planned, or actual consequences for noncompliance with that enforcement.
- e. The entities with authority to enforce H.B. 2 against individuals, the methods of enforcement are available, planned, or currently in use, and the potential, planned, or actual consequences for noncompliance with that enforcement.
- f. The applicability of Governor McCrory's Executive Order 93, including who has authority to enforce it against public agencies, what methods of enforcement are available, planned, or currently in use, and the potential, planned, or actual consequences for noncompliance with that enforcement.

- g. The applicability of Governor McCrory's Executive Order 93, including who has authority to enforce it against individuals, what methods of enforcement are available, planned, or currently in use, and the potential, planned, or actual consequences for noncompliance with that enforcement.
    - h. Accommodations made pursuant to H.B. 2.
  - 4. The procedures and protections, if any, in place to address harassment or discrimination relating to use of single-sex facilities alleged by (a) transgender employees or (b) transgender participants in a program subject to VAWA.
  - 5. North Carolina's policy, practice, or procedure for designating and changing the sex indicated on a North Carolina birth certificate.
  - 6. The employment policies and practices of public agencies in North Carolina relating to access to or use of single-sex facilities by transgender individuals, prior to the passage of H.B. 2 dating back to January 2014.
  - 7. Defendants' policies, guidance, practice(s) relating to the promotion or preservation of privacy in single-sex facilities, including the use of privacy partitions.
  - 8. All complaints relating to a transgender individual's use or potential use of a single-sex facility consistent or inconsistent with his or her gender identity in any public agency's building and Defendants' responses thereto, including investigation or discipline, on which Defendants plan to rely.
  - 9. Any communications between a public agency in North Carolina and Defendants in which such public agency expressed opposition to or concerns with H.B. 2.



All depositions noticed herein shall be recorded by videographic and stenographic means and shall take place before a notary public or other person authorized by law to administer oaths.

Respectfully submitted this 30th day of August, 2016,

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Middle District of North Carolina  
United States Department of Justice  
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*Counsel for the Plaintiff United States*

**CERTIFICATE OF SERVICE**

I certify that on August 30, 2016, I served a copy of the United States' Notice of Rule 30(b)(6) Deposition by email on the following counsel:

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*Counsel for the Plaintiff United States*

Exhibit G

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

NORTH CAROLINA STATE CONFERENCE, )  
OF THE NAACP, et al., )  
 )  
Plaintiffs, )  
 )  
v. ) 1:13CV658  
 )  
PATRICK LLOYD MCCRORY, in his )  
Official capacity as Governor of )  
North Carolina, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

LEAGUE OF WOMEN VOTERS OF NORTH )  
CAROLINA, et al., )  
 )  
Plaintiffs, )  
 )  
v. ) 1:13CV660  
 )  
THE STATE OF NORTH CAROLINA, )  
et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. ) 1:13CV861  
 )  
THE STATE OF NORTH CAROLINA, )  
et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

**MEMORANDUM ORDER**

THOMAS D. SCHROEDER, District Judge.

Several North Carolina legislators object to the United States Magistrate Judge's March 27 discovery order (the "Order") in these cases pursuant to Federal Rule of Civil Procedure 72(a). (Doc. 83 in case 1:13CV861; Doc. 97 in case 1:13CV658; Doc. 100 in case 1:13CV660.)<sup>1</sup> Plaintiffs have responded (Doc. 88) and moved to expedite the court's resolution of the objection (Doc. 87) in light of the Magistrate Judge's earlier order consolidating the three cases for the purposes of scheduling and discovery and setting of briefing deadlines for preliminary motions (Doc. 30). The court held a hearing on the objections on May 9, 2014. For the reasons set forth below, the legislators' objections will be sustained in part and overruled in part.

## **I. BACKGROUND**

### **A. Nature of the Claims and Procedural Background**

On August 12, 2013, Governor Patrick L. McCrory signed into law North Carolina Session Law 2013-381, popularly known as the Voter Information Verification Act or House Bill 589 ("HB 589"). See 2013 N.C. Sess. Laws 381, <http://www.ncga.state.nc.us/Sessions/2013/Bills/House/PDF/H589v9.pdf>. The law enacted several changes to the State's election laws. The League of

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<sup>1</sup> Because of the similar nature of the filings in these related cases, the court will refer to documents in case 1:13CV861 except where necessary to distinguish the cases.

Women Voters of North Carolina and several other organizations and individuals (the "League Plaintiffs") filed a complaint in this court on the same day. League of Women Voters of N.C. v. North Carolina, No. 1:13CV660 (M.D.N.C. filed Aug. 12, 2013). The League Plaintiffs challenge HB 589's restriction of early voting, abolition of same-day registration, abolition of out-of-precinct voting, and elimination of the discretion of county boards of elections to direct polls to remain open an additional hour on Election Day. (See Doc. 1 in case 1:13CV660.) Pursuant to 42 U.S.C. § 1983, they bring claims under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (id. ¶¶ 75-82) and Section 2 of the Voting Rights Act of 1965 ("VRA"), 42 U.S.C. § 1973 (id. ¶¶ 83-97).

In a separate case filed that same day, the North Carolina State Conference of the NAACP and several individual plaintiffs (the "NAACP Plaintiffs") challenged other provisions of HB 589. N.C. State Conference of the NAACP v. McCrory, No. 1:13CV658 (M.D.N.C. filed Aug. 12, 2013). The NAACP Plaintiffs challenge the requirement that voters present photo identification, along with the provisions challenged by the League Plaintiffs, pursuant to the VRA. (Doc. 1 in case 1:13CV658 ¶¶ 81-97.) They also contest, among others, HB 589's provisions increasing the number of poll observers and people who may challenge ballots,

under both the Fourteenth and Fifteenth Amendments. (Id. ¶¶ 98-119.)

On September 30, 2013, the United States Department of Justice (the "United States") filed a complaint challenging various provisions of HB 589. United States v. North Carolina, No. 1:13CV861 (M.D.N.C. filed Sept. 30, 2013). Pursuant to the VRA, the United States alleges that many provisions of HB 589 - including the photo identification requirement, the reduction of early voting, and elimination of same-day registration and out-of-precinct provisional ballots - have the purpose or effect of abridging the right to vote of African-Americans. (Doc. 1 in case 1:13CV861 ¶¶ 95-100.)

On December 13, 2013, the Magistrate Judge consolidated the cases for the purposes of scheduling and discovery. (Doc. 30.) Then, on January 27, 2014, the court allowed several young voters (the "intervenor") to intervene in the League of Women Voters case. (Doc. 62 in case 1:13CV660.) In addition to the sections of HB 589 challenged by the other plaintiffs, the intervenors challenge the law's elimination of pre-registration for 16- and 17-year-olds. (Doc. 63 in case 1:13CV660 ¶¶ 81-88.) They bring their claims under both the Fourteenth and Twenty-Sixth Amendments, pursuant to 42 U.S.C. § 1983. (Id. ¶¶ 95-106.)



## **B. Subpoenas to Third-Party Legislators**

Throughout December 2013, Plaintiffs served North Carolina State Senators Phil Berger, Tom Apodaca, Thom Goolsby, Ralph Hise, and Bob Rucho, as well as State Representatives Thom Tillis, James Boles, Jr., David Lewis, Tim Moore, Tom Murry, Larry Pittman, Ruth Samuelson, and Harry Warren (collectively, the "legislators") with subpoenas *duces tecum* pursuant to Federal Rule of Civil Procedure 45. (Docs. 44-1 through 44-13.) The subpoenas sought production of documents related to the passage of HB 589, including communications between the legislators themselves and between the legislators and third parties. (See id.) The legislators moved to quash the subpoenas on the ground of legislative immunity. (Doc. 44.) Plaintiffs responded (Doc. 58), and the legislators replied (Doc. 65). Plaintiffs also moved to compel production of documents previously requested from the State of North Carolina as to which the State has objected on the grounds of legislative immunity and legislative privilege. (E.g., Doc. 58 in case 1:13CV658; Doc. 70 in case 1:13CV660.) These motions seek to compel the production of documents in the possession of Defendants, including the State of North Carolina and the State Board of Elections.

## **C. The Magistrate Judge's Order**

The Magistrate Judge held a hearing on the various motions

to compel and to quash on February 21, 2014. (Doc. 75.) At the hearing, the Magistrate Judge took the motions under advisement and ordered supplemental briefing on the legislative immunity and privilege issues. (Id. at 123.) On February 26, Defendants (including the State, Governor McCrory, and the State Board of Elections), the United States, and the NAACP Plaintiffs filed supplemental briefs. (Docs. 70, 72, & 73.) The Magistrate Judge then issued the Order, granting in part and denying in part the motions to compel and motions to quash the subpoenas. (Doc. 79.) The Order concluded that the asserted legislative privilege was not absolute, but qualified, and must be evaluated under a "flexible approach," taking into account the serious claims raised under the Constitution and the VRA. (Id. at 6, 9.) The Magistrate Judge directed the parties to meet and confer and to file a joint report by April 7 presenting specific remaining disputes as to particular categories of documents. (Id. at 10.) In so doing, the Magistrate Judge noted the need for the parties to address whether North Carolina public records law might require the production of certain documents even if otherwise subject to a claim of privilege. (Id. at 7.) Finally, because any privilege could be waived, the Magistrate Judge set a deadline for Defendants to provide Plaintiffs the identity of any legislator upon whom they would rely for purposes of the preliminary motions so as to permit Plaintiffs

to take additional discovery of those legislators, should they wish. (Id. at 7, 10.)

Upon the legislators' motion (Doc. 84), the Magistrate Judge stayed all deadlines in her Order pending this court's resolution of the legislators' objections to it.

#### **D. Legislators' Objections**

The legislators raise five objections to the Magistrate Judge's Order which fall into three general categories. In the first group, the legislators contend that absolute legislative immunity confers upon them an absolute privilege shielding them from any obligation to respond to the subpoenas. (Doc. 83 at 2-3.) More specifically, the first objection states, "[t]he [legislators] object to the Order's failure to recognize an absolute legislative immunity from discovery, contrary to Supreme Court and Fourth Circuit precedent." (Id. at 2.) The second objection restates the first in slightly different terms: "[t]he [legislators] object to the Order's holding, contrary to Supreme Court and Fourth Circuit precedent, that legislative privilege is qualified, whether in the context of a claim brought under the [VRA] or otherwise." (Id.) The third objection is to the Magistrate Judge's conclusion that the document requests be evaluated "on a case-by-case basis." (Id. at 3.)

In the second area of objection, the legislators take issue

with the Magistrate Judge's statement in a footnote that Defendants acknowledged at the February 21 hearing that a "carve-out" exists that limits the legislative privilege in redistricting cases under the VRA. (Id. at 3 (objection 4) (citing Doc. 79 at 5 n.1).) In the third category, the legislators object - to the extent it will limit their right to present rebuttal evidence - to the Order's requirement that they notify Plaintiffs by a date certain which, if any, legislator upon whom they will rely has elected to waive the privilege. (Id. (objection 5).)

## **II. ANALYSIS**

### **A. Standard of Review**

This court reviews orders issued by Magistrate Judges in non-dispositive motions for clear error and rulings contrary to law. Fed. R. Civ. P. 72(a). "[U]nless the result compelled by the Magistrate Judge's ruling is contrary to law or clearly erroneous, the Order[] of the Magistrate Judge will be affirmed." Food Lion, Inc. v. Capital Cities/ABC Inc., 951 F. Supp. 1211, 1213 (M.D.N.C. 1996). The "contrary to law" standard of review "permits plenary review of legal conclusions." Stonecrest Partners, LLC v. Bank of Hampton Roads, 770 F. Supp. 2d 778, 782 (E.D.N.C. 2011) (citing PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010)); United States v. Duke Energy Corp., 1:00CV1262, 2012 WL

1565228, at \*1-2 (M.D.N.C. Apr. 30, 2012). Magistrate Judges are generally afforded great deference in discovery rulings, yet this is partly due to the "fact-specific character of most discovery disputes." In re Outsidewall Tire Litig., 267 F.R.D. 466, 470 (E.D. Va. 2010). Here, although counsel for the League Plaintiffs argues otherwise,<sup>2</sup> the Magistrate Judge has yet to apply her ruling to any specific document or category of documents, ruling only that the legislative privilege is qualified rather than absolute. Thus, unlike most discovery disputes, the legislators' objections as to the scope of the privilege (at least at this stage) present pure questions of law, rather than an application of law to complex facts, requiring this court's *de novo* review.

#### **B. Scope of the Magistrate Judge's Order**

The Order holds only that legislative immunity and privilege do not shield the legislators entirely from the burden of responding to these subpoenas:

Specifically, the Court concludes that while 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

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<sup>2</sup> At the hearing, counsel pointed to the Order's language that "many of the documents requested by the subpoenas and discovery requests involved communications with outside parties or are other documents that are considered public records" and noting that "[r]equiring production of those documents is not unduly burdensome or invasive of the legislative process." (Doc. 79 at 7.) In contrast, counsel for the NAACP Plaintiffs conceded that no motion had yet to be ruled on.

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.

(Doc. 79 at 3.) In light of this conclusion, the Order directed the parties to meet and confer in an attempt to narrow their dispute before reporting back to the court. (Id. at 7.) The limited nature of the Magistrate Judge's holding and the specific objections by the legislators narrow the scope of this court's review.

### **C. First Group of Objections**

In the first three objections, the legislators contend that an absolute legislative immunity or legislative privilege applies in this case. (See Doc. 83 at 14-15.) Thus, the legislators contend that under Supreme Court and Fourth Circuit precedent they have no obligation to respond to the subpoenas. Plaintiffs contend that the Magistrate Judge's Order "strikes the proper balance between claims of legislative privilege and documents that are not subject to the privilege." (Doc. 88 at 6.)

Broad legislative immunity is guaranteed federal legislators by the Speech or Debate Clause of the United States Constitution. U.S. Const. art. I, § 6, cl. 1 (providing that Members of Congress "shall not be questioned in any other Place"

as to "any Speech or Debate in either House"). The Constitution does not provide such immunity to state legislators. See United States v. Gillock, 445 U.S. 360, 374 (1980). Yet, the Supreme Court extended them immunity from civil suit through the federal common law in Tenney v. Brandhove, 341 U.S. 367, 372-76 (1951). See EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 180-81 (4th Cir. 2011). Consequently, legislative immunity shields state legislators from civil suit when they act within the "sphere of legitimate legislative activity." Tenney, 341 U.S. at 376.

Insofar as the Speech or Debate Clause does not reach state legislators, the parties concede that the issue before this court in this federal-question case is a matter of federal common law. To the extent the issue is one of legislative privilege, its application falls under Federal Rule of Evidence 501. See Favors v. Cuomo, 285 F.R.D. 187, 209 (E.D.N.Y. 2012); Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at \*5 & n.8 (N.D. Ill. Oct. 12, 2011) (three-judge panel). "Legislative privilege is related to, but distinct from, the concept of legislative immunity." Favors, 285 F.R.D. at 209; see also EEOC v. Wash. Suburban Sanitary Comm'n, 666 F. Supp. 2d 526, 531 (D. Md. 2009), aff'd by 631 F.3d 174 (4th Cir. 2011) ("[L]egislative privilege is a derivative of legislative immunity.").

The legislators contend that they enjoy absolute protection from inquiry into their actions, equivalent to that under the Speech or Debate Clause, but concede that no Supreme Court case so holds. They rely heavily on Tenney. In that case, the Supreme Court held that the federal common law extends immunity from civil suit under 42 U.S.C. § 1983 to a state legislator acting in his legislative capacity. 341 U.S. at 379. While the Court itself referred to legislative immunity as "the privilege" on several occasions, it is clear that only immunity from *suit*, rather than immunity from *discovery*, was at issue. Indeed, that is how the Supreme Court in Gillock later characterized the case. 445 U.S. at 371 ("The issue [in Tenney], however, was whether state legislators were immune from civil suits for alleged violations of civil rights under 42 U.S.C. § 1983.").

In Gillock, a state legislator was indicted in federal court on charges of bribery and racketeering. Id. at 362. He sought to prevent the Government from introducing evidence of his legislative acts at trial. Id. The Court ruled against him, holding that any evidentiary privilege he enjoyed as a state legislator under the federal common law does not apply to criminal cases. Id. at 373-74.

The legislators contend that their immunity is co-extensive with the federal immunity because both arose from the common law. In this regard, it is noteworthy that the Court in Gillock



rejected extending the rationale of the Speech or Debate Clause to state legislators.<sup>3</sup> Specifically, the Court noted that two principles undergird the Clause: separation of powers and comity. See id. at 370-72. As to the former, the Court concluded it "gives no support to the grant of a privilege to state legislators in federal criminal prosecutions." Id. at 370. As to the latter, it concluded "that although principles of comity command careful consideration, our cases disclose that where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." Id. at 373.

The parties have not cited any Supreme Court case since Gillock that has clarified the scope of the federal common law privilege.<sup>4</sup> Rather, the cases relied on by the legislators<sup>5</sup>

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<sup>3</sup> Indeed, the Court stated "[i]t is clear that were we to recognize an evidentiary privilege similar in scope to the Federal Speech or Debate Clause, much of the evidence at issue here would be inadmissible." Id. at 366.

<sup>4</sup> The United States contends that Gillock applies to cases brought under Section 2 of the VRA because "important federal interests" are at stake in cases such as these. (Doc. 86 at 8 n.4 (citing Gillock, 445 U.S. at 373).) However, Gillock's holding is confined to criminal cases, and any suggestion otherwise is *dicta*. The United States has cited no case which held or suggested that the legislative privilege does not apply in cases brought under the VRA.

<sup>5</sup> See, e.g., Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 507 (1975) (holding that federal legislators are absolutely immune from *suit* for their issuance of a subpoena *duces tecum* to a private organization - an act that is a legitimate legislative activity); Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 420 (D.C. Cir. 1995) (holding that documents in the possession of federal

apply the Speech or Debate Clause protections enjoyed by Members of Congress. Even Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), relied on by Plaintiffs, is not on point. There, the court reversed a lower court's finding of discrimination against a village in a Chicago suburb because the plaintiffs had failed to prove discriminatory intent on the part of the governmental body. Id. at 270-71. In so doing, the court, in examining "subjects of proper inquiry," noted that "in some extraordinary instances the members [of the governmental body] might be called to the stand a trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." Id. at 268 (citing Tenney). In a footnote, the Court observed that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government" and that "[p]lacing a decision-maker on the stand is therefore 'usually to be avoided.'" Id. at n.18 (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971)).<sup>6</sup> Arlington Heights,

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legislators relating to legislative acts were protected by a privilege of nondisclosure in a civil case). Contrary to the legislators' arguments, Eastland involved the scope of legislators' civil liability for the act of issuing a subpoena *duces tecum*, not an evidentiary privilege of nondisclosure.

<sup>6</sup> The Fourth Circuit later relied upon Arlington Heights in stating that one method of proving discriminatory intent in Equal Protection

however, was not a case about the scope of the legislative privilege. It held only that in that specific case the plaintiffs had not proven discriminatory intent as required by Washington v. Davis, 426 U.S. 229 (1976). Thus, the Court had no occasion to consider in what circumstances state or local legislators may be compelled to testify or produce documents concerning their legislative activities.

The legislators place heavy emphasis on Fourth Circuit precedent, including Washington Suburban. There, the United States Equal Employment Opportunity Commission ("EEOC") was investigating the Washington Suburban Sanitary Commission ("WSSC") - a bi-county governmental body - for possible age discrimination under federal law. 631 F.3d at 176-177. The WSSC had decided to restructure its IT department, eliminating some older positions. Id. at 177-78. The EEOC initially subpoenaed a variety of documents: documents relating to the WSSC's internal deliberations; and others that included employee files, prior age discrimination complaints, tests used in making employment decisions, the names of people terminated because of restructuring and those who applied for post-restructuring positions, and documents referring to training procedures and

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cases is by using "contemporary statements by decisionmakers on the record or in minutes of their meetings." Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 819 (4th Cir. 1995).

job descriptions in the department. Id. at 179. The WSSC responded by asserting legislative immunity and privilege. The EEOC eventually dropped its demand for records relating to the WSSC's internal deliberations. Id. As the court observed, "the district court ruled that while legislative privilege might in theory defeat the EEOC's subpoena power, the EEOC's modified subpoena asked for information about discrimination prior to and after the legislative restructuring decision, not for information about the decision to restructure itself." Id. The district court therefore ordered compliance.

The Fourth Circuit's opinion is expansive in its discussion of legislative immunity and privilege. The court acknowledged that legislative privilege is "an accepted evidentiary privilege[]" that is a "parallel concept of legislative immunity." Id. at 180. It also traced the origins of legislative immunity *from suit*, which applies to state legislators after Tenney, noting that its "practical import is difficult to overstate." Id. at 181. Immunity protects legislators from "the costs and distractions attending lawsuits," "shields them from political wars of attrition," and "prevent[s] the threat of liability" from deterring public service. Id. (internal quotation marks omitted).

Legislative privilege, on the other hand, protects "against compulsory evidentiary process . . . to safeguard this

immunity." Id. This privilege applies even if the legislators are not named in the suit. Id. (citing MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (noting that "[d]iscovery procedures can prove just as intrusive" as being named a party to litigation)). The court predicted that "if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply." Id.

Turning to the modified subpoenas, the court allowed discovery of what the EEOC ultimately sought because, rather than seeking discovery of the motives behind the restructuring, the subpoena "skirt[ed] these potentially intrusive topics and focus[ed] on evidence likely regarding unprivileged administrative personnel decisions." Id. at 183. According to the court, the EEOC's withdrawal of its requests for "any investigation into the motives underlying the decision to restructure" avoided bringing it "impermissibly close to privileged materials regarding the . . . Commissioners' reasons for approving the proposed restructuring and the county council members' reasons for approving [the WSSC's] budget, a 'quintessentially legislative' act." Id. (quoting Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998)). Thus, after describing at some length the broad parameters of the privilege, the court necessarily avoided application of the privilege to any inquiry

into legislative motive, finding it "premature" to do so simply because a "legitimate claim of privilege might ripen at some point down the road."<sup>7</sup> Id. at 182-83.

The legislators also rely on Schlitz v. Commonwealth of Virginia, 854 F.2d 43 (4th Cir. 1988).<sup>8</sup> There, a judge sued the Commonwealth of Virginia, among others, for federal age discrimination based on the General Assembly's failure to re-elect him to a judgeship. Id. at 43-44. The Fourth Circuit reversed the district court, concluding that summary judgment should have been granted to the defendants because of legislative immunity. Id. at 44, 46. Notably, the court stated that "[w]here, as here, the suit would require the legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force." Id. at 45.

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<sup>7</sup> McCray v. Maryland Department of Transportation, 741 F.3d 480, 484-87 (4th Cir. 2014), also relied on by the legislators, is unhelpful. That case concerned immunity from suit and not the application of an evidentiary privilege. Moreover, it held legislative immunity inapplicable because the discriminatory acts alleged occurred before any legislative activity. Id. at 487.

<sup>8</sup> Schlitz was overruled in part by Berkley v. Common Council of City of Charleston, 63 F.3d 295 (4th Cir. 1995) (en banc). In Berkley, the Fourth Circuit sitting *en banc* held that the City of Charleston was not immune from suit under section 1983. Id. at 302. The court stated that "[t]o the extent that [Schlitz] can be read to confer legislative immunity on municipalities from suits brought under section 1983, [it is] overruled." Id. at 303. In a footnote, the court clarified that under Schlitz, the Charleston councilmembers "may be privileged from testifying in federal district court as to their motives in enacting legislation." Id. at n.9. However, the court declined to address the privilege in its holding. Id.

It also observed that the Supreme Court has "extended the protection in the speech [or] debate clause . . . to state legislators." Id. The legislators argue that this language acknowledges that the broad immunity they enjoy is co-extensive with the federal legislators' immunity. To this end, they note, the court rejected what it construed as the judge's attempt to "circumvent the doctrine of legislative immunity by declining to name as defendants individual legislators." Id. at 46. "The purpose of the doctrine," the court concluded, "is to prevent legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves." Id. (citing Gravel v. United States, 408 U.S. 606, 616 (1972) (federal legislative immunity)).

The legislators also argue that the Magistrate Judge's reliance upon Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292 (D. Md. 1992), was misplaced. Marylanders was a redistricting case brought under the VRA and heard before a three-judge panel pursuant to 28 U.S.C. § 2284; it is therefore not binding on this court. It is nevertheless persuasive authority. In that case, the Governor of Maryland convened a five-member committee consisting of the Speaker of the House of Delegates, the President of the State Senate, and three private citizens, to advise him on creating a plan for redistricting after the 1990 federal census. Id. at 296

(opinion of Smalkin, District Judge). Under Maryland law, the Governor was required to propose a redistricting plan which would be submitted to the State legislature. Id. at 295. The legislature could then propose its own plan or do nothing; if it failed to act, the Governor's plan would become law in 45 days. Id. After the committee recommended a plan to the Governor, he made minor changes and submitted it to the legislature. Id. at 296. The legislature failed to act, and the plan became law. Id.

The plaintiffs sought to depose the members of the committee, including the two state legislators, and inquire into the committee's motives. Id. at 295. The concurring opinion of Circuit Judge Murnaghan and District Judge Motz provided the majority on the issue of legislative privilege. Id. at 301 n.19. That opinion stated:

The doctrine of legislative immunity (both in its substantive and testimonial aspects) itself embodies fundamental public policy. It insulates legislators from liability for their official acts and shields them from judicial scrutiny into their deliberative processes. 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. at 304 (opinion of Judges Murnaghan and Motz) (footnote omitted). Because of the "unique nature of legislative redistricting and the fact that testimonial legislative immunity



is not an absolute," the judges stated, they would permit the deposition of the three private-citizen members of the committee. Id. at 304-05. The decision was based in part on the fact that the composition of the committee would allow discovery of information sought through the private citizens "without directly impacting upon legislative sovereignty." Id. at 305. The court deferred ruling on whether the legislators could be deposed in their capacity as committee members, but Judges Murnaghan and Motz forecasted: "We too . . . would flatly prohibit their depositions from being taken as to any action which they took after the redistricting legislation reached the floor of the [legislature] as President of the Senate and Speaker of the House, respectively (unless they ultimately are listed by the Defendants as trial witnesses) because of the direct intrusion of such discovery into the legislative process." Id.

Thus, while Marylanders determined that legislative privilege is not absolute, it did not ultimately allow any testimony of the legislators. Instead, in respect for the sovereignty of the legislature, the court permitted the deposition of the private citizens on the committee as it appeared that the same information was available from them. In other words, where the evidence was discoverable from a non-

legislator source, the Marylanders court required the plaintiffs to pursue that before seeking to impinge upon the privilege.<sup>9</sup>

Other district courts have also concluded that the privilege is not absolute. For example, the three-judge panel<sup>10</sup> in Fair and Balanced Map considered a motion to compel a response to subpoenas *duces tecum* served upon Illinois state legislators in a redistricting case under the VRA and Fourteenth and Fifteenth Amendments. 2011 WL 4837508, at \*1-2. After recognizing that federal common law controlled the case, the court stated that the legislative privilege “protects [legislators] from producing documents in certain cases.” Id. at \*7. It concluded that “legislative privilege is qualified, not absolute, and may be overcome by a showing of need.” Id. (citing In re Grand Jury, 821 F.2d 946, 958 (3d Cir. 1987)).<sup>11</sup>

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<sup>9</sup> The court suggested that certain documents would be discoverable from the committee, yet that issue does not appear to have been squarely before it. See id. at 302 n.20 (opinion of Smalkin, District Judge).

<sup>10</sup> The Westlaw version of this opinion indicates it was written by Judge John Daniel Tinder as District Judge. Judge Tinder is a circuit judge. The case was heard before a three-judge panel including Judge Tinder of the Seventh Circuit, Judge Robert L. Miller of the Northern District of Indiana, and Senior Judge Joan Humphrey Lefkow of the Northern District of Illinois.

<sup>11</sup> In assessing need, many courts have applied a five-factor balancing test:

- (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 the government in the litigation; and (v) the

Nevertheless, "disclosure of confidential documents concerning intimate legislative activities should be avoided." Id. at \*9.

Based on these cases, it is apparent that state legislators enjoy broad immunity *from suit* under the federal common law. It is also apparent that they enjoy a legislative privilege that includes protection from testifying "for actions taken within the 'sphere of legitimate legislative activity.'" Schlitz, 854 F.2d at 45 (quoting Tenney, 341 U.S. at 376); Marylanders, 144 F.R.D. at 305 (opinion of Murnaghan, Circuit Judge, and Motz, District Judge) (finding that depositions of state legislators would be improper "as to any action which they took after the redistricting legislation reached the floor of the General Assembly"); Florida v. United States, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (holding that state legislators in a case

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possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Id. at \*7; Favors, 285 F.R.D. at 209-10; Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); Veasey v. Perry, Civ. A. No. 2:13-CV-193, 2014 WL 1340077, at \*2 (S.D. Tex. Apr. 3, 2014); Perez v. Perry, Civ. No. SA-11-CV-360-OLG, 2014 WL 106927, at \*2 (W.D. Tex. Jan. 8, 2014) (three-judge panel); Page v. Va. State Bd. of Elections, Civ. A. No. 3:13CV678, 2014 WL 1873267, at \*7 (E.D. Va. May 8, 2014).

Some courts have compared the legislative privilege to, or even defined the privilege as, a "deliberative process privilege." E.g., Doe v. Nebraska, 788 F. Supp. 2d 975, 984 (D. Neb. 2011), adopted by 2011 WL 2413359 (D. Neb. June 15, 2011) (noting that it protects pre-enactment communications between legislators containing opinions, advice, or recommendations about legislative actions). The current record and objections do not require the court to define the parameters of the deliberative process privilege.

brought under Section 5 of the VRA were privileged from testifying regarding the "reasons for their votes"); Backus v. South Carolina, Case No. 3:11-cv-03120-HFF-PMD, Order (D.S.C. Feb. 8, 2012) (quashing notice of deposition as to "any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation").<sup>12</sup>

The present dispute involves the production of documents, not testimony.<sup>13</sup> The Supreme Court has not addressed the scope of the privilege as applied to requests for documents in a civil case. The decisions of the Fourth Circuit, while highly protective of the privilege, also do not provide controlling guidance.<sup>14</sup> To be sure, the legislative privilege, being an

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<sup>12</sup> Plaintiffs noted at the hearing that they have noticed the depositions of certain legislators but have agreed to await this court's ruling before proceeding further.

<sup>13</sup> Some district courts have concluded that compulsory production of documents may be less burdensome than requiring legislators to testify. See, e.g., Doe, 788 F. Supp. 2d at 984 ("[S]tate and local officials may be protected from testifying, but are not necessarily exempted from producing documents."). On the other hand, some courts applying the Speech or Debate Clause have protected document production to the same extent as testimony. See Brown & Williamson, 62 F.3d at 420 ("We do not accept the proposition that the testimonial immunity of the Speech or Debate Clause only applies when Members or their aides are personally questioned. Documentary evidence can certainly be as revealing as oral communications - even if only indirectly when, as here, the documents in question . . . do not detail specific congressional actions.").

<sup>14</sup> Some courts have indicated that the privilege must be strictly construed because, like all privileges, it prevents the use of potentially relevant evidence. See Favors, 285 F.R.D. at 209; Fair &

evidentiary one, applies to a legislator's documents relating to legitimate legislative activity. As with other privileges, the court cannot say that it is absolute. See Marylanders, 144 F.R.D. at 304. It follows, therefore, that the court cannot say that the Magistrate Judge's Order is contrary to law, and the legislators' first group of objections is overruled.

This is the extent of the narrow question before the court at this time. Therefore, the parties should resume their effort to meet and confer to attempt to comply with the Order, consistent with this Memorandum Order. 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 document, among other things.<sup>15</sup>

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Balanced Map, 2011 WL 4837508, at \*7. These courts have cited Trammel v. United States, 445 U.S. 40, 50 (1980), which concerned the spousal testimonial privilege. In contrast, Fourth Circuit opinions have often described the legislative privilege as one that is broadly construed. See, e.g., Wash. Suburban, 631 F.3d at 180-84; Schlitz, 854 F.2d at 45-46.

<sup>15</sup> For example, at the hearing the legislators acknowledged that some documents over which they assert legislative privilege were published on the State Board of Elections website for approximately a year, raising the issue whether any privilege has been waived as to those documents.

See Wash. Suburban, 631 F.3d at 182.

**D. Other Objections**

The legislators object to the following statement in the Magistrate Judge's Order: "During the hearing on February 21, 2014, Defendants acknowledged that this 'carve out' [allowing some discovery of legislators] would allow 'more leeway' in discovery as to legislative motive in cases involving redistricting claims." (Doc. 79 at 5 n.1.) The legislators argue neither they nor Defendants have conceded any exception to the legislative privilege in redistricting cases.

The court accepts that the legislators say they have not conceded that an exception exists, and the objection is sustained to this extent. As discussed above, however, the holding in Marylanders was limited to compelling the testimony of the non-legislator members of the Governor's committee. Thus, discussion of any so-called VRA exception to the privilege was not necessary to its holding. To be sure, other 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. See, e.g., Fair & Balanced Map, 2011 WL 4837508, at \*7; Perez, 2014 WL 106927, at \*2.

Finally, the legislators object to the Magistrate Judge's setting of a deadline by which Defendants are to notify

Plaintiffs of the identity of any legislator on whom they will rely insofar as the information otherwise would have been subject to legislative privilege. (Doc. 83 at 3, 19-20.) The purpose of this portion of the Order is merely to require that Defendants provide Plaintiffs fair notice so discovery of those legislators can occur prior to any upcoming proceeding. The legislators acknowledge this, but they object to the extent the Order may be construed to prohibit any waiver "done solely for the purpose of offering rebuttal evidence." (Id. at 20.)

Notably, Defendants, who are the *parties* bound by the Order, have not objected to this portion of the Order, and the court is hard pressed to discern the standing of the legislators to object to this scheduling aspect of the Order. In any event, should the Defendants anticipate relying on any legislator's testimony, they should timely disclose it. Should Defendants disclose any legislator's testimony only for claimed rebuttal purposes, the court will consider the reasonableness of that assertion in light of the record and determine whether, if the testimony is allowed, additional discovery will be permitted. Therefore, the objection is overruled.

### **III. CONCLUSION**

For the reasons set forth above,

IT IS THEREFORE ORDERED that the legislators' objections (Doc. 83) are SUSTAINED IN PART AND OVERRULED IN PART.

IT IS FURTHER ORDERED that the parties meet and confer forthwith, as directed by the Magistrate Judge's Order, and file their report (previously set for April 7) on or before May 22, 2014, presenting any remaining disputes with respect to particular categories and types of documents for further resolution by the court.

IT IS FURTHER ORDERED that the Order's deadline of April 14 is reset to noon on May 19, 2014, by which Defendants must 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.

/s/ Thomas D. Schroeder  
United States District Judge

May 15, 2014



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

NORTH CAROLINA STATE CONFERENCE, )  
 OF THE NAACP, et al., )  
 )  
   Plaintiffs, )  
 )  
   v. )           1:13CV658  
 )  
 PATRICK LLOYD MCCRORY, in his )  
 Official capacity as Governor of )  
 North Carolina, et al., )  
 )  
   Defendants. )  
 \_\_\_\_\_ )

LEAGUE OF WOMEN VOTERS OF NORTH )  
 CAROLINA, et al., )  
 )  
   Plaintiffs, )  
 )  
   v. )           1:13CV660  
 )  
 THE STATE OF NORTH CAROLINA, )  
 et al., )  
 )  
   Defendants. )  
 \_\_\_\_\_ )

UNITED STATES OF AMERICA, )  
 )  
   Plaintiff, )  
 )  
   v. )           1:13CV861  
 )  
 THE STATE OF NORTH CAROLINA, )  
 et al., )  
 )  
   Defendants. )  
 \_\_\_\_\_ )

**MEMORANDUM ORDER**

THOMAS D. SCHROEDER, District Judge.

Before the court are two objections to the Magistrate Judge's November 20, 2014 discovery Order (the "Order") in these discovery-consolidated cases pursuant to Federal Rule of Civil Procedure 72(a). (Doc. 194 in case 1:13CV861; Doc. 207 in case 1:13CV658; Doc. 205 in case 1:13CV660.)<sup>1</sup> Plaintiffs (Doc. 201) and Defendants – and several subpoenaed North Carolina legislators – (Doc. 204) have filed objections to the Order as well as corresponding responses. (Docs. 207, 208.) For the reasons set forth below, all objections will be overruled.

#### **I. BACKGROUND**

This discovery dispute arises in three cases consolidated for discovery that involve race and age discrimination claims brought following the passage of North Carolina Session Law 2013-381 ("SL 2013-381"), known as the Voter Information Verification Act. See 2013 N.C. Sess. Laws 381 (codified in scattered sections of N.C. Gen. Stat. § 163). In League of Women Voters of N.C. v. North Carolina, No. 1:13CV660 (M.D.N.C. filed Aug. 12, 2013), the League of Women Voters of North Carolina and several other organizations and individuals (the "League Plaintiffs") challenge various provisions within SL 2013-381 and bring claims under the Equal Protection Clause of the Fourteenth Amendment to the U.S.

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<sup>1</sup> Because of the similar nature of the filings in these related cases, the court will refer to documents in case 1:13CV861, except where necessary to distinguish the cases.

Constitution, pursuant to 42 U.S.C. § 1983, and Section 2 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973. In N.C. State Conference of the NAACP v. McCrory, No. 1:13CV658 (M.D.N.C. filed Aug. 12, 2013), the North Carolina State Conference of the NAACP and several individual plaintiffs (the "NAACP Plaintiffs") challenge other provisions of SL 2013-381 and bring claims pursuant to the VRA and the Fourteenth and Fifteenth Amendments, through § 1983. In United States v. North Carolina, No. 1:13CV861 (M.D.N.C. filed Sept. 30, 2013), the United States Department of Justice (the "United States") challenges provisions of SL 2013-381 under the VRA. Finally, the court allowed several young voters (the "Intervenors") to intervene in the League of Women Voters case, with the Intervenors bringing claims under the Fourteenth and Twenty-Sixth Amendments, pursuant to 42 U.S.C. § 1983. (Doc. 62 in case 1:13CV660; 63 ¶¶ 95-106 in case 1:13CV660.) These various parties seek discovery involving State legislators' participation in SL 2013-381's passage.

**A. Procedural History**

The current discovery dispute has been extensively litigated in this court. Throughout December 2013, Plaintiffs served subpoenas *duces tecum* pursuant to Rule 45 of the Federal Rules of Civil Procedure on several then-sitting North Carolina State legislators: Senators Phil Berger, Tom Apodaca, Thom Goolsby, Ralph Hise, and Bob Rucho, as well as Representatives Thom Tillis,

James Boles, Jr., David Lewis, Tim Moore, Tom Murry, Larry Pittman, Ruth Samuelson, and Harry Warren (collectively, the "legislators"). (Docs. 44-1 through 44-13.) The subpoenas sought production of a variety of documents surrounding the passage of SL 2013-381. (See id.) The legislators moved to quash the subpoenas on the ground of legislative immunity (Doc. 44), and the issue was briefed (Docs. 58, 65). Plaintiffs also moved to compel production of documents previously requested from the State of North Carolina, to which the State had objected on the grounds of legislative immunity and legislative privilege. (E.g., Doc. 58 in case 1:13CV658; Doc. 70 in case 1:13CV660.)

On February 21, 2014, the Magistrate Judge held a hearing on the motions to quash and compel. (Doc. 75.) The court took the motions under advisement and ordered supplemental briefing on the legislative immunity and privilege issues. (Id. at 123.) On February 26, Defendants (including the State, Governor McCrory, and the State Board of Elections), the United States, and the League and NAACP Plaintiffs filed supplemental briefs. (Docs. 70, 72, 73.)

The Magistrate Judge then issued an Order on March 27, 2014, granting in part and denying in part the motions to compel and motions to quash. (Doc. 79.) The March 27 Order concluded that the asserted legislative privilege was not absolute, but qualified, and must be evaluated under a "flexible approach,"

taking into account the serious claims raised under the Constitution and the VRA. (Id. at 6, 9.) The Magistrate Judge directed the parties to meet and confer and to file a joint report by April 7 presenting specific remaining disputes as to particular categories of documents. (Id. at 10.) In so doing, the Magistrate Judge also noted the need for the parties to address whether North Carolina public records law might require the production of certain documents even if they otherwise were subject to a claim of privilege. (Id. at 7.)

The legislators raised multiple objections to the Magistrate Judge's March 27 Order. (Doc. 83 at 2-3.) This court heard oral argument on the objections on May 9, 2014, and, on May 15, 2014, issued a Memorandum Order sustaining the legislators' objections in part and overruling them in part. (Doc. 93.) In relevant part, the court overruled the legislators' objection that legislative privilege is absolute, instead holding that the privilege was qualified. (Id. at 25.) As a result, the court ordered that, after meeting and conferring, the parties file their joint report (previously set for April 7) on or before May 22, 2014. (Id. at 28.) The court also modified the Magistrate Judge's deadline by which Defendants had to notify Plaintiffs of the identity of legislators upon whom they would rely for purposes of their preliminary injunction motions. (Id.)

On May 22, 2014, the parties filed their joint status report, as directed. (Doc. 114.) The report indicated that Defendants agreed to produce documents in the custody of any State agency reflecting communications with any State legislator or legislative staff and that Plaintiffs agreed not to seek communications solely between legislators and their attorneys created after this litigation commenced or communications solely between a legislator and his or her personal aide. (Id. at 1-3.) The report, however, also noted that the parties remained unable to agree on the application of legislative privilege as to four categories of documents: (1) communications between legislators and third parties (outside of State agencies), such as constituents, lobbyists, and public interest groups; (2) communications solely among legislators; (3) communications between legislators and legislative staff (besides personal aides); and (4) communications between legislators and outside counsel prior to the commencement of this litigation. (Id. at 3.) Given this ongoing discovery dispute, the parties requested the opportunity to further brief the legislative privilege issue (id. at 4), which the Magistrate Judge approved in a Text Order on June 4, 2014.

On June 11, 2014, Defendants, the United States, and the League and NAACP Plaintiffs each filed opening briefs on the privilege issue. (Docs. 119, 120, 121.) Those parties then filed response briefs on June 25. (Docs. 139, 142, 143.) After an

apparent pause in activity while the parties litigated Defendants' motion to dismiss, Plaintiffs' motion for a preliminary injunction, and the expedited appeal of this court's preliminary injunction decision to the Fourth Circuit and to the Supreme Court, the discovery dispute resumed on November 7, 2014, when the Magistrate Judge and the parties convened a telephonic status conference to address discovery matters and the pending legislative privilege issue.

**B. The Magistrate Judge's November 20, 2014 Order and Subsequent Objections**

On November 20, the Magistrate Judge issued the current Order. (Doc. 194.) Addressing the four disputed categories of documents, the Order concluded that legislative privilege did not preclude production of communications between legislators and third parties, nor between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013 (although those communications were still subject to claims of attorney-client and other privilege). (Id. at 2, 13.) The Magistrate Judge ordered production of legislators' communications with third parties and the creation of a privilege log for communications between legislators and outside counsel prior to commencement of this litigation. (Id. at 14.) The Magistrate Judge, however, declined to order the production of, or the creation of a privilege log for, communications solely among legislators or between

legislators and legislative staff. (Id.) The Order concluded that legislative privilege applied to those internal communications, and the court quashed subpoenas and requests for their production. (Id.)

Plaintiffs and Defendants (including third-party legislators) filed their present objections to the November 20 Order. Plaintiffs object to the Order's conclusion that Defendants need not produce or create a privilege for communications solely among legislators or between legislators and legislative staff. (Doc. 201.) Defendants and the legislators object only to the portion of the Order overruling their objection to legislative privilege as to communications between the legislators and third parties, specifically those communications between the legislators and constituents. (Doc. 204 at 2.) No party objected to the portion of the Order requiring the creation of a privilege log for communications between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013.<sup>2</sup>

## **II. ANALYSIS**

### **A. Standard of Review**

This court reviews orders issued by Magistrate Judges in non-dispositive motions for clear error and rulings contrary to law.

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<sup>2</sup> In fact, on December 8, 2014, Defendants produced a privilege log reflecting communications between legislators and outside counsel prior to the commencement of this litigation. (Doc. 205 at 7-8.)



Fed. R. Civ. P. 72(a). “[U]nless the result compelled by the Magistrate Judge’s ruling is contrary to law or clearly erroneous, the Order[] of the Magistrate Judge will be affirmed.” Food Lion, Inc. v. Capital Cities/ABC Inc., 951 F. Supp. 1211, 1213 (M.D.N.C. 1996). Magistrate Judges are generally afforded great deference in discovery rulings due to the “fact-specific character of most discovery disputes.” In re Outsidewall Tire Litig., 267 F.R.D. 466, 470 (E.D. Va. 2010). Nevertheless, although rules governing discovery disputes allow discretion, a district court must vacate a Magistrate Judge’s order that is clearly erroneous or contrary to law. Id.; cf. In re Grand Jury Subpoena, 341 F.3d 331, 334 (4th Cir. 2003) (“We review factual findings underlying an attorney-client privilege ruling for clear error, and we review the application of legal principles de novo.”).

#### **B. Legislative Privilege**

Distinct from the legislative immunity afforded federal legislators under Article I of the U.S. Constitution, the legislative privilege of State legislators derives from federal common law. See Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951) (extending State legislators immunity from civil suit through federal common law); EEOC v. Wash. Suburban Sanitary Comm’n, 666 F. Supp. 2d 526, 531 (D. Md. 2009) (“[L]egislative privilege is a derivative of legislative immunity.”), aff’d, 631 F.3d 174 (4th Cir. 2011); Favors v. Cuomo, 285 F.R.D. 187, 209 (E.D.N.Y. 2012)

("Legislative privilege is related to, but distinct from, the concept of legislative immunity."). As an issue of federal common law, the application of State legislative privilege falls under Federal Rule of Evidence 501. See Favors, 285 F.R.D. at 209; Florida v. United States, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012). Specifically in the present case, the court is concerned with the scope and application of State legislative privilege in the limited context of the race and age discrimination claims presented under the VRA and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments. Cf. Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 304-05 (D. Md. 1992) (noting the "unique nature of legislative redistricting" and that "it directly involves the self-interest of the legislators themselves").

The Magistrate Judge correctly recognized that determining the scope and application of State legislative privilege requires a flexible approach.<sup>3</sup> In assessing discovery requests of State legislators, some courts consider a five-factor balancing test, as

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<sup>3</sup> As this court noted in its earlier Memorandum Order on this issue (Doc. 93 at 23 n.11), some courts have compared the legislative privilege to, or even described it as, a "deliberative process privilege." See Doe v. Nebraska, 788 F. Supp. 2d 975, 984 (D. Neb. 2011); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 97-98 (S.D.N.Y. 2003), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); Manzi v. DiCarlo, 982 F. Supp. 125, 130 (E.D.N.Y. 1997) (describing the "deliberative process privilege" as a privilege protecting the decisionmaking of the executive branch); Kay v. City of Rancho Palos Verdes, No. CV 02-03922, 2003 WL 25294710, at \*15 (C.D. Cal. Oct. 10, 2003) (same). As before, the court need not define the specific parameters of the deliberative process privilege to decide the current objections.

did the Magistrate Judge. See e.g., Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014); Doe v. Nebraska, 788 F. Supp. 2d 975, 985-86 (D. Neb. 2011); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); Veasey v. Perry, Civ. A. No. 2:13-CV-193, 2014 WL 1340077, at \*2 (S.D. Tex. Apr. 3, 2014); Perez v. Perry, Civ. No. 11-CV-360, 2014 WL 106927, at \*2 (W.D. Tex. Jan. 8, 2014) (three-judge panel); Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at \*7 (N.D. Ill. Oct. 12, 2011). But see United States v. Irvin, 127 F.R.D. 169, 173 (C.D. Cal. 1989) (applying an eight-factor balancing test). Those five factors are: "(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 the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at \*7.

Several of those factors apply to the communications at issue in the parties' objections. First, legislator communications are certainly relevant to the issue of intent tied to the various claims raised in these cases. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("The legislative or administrative history may be highly relevant, especially where

there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. In 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.”); Marylanders, 144 F.R.D. at 305 (concluding that legislative privilege “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”). Second, these documents are largely unavailable by other means. While Defendants note that substantial documentary evidence has been turned over (Doc. 119 at 13), other documents have not been made available. Defendants have not shown that there are any other paths of discovery reasonably available to Plaintiffs. Third, there is no question that Plaintiffs’ allegations in these cases are serious. As one court in this circuit observed, “The right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance.” Page, 15 F. Supp. 3d at 667. With regard to the fourth factor, the State of North Carolina is a named party in this litigation, although its legislators are involved in the litigation because of Plaintiffs’ subpoenas.

With these four factors, the court considers the intrusion into and deleterious effect on legislative decisionmaking and

activity caused by Plaintiffs' discovery requests at issue in the parties' objections.

### 1. Plaintiffs' Objection

Plaintiffs object to the Magistrate Judge's Order to the extent that it precluded the production of, or creation of a privilege log for, communications among legislators or between legislators and legislative staff.

The Fourth Circuit has emphasized the protective value of the State legislative privilege. In EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174 (4th Cir. 2011), the court explained, "Legislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." Id. at 181. Legislative privilege also enables legislators and their staff "to focus on their public duties by removing the costs and distractions attending lawsuits." Id. (noting that legislative immunity – of which legislative privilege is an extension – "shields" legislators "from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box"). Importantly, the purposes served by application of legislative privilege extend to discovery procedures. See id. (citing MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (noting that "[d]iscovery procedures can prove just as intrusive" as being named a party to litigation)).

Recognizing the extension of legislative privilege into discovery matters, the Fourth Circuit forecasted that "if [the parties] sought to compel information from legislative actors about their legislative activities, they would not need to comply." Id.

Other courts have similarly illuminated the importance of legislative privilege in the face of discovery demands. In Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292 (D. Md. 1992), a challenge to the constitutionality of a Maryland redistricting plan, a three judge panel in the District Court for Maryland held that "[t]he doctrine of legislative immunity (both in its substantive and testimonial aspects) itself embodies fundamental public policy. It insulates legislators from liability for their official acts and shields them from judicial scrutiny into their deliberative processes." Id. at 304 (Murnaghan and Motz, JJ.) (footnote omitted). Acknowledging, however, that legislative privilege is qualified, not absolute, the panel permitted the deposition of three private citizens who were part of a five-member State committee that also included two State legislators. Id. at 304-05. The decision went on to predict, "We too, however, would flatly prohibit [the two State legislators'] depositions from being taken as to any action they took after the [relevant] legislation reached the floor of the [legislature]." Id. at 305. As a result, the Marylanders court refused to permit the taking of either legislators' deposition but permitted the

deposition of the three private citizens on the committee, thus allowing for discovery "without directly impacting upon legislative sovereignty." Id.

The District Court for South Carolina evinced a similar respect for legislative sovereignty when faced with requests for depositions of State legislators. In a case alleging racial gerrymandering under § 2 of the VRA as well as the Fourteenth and Fifteenth Amendments, that court unequivocally "prohibit[ed] Plaintiffs from inquiring into any matters protected by legislative privilege." Backus v. South Carolina, 3:11-cv-03120 (D.S.C. Feb. 08, 2012) (Doc. 103 in case 3:11CV3120 at 2). The court stated further, "That means Plaintiffs are prohibited from asking any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation." Id.

Courts outside of this circuit also acknowledge the importance of legislative privilege. See Florida, 886 F. Supp. 2d at 1304 (resisting the United States' effort to obtain discovery of State legislators in a preclearance action under § 2 of the VRA and noting, "[T]he legislators have a federal legislative privilege – at least qualified, if not absolute – not to testify in this civil case about the reasons for their votes. The privilege is broad enough to cover all the topics that the intervenors propose to ask them and to cover their personal notes

of the deliberative process.”); Favors, 285 F.R.D. at 220 (in redistricting challenge, recognizing that disclosure of legislator communications may “inhibit full and frank deliberations”); Rodriguez, 280 F. Supp. 2d at 102-03 (S.D.N.Y. 2003) (in redistricting challenge, denying motion to compel production of documents concerning deliberations solely among legislators); Comm. for a Fair & Balanced Map, 2011 WL 4837508, at \*8 (noting in redistricting challenge that “the need to encourage frank and honest discussion among lawmakers favors nondisclosure.”). The value and importance of the legislative privilege is lost if it is not applied to legislative staff and aides. See Gravel v. United States, 408 U.S. 606, 616-17 (1972) (stating that, in the context of the legislative privilege for members of Congress, “the day-to-day work of . . . aides is so critical to the Members’ performance that they must be treated as the latter’s alter egos”); Page, 15 F. Supp. 3d at 667 (noting in redistricting challenge that “any effort to disclose the communications of legislative aides and assistants who are otherwise eligible to claim the legislative privilege on behalf of their employers threatens to impede future deliberations by the legislature.”); Florida, 886 F. Supp. 2d at 1304 (noting in VRA § 2 preclearance action, “The privilege also extends to staff members at least to the extent that the proposed testimony would intrude on the legislators’ own deliberative process and their ability to communicate with staff



members on the merits of proposed legislation."); Comm. for a Fair & Balanced Map, 2011 WL 4837508, at \*8 (noting in redistricting challenge that "the need for confidentiality between lawmakers and their staff is of utmost importance."); ACORN v. Cnty. of Nassau, No. CV05-2301, 2007 WL 2815810, at \*4 (E.D.N.Y. Sept. 25, 2007) (noting in re-zoning case charging discriminatory animus, "Where a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator.").

For the reasons enumerated by the Supreme Court, the Fourth Circuit, and numerous lower courts, this court concludes that, for Plaintiffs' requests for discovery of communications among legislators and between legislators and their staff, the potential intrusion into the legislative process outweighs the countervailing factors.

As a step short of production, Plaintiffs request that Defendants be ordered to produce a privilege log limited to the objective facts relied upon by the legislators. (See Doc. 201 at 11.) But Plaintiffs do not suggest that requesting the State legislators to create such a detailed privilege log is any less intrusive than immediate production. The purposes of legislative privilege – avoiding interference with the legislative process and promoting frank deliberations among legislative decisionmakers –

appear equally applicable to requests for a legislator to produce a log of all documents (and then to litigate whether to produce certain of those documents) as it would to requests for direct production of the documents. See Wash. Suburban, 631 F.3d at 181 (citing MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (noting that “[d]iscovery procedures can prove just as intrusive” as being named a party to litigation)); Powell v. Ridge, 247 F.3d 520, 530 (3d Cir. 2001) (Roth, J., concurring) (“If legislative privilege from civil discovery exists, either for a party, as in the instant case, or for a non-party as it may arise in the future, it exists to protect legislators from the burden of having to respond to discovery and of having to deal with the distractions and disruptions that discovery imposes on their ability to carry out their governmental functions.”); cf. United States v. Rayburn House Office Building, 497 F.3d 654, 660 (D.C. Cir. 2007) (noting that discovery procedures can prove just as intrusive as naming legislators as parties).

Here, approving Plaintiffs’ request for a privilege log of the objective facts State legislators relied upon would undermine the very purpose and function of legislative privilege, unduly intruding into legislative affairs and imposing significant burdens on the legislative process. See Wash. Suburban, 631 F.3d at 181; Page, 15 F. Supp. 3d at 667. As one court facing a similar

request put it:

[This] conclusion, namely that the privilege extends to objective facts, is supported by its underlying policy goal, namely protecting legislators from interference with their legislative duties. Requiring testimony about communications that reflect objective facts related to legislation subjects legislators to the same burden and inconvenience as requiring them to testify about subjective motivations – the “why” questions. Creating an “objective facts” exception to the legislative process privilege thus undermines its central purpose.

Kay v. City of Rancho Palos Verdes, No. CV 02-03922, 2003 WL 25294710, at \*11 (C.D. Cal. Oct. 10, 2003) (citation and quotation marks omitted). Therefore, considering all relevant factors, the court will not order a privilege log of objective facts relied on by the legislators.

For all these reasons, the court finds that the Magistrate Judge’s conclusion that the legislative privilege shields the production of, or creation of a privilege log for, communications among legislators or between legislators and legislative staff is neither clearly erroneous nor contrary to law. Plaintiffs’ objection is therefore overruled.

## **2. Defendants’ Objection**

Although the Magistrate Judge ordered production of all communications between legislators and third parties, Defendants now object only to the production of communications between legislators and constituents, arguing that legislative privilege

extends to those communications.<sup>4</sup> (Doc. 204 at 2-3 ("The instant objections are limited to communications between constituents and legislators.").)

Most importantly, Defendants cite no case in which a court has extended legislative privilege to communications between State legislators and constituents. Rather, several courts have denied State legislators' requests to extend legislative privilege to communications with third parties, including constituents.<sup>5</sup> See Doe, 788 F. Supp. 2d at 987 (stating, without reasoning, that

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<sup>4</sup> Defendants lodged no objection as to the production of communications between legislators and third parties functioning as experts or consultants. (See Doc. 217.) Their response brief filed with the Magistrate Judge specifically represents that those communications are not at issue in this case because there are none. (Doc. 139 at 9 (referring to experts and consultants while stating "[n]o such retained or appointed outsiders are involved in the instant case".)) Thus, the court's decision does not reach whether the legislative privilege could extend to communications between legislators and third parties functioning as experts or consultants – a proposition for which there is support. See, e.g., ACORN v. Cnty. of Nassau, No. 05CV2301, 2009 WL 2923435, at \*6 (E.D.N.Y. Sept. 10, 2009) ("Legislators must be permitted to have discussions and obtain recommendations from experts retained by them to assist in their legislative functions, without vitiating or waiving legislative privilege."); Backus, 3:11-cv-03120 (Doc. 103 at 2) (quashing deposition questions involving "communications between the Senate or the House and 'private consultants or experts'").

<sup>5</sup> Moreover, several cases have assumed that any legislative privilege is waived to the extent a legislator communicates with constituents. See Favors, 285 F.R.D. at 212 ("The law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."); Perez, 2014 WL 106927, at \*2 ("To the extent . . . that any legislator, legislative aide, or staff member had conversations or communications with any outsider (e.g. party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications."). By finding waiver, these courts necessarily presume that the legislative privilege does not otherwise extend to communications with constituents.

documents that "were communicated to or shared with non-legislative members" must be produced); Rodriguez, 280 F. Supp. 2d at 101 (stating, in *dicta*, that "a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation – a session for which no one could seriously claim privilege"); Favors v. Cuomo, 1:11-cv-05632, (E.D.N.Y. Feb. 8, 2013) (Doc. 201-2 at 18 (holding that "inquiries from members of the public or media and responses thereto" by State legislators were not privileged)); Comm. for a Fair & Balanced Map, 2011 WL 4837508, at \*10 (stating that the privilege does not extend to "outsiders," like "lobbyists, members of Congress and the Democratic Congressional Campaign Committee" because those people "could not vote for or against" the law "nor did they work for someone who could"). As one court described, "While legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view." ACORN, 2007 WL 2815810, at \*6.

Defendants also oppose disclosure of communications between legislators and constituents on the ground they are protected under the First Amendment's Petition Clause.<sup>6</sup> (Doc. 204 at 7-8.)

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<sup>6</sup> The Magistrate Judge found that Defendants had waived this argument by not raising it earlier. This court in its review must consider new arguments made toward an issue raised before the Magistrate Judge, yet it need not address arguments made regarding a new issue. See United States v. George, 971 F.2d 1113, 1118 (4th Cir. 1992) ("[A]s part of its obligation to determine *de novo* any issue to which proper objection is made, a district court is required to consider all arguments directed

Defendants argue that disclosure would chill the constituents' First Amendment rights. (Id.) In support of this argument, Defendants rely on NAACP v. State of Ala. ex rel. Patterson, 357 U.S. 449 (1958). (Id. at 7.) In NAACP, the Supreme Court held that the associational right of the First Amendment's Free Speech Clause protected against disclosure of the NAACP's membership lists. NAACP, 357 U.S. at 462-63. The Supreme Court's holding did not reach the First Amendment right to petition the government.

Defendants further argue that Plaintiffs seek to "have it both ways" by making the current requests for communications between State legislators and constituents but then opposing Defendants' request for production of documents based on the First Amendment. (Doc. 204 at 8.) Defendants, however, have not demonstrated that this is so. As far as the court can tell, Defendants' requests do not appear to have sought communications between legislators and constituents. (See Docs. 204-2 at 4-5, 204-3 at 3-5, 204-4 at 3-6, 204-5 at 4-6, collectively seeking production from several organizations of "[a]ll documents . . . relating to plans for opposing House Bill 589 or proposal for amending any provision of House Bill 589 prior to its ratification by the General Assembly, including but not limited to, training

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to that issue, regardless of whether they were raised before the magistrate."); Cent. Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., 759 F. Supp. 2d 772, 776 (E.D. Va. 2011), aff'd, 715 F.3d 501 (4th Cir. 2013) (same).

materials, talking points, press releases, speeches, notes of conversations, or drafts of proposed legislation.”)

The interests that the State legislative privilege safeguards by limiting intrusions into a legislature’s deliberative process are less discernible in the context of documents revealing communications between legislators and constituents. That is because, while a legislator no doubt must be free to meet with constituents as to matters pending before the legislative body, the constituent is always free to disclose every aspect of the encounter. From the legislator’s perspective, therefore, it is hard to contend that there is any reasonable expectation of secrecy in this context or serious threat of timidity for fear that the conversation be discovered. As in Marylanders, permitting document discovery as to communications between legislators and private citizens “would provide a means for learning pertinent information without directly impacting upon legislative sovereignty.” Marylanders, 144 F.R.D. at 305. This outcome balances respect to the legislative process while acknowledging the qualified and limited character of the State legislative privilege.

Therefore, the court concludes that the Magistrate Judge’s determination that communications between State legislators and their constituents are not protected from disclosure by the

legislative privilege is neither clearly erroneous nor contrary to law. Defendants' objection is therefore overruled.

### **III. CONCLUSION**

For the reasons stated,

IT IS THEREFORE ORDERED that the Plaintiffs' Objection (Doc. 201) and the Defendants' Objection (Doc. 204) are OVERRULED.

/s/ Thomas D. Schroeder  
United States District Judge

February 4, 2015



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

NORTH CAROLINA STATE  
CONFERENCE OF THE NAACP, et al.,

Plaintiffs,

v.

PATRICK LLOYD MCCRORY, in his  
official capacity as the Governor of North  
Carolina, et al.,

Defendants.

**UNITED STATES' BRIEF IN  
OPPOSITION TO STATE  
LEGISLATORS' OBJECTION TO  
MAGISTRATE JUDGE'S 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

The United States opposes the State Legislators' objection to Magistrate Judge Peake's March 27, 2014 order on legislative privilege. Because Judge Peake's order is not clearly erroneous or contrary to law, *see* Fed. R. Civ. P. 72(a), this Court should affirm the order. In particular, in light of the upcoming preliminary injunction motions due on May 5, 2014, this Court should require, consistent with Judge Peake's order, that Defendants produce third party communications between legislators and outside individuals and agencies.

### **BACKGROUND AND PROCEDURAL HISTORY**

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

On December 11 and 19, 2013, Plaintiffs in *NAACP v. McCrory*, 1:13-cv-658 ("NAACP Plaintiffs"), served subpoenas seeking documents from 13 North Carolina legislators (the "State Legislators" or "Movants"). The NAACP Plaintiffs' subpoenas seek documents relating to the consideration and implementation of HB 589, including documents reflecting legislative purpose; documents received by State Legislators from individuals and groups outside the North Carolina General Assembly, such as constituents, lobbyists, public interest groups, and the North Carolina State Board of Elections (SBOE); and factual data and reports relating to, for example, rates of

possession of photo identification among North Carolina voters, and the costs and other impacts of HB 589. *See, e.g.*, Ex. 1 (Subpoena to Senator Rucho).

On January 20, 2014, the State Legislators filed a joint motion to quash the 13 document subpoenas, arguing that the doctrine of legislative immunity categorically bars Plaintiffs from seeking *any* discovery from the State Legislators. ECF No. 44, 13-cv-861. On February 10, 2014, Plaintiffs in *League of Women Voters v. North Carolina*, 13-cv-660 (“LWV Plaintiffs”), filed a motion to compel the production of documents that Defendants had withheld from discovery on the same basis.<sup>1</sup> On March 27, 2014, after extensive briefing and a hearing, 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, 13-cv-861.

To that end, Judge Peake concluded that legislator communications with outside parties, and other documents that are considered public records under state law, could be produced without overly burdening legislators or intruding on the legislative process, while “other categories of documents may require further scrutiny in balancing the

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<sup>1</sup> The United States’ own requests for production seek some of the same categories of information as the NAACP Plaintiffs’ Rule 45 subpoenas and the LWV Plaintiffs’ document requests under Rule 34. In their responses to the United States’ document requests, Defendants lodged the same objection set forth in the motion to quash the legislative subpoenas, asserting that document discovery from the State Legislators is categorically barred. *See* Ex. 2

competing interests.” *Id.* at 7. Judge Peake ordered the parties to meet and confer as to the specific categories of documents that would be produced or withheld on legislative privilege grounds, and to “present any narrowed remaining disputes with respect to particular categories and types of documents for further resolution by the Court.” *Id.* at 8. On April 2, 2014, the State Legislators objected to Judge Peake’s March 27 order and moved to stay the order. ECF Nos. 83 & 84, 13-cv-861. On April 4, 2014, Judge Peake granted the motion to stay, pending resolution of the objections. Defendants have since declined to meet and confer on these issues.

### **LEGAL STANDARD**

Where, as here, a magistrate judge issues an order resolving an issue that is “not dispositive of a party’s claim or defense,” a district court may “modify or set aside any part of” the order only if it is “clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); *Everett v. Prison Health Servs.*, 412 F. App’x. 604, 605 n.2 (4th Cir. 2011); *Tafas v. Dudas*, 530 F. Supp. 2d 786, 792 (E.D. Va. 2008); *Stonecrest Partners, LLC v. Bank of Hampton Roads*, 770 F.Supp.2d 778, 782 (E.D.N.C. 2011) (magistrate judge’s decisions relating to discovery disputes “accorded greater deference”).

### **ARGUMENT**

The three related cases challenging HB 589 pursuant to Section 2 of the Voting Rights Act will require the Court to undertake a fact-intensive “appraisal of the design and impact” of HB 589’s challenged provisions. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). Plaintiffs’ discovery requests are directed at legislators who by the very nature of their jobs have first-hand knowledge relating to the development and passage of HB 589,

and are therefore likely to shed light on the process leading up to its passage, the facts and issues considered in enacting the bill, and the bill's likely impact on voters.

The State Legislators' assertion of a blanket privilege "encompass[ing] all aspects of the legislative process and forbid[ding] plaintiffs from seeking *any* production at all from the legislative movants," Movants' Obj. at 10-11, is wrong as a matter of law. Although state legislators enjoy immunity from civil liability, any evidentiary privilege they possess is qualified, at best. As Judge Peake recognized, this qualified privilege does not apply to legislator communications with outside parties, a substantial portion of the documents and communications at issue here. With respect to purely internal legislative documents, it was not clearly erroneous for Judge Peake to conclude that whether such documents should be shielded from disclosure must be determined on a case-by-case basis, taking into account the particular context of these Voting Rights Act cases. Finally, Judge Peake correctly held that Defendants must identify legislators on whom they will rely in responding to any preliminary injunction motions with ample time for Plaintiffs to conduct meaningful discovery of those individuals.

**I. No Absolute Legislative Privilege Categorically Shields Legislative Documents from Discovery in These Cases**

Judge Peake correctly held that any legislative privilege accorded to state lawmakers in these voting rights cases is qualified. *See* Order at 3. The State Legislators improperly conflate "legislative immunity," which refers to state legislators' immunity from civil liability, with "legislative privilege," which, where it exists, provides only a qualified evidentiary privilege. *See Perez v. Perry (Perez II)*, 2014 WL 106927, at \*2

(W.D. Tex. Jan. 8, 2014) (three-judge court) (“While the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, ‘at best, one which is qualified.’” (citations omitted)); *Favors v. Cuomo (Favors I)*, 285 F.R.D. 187, 209 (E.D.N.Y. 2012) (“Legislative privilege is related to, but distinct from, the concept of legislative immunity.”).<sup>2</sup>

That state legislators are immune from civil liability does not mean that they have an absolute privilege to refuse to respond to otherwise valid requests for documents or testimony. In *Tenney v. Brandhove*, the Supreme Court recognized that state legislators are immune from civil liability for “legitimate legislative activity.” 341 U.S. 367, 376 (1951). *Tenney* does not, however, “stand for the proposition that state legislators are never required to supply evidence in a federal civil case where, like the instant case, there is no threat of personal liability to any of the state legislators.” *Doe v. Nebraska*, 788 F. Supp. 2d 975, 984 n.2 (D. Neb. 2011); *see also Manzi v. DiCarlo*, 982 F. Supp. 125, 129 (E.D.N.Y. 1997) (“The Supreme Court in *Gillock* rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege.”); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95-96 (S.D.N.Y. 2003) (“[N]otwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions.”).

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<sup>2</sup> Federal common law governs questions of privilege in this federal question case. *See* Fed. R. Evid. 501; *Virmani v. Novant Health Inc.*, 259 F.3d 284, 286 (4th Cir. 2001). In addition, “because ‘[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)).

In *United States v. Gillock*, the Supreme Court declined to recognize an absolute “evidentiary privilege for state legislators for their legislative acts.” 445 U.S. 360, 373 (1980). The Court rejected the argument that the common law provided state legislators an absolute evidentiary privilege analogous to that enjoyed by members of Congress under the Speech and Debate Clause. *Id.* at 367.<sup>3</sup> The Court also rejected the notion that principles of federalism compelled it to construct such a privilege. The Court reasoned that, because “in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power[,]” the separation of powers concerns animating the Speech and Debate Clause gave “no support to the grant of a privilege to state legislators in federal criminal prosecution.” *Id.* at 370. Thus, although it recognized that “denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function,” the Court concluded that “the legitimate interest of the Federal

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<sup>3</sup> Most of the cases the State Legislators’ cite for their claim that legislative immunity and legislative privilege are “co-extensive and both absolute,” Movants’ Obj. at 18-19 (citing *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988), *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, (1975), and *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995)), address the privilege accorded to members of Congress under the Speech and Debate Clause of the United States Constitution. As the Supreme Court has recognized, the Speech and Debate Clause does not apply to state legislators, and any protection afforded state lawmakers under federal common law is “far less than the legislative privilege created by the Federal Constitution.” *Gillock*, 445 U.S. at 366 n.5; *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 906, 920 (W.D. Va. 2012) (“In contrast to the privilege enjoyed by members of Congress under the Speech or Debate Clause, there is no absolute ‘evidentiary privilege for state legislators for their legislative acts.’”) (quoting *Gillock*).

Government in enforcing its criminal statutes” outweighed the “speculative benefit to the state legislative process” of allowing the evidentiary privilege.<sup>4</sup> *Id.*

Moreover, the Court has acknowledged that legislative evidence is highly relevant to “[d]etermining whether invidious discriminatory purpose was a motivating factor” in a legislative decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In *Arlington Heights*, the Court set forth a non-exhaustive list of evidentiary factors for courts to consider in cases alleging intentional racial discrimination. *Id.* at 266-68. In evaluating discriminatory purpose under *Arlington Heights*, this Court must assess, among other things, the historical background of the passage of HB 589; the sequence of events leading up to passage of the bill; whether passage of the bill departed, either procedurally or substantively, from the normal practice; and the legislative history, including contemporaneous statements and viewpoints held by the decision makers. *Id.* The Supreme Court recognized that in “extraordinary instances” legislators could be required to testify as to legislative purpose. *Id.* at 268.

Because “racial discrimination is not just another competing [policy] consideration,” the voting rights cases under Section 2 of the Voting Rights Act currently before this Court are precisely the context in which judicial inquiry into legislative purpose is appropriate. *Id.* at 265. The Fourth Circuit itself has emphasized that race

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<sup>4</sup> Although *Gillock* involved a criminal prosecution, the Court did not limit its holding to criminal cases. The Court’s reasoning applies equally to Section 2 enforcement actions, which involve “important federal interests,” *Gillock*, 445 U.S. at 373, and which, like criminal prosecutions, “seek to vindicate public rights[.]” *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at \*6 (N.D. Ill. Oct. 12, 2011). See also United States’ Opp’n to Mot. to Quash at 10-11, ECF No. 58, 13-cv-861.



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 & n.6 (4th Cir. 1989). As Judges Murnaghan and Frederick Motz noted in *Marylanders for Fair Representation v. Schaefer*, a case challenging Maryland’s state legislative redistricting plan under Section 2 of the Voting Rights Act, “[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. 292, 304 (D. Md. 1992) (three-judge court) (opinion of Murnaghan, C.J., and Motz, D.J.).<sup>5</sup> *See also Veasey v. Perry*, 2014 WL 1340077, at \*2 (S.D. Tex. Apr. 3, 2014) (in a Section 2 case challenging Texas’ photo voter identification law, finding that the “motive and intent of the state legislature when it enacted [the law] is the crux of this Voting Rights Act case[.]” and ordering production of legislators’ documents).

Two recent decisions in Voting Rights Act cases challenging the State of Texas’ 2011 redistricting plans demonstrate the importance of legislative document discovery

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<sup>5</sup> Judge Peake’s reliance on *Marylanders* is not, as Movants suggest, improper. *See* Movants’ Obj. at 15-18. First, neither the Supreme Court nor the Fourth Circuit has recognized an absolute evidentiary privilege for state lawmakers. *See supra* at 5-7; *infra* at 16-17. Second, as discussed in more detail below, the current vote denial cases implicate the very same issues counseling against broad application of legislative privilege as the redistricting matter in *Marylanders*, *see infra* at 18-19, and courts have routinely considered legislative evidence in voting rights cases, *see infra* at 8-9 (citing cases). Finally, notwithstanding Movants’ argument to the contrary, the court in *Marylanders*, like Judge Peake here, did not decide but left open the possibility that legislators could be deposed as to certain matters. *See Marylanders*, 144 F.R.D. at 305.

and testimony. In *Perez v. Perry*, after declining to grant a blanket protective order blocking legislative depositions, the court relied on legislators' testimony to find that the Texas legislature "may have focused on race to an impermissible degree" when crafting its House redistricting plan. Op. at 6, *Perez v. Perry (Perez I)*, 5:11-cv-360 (W.D. Tex. Mar. 19, 2012) (three-judge court) (Ex. 3). Similarly, in *Texas v. United States*, the court relied in part on email exchanged among state legislative staff and consultants to conclude that Texas' congressional redistricting plan "was motivated, at least in part, by discriminatory intent." 887 F. Supp. 2d 133, 161 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 133 S. Ct. 2885 (2013); *id* at 154-56, 161 n.32. Indeed, courts routinely look to legislative evidence—including documents and testimony obtained from legislators (and their staff) —in voting rights cases, including cases arising under Sections 2 and 5 of the Voting Rights Act. See *United States v. Charleston Cnty.*, 316 F. Supp. 2d 268, 292 (D.S.C. 2003), *aff'd* 365 F.3d 341 (4th Cir. 2004) (Section 2); *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) (Section 2); *South Carolina v. United States*, 898 F. Supp. 2d 30, 44-45 (D.D.C. 2012) (three-judge court) (Section 5); *Busbee v. Smith*, 549 F. Supp. 494, 500 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983) (Section 5); *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (challenge to North Carolina's congressional redistricting plan under the Fourteenth Amendment).

Accordingly, courts hearing voting rights cases in the Fourth Circuit and around the country have recognized that although state and local legislators may be immune from civil liability, any evidentiary privilege they possess is qualified at best. See *e.g.*,

*Marylanders*, 144 F.R.D. at 304 (noting that “testimonial legislative immunity is not an absolute”); *Veasey*, 2014 WL 1340077, at \*1 (same); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at \*7 (N.D. Ill. Oct. 12, 2011) (“Under the federal common law, legislative privilege is qualified, not absolute, and may be overcome by a showing of need.”); United States’ Opp’n to Mot. to Quash at 9, ECF No. 58, 13-cv-861.

## **II. Legislator Communications With Third Parties Are Not Protected By Legislative Privilege**

In the March 27 order, Judge Peake correctly noted that “many of the documents requested by the subpoenas and discovery requests involve communications with outside parties or are other documents that are considered public records under state law. Requiring production of those documents is not unduly burdensome or invasive of the legislative process.” Order at 7. These documents should be produced immediately.

Courts routinely hold that documents and communications exchanged between legislators and non-legislators (other than their staff members) are not protected by state legislative privilege. In *Favors v. Cuomo*, for example, the court found that state legislators could not “reasonably claim a privilege” over documents that were “made public or were shared with individuals outside the legislative process.” *Favors I*, 285 F.R.D. at 213 n.26; *Balanced Map*, 2011 WL 4837508, at \*10 (“Communications between [state legislators] and outsiders to the legislative process” are not privileged.). This is true even when the “outsiders are consummate insiders[,]” such as lobbyists or representatives of public interest groups. *Rodriguez*, 280 F. Supp. 2d at 101 (noting that

“no one could seriously claim privilege” over a “conversation between legislators and knowledgeable outsiders, such as lobbyists”); *Balanced Map*, 2011 WL 4837508, at \*10 (same); *Almonte v. City of Long Beach*, 2005 WL 1796118, at \*3 (E.D.N.Y. Jul. 27, 2005) (consultation with outside “political operative[s]” was not privileged).

Several of the document requests at issue here seek information that falls squarely into this category. *See, e.g.*, Ex. 1, RFP No. 6 (requesting documents reflecting “communications between [the State Legislators] and any lobbyists, political organizations, or public interest groups regarding any provision in H.B. 589”); *id.*, RFP No. 2 (requesting documents reflecting “communications between you and your constituents regarding any provision in H.B. 589”).<sup>6</sup> Indeed, each request that seeks documents and communications “received by” any of the State Legislators encompasses information received from outside parties, which would fall beyond the scope of any legislative privilege.

Communications between legislators and staff at the SBOE also fall into this category and are not protected by legislative privilege. The SBOE is not part of the General Assembly, and its staff members are not legislative staff. Like constituent mail and other communications with outsiders, legislator communications with the SBOE are

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<sup>6</sup> As noted in the March 27 order, these documents would also be subject to disclosure under North Carolina’s Public Records Act. *See* N.C.G.S. §§ 132-1; Attorney General Legal Op., 2002 WL 544469, at \*1 (Feb. 14, 2002). It is therefore disingenuous for the State Legislators to contend that producing such communications in this case would undermine “bedrock democratic principles” and deter “ordinary citizens” from petitioning their legislators. Movants’ Obj. at 12. To the extent a document contains sensitive, non-public information, it can be designated “confidential” or “highly confidential” under the Court’s Protective Order in this case. ECF No. 36, 13-cv-861.

subject to North Carolina's Public Records Act. *See* N.C.G.S. §§ 132-1; Attorney General Legal Op., 2002 WL 544469, at \*1 (Feb. 14, 2002). Indeed, in the past, the SBOE has posted on its public website emails exchanged among legislators, legislative staff, and SBOE staff, some of which are plainly responsive to Plaintiffs' document requests regarding HB 589 in this case. *See, e.g.*, Ex. 4 at 7 (legislator requests by supporters of HB 589 for information about the number, ethnicity, and party identification of North Carolina voters who lack DMV-issued photo identification).<sup>7</sup> Nevertheless, in this litigation, Defendants assert legislative privilege as to these types of documents.<sup>8</sup>

Plaintiffs' discovery requests seek information and communications exchanged between legislators or legislative staff and the SBOE. For example, legislator requests for reports or data relating to rates of possession of photo identification among North Carolina voters, and the racial demographics of voters using early voting and same-day-registration, would fall into this category, as would SBOE responses to such requests. *See, e.g.*, Ex. 1, RFP Nos. 9, 10, 11, 12, 15. In addition to being third party communications that are beyond the scope of legislative privilege, such documents are discoverable because they reveal the "objective facts upon which lawmakers relied" in the decision-making process. *Balanced Map*, 2011 WL4837508, at \*11; *Arlington*

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<sup>7</sup> <ftp://alt.ncsbe.gov/Requests/Materials/2013IDEmails.pdf> (last visited Apr. 9, 2014).

<sup>8</sup> Although Defendants have produced privilege logs for some SBOE documents withheld on the basis of attorney-client privilege and the work product doctrine, they have not produced any log of documents withheld on the basis of legislative privilege.

*Heights*, 429 U.S. at 270 n.20 (plaintiffs were permitted “to question [legislators] fully about materials and information available to them at the time of decision”); *Nebraska*, 788 F. Supp. 2d at 984-86 (excluding “documents containing factually based information used in the decision-making process or disseminated to legislators or committees” from the scope of legislative privilege).<sup>9</sup>

**III. For Documents That May Be Subject To A Qualified Legislative Privilege, It Is Not Clearly Erroneous To Adopt A Flexible Approach That Considers The Need For Information In The Specific Context Of These Voting Rights Cases**

Judge Peake held that in these cases, “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.” Order at 3. This determination is neither clearly erroneous nor contrary to law. Fed. R. Civ. P. 72(a).<sup>10</sup> Courts have frequently applied a flexible, balancing test to determine whether legislative privilege must yield to the need for documentary evidence from state and local legislators, and commonly consider the following factors: (1) the relevance of the evidence sought; (2) the availability of other evidence; (3) the seriousness of the litigation

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<sup>9</sup> To the extent such communications relate to post-enactment implementation of HB 589, they are also outside the scope of legislative privilege because post-enactment implementation is not a “legislative act” or an “integral step[] in the legislative process.” *EEOC v. Washington Suburban Sanitary Comm’n*, 631 F.3d 174, 184 (4th Cir. 2011) (declining to quash subpoena that sought information about events occurring after a legislative act).

<sup>10</sup> The United States believes it is entitled to internal communications between and among legislators, and legislators and staff, in this Section 2 case alleging intentional racial discrimination in voting. *See, e.g., Veasey*, 2014 WL 1340077. Under the “flexible approach” adopted by Judge Peake, the Court will have the opportunity to evaluate the applicability of legislative privilege with respect to specific documents (or categories of documents) based on a more developed record, including a privilege log.

and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees. *See, e.g., Veasey*, 2014 WL 1340077, at \*2.

Applying this test, courts adjudicating Section 2 cases routinely order the production of documents over which defendants claim state legislative privilege. In *Veasey v. Perry*, for example, the court held that the balance of factors weighed in favor of disclosure and ordered the State of Texas to produce legislative documents and communications concerning the passage of Texas' photo voter identification law. The court found that the requested evidence was "highly relevant" to the United States' Section 2 claim "because it bears directly on whether state legislators, contrary to their public pronouncements, acted with discriminatory intent in enacting SB 14." *Id.* "The federal government's interest in enforcing voting rights statutes is, without question, highly important," and "the state government's role is direct." *Id.* The court also rejected Texas' contention that the United States should rely exclusively on public documents (*e.g.*, floor debate) to make its case. *Id.* at 3.

The same factors apply here. First, the requested documents are likely to contain evidence that is highly probative of Plaintiffs' claims that HB 589 violates Section 2 because of a discriminatory purpose. *See Dillard v. Baldwin Cnty. Bd. of Elections*, 686 F. Supp. 1459, 1467-68 (M.D. Ala. 1988) (to prove discriminatory intent under Section 2, plaintiffs must show that racial discrimination was a motivating factor "behind the enactment or maintenance" of a challenged electoral system). This evidence is not limited to direct evidence of individual motive. The document requests at issue here seek

additional, circumstantial evidence that is highly relevant to Plaintiffs' claims alleging intentional racial discrimination. As the Supreme Court has recognized, "assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a 'sensitive inquiry into such circumstantial and direct evidence as may be available.'" *Reno v. Bossier Parish*, 520 U.S. 471, 488 (1997) (quoting *Arlington Heights*, 429 U.S. at 266); *see also* Mem. and Order at 23-34, *Favors II*, 11-cv-5632 (E.D.N.Y. Feb. 8, 2013) (unpublished) (Ex. 5); *id.* at 34 ("[W]here documents reveal an awareness that the Senate Plan may dilute minority votes, legislative privilege is overcome."). Second, the importance of the litigation and the issues involved—eliminating racial discrimination in voting—"cannot be overstated;" and third, North Carolina's role is direct. *Veasey*, 2014 WL 1340077, at \*2.

Furthermore, as the court recognized in *Veasey*, reliance on public statements alone undercuts the inquiry into legislative purpose 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). Moreover, in this particular case, the legislative process was so severely truncated that the public legislative record is very limited. *See* Compl. ¶¶ 57-66, ECF No. 1, 13-cv-861. In *United States v. Irvin*, 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. 169, 173-74 (C.D. Cal. 1989) (balancing factors and granting the United States' motion to compel discovery of communications between county supervisors and



their staff in Voting Rights Act case). That court later found that the county supervisors' redistricting plan intentionally discriminated against Hispanic voters. *See Garza*, 756 F. Supp. at 1318; *Baldus v. Wisc. Gov't Accountability Bd.*, 2011 WL 6122542, at \*2 (E.D. Wisc. Dec. 8, 2011) (three-judge court) (concluding that "given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans," the "highly relevant and potentially unique nature of the evidence" plaintiffs sought outweighed the "minimal future 'chilling effect'" that disclosure might have on the state legislature).<sup>11</sup>

To the extent the State Legislators argue that the Fourth Circuit's employment discrimination cases compel this Court to recognize an absolute privilege of state lawmakers to categorically withhold otherwise discoverable documents, *see* Movants' Obj. at 9-10, 18-19, they misread those cases, which are distinguishable and do not justify restricting the scope of discovery in these voting rights cases. The complainants in both *McCray v. Maryland Department of Transportation*, 741 F.3d 480 (4th Cir. 2014), and *EEOC v. Washington Suburban Sanitary Comm'n (WSSC)*, 631 F.3d 174 (4th Cir. 2011), were government employees who sought to use federal antidiscrimination law to

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<sup>11</sup> Recognizing the "sensitive nature of the documents sought and the importance of preserving confidential communications among legislators," the court in *Veasey* ordered Texas to produce such documents under seal, pursuant to the protective order in that case, and reserved for trial the question of admissibility of specific documents. *Veasey*, 2014 WL 1340077, at \*3. A similar procedure could protect the confidentiality of sensitive legislator-to-legislator documents in this case, including for use in the preliminary injunction motions. *See* ECF Nos. 36 & 37 (Protective Order and Supp. Protective Order). The United States notes, however, that such an approach should not apply to third-party communications with legislators; production of these documents is not "unduly burdensome or invasive of the legislative process." Order at 7.

challenge legislative budgetary decisions that adversely affected their employment. *See McCray*, 741 F.3d at 481; *WSSC*, 631 F.3d at 176-77. Because these cases targeted facially neutral legislative budget acts, they were not ordinary employment discrimination cases. In this distinctive context, involving quintessentially legislative decisions about how to allocate governmental resources, the Fourth Circuit has concluded that the doctrine of legislative immunity, which at its core prevents plaintiffs from obtaining relief in certain cases, even when impermissible legislative motivations are involved, *see Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998), also justifies denying plaintiffs discovery into legislative motivations. *See WSSC*, 631 F.3d at 181.<sup>12</sup> The Fourth Circuit’s decisions in these cases are animated by the underlying notion that, to the extent the plaintiffs were really challenging the quintessentially legislative act of passing a budget—or, in *Schlitz*, of deciding whether to reappoint a state court judge, *see Schlitz v. Virginia*, 854 F.2d 43, 45 (4th Cir. 1988)—they had no cause of action.

These Fourth Circuit employment discrimination cases do not address the scope of legislative privilege in voting rights cases, where legislation is precisely and properly the target of the statutory or constitutional claim. In this context, courts “should not simply rely upon bright line tests which have been developed in other contexts to bar virtually all discovery of relevant facts.” *Marylanders*, 144 F.R.D. at 305.<sup>13</sup>

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<sup>12</sup> Even in this limited context, legislative privilege does not sweep as broadly as the State Legislators contend. *See United States’ Supp. Br. in Opp’n to Mot. to Quash* at 7 n.5, ECF No. 72, 13-cv-861.

<sup>13</sup> Indeed, counsel for the State Legislators recognized the differing treatment given to voting cases during the February 21, 2014 argument on the motion to quash, when he

The nature of voting rights cases dictates a narrow role—if any—for assertions of legislative evidentiary privilege. Because voting rights cases “seek to vindicate public rights[,]” they are, in some respects, “akin to criminal prosecutions” such that, “as in *Gillock*, ‘recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government.’” *Balanced Map*, 2011 WL 4837508, at \*6 (quoting *Gillock*, 445 U.S. at 373); *see also Irvin*, 127 F.R.D. at 174 (“[T]he federal interest in enforcement of the Voting Rights Act weighs heavily in favor of disclosure.”). The Supreme Court has long recognized that the Fourteenth and Fifteenth Amendments “are to a degree restrictions of State power,” *Ex Parte Virginia*, 100 U.S. 339, 346 (1879), and acting under the Civil War Amendments,” Congress is empowered to intrude “into the judicial, executive, and legislative spheres of autonomy previously reserved to the States[,]” *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976).

Like cases challenging redistricting plans under Section 2 of the Voting Rights Act, 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, North Carolina’s 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

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characterized the many Section 2 redistricting cases in which courts held that state legislative privilege was qualified, as representing an exception to the doctrine of legislative immunity. *See United States’ Opp’n to Mot. to Quash* at 12-13 (citing cases). These cases challenging HB 589 fall squarely within the scope of this exception.

eligible to vote in person in North Carolina. *See* N.C.G.S. § 163-166.13 (added by HB 589 § 2.1). North Carolina voters who fail to register sufficiently in advance of an election will no longer be able to register and vote during the early voting period, because the State has eliminated same-day registration during early voting. *See* N.C.G.S. § 163-82.6A (as amended by HB 589 §§ 16.1-16.1A). “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-American voters 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. “[T]he Legislature has taken action that affects the voting rights of [North Carolina’s] citizens and now attempts to cloak the record of that action behind a charade masking as privilege.” *Baldus v. Wisc. Gov’t Accountability Bd.*, 843 F. Supp. 2d 955, 958 (E.D. Wis. 2012) (three-judge court). The State Legislators should not be permitted to do so.

#### **IV. Defendants Must Identify Legislators Who Will Waive Legislative Privilege**

Legislative privilege is personal to each legislator and may be waived. *See Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995). Whatever else is true of legislative privilege, defendants cannot use the privilege as a shield to prevent Plaintiffs from conducting critical *and timely* discovery, and subsequently rely on legislative evidence to rebut Plaintiffs’ case. *See* Order at 9. The deadline for serving initial expert reports was April 11; the deadline for filing preliminary injunction motions is May 5; and

Defendants have yet to produce a single document from any legislator's possession, or a privilege log identifying the documents they claim are protected by legislative privilege. Judge Peake's order set an April 14, 2014 deadline for Defendants to identify legislators on whom they will rely in response to any preliminary injunction motions, whether by affidavit, testimony, or documentary evidence they otherwise contend is subject to legislative privilege. This deadline allowed Plaintiffs a bare minimum of time in which to conduct written discovery and depositions of such legislators before filing preliminary injunction motions, but Defendants seek to delay discovery even further.

To avoid undue prejudice to Plaintiffs, the United States respectfully requests that if Defendants fail to provide timely notice of legislators who will provide evidence in support of HB 589, they be precluded from relying on non-public legislative evidence in opposition to any preliminary injunction motion. Alternatively, if Defendants identify such legislators after April 21, 2014, Plaintiffs should be permitted to conduct discovery of those legislators in time for any hearing on the preliminary injunction motions, and be provided the opportunity to cross examine the legislators, and offer other relevant responsive evidence, at such a hearing.

### **CONCLUSION**

For all the foregoing reasons, the Court should affirm Judge Peake's March 27, 2014 order on legislative privilege and order Defendants to produce immediately legislators' communications with third-parties. The Court should further order Defendants to identify any legislators who will provide evidence in support of HB 589 during the preliminary injunction hearing.

Dated: April 14, 2014

RIPLEY RAND  
United States Attorney  
Middle District of North Carolina

/s/ Gill P. Beck  
GILL P. BECK  
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Telephone: (828) 259-0645

Respectfully submitted,  
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Acting Assistant Attorney General  
Civil Rights Division

/s/ Elizabeth M. Ryan  
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**CERTIFICATE OF SERVICE OF DISCOVERY**

I hereby certify that on April 14, 2014, I electronically filed the foregoing **United States' Brief in Opposition to State Legislators' Objection to 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.

/s/ Elizabeth M. Ryan  
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**SCHAERR**  
**DUNCAN**  
LLP

**VIA ELECTRONIC MAIL**

September 14, 2016

Ms. Candyce Phoenix  
Senior Trial Attorney  
United States Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
candyce.phoenix@usdoj.gov

**Re: North Carolina HB2 Litigation - August 30, 2016 Notice of Rule 30(b)(6)  
Deposition**

Dear Ms. Phoenix:

We are writing on behalf of the Defendants and Intervenor-Defendants to request clarification regarding the recently served Rule 30(b)(6) deposition notice dated August 30, 2016 (“the notice”).

First, the joint format of the notice makes it difficult to understand whom precisely the United States is seeking to depose and what matters of examination are being described for each deponent. Rule 30(b)(6) contemplates the service of a separate and distinct 30(b)(6) notice on each organization. The United States’ notice, however, simultaneously names multiple deponents and thus does not make clear what organization or organizations are being named as deponents, nor which subjects are addressed to each deponent.

Second, the notice purports to name as deponents Governor McCrory and “the Intervenor North Carolina State Legislators,” but none of them is an “organization” within the scope of Rule 30(b)(6).

Third, the discrepancy between the collective designation of “the Defendants” in the first sentence of the notice and the broader definition of “Defendant, you and your” in paragraph 4 renders the notice even more confusing as to whom the notice seeks to name as a deponent.

**KYLE DUNCAN**

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LLP

Finally, the notice raises serious concerns that it seeks inquiry into matters protected from disclosure by various privileges, such as legislative privilege and the deliberative process privilege typically applied to an executive branch and its agencies (which Defendants and Intervenor-Defendants have each asserted in their respective objections to the United States' First Set of Requests for Production of Documents). However, given the significant ambiguities in the notice discussed above, it is impossible at this time to know whether and to what extent formal objections based on such privileges should be raised.

Given these ambiguities, the Defendants and Intervenor-Defendants are not able to respond intelligently to the notice. Consequently, we respectfully request that you re-issue separate notices to each entity you wish to depose. Please consider this an attempt pursuant to Local Rule 37.1(a) to resolve this issue without court intervention. Should you wish to discuss this by telephone, please let us know immediately so that we can schedule a meet-and-confer.

Very truly yours,

/s/ William Stewart

William Stewart

MILLBERG GORDON STEWART PLLC

*Counsel for State of North Carolina, Governor  
Patrick L. McCrory, and the North Carolina  
Department of Public Safety*

/s/ S. Kyle Duncan

S. Kyle Duncan

SCHAERR DUNCAN LLP

*Counsel for Intervenor-Defendants Senator Philip  
Berger and Representative Tim Moore*

*Exhibit K*

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

JOAQUÍN CARCAÑO, et al., )  
)  
Plaintiffs, )  
)  
v. )  
)  
PATRICK MCRORY, in his )  
official capacity as Governor )  
of North Carolina, et al., )  
)  
Defendants, )  
)  
and )  
)  
PHIL BERGER, in his official )  
capacity as President Pro )  
Tempore of the North Carolina )  
Senate; and TIM MOORE, in his )  
official capacity as Speaker )  
of the North Carolina House of )  
Representatives, )  
)  
Intervenor-Defendants. )

1:16cv236

**NOTICE OF SUBPOENA TO NON-PARTY**

To: Karl S. Bowers, Jr.  
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Columbia, SC 29250  
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*Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore*

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs, by their attorneys, will serve the attached subpoena on Representative Paul Stam.

Dated this 22nd day of September 2016.

/s/ Christopher A. Brook

Christopher A. Brook  
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Irena Como\*  
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\*Appearing by special appearance pursuant to L.R. 83.1(d).

*Counsel for Plaintiffs*

## CERTIFICATE OF SERVICE

I certify that on September 22, 2016, the preceding Notice of Subpoena to Non-Party was served upon counsel for Defendants, Karl S. Bowers, Jr., Robert N. Driscoll, Robert C. Stephens, William W. Stewart, Jr., Frank J. Gordon, B. Tyler Brooks, Carolyn C. Pratt, Noel J. Francisco, Glen D. Nager, James M. Burnham, and Kristen A. Lejniaks, and upon counsel for Defendant-Intervenors, S. Kyle Duncan, Gene C. Schaerr, and Robert D. Potter, Jr., via email.

/s/ Christopher A. Brook  
Christopher A. Brook

UNITED STATES DISTRICT COURT

for the

District of

Plaintiff v. Defendant Civil Action No.

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: (Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

Place: Date and Time:

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place: Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date:

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party), who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_

on *(date)* \_\_\_\_\_ .

I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the subpoena unexecuted because: \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ \_\_\_\_\_ .

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:



**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)****(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

# **EXHIBIT A**

## **DOCUMENTS REQUESTED**

Plaintiffs serve this subpoena on Representative Paul Stam (“You”) because You are likely to possess information pertinent to this action concerning the drafting of, motivations for, consideration of, deliberations regarding, and enactment of H.B. 2.

We would be pleased to discuss these Requests with You to avoid any potential undue burden and to address any claims of legislative privilege.

Please produce the following documents created, modified, or reviewed by You between January 22, 2016 and April 22, 2016:

1. All documents concerning the Charlotte Ordinance or H.B. 2, including but not limited to (A) all Communications with Your legislative staff, (B) all Communications with other members of the North Carolina House of Representatives and North Carolina Senate or their legislative staffs; and (C) all Communications with Third Parties.

2. Documents and information available to You at the time you considered H.B. 2 and whether to vote for or against it, including but not limited to documents containing factually based information used in the decision making process or disseminated to legislators or committees, such as committee reports or minutes of meetings.

## **DEFINITIONS**

1. “H.B. 2” refers to legislation passed by the North Carolina General Assembly on March 23, 2016 and signed into law by Governor McCrory the same day, entitled “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in

Regulation of Employment and Public Accommodations,” and any prior versions of drafts thereof.

2. “Charlotte Ordinance” refers to Charlotte Ordinance No. 7056, Ordinance Book 59, Page 743 (Feb. 22, 2016), [https://www2.municode.com/library/nc/charlotte/codes/code\\_of\\_ordinances](https://www2.municode.com/library/nc/charlotte/codes/code_of_ordinances), and any prior versions or drafts thereof.

3. “Third Parties” refers to persons or organizations *other than* members of the North Carolina House of Representatives, the North Carolina Senate, and their legislative staff. Third Parties include but are not limited to state agencies, constituents, lobbyists, the North Carolina Chamber of Commerce, national and state Republican political party committees and their members and staff, experts, and consultants.

4. As used herein, the term “document” or “documents” shall be given the broadest construction permitted under the Rule 45 of the Federal Rules of Civil Procedure (“Rule 45”), and shall include without limitation:

- a. all written, typed, printed, reproduced, graphic, filmed and recorded material;
- b. all recordings, tapes, disks, drums, cassettes, electronic correspondence, computer files, or any other information that exists in electronic or magnetic form, including electronic mail messages, instant messages, text messages, calendar entries, voice mails, and social media messages, updates or posts (including, but not limited to, messages, updates, or posts on Facebook or Twitter or similar services), however stored or recorded (including, for electronic documents, those in active

and inactive drive space, and for example, deleted files in the drive slack space and documents stored in recycle bins) and including all metadata;

- c. all reports, data, information, articles, publications, agency findings, photographs, pictures, graphs, video tapes, maps, plans, calendars, or other presentations of anything concerning, describing, referring, or relating, directly or indirectly, in whole or in part, to the subject matter of the discovery request at issue;
- d. originals and all non-identical copies different from the original by reasons or marginal notations and/or other markings; and
- e. all drafts, summaries, attachments, and notes that are typed, handwritten, or otherwise made or prepared, whether used or not used.

5. “Pertaining to,” “relating to,” “related,” “concerning,” “regarding,” “reflect,” and “reflecting” shall broadly mean and include: referring to, relevant to, constituting, depicting, showing, describing, identifying, indicating, summarizing, analyzing, explaining, evaluating, appraising, evidencing, justifying, supporting, contradicting, establishing, repeating, attempting to establish the existence or nonexistence of, or attempting to establish the truth or falsity thereof.

6. “Relied upon” shall broadly mean and include: any and all data or information that was considered, weighed, analyzed, reviewed, or depended upon.

7. “Including” shall mean “including, but not limited to.”

8. “And” and “or” shall be construed both conjunctively and disjunctively and shall mean whichever construction makes the request more inclusive. The singular

form of a word shall be construed as also including the plural form of the word and vice-versa.

9. “Communication” or “communications” shall broadly mean and include any oral or written utterance, notation, or statement of any nature whatsoever, including, but not limited to: documents, as the word is defined herein, personal conversations, telephone calls, dialogues, discussions, interviews, consultations, telegrams, facsimiles, cables, electronic communications, agreements, and voice mail messages.

10. Any term not expressly defined herein shall be given its plain and ordinary meaning.

### **INSTRUCTIONS**

1. The obligations and rules of construction set forth in Rule 45 are incorporated in these requests. A copy of Rule 45 sections (c), (d), (e) and (g) is attached to the subpoena.

2. If paper copies are supplied in lieu of inspection of originals, all documents that cannot be copied legibly shall be produced for inspection in their original form.

3. To the extent documents are maintained in electronic formats, this request calls for production in electronic format. Documents maintained in electronic formats should be produced in their native formats as they currently exist.

4. Where an electronic document has been printed to hard copy and is an exact duplicate of the electronic version, only the electronic version need be produced. However, if a printed document contains any notations or markings that are not on the electronically stored document, both versions of the document should be produced.

5. If, in responding to the subpoena, you identify any ambiguity in construing a request, definition, or instruction, please describe the matter deemed ambiguous and set forth the construction applied in responding to the subpoena.

6. If a document responsive to the subpoena has been transferred to the custody or control of another person or entity, please provide the name and address of such other person or entity and the date and circumstances of the transfer.

7. You may withhold from production in response to the subpoena any documents, including electronically stored information, that are protected by the attorney-client privilege provided you comply with Rule 45(e)(2).

8. To the extent you withhold from production in response to the subpoena any documents, including electronically stored information, that you claim are protected by the legislative privilege, provide a privilege log identifying each such document and describing the nature of the withheld document in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim

9. You may designate documents, including electronically stored information, as “Protected Confidential Information” pursuant to the Stipulated Confidentiality Agreement and Protective Order entered in this case on September 20, 2016 and the Supplemental Protective Order entered in this case on September 21, 2016 (collectively, the “Protective Order”). A copy of the Protective Order is enclosed.

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Irena Como\*  
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# **EXHIBIT B**

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

JOAQUÍN CARCAÑO, et al.,

*Plaintiffs,*

v.

PATRICK MCCRORY, et al.,

*Defendants.*

No. 1:16-cv-00236-TDS-JEP

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UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF NORTH CAROLINA, et al.,

*Defendants.*

No. 1:16-cv-00425-TDS-JEP

**STIPULATED CONFIDENTIALITY AGREEMENT  
AND PROTECTIVE ORDER**

This matter comes before the Court, pursuant to Fed. R. Civ. P. 26(c) and Local Rule 26.2, for the entry of a Stipulated Confidentiality Agreement and Protective Order (“Protective Order”) governing the disclosure by any Party of any non-public, confidential information produced, obtained, or exhibited in the above-captioned actions (the “Litigation”), including but not limited to the full names and other personal

identifying information (“PII”), including such information subject to the Privacy Act, 5 U.S.C. § 552a(b)(11), and other particularly sensitive and highly personal information of individuals identified or disclosed by Plaintiff United States, the *Carcaño* Plaintiffs, the State of North Carolina, Governor Patrick L. McCrory, the North Carolina Department of Public Safety, President Pro Tempore Phil Berger, Speaker Tim Moore, the University of North Carolina, the Board of Governors of the University of North Carolina, and Chairman W. Louis Bissette, Jr., in his official capacity.

The Court has previously permitted the United States to file the declarations of six witnesses anonymously in *United States v. State of North Carolina, et al.* (16-cv-425), using initials rather than their full names. Docket Text Order Granting Docket 71, dated 7/14/2016. Further, in *North Carolinians for Privacy, et al. v. United States Department of Justice, et al.* (16-cv-845), the Court permitted the North Carolinians for Privacy (“NCFP”) Plaintiffs to permit individuals named in NCFP’s Amended Complaint, as well as certain fact witnesses, who are minor children or parents of minor children, to proceed using initials rather than their full names. Docket 57 Order Granting Docket 51, dated 8/19/2016. These same NCFP Plaintiffs and fact witnesses who are parents of minor children have been identified as witnesses in initial disclosures by the Defendants in this Litigation. The Parties in this Litigation have agreed, as set forth in this Protective Order, to treat certain PII relating to two of the United States’ anonymous witnesses as “HIGHLY CONFIDENTIAL-ATTORNEYS’ EYES ONLY INFORMATION;” PII of the remaining four of the United States’ anonymous witnesses and the anonymous

witnesses identified in the Initial Disclosures of the State of North Carolina, Governor Patrick L. McCrory, the North Carolina Department of Public Safety, and President Pro Tempore Phil Berger and Speaker Tim Moore—all of whom are parents of minor children—as “HIGHLY CONFIDENTIAL INFORMATION;” and other highly personal and sensitive information, including information relating to the fact witnesses identified by the *Carcaño* Plaintiffs, the United States, and the State of North Carolina, Governor Patrick L. McCrory, the North Carolina Department of Public Safety, and President Pro Tempore Phil Berger and Speaker Tim Moore as “CONFIDENTIAL INFORMATION.”

Through this Protective Order, the Parties seek to limit the use of information and documents, identified herein, to protect witnesses from harm, and to maintain the confidentiality of highly personal and sensitive information. Accordingly, the Parties have agreed to entry of this Protective Order. For good cause shown, this Court finds that entry of this Protective Order is appropriate.

**IT THEREFORE IS ORDERED as follows:**

**I. Protected Confidential Information Defined** - “Protected Confidential Information”

shall include Confidential Information, Highly Confidential Information, and Highly Confidential – Attorneys’ Eyes Only Information.

- 1) “Protected Confidential Information” shall not include any information disclosed, gathered, or discovered outside this Litigation.
- 2) “Protected Confidential Information” also shall include medical records and any other documents or information relating to individuals’ medical conditions or

treatment (“Medical Information”). However, pursuant to the Court’s direction during its September 2, 2016 Status Conference with the Parties and its order of September 6, 2016, the Parties have agreed to address the treatment, handling, and confidentiality of Medical Information related to parties and witnesses in a separate supplemental protective order. If the Parties reach agreement as to the treatment of Medical Information within a reasonable time, they will submit a Stipulated Supplemental Confidentiality Agreement and Protective Order Regarding Medical Information to this Court for its review and approval. If the Parties are unable to reach agreement, they anticipate that this Court will set forth confidentiality obligations and handling limitations for Medical Information in an appropriate order after motion and briefing under the procedure described in the Rule 26(f) Report(s) to be filed on September 12, 2016 or the then-operative scheduling order of the Court.

- 3) “Confidential Information” refers to:
  - a) information relating to an individual’s Medical Information, and criminal or financial history; confidential academic, employment, or personnel information; confidential safety or security information; and/or other highly personal and sensitive information or information otherwise protected from disclosure by applicable federal or state law. Nothing in this paragraph shall waive an individual or parties’ right to object to the production of such information.
- 4) “Highly Confidential Information” refers to:
  - a) the full names and other similarly identifying information of the anonymous

witnesses identified in the Initial Disclosures of the State of North Carolina, Governor Patrick L. McCrory, the North Carolina Department of Public Safety, and President Pro Tempore Phil Berger and Speaker Tim Moore—witnesses who have been identified as Y.K., D.H. , R.F., S.B., E.S., D.H., and C.C.—and the fact witnesses with the initials D.S.B., C.W., A.T., H.K, who signed declarations that were submitted as exhibits to the United States’ Motion for Preliminary Injunctive Relief (Docket 76, at Exhibits 33, 39, 40, and 45);

- b) the current home or cellular telephone number(s) or home address of any party, witness, or potential witness in this action; and
- c) the full names of other similarly situated individuals who all Parties agree should be covered by the terms of this Protective Order relating to Highly Confidential Information.

5) “Highly Confidential – Attorneys’ Eyes Only Information” refers to:

- a) the full name and other similar identifying information of the fact witnesses with the initials A.N. and D.B., who signed declarations which were submitted as exhibits to the United States Motion for Preliminary Injunctive Relief (Docket 76, at Exhibit 41 and 44); and
- b) the full names of other similarly situated individuals who all Parties agree should be covered by the terms of this Protective Order relating to Highly Confidential – Attorneys’ Eyes Only Information.

- 6) “Documents and Information” shall include all documents and information exchanged during the course of formal or informal discovery and/or in preparation for any hearings and trial held in this Litigation. Such documents and information shall include, but are not limited to, documents produced in response to document requests, including all electronically stored information; answers to interrogatories; answers to requests for admission; and all portions of deposition testimony identified as “confidential,” and related deposition exhibits. It shall also include summaries and compilations, which would reveal the specific information subject to paragraph 1, 2, or 3 above, including but not limited to charts, tables, graphs, and models.
- 7) “UNC” means the University of North Carolina, the Board of Governors of the University of North Carolina, Chairman W. Louis Bissette, Jr., President Margaret Spellings, all campuses and affiliates of the University of North Carolina, and their Counsel in this Litigation who have direct responsibility for the preparation and trial of these lawsuits.

## **II. Limitations on Disclosure of Protected Confidential Information**

- 1) Protected Confidential Information disclosed in connection with this Litigation shall be used solely for the purposes of this Litigation.
- 2) Any Confidential Information or Highly Confidential Information may, without further agreement by the Signatories, be disclosed to the following persons:
  - a) Defendants and Plaintiffs and their employees and contractors in this Litigation (“Parties”) who are required in good faith to provide assistance in the conduct of

this Litigation.

- b) attorneys, legal assistants, paralegals, secretaries, and other employees of Counsel for Defendants and Plaintiffs in this Litigation (jointly, “the Parties’ Counsel”) employed in connection with the preparation and trial of this Litigation;
  - c) witnesses at depositions to whom the Documents and Information directly relate;
  - d) the court and its personnel; and
  - e) any court reporters present in their official capacity at any hearing, deposition, or other proceeding in this Litigation.
- 3) Highly Confidential – Attorneys’ Eyes Only Information, may, without further agreement by the Signatories, be disclosed to the Parties’ Counsel who have direct responsibility for the preparation and trial of the lawsuits, the court and its personnel, or any court reporters present in their official capacity at any hearing, deposition, or other proceeding in this Litigation.
- 4) Parties or witnesses in this Litigation, including parties or witnesses who have been identified as covered by the terms of this Protective Order relating to Highly Confidential Information and Highly Confidential – Attorneys’ Eyes Only Information, may allege in this Litigation discrimination or harassment occurring at UNC or involving persons, students, employees, entities, or other affiliates of UNC. The Parties recognize that such allegations by parties or witnesses may give rise to a need or obligation by UNC to conduct further investigations of the alleged discrimination or harassment in order to comply with its nondiscrimination policies or



applicable federal or state law. The Parties further recognize that such investigations may require disclosure of Protected Confidential Information to persons, employees, entities, or other affiliates of UNC other than those designated for disclosure of Protected Confidential Information under the terms of this Protective Order. Should UNC determine that a Party or non-Party witness has made a disclosure triggering a need or obligation by UNC to conduct such a further investigation and to make such a disclosure of Protected Confidential Information, it shall notify counsel for the Party, counsel for the non-Party witness if that witness is represented by counsel in connection with this Litigation, or counsel for the Party who offered the non-Party witness if that non-Party witness is not represented by counsel. UNC and the notified Party shall discuss on a case-by-case basis the need for further disclosure and the manner and scope of such disclosure. The Parties shall conduct all such discussions in good faith. If the Parties are unable to agree on a resolution, UNC may file a motion with the Court requesting a determination as to its obligations under its policies or federal or state law and an order from the Court granting appropriate relief from any Party.

- 5) Before making a disclosure of documents containing Protected Confidential Information to persons permitted under this Protective Order, such persons shall be advised of the terms of this Protective Order and be given a copy of it. With the exception of the court and its personnel, such persons shall be required to execute a non-disclosure agreement in the form of Attachment A. The signed non-disclosure

agreement shall be retained by counsel for the signatory making the disclosure.

- 6) The terms of this Protective Order also apply to information produced and testimony given by non-Parties to this Litigation (such as non-Party anonymous witnesses and non-Party fact witnesses). Such information produced and testimony given by non-Parties is protected by the terms, remedies, and relief provided by this Protective Order, and counsel for non-Parties may invoke the terms, remedies, and relief provided by this Protective Order on behalf of non-Parties on the same bases and to the same extent that counsel for the Parties may on behalf of the Parties or non-Party witnesses. Nothing in these provisions shall be construed as prohibiting a non-Party witness from seeking additional protections from the Court under appropriate circumstances and as allowed by law.

### **III. Handling and Use of Confidential Information**

- 1) The Parties and Parties' Counsel must not disclose or permit the disclosure of any Documents or Information designated as Protected Confidential Information, except as is otherwise permitted under this Protective Order.
- 2) Designation of Protected Confidential Information must be made by placing or affixing on the document in a manner that will not interfere with its legibility the word/phrase "CONFIDENTIAL," "HIGHLY CONFIDENTIAL," or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," as appropriate. Designation of electronically stored information as Protected Confidential Information must be made by identifying the electronically stored information or the media on which the

electronically stored information is stored as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL,” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” The designation of Protected Confidential Information should be made prior to, or contemporaneously with, the production or disclosure of that information; however, inadvertent disclosure of such information shall be handled as discussed in paragraphs 10 and 12 *infra*. A Party may also designate Documents or Information obtained through a subpoena as Protected Confidential Information. The parties must have a good-faith basis in fact and law to designate material as Protected Confidential Information.

- 3) Where a document contains both Protected Confidential Information and information that is not Protected Confidential Information, only the portion that constitutes the Protected Confidential Information shall be so designated.
- 4) All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as “copies”) of Documents or Information designated as Protected Confidential Information under this Protective Order, or any portion thereof, must be immediately affixed with the words/phrase “Confidential Information,” “Highly Confidential Information,” or “Highly Confidential – Attorneys’ Eyes Only Information,” as appropriate, if such designation does not already appear.
- 5) Before disclosure may be made to a court reporter, the reporter must be alerted that the Documents and Information he or she is about to receive must be designated in the deposition transcript as “Confidential Information,” “Highly Confidential

Information,” or “Highly Confidential – Attorneys’ Eyes Only Information,” as appropriate, in the deposition transcript and on the deposition exhibit. If a party does not designate Documents and Information as Protected Confidential Information during the deposition, the party may do so within seven (7) calendar days after receipt of the deposition transcript.

- 6) For any deposition transcript that contains Protected Confidential Information in either the testimony or exhibits, the court reporter must create two versions of the transcript: (1) a copy with the Protected Confidential Information with the transcript and/or exhibits redacted; and (2) a copy with the Protected Confidential Information included but available and produced either electronically using a special password-protected format OR in hardcopy produced in a sealed envelope labeled “Confidential Information,” “Highly Confidential Information,” or “Highly Confidential – Attorneys’ Eyes Only Information,” as appropriate.
- 7) When Highly Confidential – Attorneys’ Eyes Only Information is used or such testimony is solicited at a deposition, only those to whom such material may be disclosed may remain in attendance.
- 8) Prior to calling any of the anonymous witnesses to testify in open court, the party seeking to examine an anonymous witness must notify the other Parties so that the appropriate Party may move the court (a) to be referred to solely by their initials during their testimony; (b) for the exclusion of sketch artists and cameras from the court room during the testimony of the anonymous witness; and (c) for the assistance

of the United States Marshals Service to move anonymous witnesses in and out of the courthouse without being observed or photographed.

- 9) If any document which reveals Protected Confidential Information is filed with the Court, the portion(s) of the document which constitute the Protected Confidential Information shall be redacted from the document when filing, and the party seeking to file such papers must file a motion to file under seal the portion of that document containing the Protected Confidential Information in accordance with Local Rule 5.4 and the Court's "Sealed Document Guidance."
- 10) If Protected Confidential Information is disclosed inadvertently or otherwise to any person other than in the manner authorized under this Protective Order, then the signatory responsible for the disclosure or who learns of the disclosure, must immediately upon learning of the disclosure, inform counsel for the other signatories of all pertinent non-privileged facts relating to such disclosure in writing and shall make reasonable efforts to prevent any disclosure by each unauthorized person who received the Protected Confidential Information.
- 11) The designation of Protected Confidential Information by a Party or non-Party may be challenged by an opposing Party or Parties by serving written notice on the designating Party or non-Party. After notice has been given, the Parties and, if relevant, non-Parties, will make a good faith effort to resolve the designation issue. If the Parties and, if relevant, non-Parties, are unable to resolve the designation issue after sincere, good faith efforts, the Party or Parties opposing the designation may file

a motion with the Court requesting a determination as to the confidential nature of the documents and information at issue. In the event of a failure to reach agreement upon the designation as Protected Confidential Information, the designation shall remain in effect unless or until the Court orders otherwise.

12) Inadvertent disclosure of Documents and Information to an opposing party without identifying the same as Protected Confidential Information shall not be deemed a waiver of such confidentiality with regard to the material inadvertently disclosed, nor shall it be deemed a waiver of confidentiality with regard to similar material. If such inadvertent disclosure occurs, the producing party may subsequently produce a copy of that document marked with the Protected Confidential Information designation, which copy shall be substituted for the copy produced previously and the Protected Confidential Information contained therein shall be treated thereafter as Protected Confidential Information under this Protective Order. Any such Documents or Information inadvertently disclosed without the Protected Confidential Information designation shall be returned to the disclosing party promptly upon receipt by the receiving party of notice of the inadvertent disclosure, and the receiving party shall keep no copies or reproductions, and shall make no use whatsoever of the Documents or Information inadvertently disclosed.

13) Within sixty (60) calendar days of the final conclusion of this Litigation (including all time for appeals, or the expiration or dissolution by the Court of any consent decree, order, or judgment, whichever is later), all material not received in evidence

and treated as Protected Confidential Information under this Protective Order, including all copies thereof, must be returned to the producing party. If the Parties so stipulate, the material may be destroyed.

- 14) Each Party agrees to notify counsel of record for all other Parties of any request or demand made by a non-Party for Protected Confidential Information, including but not limited to requests and demands made pursuant to the North Carolina Public Records Law (G.S. § 132) or pursuant to the Freedom of Information Act, 5 U.S.C. § 552. Such notice shall be given promptly upon receipt of such request or demand and prior to complying with such request or demand, to allow any other Party the opportunity to oppose such request or demand, or to seek the Court's enforcement of this Protective Order, and/or to assert any statutory exemptions or privileges as may apply.
- 15) Nothing in this Order shall be construed to limit the Parties' right to seek modification of this Confidentiality Agreement and Protective Order or to apply for additional protective orders as may become necessary due to a substantial change in circumstances or for other good cause shown.

IT IS SO ORDERED.

This, the 20th day of September, 2016.

/s/ Joi Elizabeth Peake  
United States Magistrate Judge

**Attachment A**

NON-DISCLOSURE AGREEMENT

The undersigned hereby acknowledges that (s)he has read the Protective Order entered by the United States District Court for the Middle District of North Carolina on \_\_\_\_\_, 2016, in the action entitled *United States v. State of North Carolina, et al.* (16-cv-425) or, the action entitled *Carcaño v. McCrory* (16-cv-236) (together, this “Litigation”). The undersigned agrees not to use the Protected Confidential Information described in the Protective Order for any purpose other than in connection with this Litigation and agrees to be bound by the terms and conditions of the Protective Order unless and until modified by further order of the Court in this Litigation.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name



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

JOAQUIN CARCAÑO, et al.,

Plaintiffs,

v.

PATRICK McCRORY, in his official  
capacity as Governor of North Carolina, et al.,

Defendants,

and

PHIL BERGER, in his official capacity as  
President Pro Tempore of the North  
Carolina Senate; and TIM MOORE, in his  
official capacity as Speaker of the North  
Carolina House of Representatives,

Intervenor-Defendants.

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1:16CV236

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, et al.,

Defendants,

and

PHIL BERGER, in his official capacity as  
President Pro Tempore of the North  
Carolina Senate; and TIM MOORE, in his  
official capacity as Speaker of the North  
Carolina House of Representatives,

Intervenor-Defendants.

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1:16CV425

SUPPLEMENTAL PROTECTIVE ORDER

The parties have entered into a stipulated protective order pursuant to Federal Rule of Civil Procedure 26(c) concerning the handling and use of documents and depositions in this case. See Fed. R. Civ. P. 26. In approving the stipulated protective order, the Court orders the parties to follow these additional procedures:

- (1) TO THE EXTENT THE STIPULATED PROTECTIVE ORDER IS INCONSISTENT WITH THIS ORDER, THE TERMS OF THIS ORDER SHALL TAKE PRECEDENCE.**

By approving this Order and accepting the stipulation, the Court is not ruling on whether any document or information is, in fact, entitled to protection under Rule 26(c). Rather, the Court approves the protective order in order to minimize discovery problems and to promote and expedite unrestricted discovery without Court intervention. Cf. Longman v. Food Lion, Inc., 186 F.R.D. 331, 333 (M.D.N.C. 1999) (noting that, in a case involving “hundreds of documents containing confidential business information,” a blanket protective order was “essential to the efficient functioning of the discovery process”). However, the stipulated protective order is limited by the concerns set out in Haas v. Golding Transport, Inc., No. 1:09CV1016, 2010 WL 1257990 (M.D.N.C. March 26, 2010). Therefore, the Court enters this Supplemental Protective Order to address those concerns. To the extent any of the terms of the stipulated protective order are inconsistent with this Supplemental Protective Order, this Supplemental Protective Order controls.

- (2) PLEADINGS, MOTIONS, BRIEFS, OR EXHIBITS MAY NOT BE FILED UNDER SEAL WITHOUT SEPARATE COURT APPROVAL.**

Regardless of any provision contained in the stipulated protective order, the parties may not file any pleading, motion, brief or exhibit under seal without obtaining separate

approval from the Court. Thus, a party seeking to file any document under seal must file a separate motion and obtain permission of the Court to file the document under seal. Any request to file a document under seal must meet the requirements of Federal Rule of Civil Procedure 26(c) and must meet the stringent requirements for sealing set out by the Fourth Circuit, as applicable. See Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178 (4th Cir. 1988) (setting out the standard for sealing documents protected by the common law right of access based on a weighing of “competing interests,” as well as the higher standard for sealing documents protected by the First Amendment based on a showing that the restriction is “narrowly tailored” and serves a “compelling interest”); Rushford v. The New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988) (discussing the applicability of the First Amendment protection to documents filed in connection with motions for summary judgment); Virginia Dep’t of State Police v. Washington Post, 386 F.3d 567, 576 (4th Cir. 2004) (noting that on a motion to seal, the court “must determine the source of the right of access with respect to each document, . . . [and] must then weigh the appropriate competing interests under the following procedure: it must give the public notice of the request to seal and a reasonable opportunity to challenge the request; it must consider less drastic alternatives to sealing; and if it decides to seal it must state the reasons (and specific supporting findings) for its decision and the reasons for rejecting alternatives to sealing” (internal citations omitted)).

**The parties are required to comply with the provisions of Local Rule 5.4 for filing documents under seal.** The parties are directed to keep to a minimum the amount of material that they would seek to file under seal. In this regard, the parties are directed to

exclude confidential information from court filings unless directly relevant to the issue to be considered. If it is necessary to file information that has been designated as confidential by another party, the filing party should request that the confidentiality designation be eliminated by the supplier of the information. If that request is refused, the filing party must file a motion to seal. In that instance, the motion to seal must set out why it is necessary to file the confidential information, and must detail the efforts made to request that the confidentiality designation be eliminated. In response, the party asserting the confidentiality designation shall have the burden of making the requisite showing under the standards set out above.

If a party files a motion seeking to file a document under seal, a redacted copy of the document for which sealing is sought must be filed on the public record. In the redacted document, the omitted material must be generally identified. For example, if only a page, sentence, or word of a deposition, brief, or other material contains confidential information, then only that page, sentence or word should be redacted from the item filed in the public record of the Court, with an appropriate explanation at the place of withdrawal in the document. The original, unredacted document may be filed under seal when the motion to seal is filed. For ease of court review, a party shall submit a judge's copy of the complete unredacted document, with the redacted part clearly marked thereon by highlighting.

**(3) EVIDENCE OR TESTIMONY INTRODUCED IN COURT MAY ONLY BE SEALED BY SEPARATE COURT ORDER ON MOTION OF A PARTY.**

To the extent that any party would seek to seal or otherwise restrict access to an exhibit or other document introduced during a hearing, trial, or other court proceedings, the

party must make a separate motion in that regard for consideration by the court conducting the proceedings, supported by sufficient justification therefor. Likewise, to the extent any party would seek to seal any portion of a transcript of a court proceeding, the party must file a separate motion to seal for consideration by the court that conducted such proceeding.

**(4) SEALING DOCUMENTS OR RESTRICTING ACCESS IN PROCEEDINGS BEFORE ANY OTHER COURT, INCLUDING ON APPEAL, MUST BE ADDRESSED BY THE PARTIES UNDER THE RULES OF THAT COURT.**

To the extent the parties may later proceed before any other court, including in any appeals in the present case, the parties must follow the rules of that court with respect to any issues of sealing or restricting access to documents.

**(5) THE STIPULATED PROTECTIVE ORDER, AS LIMITED AND MODIFIED BY THIS SUPPLEMENTAL PROTECTIVE ORDER, MAY NOT BE MODIFIED BY THE PARTIES WITHOUT LEAVE OF COURT.**

Orders in this case, including the stipulated protective order, may not be modified solely by agreement of the parties, and may only be modified with leave of Court on a motion of the parties.

**(6) ALL DOCUMENTS, SEALED OR OTHERWISE, FILED WITH THE COURT SHALL BE DISPOSED OF PURSUANT TO LOCAL RULE 79.4.**

Local Rule 79.4 provides for disposition of documents filed with the Court, and will continue to control unless otherwise ordered by the Court at the conclusion of the case

**IT IS THEREFORE ORDERED** that the stipulated protective order is LIMITED and MODIFIED as set out herein.

**IT IS FURTHER ORDERED** that any document or item submitted to the Court in violation of this Order is subject to being stricken.

This, the 21st day of September, 2016.

/s/ Joi Elizabeth Peake  
United States Magistrate Judge