UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, et al., *Plaintiffs*, v. PATRICK MCCRORY, et al., *Defendants*, PHIL BERGER, et al., *Intervenor-Defendants*.	No. 1:16-cv-00236-TDS-JEP

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER BASED ON LEGISLATIVE PRIVILEGE

TABLE OF CONTENTS

Plaintiffs respectfully submit this opposition to Intervenor-Defendants' and Defendant Governor McCrory's Motion for a Protective Order Based on Legislative Privilege ("PO Mot."), ECF 153 (Sept. 23, 2016).

Defendants seek a remarkably broad protective order based on legislative privilege that would bar document and deposition discovery into issues of central relevance to Plaintiffs' equal protection claim under *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and its progeny. Defendants have utterly failed to meet their burden to prevent discovery into their motives in enacting H.B. 2 and into any procedural irregularities in the enactment of H.B. 2. Under *Arlington Heights*, both of these issues are highly relevant to proving discriminatory intent. Surprisingly, Defendants fail even to reference, much less address, Plaintiffs' equal protection claim until the very last paragraph of their brief. Protective Order Brief ("PO Br."), ECF 154 (Sept. 23, 2016) at 19. This omission renders most of Defendants' brief non-responsive to the issue of how legislative privilege applies in this specific case.

Defendants' failure to acknowledge legislative intent as a central issue is particularly striking given this Court's focus on that issue in denying Plaintiffs a preliminary injunction on equal protection grounds. Memorandum Opinion, ECF 127 (Aug. 26, 2016) at 57-58. The Court stated that "it is hard to infer legislative intent based on the current record which . . . contains little information about the legislative process leading to HB2's passage." *Id.* at 58. Based on that record, the Court concluded that "Plaintiffs have not clearly shown that privacy was an afterthought or a pretext invented

after the fact solely for litigation purposes. Nor does the court infer improper motive simply from the fact that Part I [of H.B. 2] negatively impacts some transgender individuals." *Id.* at 59. In light of these statements, and the authorities relied upon by this Court, the discovery Plaintiffs seek is of paramount importance.

In the context of this specific case, Intervenor-Defendants have waived legislative privilege given their representations to the Court in seeking to intervene, their voluntary intervention, and their active participation in every aspect of this litigation. Their waiver extends to their own documents and depositions and also Defendant McCrory's communications with them. Finding a waiver of legislative privilege under the unique and highly unusual circumstances here would have no appreciable effect on legislative privilege generally. To the extent state legislative leaders intervene in federal court to defend legislation—which appears rare—they may well be able to do so while preserving legislative privilege. Intervenor-Defendants made no attempt to do that here. To the contrary, they intervened with the express purpose of defending their own and other legislators' motives and the "genesis" of H.B. 2. Motion to Intervene ("Mot. to Intervene"), ECF 34 (May 25, 2016) at 2, 13; *see infra* 4-5.

Even if legislative privilege has not been waived, under the five-factor balancing test for legislative privilege that this and other courts employ, Defendants have failed to justify a protective order with respect to any of the categories of disputed documents. If the Court finds any of the disputed categories to be privileged, Defendants should be required to produce a privilege log in order to ensure the privilege is being properly

asserted. This is particularly true for Defendant McCrory, who has taken an incredibly broad view of his entitlement to *legislative* privilege and seeks to shield even documents concerning his *enforcement* of H.B. 2 by way of Executive Order 93. PO Mot. at 2. *In camera* review of certain specific documents may be warranted to determine whether they are privileged.

As to depositions, Defendants spend but a short paragraph arguing why they should not be deposed, PO Br. at 6, and do not even attempt to show the extraordinary circumstances that could justify such a result. As active participants in this case, Defendants may be deposed about any non-legislatively-privileged matters relevant to Plaintiffs' claims, such as their communications with third parties regarding H.B. 2 and—particularly as to Defendant McCrory—the enforcement of the H.B. 2.

ARGUMENT

I. Defendants Bear A Heavy Burden In Preventing Discovery Into Core Issues In This Case.

Defendants nowhere refer to the heavy burden they must meet to obtain the broad protective order they seek. As the parties asserting the privilege, Defendants must "demonstrate[e] its applicability." *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011); 26A Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5675, at 89 (1992) ("legislator or an aid has the burden of proving the preliminary facts of the privilege").

Furthermore, in order to obtain a protective order, Defendants must show good cause and provide a specific demonstration in support of the request as opposed to

conclusory or speculative statements. *E.g.*, *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc*., 200 F.R.D. 255, 259 (M.D.N.C. 2001). Defendants' burden is particularly high in preventing their depositions. "[P]rotective orders which totally prohibit a deposition should be rarely granted absent extraordinary circumstances." *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D.N.C. 2001) (internal quotation marks omitted).

II. Intervenor-Defendants Have Waived Their Legislative Privilege.

Intervenor-Defendants ask this Court to shield them from discovery into their and other legislators' motives in enacting H.B. 2 and into the genesis of H.B. 2. But that is a *complete reversal* of the position they took in asking this Court to intervene. In their own words, Senator Berger and Speaker Moore sought to "vigorously defend" against Plaintiffs' "critici[sms of] the legislative process used in passing [H.B. 2], as well as the statements, *motives* and actions of various legislators involved—*including specifically Speaker Moore and Senator Berger. No existing defendant has Intervenors' familiarity with the genesis of the Act*." Mot. to Intervene at 2, 13 (emphasis added); *see also* Reply in Support of Mot. to Intervene, ECF 43 (June 3, 2016) at 4 (stating that Berger and Moore "have a special interest in rebutting the [*Carcaño* Plaintiffs'] broad challenges to the legislative process behind the Act, which specifically target statements ascribed to them."). Notably, their motion papers made no reference to legislative privilege.

In their Proposed Answer, ECF 36 (May 25, 2016), Berger and Moore further repeatedly denied that they or any other legislators acted out of animus in voting for H.B. 2,

id. ¶¶ 3-5, 15, 58-59, 66, 80, and affirmatively represented that "*the Act was not motivated by ill will or animus toward anyone*," *id.* ¶ 98 (emphasis added).[1] In short, they sought to intervene for the express purpose of showing that neither they nor any other legislators acted out of animus toward transgender individuals in particular, or LGBT people more generally, when the Legislature, together with Governor McCrory, enacted H.B. 2.

Intervenor-Defendants' representations to this Court in intervening and their active litigation of this case waived any legislative privilege they might otherwise have had as subpoenaed non-parties (as in *N.C. State Conference of the NAACP v. McCrory*, No. 1:13CV658, 2014 WL 12526799 (M.D.N.C., Nov. 20, 2014) ("*NAACP I*"), and *N.C. State Conference of the NAACP v. McCrory*, No. 1:13CV658 (M.D.N.C. Feb. 4, 2015) ("*NAACP II*") (PO Mot. Exh. H)). The unique facts at issue here make this an extremely unusual case as far as legislative privilege is concerned. If this Court concludes, as it should, that Intervenor-Defendants waived legislative privilege, such a ruling will not in any way undermine the federal common law privilege that applies to state legislators generally. State legislators are highly unlikely in a typical case to take the remarkable steps that Intervenor-Defendants have taken in intervening in and litigating this case.

The authority most directly on point is *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001), which strongly supports waiver of legislative privilege here. In *Powell*, a broad array of plaintiffs sued the Pennsylvania governor and other state executive branch officials

[1] Their Answer, ECF 54 (June 9, 2016), contains the same denials and factual assertions. *Id.* ¶¶ 3-5, 15, 58-59, 66, 80, 98. It also make no reference to legislative privilege.

challenging the formula used by the state to allocate certain federal educational funds as yielding racially discriminatory results in Philadelphia and elsewhere. *Id.* at 522. Four Pennsylvania legislative leaders ("Legislative Leaders") moved to intervene, citing "their financial and legal interests in the litigation and the need to 'articulate to the Court the unique perspective of the legislative branch.'" *Id.*[2] In a footnote, they stated they did not waive any "speech or debate immunity." *Id.* at 522 n.1.

The district court granted intervention, and the Legislative Leaders moved to dismiss. After dismissal was reversed on appeal, the plaintiffs sought discovery from the Legislative Leaders, who asserted legislative privilege. 247 F.3d at 523. The district court granted plaintiffs' motion to compel and the Third Circuit affirmed, first noting that "the Legislative Leaders are not seeking immunity from this suit which, it must be remembered, they voluntarily joined." *Id.* at 525. Instead they were seeking "a privilege which would allow them to continue to actively participate in this litigation by submitting briefs, motions, and discovery requests of their own, yet allow them to refuse to comply with and, most likely, appeal from every adverse order." *Id.*

The Third Circuit rejected the Legislative Leaders' privilege claims, noting that they "have failed to come up with even one case which hints at the existence of the privilege they press." 247 F.3d at 525. Instead, "every case" the Legislative Leaders cited to "support this privilege features, in direct contrast to this case, a defendant or a target of a

[2] The Legislative Leaders included the speaker of the house and the president *pro tempore* of the senate. Petitioner for Certiorari, No. 00-1854, *Ryan v. Powell*, 2001 WL 34125228, at *1 (U.S. filed June 12, 2001), *cert denied*, 534 U.S. 823 (2001).

subpoena seeking to extricate him or herself *completely* from various legal entanglements." *Id.* (emphasis in original). The court went on to observe that "[u]nlike the reluctant participants in the cases upon which they rely, the Legislative Leaders voluntarily installed themselves as defendants . . . [a]nd . . . wish to remain as defendants and participate as long as this case is around." *Id.* Rather than "legislators caught up in litigation in which they do not wish to be involved," the Legislative Leaders were "self-made defendants who seek to turn what has heretofore been the shield of legislative immunity into a sword." *Id.*; *see also Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100, 103 (S.D.N.Y. 2003) (adopting *Powell*'s holding that legislative privilege can be waived through voluntary participation in litigation, but declining to find waiver "at least at this juncture" given that defendants "have made a colorable claim" that New York state law "requires their continued participation"), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003).

The Intervenor-Defendants' waiver of legislative privilege in this case is even more compelling than in *Powell*. Unlike the Legislative Leaders in *Powell*, Intervenor-Defendants made no reference to legislative privilege in seeking to intervene. Far from invoking privilege, they willingly forfeited it by representing to this Court that they were intervening in order to defend their own and other legislators' motives in passing H.B. 2. Mot. to Intervene, at 2, 13. They went further still, seeking to intervene based on their "familiarity with the genesis of [H.B. 2.]" *Id.* at 13. Having intervened for those express purposes, Intervenor-Defendants cannot now use legislative privilege to prevent discovery

into those very matters, which are of central relevance to Plaintiffs' equal protection claim under *Arlington Heights*.

In attempting to avoid waiver, Intervenor-Defendants claim that legislative privilege may be waived "only after explicit and unequivocal renunciations of the protection," PO Br. at 12, relying on *United States v. Helstoski*, 442 U.S. 477, 490 (1979). That case, however, is inapposite because it addressed federal legislators' *immunity from suit* under the U.S. Constitution's Speech or Debate Clause. Defendants cite no case applying *Helstoski* to state *legislative privilege*,[3] and that argument was rejected in *Favors v. Cuomo*, 285 F.R.D. 187, 211-12 (E.D.N.Y. 2012). *See also Almonte v. Long Beach*, No. CV 04-4192, 2005 WL 1796118, at *3-4 (E.D.N.Y. July 27, 2005).

Intervenor-Defendants next try to distinguish *Powell* by claiming that contrary to the Legislative Leaders in that case, Berger and Moore intervened pursuant to a "statutory duty," citing N.C. Gen Stat. § 1-72.2. PO Br. at 12-15. But the statute's plain text makes clear that it merely *permits* intervention. N.C. Gen Stat. § 1-72.2; *see also* Mot. to Intervene at 3. It simply has no bearing on Intervenor-Defendants' waiver of legislative privilege.[4]

[3] The only case Defendants cite concerns legislative immunity. PO Br. at 12 (quoting *2BD Assocs. Ltd. P'ship v. Cty. Comm'rs*, 896 F. Supp. 528, 535 (D. Md. 1995)).

[4] Defendants suggest that because Berger and Moore intervened in their official capacities, they cannot waive their personally held legislative privilege. PO Br. at 14. In *Favors*, the court confronted and rejected that very argument, both as to an across-the-board waiver as in *Powell* and as to selective waiver. 285 F.R.D. at 206, 210-12. Although the court found the legislators' efforts to distinguish *Powell* unavailing, the court ultimately "reject[ed] the notion that the defendants' participation in this lawsuit, *standing alone, automatically waives the legislative privilege in all respects*." *Id.* at 211 (emphasis added). Here, Plaintiffs do not argue that Berger and Moore's intervention, standing alone, waived the

Like the Legislative Leaders in *Powell*, Intervenor-Defendants sought to intervene on behalf of the state legislature to represent its interests. Mot. to Intervene, at 1-2; *see also Powell*, 247 F.3d at 522. Even if it mattered, Defendants are wrong in claiming that the Legislative Leaders in *Powell* "had no authority . . . different than other members" of the legislature. PO Br. at 15. The *Powell* Legislative Leaders included Berger's and Moore's counterparts—the speaker of the house and president *pro tempore* of the senate. *See supra* n. 2.

Finally, Defendants claim that the consequences of finding waiver here would be "staggering" because "States could designate legislative agents to defend challenged state laws . . . only at the price of waiving those legislators' immunity from discovery and testimony." PO Br. at 15. That is alarmist and incorrect. Finding waiver here would, like the waiver in *Powell*, have no appreciable effect on legislative privilege. Moreover, the facts warranting waiver here are unique and unlikely to arise with any regularity again. Berger and Moore voluntarily intervened with the express purpose of defending their own and other legislators' motives and the genesis of H.B. 2, and they made no attempt to invoke or preserve legislative privilege. Accordingly, Defendants' assertion that a finding of waiver would violate the Tenth Amendment, PO Br. at 15, is frivolous.

III. Even If Not Waived, Legislative Privilege Is Qualified And Not Absolute.

Defendants claim in error that legislative privilege is absolute, except "[i]n a few,

---

privilege. Instead, they waived the privilege by intervening *to defend their motives and the genesis of H.B. 2*, and by aggressively participating in every aspect of discovery.

very limited contexts . . . when the nature of the claims involved self-dealing, corruption, crime, or retaliation." PO Br. at 7. They support this assertion by relying heavily on legislative *immunity* cases,[5] which are inapplicable here. The Governor has no legislative immunity from suit, and Intervenor-Defendants waived their immunity by becoming willing litigants. Defendants apparently seek to rely on legislative immunity cases because, "[w]hile the common-law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, 'at best, one which is qualified.'" *Perez v. Perry*, Case No. SA–11–CA–360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (citing *Rodriguez*, 280 F. Supp. 2d at 95, 100); *see also NAACP I*, 2014 WL 12526799, at *2 ("legislative privilege is not absolute, but rather requires a flexible approach" (internal quotation marks omitted)); *NAACP II*, at 5 ("[T]he court overruled the legislators' objection that legislative privilege is absolute, instead holding that the privilege was qualified."). Therefore, Defendants' attempts to portray legislative privilege as absolute should be rejected out of hand.[6]

[5] PO Br. at 3-5 (citing, *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1951) (using "privilege" to refer to immunity from suit); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Schlitz v. Virginia*, 854 F.2d 43 (4th Cir. 1988), *overruled by Berkley v. Common Council of City of Charleston*, 63 F.3d 295 (4th Cir. 1995); *Dobrich v. Walls*, 380 F. Supp. 2d 366 (D. Del. 2005); *MINPECO, S.A. v. Commodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988)).

[6] Defendants also improperly seek to expand the scope of legislative privilege by relying on three types of cases that arise in very different contexts: (1) legislative immunity cases where the defendants are sued in their individual capacities for punitive damages, PO Br. at 5-6 (quoting *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980), and citing *Almonte v. City of Long Beach*, 478 F.3d 100 (2d Cir. 2007)); (2) a case involving non-parties subpoenaed to be deposed, PO Br. at 5 (quoting *Dyas v. City of Fairhope*, No. 08-0232-WS-N, 2009 WL 3151879 (S.D. Ala. Sept 24, 2009)), and (3) a case involving a federal

Defendants next assert that the "five factor balancing test [for legislative privilege] applied by this and other courts in redistricting and voting rights cases is not applicable in this case." PO Br. at 10 (footnote omitted). That is simply incorrect, and ignores that Plaintiffs assert an equal protection claim that makes Defendants' intent in enacting the challenged legislation, and any procedural irregularities in the legislative process, highly relevant. That Defendants do not mention Plaintiffs' equal protection claim until the last paragraph of their brief is no accident: it fundamentally undermines their arguments.

The Supreme Court and Fourth Circuit have made clear that if a law is facially neutral—and Plaintiffs contend H.B. 2 is not—then to prevail on an equal protection claim plaintiffs must prove discriminatory intent. *Arlington Heights*, 429 U.S. at 265-66; *N.C. State Conf. of NAACP v. McCrory*, No. 16-1468, — F.3d —, 2016 WL 4053033, at *6 (4th Cir. July 29, 2016). And among the evidence relevant to discriminatory intent are "contemporary statements by members of the decisionmaking body," the "specific sequence of events leading up the challenged decision," and "[d]epartures from the normal procedural sequence." *Arlington Heights*, 429 U.S. at 267-68. Consequently, Defendants have no basis to assert that the discovery Plaintiffs seek is irrelevant, PO Br. at 16, 19, or

---

congressman's legislative privilege under the Speech and Debate Clause, PO Br. at 6 (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983)). In *Dyas*, for example, which concerned the deposition of subpoenaed third-party legislators, the plaintiffs admitted they would pursue broad lines of questioning for the "purpose of proving the deponents' intent," which the court held was protected by the legislative privilege. 2009 WL 3151879, at *8. The court prohibited such questioning, but allowed the depositions to proceed. *Id.* at *9-10. The issues presented in *Dyas* and these other cases are simply not presented here.

that this case should be treated differently than other equal protection cases, including voting rights cases, when it comes to the proper test for legislative privilege.

The five-factor test for legislative privilege applied by this and other courts in many different contexts applies here as well. Notably, the five factors were originally catalogued by Judge Weinstein in securities litigation. *Rodriguez*, 280 F. Supp. 2d at 100-01 (quoting *In re Franklin Nat'l Bank Secs. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)).[7] This five-factor test has since become authoritative and has been applied in many different contexts, not just the limited ones Defendants claim. *E.g.*, *ACORN v. Cty. of Nassau*, No. 05-2301, 2007 WL 2815810, at *1-3 (E.D.N.Y. Sept. 25, 2007) (claim of racial discrimination in zoning).

Application of this five-factor test leads to the conclusion that a protective order of the remarkably broad scope Defendants seek is wholly unwarranted. Notably, Defendants' brief applies the five-factor test in a single paragraph, PO Br. at 10-11, and fails to address any of the specific categories of disputed documents the parties identified in their meet and confers, including communications with third parties, state agencies, and legislators and their staff. PO Mot. Exh. E at 5-14. As this Court noted in *NAACP I*, many of the relevant factors in the five-factor test "apply generally across the disputed categories of documents." *NAACP I*, 2014 WL 12526799, at *2. After assessing the factors generally applicable

[7] The 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." 478 F. Supp. at 583.

across categories of documents, the Court then went on to "further consider the various factors" as they applied to each category of disputed documents. *Id.* at *3. That is the approach Plaintiffs take below.[8] In applying the five-factor test, it is important to bear in mind that Defendants are active participants in this litigation, in contrast to the subpoenaed non-party legislators in *NAACP*. *Id.* at *1.

With respect to the first factor, the evidence Plaintiffs seek regarding Defendants' motives in enacting H.B. 2 and any procedural irregularities therein is highly relevant to discriminatory intent. *Arlington Heights*, 429 U.S. at 267-68. As this Court has noted, "pertinent authority suggests that legislator communications may be relevant both to motive and to providing context for legislative actions," and in addition "are, at the very least, reasonably calculated to lead to admissible evidence regarding the same." *NAACP I*, 2014 WL 12526799, at *2; *see also NAACP II* at 11-12 ("legislator communications are certainly relevant to the issue of intent").[9] In arguing against relevance, Defendants

[8] Defendants fail to apply the five-factor test to any of the categories of disputed documents raised during the parties' meet and confers, PO Mot. Exh. E at 5-14, and thus have waived the right to do so in their reply. *Bunton v. Colvin*, No. 1:10CV786, 2014 WL 639618, at *5 (M.D.N.C. Feb. 18, 2014).

[9] Defendants erroneously cite *South Carolina Education Association v. Campbell*, 883 F.2d 1251 (4th Cir.1989), for the proposition that the motives of individual legislators are irrelevant in this case. PO Br. at 17. *Campbell* squarely held that legislators' motives are indeed relevant in "limited exceptions" where "the very nature of the constitutional question requires an inquiry into legislative purpose." *Campbell*, 883 F.2d at 1259 (internal quotation marks omitted); *NAACP I*, 2014 WL 12526799, at *2 (quoting *Campbell*). These exceptions include discrimination cases brought under the Equal Protection Clause, like the case at bar. *Campbell*, 883 F.2d at 1259 & n. 6 (citing *Arlington Heights*). *Campbell* then went on to hold that the case before it did not fall into one of those "limited exceptions," and proceeded to criticize the district court for relying on the testimony of

provide a single conclusory sentence referencing another section of their brief, PO Br. at 10, but even that section does not address Plaintiffs' equal protection claim and the relevance of Defendants' animus toward the transgender and broader LBGT communities. *Id.* at 16-19. In short, "nothing Defendants offer suggests that the documents sought are irrelevant in the discovery context in this case." *NAACP I*, 2014 WL 12526799, at *2. The first factor weighs heavily in favor of disclosure.

The second factor, the availability of other evidence, also weighs in favor of disclosure. "Defendants have not shown that the requested documents are available elsewhere, nor have Defendants otherwise provided a viable alternative for obtaining the documents from other sources." *Id.*, at *3; *see also NAACP II* at 12 ("these documents are largely unavailable by other means," and "Defendants have not shown that there are any other paths of discovery reasonably available to Plaintiffs."). Defendants blithely assert that "the most probative evidence" is "the public legislative record," PO Br. at 10, but that ignores the "practical reality that officials '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 [or other] minority.'" *Veasey v. Perry*, No. 2:13–CV–193, 2014 WL 1340077, at *3 (S.D. Tex. 2014) (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982)). Accordingly, this factor also weighs in favor of disclosure.

---

individual legislators. *Campbell*, 883 F.2d at 1259-62. The language Defendants rely on, PO Br. at 17, comes from this subsequent portion of *Campbell*, which has no application here.

As to the third factor, Defendants concede that "Plaintiffs' claims are serious." PO Br. at 10. Nevertheless, Defendants try to diminish the significance of that concession by asserting that "voting rights claims are of 'cardinal importance.'" PO Br. at 10 (quoting *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014)). However, Defendants misleadingly quote from *Page*, which states that "[t]he right to vote *and the rights conferred by the Equal Protection Clause* are of cardinal importance." 15 F. Supp. 3d at 667 (emphasis added). The rights conferred by the Equal Protection Clause are squarely at issue in this case, and this factor thus weighs heavily in favor of disclosure.

The fourth factor also weighs heavily in favor of disclosure—more so than in *NAACP*. "[T]he government is directly involved in this litigation, in the alleged violations, and in any potential remedy that is sought." *NAACP I*, 2014 WL 12526799, at *3. But here, Intervenor-Defendants are willing participants rather than subpoenaed third parties. *NAACP II* at 12. "If the role of the government (here, the state legislators) is not only direct, but voluntary, then, as a matter of fairness, the defendants' claims of privilege against compelled disclosure must be weakened." *Favors*, 285 F.R.D. at 211.

As this Court did in *NAACP I*, Plaintiffs apply the fifth factor and weigh it against the other four factors in the context of each category of disputed documents. *NAACP I*, 2014 WL 12526799, at *3-5. "If consideration of the first four factors leads to the conclusion that they outweigh the risk addressed by the fifth—possible future timidity—then the demanded document ought to be disclosed, despite the assertion of legislative privilege." *Favors v. Cuomo*, No. 11-CV-5632, 2015 WL 7075960, at *11 (E.D.N.Y.

Feb. 8, 2015). Furthermore, although the fifth factor generally "weighs against displacing the privilege, . . . the defendants' [here Intervenor-Defendants'] decision not to invoke legislative immunity, and their continued, voluntary involvement in this litigation, undercut their predictions of future timidity." *Id.* at *12.

1. *Communications with third parties*: "[S]uch communications are not ordinarily the type of legislative acts that the privilege is designed to protect." *NAACP I*, 2014 WL 12526799, at *3. And, as this Court has pointed out, "even to the extent such communications can be argued to encompass the type of legislative acts protected by the legislative privilege, that privilege was waived when the communications were shared with non-legislative outside parties." *Id.* at *3; *see also NAACP II* at 20-24. Defendants give no reason why such communications should be protected, and there is "no basis to conclude that requiring production of the communications with third parties would result in future timidity in communications, as the possible sharing or publications of these documents would not be unexpected." *NAAPC I*, 2014 WL 12526799, at *4. Furthermore, given that Defendants are parties to this litigation rather than non-parties as in *NAACP*, there is no reason to believe that "requiring production of these communications would impose a heavy burden on Defendants or divert the state legislators from their duties." *Id.*[10] As a result, Defendants' communications with all third parties, including, but not limited to,

[10] Defendants represented during the parties' meet and confers that, although they would object to production of communications with experts or consultants, no such communications exist. PO Mot. Exh. E at 5. Assuming that remains true, the Court need not reach that particular issue. *NAACP II* at 20 n.4.

political party representatives, lobbyists, constituents, public interest groups, and federal legislators should be produced.

2. *Communications with state agencies, including UNC*: Defendants provide no reason why these communications are privileged. Even Defendants' broad conception of legitimate legislative activity does not include communications with state agencies. PO Br. at 4-6. As a result, this entire category should be produced.

3. *Factual information available to the legislators or governor at the time they enacted H.B. 2*: Numerous courts have held that the legislative privilege does not extend to the factual materials and information (*e.g.*, committee reports and minutes of meetings) made available to legislators at the time they enacted the challenged legislation. *E.g.*, *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 302 n.20 (D. Md. 1992); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 WL 4837508, at *9 (N.D. Ill. Oct. 12, 2011); *ACORN*, 2007 WL 2815810, at *3.

This Court's ruling in *NAACP* that subpoenaed non-party legislators did not have to create a privilege log of communications referencing objective facts is not to the contrary. *NAACP II* at 18-19. In reaching that conclusion, the Court relied on *Kay v. City of Rancho Palos Verdes*, No. CV 02-03922, 2003 WL 25294710 (C.D. Cal. Oct. 10, 2003), which held that defendant city council members could not be deposed "about communications that reflect objective facts related to legislation" because such depositions would "interfere with their legislative duties." *Id.* at *11. Here, Plaintiffs do not seek depositions about

communications that reference objective facts, or even the communications themselves (*e.g.*, an email from a legislator to his staff that mentions some objective facts the legislator is considering). Rather, Plaintiffs seek the underlying factual material made available to Defendants, such as committee reports and meeting minutes. Producing this narrow category of documents would in no way interfere with Intervenor-Defendants' legislative duties, particularly given that the Legislature's and Governor's consideration of H.B. 2 lasted a matter of hours, meaning there are likely to be few if any such documents.

4. *Communications between or among legislators and their staff and the governor and his staff when engaging in legitimate legislative activities relating to H.B. 2*: Defendants have not shown why they should be entitled to withhold even this category of documents from discovery, particularly those communications that on their face show animus toward the transgender and broader LGBT communities. *NAACP* is not to the contrary because Defendants are active participants in every aspect of discovery, not subpoenaed non-parties. The legislative immunity cases this Court relied on in *NAACP* in shielding this category of documents from production and a privilege log, *NAACP II* at 13-17, have no application here, given Intervenor-Defendants' voluntary waiver of immunity from suit. And given that H.B. 2 was considered by the Legislature and Governor for a matter of hours, the potential for intrusion into the legislative process is negligible and does not outweigh the countervailing factors.

Even if this Court were to shield these documents from discovery, Defendants should at least be required to produce a privilege log, particularly given their exceedingly

broad view of the scope of legitimate legislative activities. PO Br. at 4-6. And although this Court expressed concern in *NAACP I* that requiring privilege logs "would entail the extensive involvement of the legislators . . . and would require review of potentially thousands of documents," *NAACP I*, 2014 WL 12526799, at *5, those concerns are not present here. Intervenor-Defendants are already heavily involved and the potential number of documents here is comparatively tiny given that H.B. 2 was considered over a few hours, whereas the statute at issue in *NAACP* was considered for over four months.[11]

The need for a privilege log is even more critical for Defendant McCrory, who is claiming legislative privilege for himself and his staff for an incredibly broad array of communications concerning H.B. 2, from the moment H.B. 2 was first discussed through the present. PO Mot. Exh. E at 1. He even asserts legislative privilege over documents relating to Executive Order 93, PO Mot. at 3, which by definition is non-legislative. A privilege log is clearly necessary to ensure that the Governor's broad assertion of legislative privilege is not shielding highly relevant, non-privileged documents. *In camera* review of specific documents withheld by defendants may be warranted to determine whether they are privileged or not.

Finally, the Court should reject out of hand Defendants' bare assertion that "the scope and number of documents [Plaintiffs seek] would be massive; collecting, sifting, and producing them would far outweigh their relevance to Plaintiffs' claims." PO Br. at 16;

[11] *N.C. State Conference of the NAACP v. McCrory*, No. 13cv658, — F. Supp. 3d —, 2016 WL 1650774, at *8, 13 (M.D.N.C. Apr. 25, 2016), *rev'd*, No. 16-1468, — F.3d —, 2016 WL 4053033 (4th Cir. July 29, 2016).

see Drexel Heritage, 200 F.R.D. at 259 (conclusory statements insufficient). Defendants cannot remedy this failure in their reply brief.

IV. Defendants Have Not Shown Extraordinary Circumstances Necessary To Shield Them From Depositions.

Defendants devote just three lines of text to prevent their depositions. PO Br. at 6. They do not cite a single case in which a legislator who intervened or a state official who was sued was shielded from being deposed on legislative privilege grounds. Instead, they rely on legislative *immunity* cases. PO Br. at 6 & nn. 3 & 4.[12]

Notably, two of the cases Defendants cite contradict their position because they allowed depositions of legislators on non-privileged matters. PO Br. at 6 n.4; *ACORN*, 2007 WL 2815810, at *6; *Dyas*, 2009 WL 3151879, at *10. Courts frequently allow legislators (whether parties or non-parties) to be deposed notwithstanding assertions of legislative privilege. *E.g.*, *ACORN*, 2007 WL 2815810, at *6; *Dyas*, 2009 WL 3151879, at *10; *Nashville Student Org. Comm. v. Hargett*, 123 F. Supp. 3d 967, 969-71 (M.D. Tenn. 2015) (collecting cases). Plaintiffs are entitled to depose Defendants on any non-privileged matter, such as communications with third parties and state agencies about H.B. 2, and communications concerning enforcement of H.B. 2.

CONCLUSION

For the foregoing reasons, Defendants' protective order motion should be denied.

[12] For example, Defendants chiefly rely on *Schlitz*, 854 F.2d at 45-46, which granted legislative immunity from suit and thus did not even address legislative privilege.

Respectfully submitted,

Dated: October 7, 2016

/s/ Christopher A. Brook

Christopher A. Brook
N.C. State Bar No. 33838
Irena Como*
AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, North Carolina 27611
Telephone: 919-834-3466
Facsimile: 866-511-1344
cbrook@acluofnc.org
icomo@acluofnc.org

James D. Esseks*
Leslie Cooper*
Elizabeth O. Gill*
Chase B. Strangio*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
Telephone: 212-549-2627
Facsimile: 212-549-2650
jesseks@aclu.org
lcooper@aclu.org
egill@aclunc.org
cstrangio@aclu.org

Jon W. Davidson*
Tara L. Borelli*
Peter C. Renn*
Kyle A. Palazzolo*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 1070
Atlanta, GA 30308-1210
Telephone: 404-897-1880
Facsimile: 404-897-1884
jdavidson@lambdalegal.org
tborelli@lambdalegal.org
prenn@lambdalegal.org
kpalazzolo@lambdalegal.org

Paul M. Smith*
Scott B. Wilkens*
Luke C. Platzer*
JENNER & BLOCK LLP
1099 New York Avenue, NW Suite 900
Washington, DC 20001-4412
Telephone: 202-639-6000
Facsimile: 202-639-6066
psmith@jenner.com
swilkens@jenner.com
lplatzer@jenner.com

Counsel for Plaintiffs

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

CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on October 7, 2016, I electronically filed the foregoing PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR A PROTECTIVE ORDER BASED ON LEGISLATIVE PRIVILEGE, using the CM/ECF system, and have verified that such filing was sent electronically using the CM/ECF system to all parties who have appeared with an email address of record.

/s/ Christopher A. Brook
Christopher A. Brook