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

MEMORANDUM IN SUPPORT OF 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

INTRODUCTION AND STATEMENT OF FACTS

Senate President pro tempore Philip Berger and House Speaker Tim Moore ("Intervenor-Defendants") have jointly intervened in these cases as "agents of the State," *see* N.C.G.S § 1-72.2, to defend the validity of the Public Facilities Privacy and Security Act ("HB2"). Together with Defendants Governor Patrick McCrory, the State of North Carolina, and the North Carolina Department of Public Safety ("DPS"), they now seek a protective order concerning Plaintiffs' pending discovery requests that directly threaten legislative privilege, *see* Exhs. A, B, C, D-1, D-2, and D-3 (Requests for Production of Documents served by United States and Carcaño plaintiffs), as well as a protective order barring the depositions of Intervenor-Defendants, the Governor, and any member of their staffs in this matter on the basis of legislative and deliberative process privilege.[1]

QUESTIONS PRESENTED

1. Does legislative privilege prevent discovery from the movants on matters within the scope of legitimate legislative activity related to HB2?
2. Did Senator Berger and Speaker Moore explicitly and unequivocally waive their personal legislative privileges by intervening jointly "as agents of the State" pursuant to statutory authority?
3. Are individual legislators' motives for supporting HB2 relevant to any of the Plaintiffs' claims so as to justify Plaintiffs' discovery requests directed to discovering such motives?

[1] Before filing this motion, the parties conferred on September 15, 20, and 22, but did not resolve their disagreements. Defendants made repeated efforts to compromise on various document categories, as well as on a time frame for relevant documents, to no avail. *See* Exh. E (defense e-mails to plaintiffs' counsel). Moreover, three hours after the final meet and confer on September 22, the *Carcaño* Plaintiffs served notice of subpoenas *duces tecum* issued to four additional legislators—Representative Paul Stam, Representative Dan Bishop, Senator E.S. ("Buck") Newton, and Representative Hugh Blackwell—seeking legislatively privileged material. *See* Exh. K. Movants remain open to negotiation but had no choice but to file this motion.

ARGUMENT

I. LEGISLATIVE PRIVILEGE PROTECTS ALL MOVANTS ON MATTERS WITHIN THE SCOPE OF LEGITIMATE LEGISLATIVE ACTIVITY RELATED TO HB2.

A. Legislative privilege broadly protects all legitimate legislative activity, including activity by the Governor and other state officials outside the legislative branch.

Discovery is limited to "any nonprivileged matter … relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Legislative privilege "clearly falls within the category of accepted evidentiary privileges," *E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 180 (4th Cir. 2011) ("*WSSC"*), and is broadly construed. *See* Exh. G at 24-25 n.14 and sources cited therein (North *Carolina State Conf. of the NAACP v. McCrory*, Nos. 1:13-CV-658, 660, 861 ("*NAACP"*), 5/15/14 Mem. Order). Protecting the privilege justifies a Rule 26(c) protective order. *Bannum, Inc. v. City of Beaumont, Texas*, 236 F. Supp.2d 633 (E.D. Tex. 2002). Determination of legislative privilege is a legal finding reviewed *de novo*. *McCray v. Maryland Dept. of Transp.,* 741 F.3d 480, 484 (4th Cir. 2014).

Legislative privilege and legislative immunity are "parallel" doctrines, "two sides of the same coin." *WSSC*, 631 F.3d at 180; *Lee v. Virginia State Bd. of Elec.*, No. 3:15-CV-357, 2015 WL 9461505, at *2 (E.D. Va. Dec. 23, 2015). Just as legislative immunity "reinforces representative democracy, fostering public decisionmaking by public servants for the right reasons," legislative privilege concomitantly protects against compulsory evidentiary process, both from written discovery and testimony. *See WSSC,* 631 F.3d at 180, 181; *Bogan v. Scott-Harris,* 523 U.S. 44, 52 (1998).

The privilege's broad protection extends to those "acting in the sphere of legitimate legislative activity." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). That sphere "is not confined to the legislative branch," but may extend to "the judiciary" and "members of the executive branch," as "[i]t is the *function* of the government official that determines whether or not he is entitled to legislative immunity, not his title." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 299, 298 (D. Md. 1992) (internal citations omitted). Moreover, the protected legislative sphere "has been broadly interpreted to include activities that are 'an integral part of the deliberative and communicative processes' by which legislators participate in proceedings with respect to the consideration, passage or rejection of proposed legislation and with respect to other matters arising within their jurisdiction." *Dobrich v. Walls*, 380 F. Supp.2d 366, 376 (D. Del. 2005). Because '[t]he privilege protects the legislative process itself," it "therefore covers both governors' and legislators' actions in the proposal, formulation, and passage of legislation." *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015).[2]

In light of its breadth, courts have readily applied legislative immunity or privilege to a broad range of activities. *See, e.g., Schlitz v. Commonwealth of Virginia*, 854 F.2d

[2] While legislative privilege and deliberative process privilege are often addressed together, the scope of legislative privilege is broader. Deliberative process privilege typically applies to executive and administrative officials and protects the "decisionmaking processes of government agencies" to encourage "frank discussion of legal or policy matters." *Ethyl Corp. v. United States E.P.A.,* 25 F.3d 1241, 1248 (4th Cir. 1994). Documents reflecting the factual bases for such opinions fall outside the deliberative process privilege unless those facts are "intertwined with the policy-making process." *Bethune-Hill v. Virginia State Bd. of Elec.*, 114 F. Supp. 3d 323, 338 (E.D. Va. 2015). In contrast, the legislative privilege "has a wider sweep based on different purposes." *Id.* Because the privilege protects the entire legislative process, "the activity of legislative fact-finding is encompassed within the privilege." *Id.* This is consistent with this Court's own recognition of the broad scope and application afforded to legislative privilege. *See* Exh. G at 24-25 n.14 (*NAACP*, 5/15/14 Mem. Order).

43, 46 (4th Cir. 1988) (state legislators electing state court judges), *overruled on other grds.*, *Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 303 (4th Cir. 1995) (*en banc*); *Simpson v. City of Hampton,* 166 F.R.D. 16, 19 (E.D. Va. 1996) (keeping personal notes and files, information gathering and review); *MINPECO, S.A. v. Conticommodity Services, Inc*., 844 F.2d 856, 860 (D.C. Cir. 1988) (preparing committee statements and reports); *Dyas v. City of Fairhope*, 2009 WL 3151879, at *8 (S.D. Ala. Sept. 24, 2009) (conversing with constituents). Moreover, a state executive's actions in a legislative capacity are not limited to signing or vetoing legislation. *See Edwards v. United States*, 286 U.S. 482, 490 (1932). Instead, "when a governor and a governor's appointee advocate bills to the legislature, they [also] act in a legislative capacity." *Baraka v. McGreevey,* 481 F.3d 187, 196-97 (3d Cir. 2007); *see also Marylanders*, 144 F.R.D. at 300-01 (governor's "preparation and introduction of legislation for the legislature . . . to consider and accept or reject" is a legislative activity).

Even as to acts "not themselves legislative and thus not independently privileged," the privilege prohibits questions seeking to challenge the motivation of a legislative decision. *Dyas*, 2009 WL 3151879, at *9. Thus, even matters incidental to the formal legislative process fall within the scope of legitimate legislative activity, including:

- "the historical background of past official actions; the sequence of events leading up to the challenged decisions; departures from normal procedural sequences; substantive factors usually considered important in such decisions; and the legislative history of the decisions." *Dyas*, 2009 WL 3151879, at *8-9;
- "[m]eeting with 'interest' groups, professional or amateur, regardless of their motivation" as such activities are "part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the

legislation they are to consider." *Bruce v. Riddle,* 631 F.2d 272, 280 (4th Cir.1980); *accord Almonte v. City of Long Beach*, 478 F.3d 100 (2d Cir. 2007);

- a legislator's receipt of "information pertinent to potential legislation or investigation," including "[c]onstituents provid[ing] data to document their views when urging the [legislator] to initiate or support some legislative action…. [For] the privilege extends to questions about a [legislator's] sources of information." *Miller v. Transamerican Press, Inc*., 709 F.2d 524, 530-31 (9th Cir. 1983).

Permitting depositions of sitting legislators and state executives is particularly disfavored. *See Schlitz*, 854 F.2d at 45-46 (privilege applies in "full force" to prohibit deposing legislators).[3] Few if any cases have ever allowed such depositions.[4]

Plaintiffs' discovery directly targets legitimate legislative activity. Among other things, plaintiffs seek "all documents reviewed, received, or considered in connection with the enactment and/or passage of" HB2; all communications between defendants and their "current or former employees, agents, or representatives" regarding HB2; all documents "relating to, supporting, or opposing the passage of" HB2; all "studies, data, reports, surveys, or similar documents, related to any privacy, safety, or any other justification or rationale underlying or supporting the passage" of HB2; and all documents and communications related to the "drafting, passage, justifications,

[3] *See also Metro Pony, LLC v. City of Metropolis*, No. 3:11-CV-144, 2011 WL 1671541, at *3 (S.D. Ill. May 3, 2011) ("[i]n accordance with the purpose of absolute legislative immunity, the scope of the testimonial privilege is broad"); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (legislative testimony "frequently will be barred by privilege").

[4] *See ACORN v. Cty. of Nassau*, No. 05-cv-2301, 2007 U.S. Dist. LEXIS 71058, at *10 (E.D.N.Y. Sep. 25, 2007) ("neither plaintiffs' submissions nor the court's own research has identified a single case in which the seriousness of the litigation overrode the assertion of legislative privilege as to testimony regarding a legislator's motivations"); *MLC Automotive, LLC v. Town of Southern Pines,* Case No. 1:05-cv-1078, 2007 WL 128945, at *5-6 (M.D.N.C. Jan. 11, 2007) (allowing councilmembers' depositions would effectively "eviscerate" testimonial privilege)*; see also Dyas*, 2009 WL 3141879, at *10 (for the privilege "not to fail of its essential purpose . . . [it] prevents a litigant from deposing an unwilling legislator to probe for evidence with which to support the litigant's challenge to a legislative decision as improperly motivated, procedurally defective or otherwise infirm").

implementation, and effects" of HB2. *See* Exhs. A to D. Additionally, Plaintiffs have indicated their intent to depose Senator Berger, Speaker Moore, and Governor McCrory concerning their involvement with HB2, and the United States has already issued them a Rule 30(b)(6) deposition notice.[5] *See* Exh. F. These requests directly and inappropriately intrude into the legislative process and should be barred by a protective order.

B. There is no basis to override legislative privilege in these cases.

In a few, very limited contexts, federal courts including this Court have allowed legislative discovery when the nature of the claims involved self-dealing, corruption, crime, or retaliation. Voting rights and redistricting cases constitute the largest number of such cases. *See* Exh. H, at 19-23 (*NAACP*, 2/4/15 Mem. Order). Legislative redistricting cases present a "particularly appropriate circumstance for qualifying" the privilege because of "the very real threat of legislative self-entrenchment." *Bethune-Hill v. Virginia State Board of Elections*, 114 F. Supp. 3d 323, 336-37 (E.D. Va. 2015) (internal quotation omitted). As explained in *Marylanders for Fair Representation*:

> Legislative redistricting is a *sui generis* process. While it is an exercise of legislative power, it is not a routine exercise of that power. . . . Inevitably, it directly involves the self-interest of the legislators themselves.

144 F.R.D. at 304 (Motz, and Murnaghan, J.J. concurring); *see also Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 665 (E.D. Va. 2014) (quoting *Marylanders)*.

[5] The United States issued a single Rule 30(b)(6) notice directed to all Defendants. Exh. F. Defendants have asked the United States to reissue separate Rule 30(b)(6) deposition notices to clarify which entities are to be deposed and which topics are to be sought of each. Exh. J (defense counsel letter dated 9/14/14).

Absent extraordinary circumstances, legislative privilege is "the default common-law presumption[]" that prevents judicial inquiry into the motive of legislators. *Bethune-Hill*, 114 F. Supp. 3d at 334. The *Bethune-Hill* court reasoned that whether legislative privilege is absolute or qualified depends on the nature of the claim and the defendant, not on a blanket rule. *Id.* at 335. Absent "express congressional declaration to the contrary," legislative privilege "prevents compelled testimony or documentary disclosure" in civil suits against individual legislators. *Id.*

In voting rights cases, the challenged legislation "involves the establishment of the electoral structure by which the legislative body becomes duly constituted," such that courts will apply a balancing test to determine whether legislative privilege must yield. *Marylanders,* 144 F.R.D. at 304; *see also, e.g., McCutcheon v. Federal Elec. Comm'n*, 134 S. Ct. 1434, 1441-42 (2014) (noting that "those who govern should be the *last* people to help decide who *should* govern"). Thus, legislative privilege "may *become qualified* based on the nature of the claim at issue." *Bethune-Hill*, 114 F. Supp. 3d at 334 (emphasis added). A similar rationale applies in criminal or fraud cases, given analogous concerns with self-dealing. *See, e.g., United States v. Gillock*, 445 U.S. 360 (1980).

In *NAACP, supra*, the United States—opposing the assertion of legislative privilege—acknowledged to this Court the distinction between voting rights cases where the privilege is qualified versus other types of cases:

> These Fourth Circuit employment discrimination cases [*WSSC*, *McCray* and *Schlitz*] 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. . . . 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.'"

See Exh. I, at 17-18 (*NAACP*, 4/4/14 United States' Brief in Opp. to State Legislators' Obj. to Magistrate Judge's Order on Legislative Privilege).

By contrast, no extraordinary circumstance exists in these cases that would override legislative privilege. The United States and the *Carcaño* plaintiffs assert claims for sex discrimination under Title VII, Title IX, and the Equal Protection Clause, as well as claims under the Violence Against Women Act and the Due Process Clause. The Fourth Circuit has applied the privilege to bar legislative discovery with respect to similar claims alleging age, sex, race, and disability discrimination under Title VII, the Age Discrimination in Employment Americans Act, and the Americans with Disability Act. The same result should obtain here.

For instance, *WSSC, supra,* involved age discrimination claims against a public utility commission. The court stated that the EEOC had "properly" withdrawn portions of its subpoenas demanding records of "internal deliberations" and the "analysis and standards" used in the challenged decision, because those inquiries would have drawn "impermissibly close" to "quintessentially legislative" acts. 631 F.3d at 179, 183. Likewise, *McCray, supra*, involved claims of discrimination based on race, sex, age, and disability. The court upheld application of legislative immunity to bar the plaintiff's

claims insofar as they were based on legislative advice provided by the defendants. 741 F.3d at 485. And, in *Schlitz, supra,* the Fourth Circuit explained that "[w]here, as here, the suit would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force." 854 F.2d at 45 (citations omitted); *see also Lee*, 2015 WL 9461505, at *5; *Backus v. South Carolina*, Case No. 3:11–cv–03120, 2012 U.S. Dist. LEXIS 37055, at *2-3 (D.S.C. Feb. 8, 2012).

Consequently, the five-factor balancing test[6] applied by this and other courts in redistricting and voting rights cases is not applicable in this case. Should the Court conclude otherwise, however, balancing those factors weighs against discovery.

First, the discovery sought has little if any relevance to the claims asserted. *See infra,* section III. Second, Plaintiffs already have access to the most probative evidence available, which is found in the public legislative record. *See Committee for a Fair & Balanced Map*, 2011 WL 4837508, at *29, 8 (non-disclosure favored due to availability of "considerable information" in public record including hearing minutes, special interest position papers, lawmakers' statements during debate, committee reports, press releases, and newspaper articles). Third, although Plaintiffs' claims are serious, voting rights claims are of "cardinal importance." *Page*, 15 F. Supp. 3d at 667. Fourth, although the government is always involved in passing statutes, redistricting cases are "*sui generis*" because they "directly involve the self-interest of the legislators themselves."

[6] Those factors are (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and the issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Committee for a Fair & Balanced Map v. Illinois State Bd. of Elec.*, Case No. 11-CV-5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011).

Marylanders for Fair Representation, 144 F.R.D. at 304 (Motz, and Murghnahan, J.J. concurring). Finally, the risk of adding fuel to the fire of public vitriol surrounding this dispute by exposing individual legislators to the discovery process poses a real threat of dampening future legislative efforts on publicly sensitive matters.[7]

The correct application of legislative privilege in this case is a matter of paramount importance. As noted, on the eve of the filing deadline for this motion, and a mere three hours after participating in a meet-and-confer with defense counsel for the purpose of attempting to resolve disputes regarding legislative privilege, counsel for the *Carcaño* Plaintiffs served notice of document subpoenas to four additional legislators, including the two primary sponsors of the bill, Representatives Paul Stam and Dan Bishop, and Senator E.S. "Buck" Newton, who is standing for election as state attorney general in November. Exh. K. The subpoenas, which will be dealt with by separate motions to quash, command production of documents clearly within the scope of legislative privilege.[8] The consequences of opening the door to this type of unprecedented legislative discovery would be profound.

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[7] Should the Court instead balance the five factors to require production of some categories of documents but not others, as it did in the voter ID cases, *see* Exh. H, Defendants urge the Court to exempt Defendants from producing a privilege log because, as the Court explained in those cases, such a requirement "would undermine the very purpose and function of legislative privilege" and would "impos[e] significant burdens on the legislative process." Exh. H at 18.

[8] The subpoenas demand "[a]ll 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" and "[d]ocuments 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." Exh. K.

II. INTERVENOR-DEFENDANTS DID NOT WAIVE LEGISLATIVE PRIVILEGE BY INTERVENING AS AGENTS OF THE STATE TO DEFEND HB2.

Legislative privilege is personal: "it belongs to the individual members of a [] legislature, not the [institution] as a whole." *A Helping Hand, LLC v. Baltimore County, Maryland*, 295 F. Supp. 2d 585, 590 (D. Md. 2003); *see Alexander v. Holden*, 66 F. 3d 62, 68 n.4 (4th Cir. 1995). Only the individual legislator can waive his or her personal legislative privilege, and "only after explicit and unequivocal renunciations of the protection." *2BD Associates Ltd. Partnership v. County Comm'rs*, 896 F. Supp. 528, 535 (D. Md. 1995) (quoting *United States v. Helstoski,* 442 U.S. 477, 490-91 (1979)).

Plaintiffs have suggested Intervenor-Defendants waived their personal legislative privilege by intervening in these cases. As noted, President pro tempore Berger and Speaker Moore jointly intervened to defend HB2 under this authorizing statute:

> The Speaker of the House of Representatives and the President Pro Tempore of the Senate, *as agents of the State*, shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.

N.C. Gen. Stat. § 1-72.2 (emphasis added). As the statute makes plain, Intervenor-Defendants did not intervene in their individual capacities to vindicate personal interests or even their interests as individual legislators. Rather, North Carolina law expressly authorizes them to jointly represent the interests of the State just as an attorney general would. The existence of this provision is no accident, given the recent phenomena of state attorneys general refusing to defend state laws. *See* John W. Suthers, "A 'Veto' Attorneys General Shouldn't Wield," *The Washington Post* (Feb. 2, 2014). In reaction to

this practice, the North Carolina law was enacted in 2013. Intervenor-Defendants invoked that law only after the North Carolina Attorney General publicly announced his office would not defend HB2. *See* "*Attorney General Roy Cooper's comments from news conference on House Bill 2,"* N.C. Att'y Gen'l Press Release (Mar. 29, 2016).[9]

The Supreme Court has already provided clear guidance on the nature of the intervention in this case. In *Karcher v. May*, 484 U.S. 72 (1987), a state attorney general refused to defend a challenged New Jersey statute and the house speaker and senate president "sought and obtained permission to intervene as defendants on behalf of the legislature" to defend the challenged statute. *Id.* at 75. With direct application here, the Supreme Court observed:

> The fact that [the speaker] and [senate president] participated in this litigation in their official capacities as presiding officers on behalf of the legislature does not mean that they became parties in all of their personal and professional capacities.

Id. at 78; *see also id.* at 83 (White, J., concurring) ("[n]either official intervened in his individual capacity as a legislator"). The Court thus concluded that the speaker and senate president never intervened in their capacity as individual legislators; to the contrary, "the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder." *Id.* at 78.

The Supreme Court recently clarified *Karcher* in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), another situation involving a state attorney general's "veto."

[9] Available at the Attorney General's website at http://ncdoj.com/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/Comments-on-House-Bill-2.aspx.

Acknowledging that "a State must be able to designate agents to represent it in federal court" to vindicate the enforceability of its laws, the Court recognized that "state law may provide for other officials [other than an attorney general] to speak for the State in federal court." *Id.* at 2664 (speaker and senate president "in their official capacities, could vindicate that interest in federal court on the legislature's behalf").

Within two months of *Hollingsworth,* North Carolina enacted N.C. Gen. Stat. § 1-72.2 to ensure that some "agent of the State" would be authorized to defend its laws should the attorney general refuse to do so. *Karcher* and *Hollingsworth* teach that Intervenor-Defendants' involvement in these cases is not in their individual capacities or even as individual legislators. It follows that their act of intervention does not remotely imply that they have waived the legislative privilege that belongs to each of them personally—much less does it amount to the "explicit and unequivocal" waiver actually required.

The intervention in this case stands in stark contrast to a case like *Powell v. Ridge*, 247 F.3d 520 (3d Cir. 2001), where several members of the Pennsylvania General Assembly intervened in a suit alleging race discrimination in the state's formula for allocating educational funds. Unlike the present case, no state statute authorized them to intervene and thus there was no issue regarding their legal personage or capacity as explained in *Karcher*. Consequently, the *Powell* legislators did not represent the state but sought only to defend "financial and legal interests in the litigation" specific to the legislature, and to advise the court concerning "the unique perspective of the legislative

branch of the Pennsylvania government." *Id.* at 522. They had no authority or capacity different than other members.

In sharp contrast, here the State of North Carolina expressly designated by statute who could speak for it by way of intervention—*only* the Senate President pro tempore and the Speaker, and *only* if they act jointly. N.C. Gen. Stat. § 1-72.2. To punish them for fulfilling their statutory duty by eviscerating their personal legislative privileges would countermand the purpose of the statute. To the extent that *Powell* would indicate this result, it should be rejected.[10]

The consequences of finding a waiver based on intervention under N.C. Gen. Stat. § 1-72.2 would be staggering. It would mean that States could designate legislative agents to defend challenged state laws—which the Supreme Court recently said States "must" be able to do, *Hollingsworth*, 133 S. Ct. at 2664—only at the price of waiving those legislators' immunity from discovery and testimony. That would effectively nullify the States' ability to defend their own laws in the increasingly common instance where attorneys general refuse to do so. Such a result would not only be absurd, but would surely violate the Tenth Amendment. *Cf. New York v. United States*, 505 U.S. 144, 161 (1992) (noting "Congress may not simply 'commandeer the legislative processes of the States'") (quoting *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)). The Court should therefore reject it out of hand.

[10] Furthermore, *Powell* itself indicated it was limited to its facts. For instance, the intervenors there failed to respond to a motion to compel until after the district court had already granted it, and so the district court gave "short shrift" to their "multitude of objections" on reconsideration. *See* 247 F.3d at 523. The court warned that it was not "attempting to draw a bright line for all cases" or "to set out the precise parameters of legislative immunity for cases to come." *Id.* at 526.

III. DISCOVERY SEEKING INDIVIDUAL LEGISLATORS' AND THE GOVERNOR'S MOTIVES SHOULD BE PRECLUDED AS IRRELEVANT AND DISPROPORTIONATELY BURDENSOME.

In addition to being protected by the legislative privilege, information from individual legislators about their personal or political motives in enacting a statute—as sought by Plaintiffs' discovery requests—is irrelevant and producing it would be disproportionately burdensome. As noted, Rule 26 limits the scope of discovery to "any nonprivileged matter that is relevant to any party's claim or defense …." Fed. R. Civ. P. 26(b)(1). By seeking documents from Berger and Moore related to the "drafting, passage, justifications, implementation, and effects" of HB2 and documents "reviewed, received, or considered in connection with the enactment and/or passage of" HB2, and by making similar requests of Governor McCrory, the State, and DPS, Plaintiffs' discovery directly and impermissibly seeks to probe those officials' motives for supporting HB2. Furthermore, the scope and number of those documents would be massive; collecting, sifting, and producing them would far outweigh their relevance to the Plaintiffs' claims.

Inquiry into legislative motive is generally prohibited.[11] To be sure, some courts have recognized "limited exceptions," such as in race and sex discrimination cases, where "the very nature of the constitutional question requires an inquiry into legislative purpose." *Campbell,* 883 F.2d at 1259 (quoting *United States v. O'Brien*, 391 U.S. 367,

[11] *See Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810) ("a court . . . cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law"); *United States v. O'Brien,* 391 U.S. 367 (1968) ("[i]nquiries into congressional motives or purposes are a hazardous matter"); *South Carolina Educ. Ass'n v. Campbell*, 883 F.2d 1251 (4th Cir. 1989) ("the Supreme Court has long recognized that judicial inquiries into legislative motivation are to be avoided"); *Wall Distributors, Inc. v. City of Newport News, Va.*, 782 F.2d 1165, 1170 (4th Cir. 1986) ("courts must 'eschew altogether the 'guesswork' of speculating about the motive of lawmakers'").

383 n.30 (1968)). This explains why legislative motive in voting rights cases is considered an appropriate subject of discovery. *See supra,* section III; *see also, e.g., WSSC*, 631 F.3d at 181 (relevance of legislative discovery not challenged); Exh. H at 11 (*NAACP*, 2/4/15 Mem. Order, at 11 (legislative discovery was "certainly relevant to the issue of intent tied to the various claims raised in this case")).

Even in cases in which legislative motive is relevant, however, inquiry is generally limited to the legislative record and historical background materials and does not extend to personal views or communications by legislators. As the Fourth Circuit recognized, "[i]t is axiomatic that if motivation is pertinent, it is the motivation of the entire legislature, not the motivation of a handful of voluble members, that is relevant." *Campbell,* 883 F.2d at 1262. Thus, in *Campbell*, the Fourth Circuit reversed the district court precisely for admitting individual legislators' testimony as to their personal or political motives for supporting the legislation and for imputing the illicit motives of a few to the whole. *Id.* The Fourth Circuit thereby made clear that simply alleging that lawmakers possessed an impermissible "motive" when enacting a piece of legislation is not enough to overcome legislative privilege.

In *NAACP*, *supra*, this Court distinguished between seeking discovery about discriminatory intent from individual legislators versus gleaning it from the public record. Relying on *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977), this Court noted the Supreme Court's warnings about attempts to prove discriminatory intent through the testimony of individual legislators. *See* Exh. G at 14-15 & n.6 (*NAACP*, 5/15/14 Mem. Order); *see also Arlington Heights,* 429 U.S. at 268 n.18

(evidence of legislative intent may be found in "the legislative or administrative history"; even in "extraordinary instances" when members might be called to the stand concerning the purpose of official action, such testimony "frequently will be barred by privilege"). Instead, this Court described the better course suggested by the Fourth Circuit, *i.e.*, using information found "on the record or in minutes of their meetings.'"[12]

Likewise, in *Fair & Balanced Map,* 2011 WL 4837508 at *2-4 & *8, the court questioned the relevance of subpoenas directed to the state house of representatives and its speaker, the state senate and its president, and various legislative staffers concerning their motives in drawing a redistricting map. Because the case involved allegations of racial gerrymandering, the question of legislative intent was squarely presented, and the court employed the "totality of the circumstances" test to evaluate legislative motive. *Id.* at *3 (following *Rogers v. Lodge,* 458 U.S. 613, 622-27 (1982)). Discussing relevance both in terms of Rule 26 and the five-factor balancing test for federal redistricting cases,[13] the court reasoned that "the most important events" probative of legislative intent were those undertaken by the entire legislative body, such as committee meetings and floor debates, not deliberations by individual legislators. *Id.* at *4. Reasoning that plaintiffs already had "considerable information at their fingertips," including public hearing

[12] Exh. G at 14-15 & n.6 (*NAACP*, 5/15/14 Mem. Order, at 14-15 & n.6 (quoting *Sylvia Dev. Corp. v. Calvert Cnty.* 48 F.3d 810, 819 (4th Cir. 1995)); *see also McCray*, 741 F.3d at 485 (in Title VII claim alleging discriminatory animus based on race, gender, age, and disability, "[l]egislative immunity is a shield that protects despicable motives as much as it protects pure ones"); *see also Marylanders for Fair Representation*, 144 F.R.D. at 304-05 (plaintiffs should pursue discovery from a non-legislative source before seeking to invade the privilege).

[13] As noted *supra,* section III, the five-factor balancing test for legislative privilege is used in redistricting cases only because of the unique nature of those cases, and is not applicable here.

minutes, special interest group position papers, statement made by lawmakers during debate, committee reports, press releases, newspaper articles, and other items of public record, *id.* at *8, the court quashed the subpoenas insofar as they sought non-public information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers, as well as the identities of persons who participated in the decisions. *See also In re Hubbard,* 803 F.3d at 1312 n.4 (*O'Brien* rule prohibits inquiry into subjective motives except in limited circumstances such as bills of attainder, ex post facto laws, or other grounds where the challenged statute is penal in nature).

The same reasoning applies with even greater force in the present case, in which inquiry into the personal motives of individual legislators should have no relevance.

Finally, the fact that the *Carcaño* Plaintiffs bring an Equal Protection claim alleging the "animus" of the legislature does not change the calculus. *See* Second Amended Compl. at ¶ 194. The Supreme Court cases from which such a claim arises—cases like *Windsor v. United States*, 133 S. Ct. 2675 (2013), *Romer v. Evans*, 517 U.S. 620 (1996), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)—give no indication that the nature of the claim justifies intrusive discovery designed to probe individual legislators' motives. To the contrary, those cases relied on the public record, as well as the text and structure of the law, to assess legislative purpose. *See, e.g., Windsor*, 133 S. Ct. at 2693-94 (assessing purpose of Defense of Marriage Act by relying on title, text, and effects of Act, as well as on statements from House Report) (quoting H.R. Rep. No. 104-664 (1996)).

CONCLUSION

For the foregoing reasons, the Motion for Protective Order should be GRANTED.

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CERTIFICATE OF SERVICE

I certify that, on this date, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 23rd day of September, 2016.

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