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

REPLY 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

State Defendants and Intervenor-Defendants (collectively, "Defendants") submit this reply in support of their motion for a protective order based on legislative privilege (*Carcaño* Doc. 154; *USA* Doc. 183).

ARGUMENT

I. Plaintiffs' discovery targets "the sphere of legitimate legislative activity" and thus squarely implicates the broad doctrine of legislative privilege.

Plaintiffs' oppositions show a basic misunderstanding of legislative privilege. First, they suggest defendants have not even "demonstrate[d] [the] applicability" of the privilege. *Carcaño* Opp. (Doc. 160) at 3; DOJ Opp. (Doc. 198) at 7-8. That is baffling. As already explained, Plaintiffs' discovery *explicitly* seeks materials from two sitting legislators and the Governor about their roles in considering and signing HB2. *Carcaño* Doc. 154 ("Mem.") at 4-7, Exs. A-D. That discovery obviously targets material within the privileged "sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Second, the *Carcaño* plaintiffs accuse defendants of relying on legislative *immunity* cases instead of *privilege* cases. *Carcaño* Opp. at 8, 10, 20. That is a distinction without a difference. The Fourth Circuit and this Court treat the two doctrines interchangeably and rely upon immunity cases to discern the scope of the privilege.[1]

[1] *See, e.g., EEOC v. Wash. Suburban Sanitary Comm'n,* 631 F.3d 174, 181 (4th Cir. 2011) ("*WSSC*") ("Legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity," and "applies whether or not the legislators themselves have been sued"); *N.C. State Conf. of NAACP v. McCrory*, No. 1:13CV658, 2014 WL 12526713, at *2 (M.D.N.C. Mar. 27, 2014) ("*NAACP I*") (noting immunity and privilege are "parallel concept[s]" and that immunity "also functions as an evidentiary and testimonial privilege"); *see also* Mem. at 3 (discussing relationship between legislative immunity and privilege).

Third, plaintiffs claim defendants seek an overbroad, "absolute" form of the privilege. *Carcaño* Opp. at 1; DOJ Opp. at 10, 12. But the privilege's purpose is to protect "the legislative process itself," and its scope is necessarily broad. *In re Hubbard*, 803 F.3d 1298, 1308 (11th Cir. 2015); *see also* Mem. at 4 (collecting cases).[2] In most cases—even cases alleging a law's invalidity—plaintiffs are not entitled to seek discovery from or depose sitting lawmakers concerning the lawmaking process. *See* Mem. at 9-10 (discussing cases). Otherwise "the privilege would be of little value." *Tenney,* 341 U.S. at 377. Moreover, as defendants have already explained, the less categorical approach to the privilege in the "*sui generis*" realm of voting and redistricting cases should not apply here.[3] And even in those unique cases, this Court observed that "legislators are protected from intrusive questioning regarding their legislative activities or motives, because of 'the direct intrusion of such discovery into the legislative process.'" *Id.* (quoting *Marylanders*, 144 F.R.D. at 305).[4]

II. Plaintiffs' waiver arguments are mistaken.

Plaintiffs make various arguments mistakenly claiming Intervenors waived

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[2] *See also, e.g.,* 6-26 Moore's Federal Practice - Civil § 26.52 (2015) (cataloguing breadth of privileged legislative activities, including "proposing and voting on legislation," "making, publishing, presenting, and using legislative reports," and "gathering information during legislative-related investigations").

[3] Mem. at 7 (quoting *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992)); *see also NAACP I*, at *2 (following *Marylanders* in taking "a less categorical, more flexible, approach … in a case under the Voting Rights Act") (internal quotations omitted).

[4] Seeking to spare the Court, defendants negotiated with plaintiffs about producing some of the document categories in the Voter ID cases. Mem. at 2 n.1 & Ex. E. Defendants have consistently argued, however, that the five-factor balancing test should not apply here. *Id.* at 10 & n.6. Now, however, the *Carcaño* plaintiffs assert that defendants waived their "right" to apply the balancing test by failing to apply it in their initial brief. *Carcaño* Opp. at 13 n.8. They are mistaken: defendants' brief applied the balancing factors and also urged the Court—if it did order some production—to avoid requiring a privilege log, as was done in the Voter ID cases. Mem. at 10-11 & n.7.

legislative privilege. More fundamentally, they ignore the *basis* for Intervenors' presence here—the statute authorizing them to intervene as "agents of the State" to defend laws. Mem. at 12; N.C. Gen. Stat. § 1-72.2. They also ignore (or, in the United States' case, minimize) the Supreme Court's recognition that such statutes enable States to designate officials to defend laws attorneys general will not defend. *Id.* at 13-14 (discussing *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Karcher v. May*, 484 U.S. 72 (1987)).

The *Carcaño* Plaintiffs say privilege was waived, not by intervention, but by Intervenors' "representations" that they sought to "vigorously defend" legislators' "motives" for passing HB2. *Carcaño* Opp. at 4-5, 8 n.4. That is wrong. Intervenors' motion did not say they would "vigorously defend" legislators' "motives" for passing HB2; it said "*the General Assembly, through its representatives, must be allowed to vigorously defend these direct challenges to its power and process*." *Carcaño* Doc. 34 ("Mot. to Intervene") at 2 (emphasis added). Plaintiffs splice the phrase "vigorously defend" onto a description of Plaintiffs' *own claims about motives* appearing *eleven* pages later. *Carcaño* Opp. at 4 (quoting Mot. to Intervene at 2, 13). Thus, plaintiffs' argument—which ironically turns on Intervenors' "representations"—warps them.[5] Furthermore, the argument is a distraction because plaintiffs never argue these "representations" (or any others) make the required "explicit and unequivocal

[5] Plaintiffs also cite Intervenors' statement that they are familiar with the "genesis" of HB2. *Carcaño* Opp. at 4. But this accurate statement is not a "representation" that Intervenors intend to rely on privileged communications to defend HB2, nor is it remotely an explicit renunciation of privilege.

renunciation[ ]" of privilege. Mem. at 12.[6] Finally, plaintiffs ignore that the Intervenor's motion *repeatedly* said they sought to intervene *only* in their official capacity as House and Senate leaders,[7] and thus could not have waived a privilege "personal" to each legislator. Mem. at 12.

Both sets of plaintiffs rely heavily—but incorrectly—on *Powell v. Ridge,* 247 F.3d 520 (3rd Cir. 2001). *Carcaño* Opp. at 5-9; DOJ Opp. at 16-20. *Powell*, however, (1) did not involve a statute authorizing House and Senate leaders to intervene; (2) did not involve an attorney general refusing to defend challenged laws; (3) involved legislators vindicating their "financial and legal interests," 247 F.3d at 523, instead of legislative leaders authorized to vindicate the legislature's institutional interests; and (4) involved a bizarre privilege claim that would have empowered intervenors to "testify at trial but not be cross-examined." *Id.* at 525. But if *Powell* means that legislators "waive" their personal legislative privilege by intervening under express authority to defend laws, then it is wrong.[8] That result would both violate the Tenth Amendment and flout the Supreme

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[6] Plaintiffs say the requirement of "explicit" renunciation is inapplicable because it comes from *immunity* cases, but as already explained immunity is a "parallel" doctrine that informs application of privilege. *See, e.g., WSCC*, 631 F.3d at 181; *NAACP I*, at *2. Furthermore, they say that the requirement was rejected by *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012), but *Favors* also explained waiver would occur if a legislator "testifies" as to privileged matters or shares privileged communications with outsiders. *Id.* at 212. Nothing of the sort is alleged here as a basis for waiver.

[7] *See* Carcaño Doc. 34 at 3 (arguing "this is the quintessential case for application of [§1-72.2] giving these Intervenors the right to intervene to defend laws passed by the General Assembly"); *id.* at 10 (noting "as leaders of the Legislative Branch … [t]hey are expressly authorized by North Carolina law to defend the Act in litigation"); *see also United States* Doc. 9 (containing similar statements).

[8] Plaintiffs themselves cite a decision, *Rodriguez v. Pataki*, 280 F.Supp.2d 89 (S.D.N.Y.), that illustrates *Powell*'s limited reach. There the court declined to find waiver under *Powell* even where a state statute only arguably required participation by House and Senate leaders and where the attorney general was defending the challenged law. *Id.* at 102-03. Here, the state statute expressly authorizes the House and Senate leaders to intervene, and the attorney general has refused to defend the challenged law.

Court's teaching in *Karcher* and *Hollingsworth* that States "must be able" to designate officials to represent them in federal court. Mem. at 13-15. Incredibly, the United States *admits* that *Karcher* and *Hollingsworth* "stand[ ] for the proposition that state legislatures may designate officials to represent them" but then says they "shed no light on" whether those officials waive privilege by doing so. DOJ Opp. at 20. The United States profoundly misreads those cases.

Finally, the United States makes the puzzling argument that Intervenors have waived privilege by claiming HB2 "was designed to protect women and children," and by thus "seek[ing] to affirmatively introduce evidence regarding what thought process and facts went into the design of HB2." DOJ Opp. at 16. This argument evidently refers to Defendants' preliminary injunction opposition, *see id.* at 5 (quoting PI Opp. at 20), but fails to make a coherent case for waiver. Briefly: (1) Defendants' safety arguments contest the irreparable harm and public interest claims supporting the United States' preliminary injunction motion (*see* PI Opp. at 19-41); and (2) those arguments do not rely on the "thought process and facts" informing HB2's "design," but on the public legislative record (*id.* at 5-6 & Exs. D-G). Nor do Defendants—as the United States asserts without citation—"propose to selectively introduce arguments about privacy and safety based upon public statements, while shielding from discovery possibly more illuminating communications that took place off the record." DOJ Opp. at 2-3. To the contrary, while the *United States* wrongly relies on "public statements" to attack HB2,[9]

[9] *See* DOJ Compl. (Doc. 1) at ¶¶ 14-19 (relying on "explicit public statements" from "Governor McCrory and North Carolina legislators").

Defendants have relied on the public legislative record to defend HB2. *See* PI Opp. at Exs. D-G (House and Senate floor and committee transcripts). Indeed, Intervenor-Defendants have already offered to stipulate that, with respect to the United States' claims or defenses, they would "rely only on the public legislative record surrounding the passage of HB2, as well as the public record surrounding the passage of the Charlotte Ordinance." Ex. A.

III. Showing legislative purpose—which is relevant only to one *Carcaño* claim and to *none* of the United States' claims—does not justify discovery into privileged material reflecting individual legislators' motives.

Plaintiffs' oppositions erase the difference between a legislature's collective purpose in passing a law (which is sometimes relevant) and individual legislators' motives for supporting a law (which are almost never relevant). *See* Mem. at 16-19. Now the United States clarifies—after months of hearings and negotiations—that its discovery regarding HB2's purposes has *no relevance* to its claims. DOJ Opp. at 2 ("To clarify, the United States does not need this information to prove its case . . . ."). For their part, the *Carcaño* Plaintiffs confirm that HB2's purpose bears on *one* of their claims (equal protection), and they chide Defendants for addressing that claim in the "last paragraph of their brief." *Carcaño* Opp. at 1. But Defendants *did* address that claim and pointed out that the Supreme Court cases *directly* on point—*Windsor*, *Romer*, and *City of Cleburne*—provide no justification for discovery into "individual legislators' motives," and rely instead on "the public record" and the "text and structure of the law" to demonstrate

purpose. Mem. at 19. "Surprisingly," the *Carcaño* Plaintiffs "fail even to reference, much less address" that argument, *Carcaño* Opp. at 1, which refutes the assertion that their equal protection claim justifies discovery into legislators' motives for supporting HB2.

Instead, the *Carcaño* Plaintiffs rely exclusively on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), but that decision—even assuming it applies[10]—considered a legislature's *collective* purpose, not individual legislators' motives. *See id.* at 265 (assessing purposes of "a legislature or administrative body"). Its references to "contemporary statements," the "sequence of events leading up to the challenged decision," and "departures from normal procedural sequence" were all references to matters in the public domain, and even then the Court confirmed that legislative privilege would still apply. *Id.* at 267-68 & n.18; *see also N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 229 (4th Cir. 2016) (under *Arlington Heights*, legislators' testimony "frequently will be barred by [legislative] privilege," and "statements from only a few legislators … are of limited value").[11]

In any event, it is settled law that, even where inquiry into the legislature's purpose is relevant, that inquiry considers the body's *collective purpose* as shown by public evidence, and *not* the motives of individual legislators. *See, e.g., Edwards v.*

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[10] The issue in *Arlington Heights* was whether a facially neutral policy with discriminatory effect was actually motivated by discriminatory motives. *Id.* at 264-65. Plaintiffs acknowledge this, but then confusingly emphasize that they "contend HB2 is not" facially neutral. *Carcaño* Opp. at 11. In fact, they contend the *opposite*—that HB2 is facially discriminatory. *See, e.g., Carcaño* Doc. 151 at ¶ 179 ("H.B. 2 facially classifies people based on sex, gender identity, and transgender status.").

[11] *And see, e.g., Dyas v. City of Fairhope*, 2009 U.S. Dist. LEXIS 92001, at *26-27 (S.D. Ala. Sept. 24, 2009) (although *Arlington Heights* "did identify lines of inquiry as a means of establishing indirectly that an unlawful discriminatory intent motivated the passage of particular legislation, . . . it did not say that a litigant may depose a legislator to obtain this information").

Aguillard, 482 U.S. 578, 594-95 (1987) (discerning "purpose behind a statute" by looking to "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history"); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (in seeking legislative intent "[w]e have eschewed reliance on the passing comments of one member"); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it[.]"); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("Judicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed"); *South Carolina Educ. Ass'n v. Campbell,* 883 F.2d 1251 (4th Cir. 1986) ("[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.")

IV. Legislative privilege prohibits deposing the Intervenor-Defendants, the Governor, and their staffs.

Plaintiffs' oppositions fail to cite a single equal protection case allowing a sitting state legislator or Governor to be deposed.[12] Contrary to the contention that *ACORN v. County of Nassau*, 2007 U.S. Dist. LEXIS 71058 (E.D.N.Y. Sept. 25, 2007), and *Dyas v. City of Fairhope*, 2009 WL 3151879 (S.D. Ala. 2009), "allowed the depositions of legislators on non-privileged matters," *Carcaño* Opp. at 20, those cases did not involve *state legislators*, but local officials and employees partially acting in "legislative" roles.

[12] Like the other cases they rely on, *Nashville Student Org. Comm. v. Hargett*, 123 F.Supp.3d 967, 969-70 (M.D. Tenn. 2015), was a voter identification case. *Carcaño* Opp. at 20; *see also Hargett*, 123 F.Supp.3d at 969 (observing "the plaintiffs cite a litany of recent federal decisions … involving federal constitutional challenges premised on the right to vote").

Moreover, depositions in those cases were allowed on certain matters not because they were "non-privileged," *Carcaño* Opp. at 20, but because they were *non-legislative.*[13]

The *Carcaño* plaintiffs also erroneously disregard *Schlitz v. Commonwealth of Virginia*, but that case turned specifically on the danger of requiring sitting legislators "to testify regarding conduct in their legislative capacity," including motive. 854 F.2d 43, 45-46 (4th Cir. 1988), *overruled on other grds., Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 303 (4th Cir. 1995) (*en banc*). Nor is *Schlitz* limited to legislative immunity cases. *See Dyas,* 2009 U.S. Dist. LEXIS 92001 at *23-24 (citing *Schlitz* for the proposition that "[t]he purposes that underlie legislative immunity also apply to the testimonial privilege.")

V. Requiring a privilege log would itself invade legislative privilege and would be disproportionately burdensome.

In *North Carolina State Conf. of the NAACP v. McCrory,* Nos. 1:13-CV-658, 660, 861 (M.D.N.C. Feb. 4, 2015), this Court correctly rejected the argument that requiring legislators to produce a privilege log is "any less intrusive than immediate production," confirmed that "[t]he purposes of legislative privilege … appear equally applicable to requests for a legislator to produce a log of all documents," and concluded that requiring a privilege log "of the objective facts State legislators relied on would undermine the very purpose and function of legislative privilege, unduly intruding into legislative affairs and

[13] *ACORN* involved a motion to compel the deposition of a zoning specialist hired by a village board of trustees, and the court allowed deposition only as to pre-deliberative matters. 2009 U.S. Dist. LEXIS 3151879 at *4-5, 19. *Dyas* involved members of a city council and zoning commission, and the court allowed depositions regarding "administrative" matters but prohibited depositions regarding "legislative" matters. 2009 U.S. Dist. LEXIS 3151879 at *5, 10-14.

imposing significant burdens on the legislative process." Mem., Ex. H at 17-18. The *Carcaño* Plaintiffs attempt to distinguish that ruling by ostensibly narrowing their document requests (which they have not, in fact, done) to "underlying factual material made available to Defendants, such as committee reports and meeting minutes."[14] *Carcaño* Opp. at 18. They also speculate that given the brevity of the special session "the potential number of documents here is comparatively tiny." *Id.* at 19. That is incorrect. Even on a conservative estimate, the creation of a privilege log would require the logging of over 20,000 documents, and a minimum of 560 hours of attorney review time, all at considerable expense. *See* Ex B. Plainly, that is disproportionately burdensome, given the marginal relevance (at best) of the requests to the *Carcaño* Plaintiffs' claims.

On this subject, the United States contends only that Defendants have waived legislative privilege and that Governor McCrory failed to address application of privilege to "strictly factual" information, DOJ Opp. at 15 n.6., neither of which is correct. *See* part II, *supra*; Mem. at 4 n.2 (addressing application of legislative and deliberative process privileges to "strictly factual" information).

CONCLUSION

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

Counsel signatures on following page.

[14] Transcripts of all committee and floor debates are already available on the General Assembly's website, http://www.ncleg.net/gascripts/billsummaries/billsummaries.pl?Session=2015E2&BillID=H2, and the committee minutes are available publicly through the legislative library.

Respectfully submitted,

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert C. Stephens
Robert C. Stephens (State Bar #4150)
Counsel for the State of North Carolina and Governor McCrory
General Counsel
Office of the Governor of North Carolina
20301 Mail Service Center
Raleigh, NC 27699
Telephone: (919) 814-2027
E-mail: bob.stephens@nc.gov
*appearing as Local Rule 83.1 Counsel

By: /s/ Robert N. Driscoll
Robert N. Driscoll*
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
McGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
Telephone: (202) 802-9950
E-mail: rdriscoll@mcglinchey.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ William W. Stewart, Jr.
William W. Stewart, Jr.
(State Bar #21059)
Frank J. Gordon (State Bar #15871)
B. Tyler Brooks (State Bar #37604)
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
Telephone: (919) 836-0090
E-mail: bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com

By: /s/ S. Kyle Duncan
S. Kyle Duncan* (DC Bar #1010452)
Gene C. Schaerr* (DC Bar #416638)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
SCHAERR|DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 714-9492
E-mail: kduncan@schaerr-duncan.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert D. Potter, Jr.
Robert D. Potter, Jr. (State Bar #17553)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
2820 Selwyn Avenue, #840
Charlotte, NC 28209
Telephone: (704) 5522-7742
E-Mail: rdpotter@rdpotterlaw.com

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 19th day of October, 2016.

/s/ S. Kyle Duncan
S. Kyle Duncan (DC Bar #1010452)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
SCHAERR|DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 714-9492
E-mail: kduncan@schaerr-duncan.com

EXHIBIT A

From: **Kyle Duncan** kduncan@schaerr-duncan.com
Subject: Re: Moving Call to Tomorrow at Noon or 4:30pm EST?
Date: October 5, 2016 at 9:47 AM
To: Driscoll, Robert rdriscoll@mcglinchey.com
Cc: Newton, Jonathan (CRT) Jonathan.Newton@usdoj.gov, Carney, Chris (CRT) Chris.Carney2@usdoj.gov, Pellegrino, Whitney (CRT) Whitney.Pellegrino@usdoj.gov, Butch Bowers Butch@ButchBowers.com

KD

Jonathan:

I'm following up on Bob Driscoll's email below to add the Intervenor-Defendants' views on these matters, in hopes of fostering a productive conversation regarding potential stipulations.

1. The Intervenor-Defendants share the State Defendants' concern that the United States' proposed stipulations clearly intrude into matters protected by legislative privilege, as we have outlined in our motion for protective order. Consequently, our clients cannot agree to a stipulation addressing what information they "relied on" or "were aware of" that motivated or informed their decision to support HB2. In our view, by stipulating with respect to those matters, it would effectively reveal legislatively privileged information. Moreover, the information is irrelevant: as we have explained in our motion for protective order, evidence bearing on the knowledge or motivations of individual legislators is not relevant to the collective purpose of the General Assembly in passing HB2.

2. However, I have read Bob's email below and I think I understand the United States' concerns about having notice of what evidence the State Defendants and Intervenor-Defendants would rely on to demonstrate the purposes of HB2 (I was not personally involved in the conversations Bob is referring to, so I am basing this view on his email). To assuage those concerns, the Intervenor-Defendants would be willing to stipulate that—to the extent the General Assembly's purpose for enacting HB2 is relevant to any of the United States' claims or defenses to those claims—the Intervenor-Defendants would rely only on the public legislative record surrounding the passage of HB2, as well as the public record surrounding the passage of the Charlotte Ordinance. We would work with the United States to specify what that public legislative record consists in—but for purposes of HB2, we believe it consists in the public transcripts of the full House and Senate sessions during which HB2 was considered, as well as the relevant committee sessions. To be clear, however, by relying on these public materials, we would be able to rely on any incidents concerning privacy or safety concerns mentioned in that public record, whenever those events occurred. Naturally, the United States would be free to make whatever arguments it chooses regarding the relevance or weight the Court should give to the public record and the incidents and arguments mentioned therein.

3. Additionally, in order to defend the purposes sought to be achieved by HB2, the Intervenor-Defendants would also rely on the opinions of their public safety and law enforcement experts, as well as the examples of public safety and privacy concerns relied on in their reports. The examples discussed in the reports are obviously known to the United States and the United States will have the opportunity to question our experts about them and argue whatever it likes about their relevance to the issues. We believe our experts may rely on such incidents because, as explained by our experts, such incidents demonstrate the justification for HB2. Naturally, the United States can and will contest those conclusions through their own experts and by deposing our experts.

4. We believe we could craft stipulations along the lines discussed in 2 and 3, above, that should meet the United States' concerns about notice and opportunity to contest our evidence, and that should also limit the need for discovery on these matters. Since the United States would be assured of the evidence to be relied on by the Intervenor-Defendants to show the purposes served by HB2, there would be no need for discovery into individual legislators' motivations for voting for HB2 and thus no need for litigation over the scope of legislative privilege. Furthermore, the stipulations also ought to assuage the United States' concerns about the relevant time period from which evidence in support of HB2 would be drawn. Specifically, by agreeing to rely only on the public legislative record surrounding HB2 and the Charlotte Ordinance, the evidence of public safety or privacy incidents would be necessarily limited to incidents discussed in that public record (whenever they may have occurred). Furthermore, there would also be no notice concern with respect to the incidents relied on by our public safety experts—the United States would already know about those examples, because they are in the expert reports, and will have an opportunity to contest them through their own experts and through cross-examination of our experts.

We hope this provides some indication of a path forward for stipulations on these matters. We're available for a call later this afternoon, after 3pm EDT, if you would like to discuss this further.

Regards,
Kyle

Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900 | Washington, DC 20006
202-787-1060 (office) | 202-714-9492 (mobile)
KDuncan@Schaerr-Duncan.com | www.Schaerr-Duncan.com

> On Oct 4, 2016, at 1:39 PM, Driscoll, Robert <rdriscoll@mcglinchey.com> wrote:

Jonathan et al:

Thank you all for continuing to discuss, in good faith, possible stipulations that might obviate the need for some requested discovery in this case. Prior to offering up my crack at some language, I wanted to flag what I view as some core issues that likely lie beneath the surface of these discussions. I would rather flag these issues now, and see if, by getting them on the table and expressing our concerns, both sides can quickly determine whether further wordsmithing can solve our problems, or if our difference are too fundamental.

First, as I understood the United States' initial concern with the State Defendants proposed relatively short time frame for any documents searches, it was the United States' fear that not taking such discovery risked getting in some sense "sandbagged" at trial by the introduction of documents used to establish a history of public safety-related incidents involving transgendered, or purportedly transgendered, persons as a basis for HB2. I do not believe that is our intention. My understanding is that, to the extent the State Defendants introduce evidence of a basis or "justification" for HB2, we will rely on: (1) the publicly available record surrounding the passage of HB2 (e.g., committee hearings, floor debates, public statements of the Governor or other officials); (2) the publicly available record surrounding the passage of the Charlotte Ordinance addressing, among other things, public access to single-sex bathrooms based on gender identity; and (3) the opinions of our experts, which have been, or will be, disclosed, and the documents or information relied on by them. This perception on my part as to what would likely be offered as evidence was the reason for my hope that we could work something out in terms of a stipulation, because as I see this playing out, I don't foresee a real chance of the United States being sandbagged in the manner that was raised.

However, in reviewing Taryn's email discussing topics for stipulations, I was a concerned that many of topics were framed as "state of mind" issues rather than factual or evidentiary agreements. For example, although Taryn's email was directed to the legislative intervenors, the emails sought a stipulation that the legislative agreements "were not aware" of certain issues or facts, of were "aware" of others, or that the legislative intervenors "do not claim any basis for supporting HB2 beyond . . . " . Aside from the fact that these stipulations would likely intrude on legislative privilege (including that held by the Governor) by exploring legislators reasons for voting for a bill, from the perspective of the State defendants, such proposals are unworkable because determining whether "the State of North Carolina," was, for example, aware of the practices of some transgendered persons with respect to choice of bathroom prior to HB2 is unanswerable To be sure, some state employees, such as transgendered state employees, would clearly know the practices of some transgendered individuals. Some, however, likely have no idea. I think this entire issue can be avoided, however, by focusing stipulations on what documents or evidence the parties will introduce (or agree not to introduce) in its case.

For example, I would recommend that my clients agree that not to introduce documents that predate January 1, 2016 (or other reasonable date linked to the Charlotte ordinance) to establish any basis or justification for HB2, other than those documents relied on by expert witnesses, documents that were submitted as part of the public record, or used to rebut United States' witnesses. But I could not recommend that my clients agree that that the State, or a State entity was "aware" or "not aware" of any specific facts, or that certain events did or did not occur. Indeed, it is only by doing the discovery we would prefer not to waste time doing that some of the matters sought be agreed to could be determined.

As I see this playing out, the bottom line is that at trial, the United States will argue that the term "sex" in Title VII, IX, and VAWA encompasses gender identity and thus that HB2 thus violates these statues. The definition of "sex" strikes me as a legal question to which the discovery we are discussing is irrelevant. Should that legal question be answered in the United States' favor, the State defendants would argue that HB2 is justified for the same public safety and privacy reasons' that single gender bathrooms and changing facilities exist in the first place, and would use its experts to establish the validity of the HB2 and the public record to establish the reason for its passage (as described above) to the extent that becomes an issue. The United States is of course free to argue that these reasons are insufficient under whatever standard they Court adopts . So what we are really discussing is discovery that would be of marginal relevance even to this question, as any discovery taken by the United States would per se not be part of the public record, and thus it would be difficult to argue (even should I or other counsel want to) that HB2 was passed for reasons never discussed or raised publicly, and not reflected in the public record.

Thus, my first attempt at proposed stipulations would be along the lines of :

1. The State defendants agree not to introduce evidence of events that occurred prior to January 1, 2016 as a basis or justification for HB2, with the exception of (1) documents or evidence relied on by its expert witnesses; or(2) documents that are part of the public record with respect to HB2's passage, although they may, in original form, predate Jan1, 2016. Thus discovery prior to this date is unnecessary.

2. The State defendants agree not to introduce evidence or documentation that the Governor McCrory's office was not aware of as a basis or justification for Governor McCrory's signing of HB2. Thus, discovery of state agencies other than Governor McCrory's office on the question of the basis for the signing of HB2 is unnecessary.

I'm sure there could be more, but I wanted to show the way I am thinking about this and see if we can work along these lines.

We look forward to talking later,

Bob

From: Driscoll, Robert
Sent: Tuesday, October 4, 2016 12:52 PM
To: Newton, Jonathan (CRT) <Jonathan.Newton@usdoj.gov>; Kyle Duncan <kduncan@schaerr-duncan.com>
Cc: Carney, Chris (CRT) <Chris.Carney2@usdoj.gov>; Pellegrino, Whitney (CRT) <Whitney.Pellegrino@usdoj.gov>
Subject: RE: Moving Call to Tomorrow at Noon or 4:30pm EST?

Ok. I should have something over shortly but have been delayed somewhat, for which I apologize.

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

DECLARATION OF AARON VICK

I, AARON VICK, hereby declare and affirm as follows:

1. My name is Aaron Vick, and I am over 18 years of age. I am competent and qualified to make this Declaration.

2. I am employed by Cicayda, LLC ("Cicayda"), where I serve in the capacity as Chief Strategy Officer. Cicayda provides eDiscovery and litigation support services to clients involved in federal litigation.

3. I have personal knowledge of the facts stated herein.

4. Philip Berger (acting in his official capacity as the President pro tempore of the Senate for the North Carolina General Assembly) and Tim Moore (acting in his official capacity as Speaker of the House for the North Carolina General Assembly) (together, "Intervenor-Defendants" or "clients") have retained Cicayda to assist them with eDiscovery in the above-referenced litigation.

5. Intervenor-Defendants have asked me to provide an analysis of the burdens associated with the creation and production of a privilege log if the Court were to order the production of such a log in connection with legislatively privileged materials.

6. By providing this affidavit, neither Cicayda nor the clients waive attorney work product, attorney-client privilege, legislative privilege, or any other applicable privilege.

7. Cicayda's collection and analysis of documents potentially responsive to the discovery the plaintiff parties have propounded to date is ongoing and will not be completed for some time. The parties are still negotiating search terms and other parameters for electronic discovery.

8. Based on the current status of eDiscovery negotiations, I have endeavored to identify documents (a) dated on or after January 1, 2014; (b) from a custodian list that includes President pro tempore Phil Berger, Speaker Tim Moore, and their respective staffs during the relevant time period (49 individuals); (c) that contain one or more of 76 search terms for which Intervenor Defendants have proposed to search; (d) and that reflect communications purely internal to members of the North Carolina General Assembly and their staffs. Due to the time constraint of this motion and sheer volume, I

have not included communications with non-legislator third-parties at this time, although I can perform a similar analysis incorporating those communications as well.

9. As of the date of this Declaration, Cicayda has identified 20,618 documents that satisfy the above parameters. Collection efforts are ongoing and I expect to encounter thousands of additional such documents.

10. In addition to forensic document collection and data analysis services, Cicayda also offers managed review services for its clients, which is performed by specially retained attorneys working in consultation with the clients and outside attorneys.

11. Based on my past experience providing managed review services, I estimate that creating a privilege log for just the 20,618 documents identified so far would consume a minimum of 560 hours of attorney time. The cost of this effort by Cicayda would be at least $55,000. This estimate is for Cicayda's efforts only, and does not include costs associated with the time and efforts required to be put forth by the clients and their staffs or by outside attorneys.

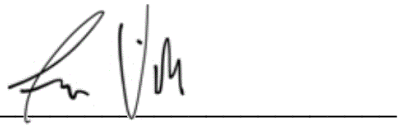
12. Depending on the ultimate determination of what is included within the scope of materials protected by legislative privilege, the effort of creating a privilege log would require personal involvement by President pro tempore Berger and Speaker Moore and their staffs, including identifying senders and recipients of various communications, explaining the purpose of various communications, putting communications into context, and evaluating the sources of content contained in various communications.

13. Expanding the number of documents to be logged, whether by additional collections within the above parameters, expanded parameters, or adding third-party communications would necessarily add to the time, effort, and cost involved in creating a privilege log.

14. The above analysis contemplates creating a log on the basis of legislative privilege only. Logging additional types of privilege (e.g., attorney-client, attorney work product) is not included.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: October 19, 2016



Aaron Vick