IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Consolidated Civil Action

RALEIGH WAKE CITIZENS ASSOCIATION, et al. Plaintiffs, v. WAKE COUNTY BOARD OF ELECTIONS, Defendant.	No. 5:15-cv-156

CALLA WRIGHT, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	No. 5:13-cv-607

PLAINTIFFS' RESPONSE TO MOTION TO QUASH SUBPOENAS SERVED ON STATE LEGISLATORS

On October 20, 2015, Plaintiffs in these consolidated actions served subpoenas seeking information relevant to the claims in this case on four North Carolina legislators (the "State Legislators"). On November 4, 2015, those four State Legislators moved to quash the subpoenas in their entirety. Plaintiffs submit this brief in opposition to the motion to quash. The motion should be denied because legislative immunity and privilege, vastly overstated by movants, is

inapplicable to the requested documents, or if applicable, the privilege should yield in the instant case.

STATEMENT OF THE CASE

These consolidated actions bring claims pursuant to the Fourteenth Amendment of the United States Constitution against redistricting plans for the Wake County Board of Education ("School Board") and Wake County Board of County Commissioners ("County Commission") enacted by the North Carolina General Assembly in 2013 (Senate Bill 325, N.C. Sess. Law 2013-110) and 2015 (Senate Bill 181, N.C. Sess. Law 2015-4), respectively. Prior to the 2013 legislative action, the nine members of the School Board were elected from single-member districts. The legislature's plan created a mixed system of election, with seven members elected from single-member districts and two members elected from two super districts that divide the county in a donut shape. Prior to the 2015 legislative action, the seven members of the County Commission were elected at large in the county using residency districts. The 2015 legislation imposed the same 7-2 system for County Commission elections.

Plaintiffs allege that the legislature's 7-2 system for School Board and County Commission elections is unconstitutional in two ways. First, both the seven-district and super district plans rely on unconstitutional population deviations, resulting in some votes carrying more weight than others. These deviations result from an arbitrary and discriminatory intent to favor rural and suburban voters over urban voters, to target incumbents who are registered Democrats, and to favor voters who prefer conservative education policies, despite the fact that voters in the county as a whole have rejected those policies. Second, District 4 in the seven-district plan is racially-gerrymandered. Race predominated in the drawing of the district, and

that district cannot survive strict scrutiny because it was not narrowly tailored to advance a compelling state interest.

On March 17, 2014, the district court dismissed Plaintiffs' case in the *Wright* action, holding that Plaintiffs had not pled an actionable claim. *Wright v. North Carolina*, 787 F.3d 256, 261 (4th Cir. 2015). The Fourth Circuit Court of Appeals reversed that decision on May 27, 2015, stating that Plaintiffs had adequately stated their claim, and that even with deviations under 10%, plaintiffs could prove an equal protection violation if those deviations were tainted by arbitrariness or discrimination. *Id*. at 265-67. The Fourth Circuit did uphold the district court's refusal to allow Plaintiffs to amend the complaint to add state legislators as defendants on the grounds that state legislators were not proper defendants. *Id*. at 261-63.

STATEMENT OF FACTS

After the Fourth Circuit in the *Wright* case on proper defendants, despite allegations of arbitrary and discriminatory intent and despite the fact that the challenged law originated not from Wake County officials, but from the General Assembly, the Wake County Board of Elections remains as the only Defendant in this case. And, as stated in their answer to the complaint, *RWCA v. Wake County Bd. of Elections*, No. 5:13-cv-00607, Dkt. No. 29 (*see, e.g.,* ¶ 3), the Wake County Board of Elections has no access to or knowledge of the information that is at the heart of this complaint—the reasons for the deviations in the challenged plans and the justifications underlying the drawing of District 4 as a majority black district.

Plaintiffs seek from certain members of the General Assembly data, communications, and analysis relating to the justifications for overpopulated districts in both S.B. 325 and S.B. 181. Broadly speaking, Plaintiffs requested: (1) documents indicating the purpose of the redistricting plans; (2) communications with third parties, such as communications with the Governor,

election officials and lobbyists; and (3) reports, studies, or other documents containing facts the legislature considered, including public opinion polls. The subpoenas are attached to this document as Appendix A. This information is relevant because the Court must determine whether the challenged plans, and most importantly the deviations contained therein, were tainted by arbitrariness or discrimination. That is, the Court must identify and evaluate the reasons for the deviations. Understanding what information was before the legislature, particularly with respect to communications with election administrators, Wake County voters, and lobbyist or interest groups, would greatly assist the Court in making that determination.

Without access to party discovery from non-parties who solely possess information relevant to these claims, and given their need to gather evidence in support of their claims, Plaintiffs served upon State Legislators (Sen. Barefoot, Sen. Rucho, Rep. Lewis and Rep. Stam) subpoenas for documents on October 21, 2015,[1] with a response due on November 4, 2015. These requests were narrowly drawn to elicit documents relevant to this Court's consideration of the claims in this case. The requests specifically seek, among other documents, documents and communications that were received by or sent to third parties—e.g., the Governor, who publicly opposed S.B. 181[2]—or election administrators. On November 4, 2015, the State Legislators filed a motion to quash the subpoenas in their entirety, arguing that legislative immunity, privilege, and state confidentiality laws completely relieved them of the obligation of having to respond substantively.

Finally, of particularly relevance to the instant motion, the North Carolina General Assembly, including the state legislator movants, passed House Bill 373 on September 24, 2015,

[1] The subpoena for Sen. Barefoot was corrected on October 30 to accurately reflect his full name, although the Attorney General had already accepted the first subpoena on his behalf.
[2] Andrew Kenney, *New Law Could Make Republican Majority in Wake County*, Raleigh News & Observer , Apr. 1, 2015, http://www.newsobserver.com/news/local/counties/wake-county/article17141561.html.

which moved up the primary election date for county offices, state legislative offices, and other statewide elections from May 2016 to March 15, 2016, to coincide with the presidential primary date, which itself was only moved up to March from the traditional May date in 2013. N.C. Sess. Law 2015-258. The Governor signed H.B. 373 on September 30, 2015. This earlier primary date means that filing for the County Commission seats under the challenged plan opens December 1, 2015. As discussed with the Court at the October 1, 2015, hearing, that significantly earlier filing period has necessitated an expedited trial schedule, with the matter to be tried on December 16-18, 2015.

ARGUMENT

I. The State Legislators Are Not Relieved of their Duty to Respond to the Subpoenas by Legislative Immunity/Privilege or State Confidentiality Laws

A. Legislative Immunity or Privilege Does Not Apply to the Documents Requested

The State Legislators do not enjoy an absolute legislative immunity that would relieve them of all duty to respond to the subpoenas at dispute now. The Speech or Debate Clause of the U.S. Constitution grants broad legislative immunity to federal legislators. U.S. CONST. art. I, § 6, cl. 1. Legislative privilege is a derivative of legislative immunity. *EEOC v. Wash. Suburban Sanitary Comm'n*, 66 F. Supp. 2d 526, 531 (D. Md. 2009), *aff'd by* 631 F.3d 174 (4th Cir. 2011).

The Constitution does not offer the same legislative immunity and privilege protections to state legislators, although the Supreme Court extended immunity from civil suit to state legislators through common law in *Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951). Federal common law immunity from suit certainly does not give rise to an absolute evidentiary privilege for state legislators. *See United States v. Gillock*, 445 U.S. 360, 374 (1980) (holding there was no legislative privilege for state legislators in federal criminal prosecution based on balancing

interests); *Doe v. Pittsylvania County*, 842 F. Supp. 2d 906, 920 (W.D. Va. 2012) (stating there is "no absolute evidentiary privilege for state legislators for their legislative acts") (internal quotations omitted). And the concept of legislative privilege does not "prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy." *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992).

The State Legislators' blanket reliance on the concept of legislative immunity to avoid producing relevant material is contrary to the separation of powers and good government principles underlying the development of this protection. "The primary purpose of legislative immunity is not to protect the confidentiality of legislative communications, nor is it to relieve legislators of the burdens associated with document production." *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994). Moreover, where the legislator is not a party to the litigation, principles of legislative immunity are even more attenuated. "The privilege when applied to records or third-party testimony is one of nonevidentiary use, not of non-disclosure." *In re Grand Jury Investigation into Possible Violations of Title 18, etc*., 587 F.2d 589, 597 (3d Cir.1978). "This means that 'documents created by legislative activity can, if not protected by any other privilege, be disclosed and used in a legal dispute that does not directly involve those who wrote the document, i.e., the legislator or his aides.'" *Small v. Hunt*, 152 F.R.D. 509, 513 (E.D.N.C. 1994) (quoting *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 297 (D.P.R. 1989)); *see also Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 302 n.20 (D. Md. 1992). Thus, in *Small v. Hunt,* the court required production of agendas, minutes, and other documents considered by or produced by a quasi-legislative settlement committee where the legislators on the committee were not defendants in the case.

Indeed,

> while the judicially-created doctrine of 'legislative immunity' provides individual legislators with absolute immunity from liability for their legislative acts, that immunity does not preclude all discovery in the context of this case; instead, claims of legislative immunity or privilege in the discovery context must be evaluated under a flexible approach that considers the need for the information in the context of the particular suit presented, while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process.

League of Women Voters of North Carolina, et al. v. State of North Carolina, et al. ("LWVNC"), No. 1:13-cv-660, Doc. 97, at 3 (M.D.N.C. Mar. 27, 2014).

"[B]ecause '[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence,' any such privilege 'must be strictly construed.'" *United States v. Squillacote*, 221 F.3d 542, 560 (4th Cir. 2000) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)). Evidentiary privileges must be "accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (internal quotation marks and citation omitted). Moreover, state legislative privilege must yield "where important federal interests are at stake." *Gillock*, 445 U.S. at 373.

It is disingenuous to state that the "the law is clear that the legislative movants are not required and cannot be required to comply with the subpoenas and requests for production of documents served on them by plaintiffs." Motion to Quash 7. In fact, some of the very same State Legislators, in an action defended by the Attorney General's office in the Middle District of North Carolina, were required to comply with similar subpoenas mere months ago. The Magistrate Judge and District Court Judge rejected those arguments there, ordering the

production of many documents that plaintiffs in that action requested. *LWVNC*, No. 1:13-cv-660, Doc. 97, at 3-5 (Mar. 27, 2014), and Doc. 109, at 24-25 (May 15, 2014).

Then and now counsel for State Legislators relied primarily on *Tenney* and *EEOC*. When reviewing objections to the Magistrate Judge's denial in part of the motion to quash that state legislators filed in the *LWVNC* case, Judge Schroeder reviewed those cases and rejected the very interpretation of these two cases that the State Legislators offer now. With respect to *Tenney*, Judge Schroeder rejected the contention that it provided support for the state legislators' position on the privilege because in that case, "it is clear that only immunity from *suit*, rather than immunity from *discovery*, was at issue." *LWVNC*, No. 1:13-cv-660, Doc. 109, at 12.

With respect to *EEOC*, while noting the sometimes broad language used in dicta in the opinion, Judge Schroeder read that case as not being on point because the Fourth Circuit did allow the discovery sought, albeit from modified subpoenas. Consequently, the appeals court "necessarily avoided application of the privilege to any inquiry into legislative motive, finding it 'premature' to do so simply because a 'legitimate claim of privilege might ripen at some point down the road." *Id*. at 17-19 (internal citations omitted). Judge Schroeder thus rejected the *LWVNC* state legislators' reliance on *EEOC*, stating that it did not "provide controlling guidance." *Id*. at 14.

Thus, none of the State Legislators' arguments regarding the correct interpretation of *Tenney* and *EEOC*, and legislative immunity in general, prevailed in the Middle District earlier this year, and they are incorrect here, as well. Blanket immunity used to exclude relevant documents in the possession of legislators from federal litigation should not

> trump the need for direct evidence that is highly relevant to the adjudication of public rights guaranteed by federal statutory law and the Constitution, especially where no threat to legislative immunity itself is presented. Although the Court will not lightly intrude upon the state legislative privilege, it must be a qualified

> privilege in such a scenario and yield in the face of an evidentiary need that lies at the core of the inquiry required by the Supreme Court in redistricting cases.

Bethune-Hill v. Va. State Bd. of Elections, No. 3:14-cv-852, 2015 U.S. Dist. LEXIS 68054, at *25-*26 (E.D. Va. May 26, 2015). The law does not permit that kind of total obfuscation, as that is certainly not in the best interest of justice.

B. If Privilege Applied, It Would Be Qualified and Yield in This Case

Any assertion of legislative privilege must turn on a balancing test which, in this case, tips in favor of disclosure. *See, e.g., Ala. Educ. Ass'n v. Bentley*, No. CV-11-S-761-NE, 2013 WL 124306, at *13 (N.D. Ala. Jan. 3, 2013) (explaining that the "legislative privilege is not absolute" and thus courts must "balance the various competing interests" to determine if the legislative privilege applies) (internal quotations omitted); *see also Favors v. Cuomo*, 285 F.R.D. 187, 209 (E.D.N.Y. 2012) (explaining that "the legislative privilege for state lawmakers is, at best, one which is qualified" and "a court must balance the interests of the party seeking the evidence against the interests of the individual claiming the privilege") (internal quotation marks omitted); *Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 304 (S.D.N.Y. 2003) (affirming magistrate's analysis of legislative privilege, including that it is not absolute and determined by a balancing of interests).

But even before applying that balancing test, at least two broad categories of documents requested by Plaintiffs lie wholly outside any applicable legislative privilege, including: (1) documents that have been disclosed to third parties, for which any legislative privilege has been waived, *Rodriguez*, 280 F. Supp. at 101 (noting that "no one could seriously claim privilege" over a "conversation between legislators and knowledgeable outsiders, such as lobbyists"); and (2) non-deliberative documents that contain objective facts or information available to legislators

at the time of their decision. *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, No. 11-c-5065, 2011 WL 4837508, at *11 (N.D. Ill. Oct. 12, 2011) (documents revealing the "objective facts upon which lawmakers relied" in the decision-making process are beyond the scope of legislative privilege); *Doe v. Nebraska*, 788 F. Supp. 2d 975, 984-86 (D. Neb. 2011) ("documents containing factually based information used in the decision-making process or disseminated to legislators" are outside the scope of legislative privilege).

Moving to the balancing test, analyzing the very few document requests to which the privilege may even be arguably applicable, the balancing test tips in favor of production of the requested documents. Because the privilege is qualified, this Court must balance the legitimate interests on both sides against each other. *Rodriguez*, 293 F. Supp. 2d at 304 (*citing In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987)). Specifically, the Court should consider the following factors:

> (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.

Rodriguez, 293 F. Supp. 2d at 304 (internal citations omitted).

Here, the information sought is central to the claims in the case. Plaintiffs allege that the General Assembly's enactments were in part racially motivated gerrymanders and contained population deviations that were arbitrary and discriminatory. Plaintiffs are seeking from the State Legislators precisely the information that would shed light on those claims. The information is in the possession of the State Legislators. Plaintiffs could not possibly subpoena every third party in the state of North Carolina who may have communicated with the State Legislators—that is simply unworkable. There is no other source for this information. This

litigation centers on one of the most fundamental rights known to American citizens, the right to vote and the right to have one's vote counted equally. Finally, concerns over the inhibition of legislative deliberations should weigh less heavily in cases where the right to vote is at stake because the intent behind passing the challenged legislation plays a different role than, for example, a civil suit seeking legislators' documents to determine intent for the purposes of statutory construction. *See Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11–CV–562, 2011 WL 6122542, at *2 (E.D. Wis. Dec. 8, 2011). Applying the balancing test, the privilege should yield, and the Court should order production of the requested materials.

Faced with similar claims in a case alleging racial gerrymandering in redistricting, the Eastern District of Virginia recently employed a balancing test and concluded that the plaintiffs were entitled to discovery of almost exactly the same documents as those sought here, including communications between legislators and individuals outside the legislature. "Balancing the competing, substantial interests at stake, the Court finds that the totality of circumstances warrant the selective disclosure of the assertedly privileged documents in the House's possession. In this context, where Plaintiffs allege racial gerrymandering . . . and the intent of the legislature is the dispositive issue in the case, the balance of interests calls for the legislative privilege to yield." *Bethune-Hill*, 2015 U.S. Dist. LEXIS 68054, at *39-*40. Indeed, the *Bethune-Hill* court found that in the context of an equal protection challenge to a redistricting plan, the first four factors of the balancing test weighed heavily in favor of disclosure and therefore outweighed the fifth factor. *Id.* at *30-*40. The same is true in this case, where the public interest at stake is significant, because "there is no more foundational right than meaningful representation," *id.* at *35, and the legitimacy of the redistricting process is in question.

C. State Confidentiality Statutes Do Not Apply to the Requested Documents

Beyond the claims of legislative immunity and privilege, the State Legislators claim that state laws entitle them to resist disclosure in the instant case. But those very North Carolina statutes cited by the State Legislators concerning the confidentiality of legislative communications provide an exception to the general rule of confidentiality when the interests of justice require it. North Carolina General Statute § 120-132(c), which addresses testimony by legislative employees, states: "Subject to G.S. 120-9, G.S. 120-33, and the common law of legislative privilege and legislative immunity, the presiding judge may compel disclosure of information acquired under subsection (a) of this section if in the judge's opinion, the disclosure is necessary to a proper administration of justice." For all the reasons discussed in the previous section, the documents requested are necessary to shed the light of truth on the disputed matter, and are necessary to a proper administration of justice.

D. If the Privilege Applies, State Legislators Should Produce a Privilege Log

State Legislators not only wish to withhold all documents responsive to the subpoenas issued by Plaintiffs, but they also appear to wish to do so without producing a privilege log. That is not permissible under the Federal Rules of Civil Procedure. In fact, Fed. R. Civ. P. 45(e)(2)(A) requires description of documents so that the opposing party can assess the withholding party's claim of privilege. The State Legislators must produce the documents that are categorically not privileged, and must produce a privilege log so that the Court can determine whether the qualified privilege applies to any of the remaining documents. This is true even for claims of legislative privilege. For example, production of a privilege log was required in:

- *Bethune-Hill,* 2015 U.S. Dist. LEXIS 68054, at *47 (ordering a privilege log for documents withheld on the basis of legislative privilege that contained sufficient detail to allow the plaintiffs to discern whether or not the documents are properly

withheld; noting that a notation that merely indicates a document relates to redistricting issues is insufficient)

- *LWVNC*, No. 1:13-cv-660, Doc. 97, at *7 (ordering the parties to meet and confer on the categories of documents to be included in privilege log when claiming legislative privilege)

- *Favors*, 285 F.R.D. at 223-24 (requiring supplementation of privilege log to support claims of legislative privilege)

- *Nebraska*, 788 F. Supp. 2d at 986-87 (requiring production of a privilege log for documents withheld on privilege grounds, including legislative privilege)

- *Young v. City and County of Honolulu*, Civ. No. 07-00068, 2008 WL 267365, at *2 (D. Haw. July 8, 2008) (noting that ordered production of a privilege log would include documents withheld on legislative privilege grounds)

The State Legislators here have no basis for failing to produce a privilege log, and should be ordered to produce the log immediately if they wish to proceed with claims of legislative privilege so that this Court has the information necessary to engage in the balancing test described in Section I.B. *supra* at 9-11.

II. The Requests Are Not Overbroad and Time for Response Is Reasonable Given the Expedited Schedule

In a last ditch effort to avoid having to comply with the subpoena duces tecum, State Legislators complain that the requests are overbroad and therefore the time afforded to them to respond is inadequate. This argument fails for several reasons.

First, as a primary matter, these cases are on an expedited schedule for trial because of State Legislators' own actions. When S.B. 181 was enacted, the primaries for the 2016 county commission elections were scheduled to be in May, as they have been for many years. On September 24, 2015, the North Carolina General Assembly moved the primaries for the county commission elections, along with elections for other offices, up to March 15, 2016, to coincide with the presidential primary. N.C. Sess. Law 2015-258. This case would not have needed to be

on such a tight trial and discovery schedule had the primary election not been moved up. It is a manifestly unjust position to create the time crunch, and then claim the time crunch prevents one from producing relevant information necessary for this Court's consideration of this matter.

Second, while Plaintiffs do not believe that the subpoena requests are overly broad, State Legislators have not made a good faith effort to meet-and-confer with Plaintiffs to refine or prioritize the materials that must be identified and produced. Indeed, where documents requested by subpoena "involve communications with outside parties or are other documents that are considered public records under state law," "[r]equiring production of those documents is not unduly burdensome." *LWVNC*, No. 1:13-cv-660, Doc. 97, at *7. As citizens of this state, Plaintiffs are entitled to the information requested by subpoena, and the State Legislators must make an honest effort to review and produce the documents or communications requested in a timely fashion.

Finally, State Legislators' portrayal of the scope of the discovery request is simply illogical. They represent that their counsel would have to review 600,000 email messages in thirty-seven separate accounts for privileged and/or confidential material. Even Plaintiffs think it is implausible that each of the alleged 600,000 email messages that State Legislators possess is relevant to this case. Like every other entity of its size and resources, staff or counsel for the State Legislators can search these accounts for relevant information using search terms. Plaintiffs would be happy to supply State Legislators with those search terms. And then counsel for State Legislators' review for privileged or confidential materials can be limited to the products of those searches. This type of effort is now the hallmark of complex civil litigation, particularly when fundamental rights are at stake. State Legislators are not a special class of citizens—they must comply with properly issued discovery requests when they possess evidence

relevant to disputed issues of fact that is not available from any other sources, particularly where constitutional rights are at stake.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the State Legislators' motion to quash and overrule their objections to the subpoena.

Respectfully submitted this 10th day of November, 2015.

/s/ Allison J. Riggs
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this day electronically filed the foregoing **Opposition to Motion to Quash Subpoenas** in the above-titled action with the Clerk of the Court using the CM/ECF system, which on the same date sent notification of the filing to the following:

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This the 10th day of November, 2015.

/s/ Allison J. Riggs
Allison J. Riggs

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Raleigh Wake Citizens Ass'n, et al.
Plaintiff
v.
Wake County Board of Elections
Defendant

Civil Action No. 5:15-cv-156 (5:13-cv-607)

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

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

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

Place:	Date and Time:
Southern Coalition for Social Justice 1415 W. N.C. Highway 54, Suite 101 Durham, NC 27707	11/4/2015 10:00 AM

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

Place:	Date and Time:

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

Date: 10/21/2015

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

s/ Anita S. Earls
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs Raleigh Wake Citizens Ass'n, et al., who issues or requests this subpoena, are:

Anita Earls, Southern Coalition for Social Justice, 1415 W. Hwy 54, Ste. 101, Durham NC 27707, anita@scsj.org, 919-323-3380

Notice to the person who issues or requests this subpoena

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

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PROOF OF SERVICE

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

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

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

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

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0 .

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

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

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

(c) Place of Compliance.

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

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

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

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

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

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

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

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

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

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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

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

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

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

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

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

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

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

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

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

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

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

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

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

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

(i) expressly make the claim; and

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

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

(g) Contempt.

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

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A TO PLAINTIFFS' SUBPOENA TO JOHN CHADWICK BAREFOOT

DEFINITIONS

Except as specifically defined below, the terms used in this Attachment to Plaintiffs' Subpoena shall be construed and defined in accordance with the Federal Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

1. "2013 N.C. Sess. Laws 110" means Session Law 2013-110/Senate Bill 325 ratified by the General Assembly on June 13, 2013.

2. "2015 N.C. Sess. Laws 4" means Session Law 2015-4/Senate Bill 181 ratified by the General Assembly on April 2, 2015.

3. "Any" and "all" mean "any and all."

4. "Communication" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfers of information via email, report, letter, text message, voicemail message, written memorandum, note, summary, and other means.

5. "Date" means the exact day, month, and year, if ascertainable, or, if not, the best available approximation (including relationship to other events).

6. "Document" is synonymous in meaning and scope to the term "document" as used under Federal Rule of Civil Procedure 24 and the phrase "writings and recordings" as defined in Federal Rule of Evidence 1001, and includes, but is not limited to, any computer discs, tapes, and printouts, emails, databases, and any handwritten, typewritten, printed, electronically recorded, taped, graphic, machine-readable, or other material, of whatever nature and whatever form, including all non-identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

7. "Election method" includes but is not limited to the structure, election system, election districts, and timing of elections for any elected board in Wake County, including the Wake County Commission and Wake County School Board.

8. "Governor" means the office of the Governor of North Carolina and any of its agents, representatives, employees, members, or other persons acting or purporting to act on its behalf.

9. "Including" means "including but not limited to."

10. "Minority" means any group of voters that is a statistical minority in Wake County, including but not limited to non-white voters.

11. "Election history or political performance of candidates or electoral districts" means any data or information relating to the political party registration or political affiliation of voters and elected officials in Wake County, election results or political party registration in any electoral district or countywide election in Wake County, or relating to the partisan composition of elected bodies of government in Wake County, including but not limited to the Wake County Commission and Wake County School Board.

12. "Person" means not only natural persons, but also firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, trusts, groups, and organizations; federal, state, or local governments or government agencies, offices, bureaus, departments, or entities; other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof.

13. "Redistricting legislation" means any proposed or enacted legislation concerning changes to the structure, election method, election districts, or timing of elections or candidate

filing for the Wake County Commission, Wake County School Board, or any other elected body in Wake County, including but not limited to 2013 N.C. Sess. Laws 110 and 2015 N.C. Sess. Laws 4.

14. "Relating to," "regarding," or "reflecting" and their cognates are to be understood in their broadest sense, and shall be construed to include pertaining to, commenting on, memorializing, reflecting, recording, setting forth, describing, evidencing, or constituting.

15. "Relative voting strength" means the level of representation, electoral power, or ability to elect candidates of their choice of voters who reside in unincorporated Wake County or in municipalities other than Raleigh.

16. "S.B. 181" means Senate Bill 181, which was filed in the North Carolina General Assembly on March 4, 2015 under the short title "Wake County Commissioner Districts."

17. "S.B. 325" means Senate Bill 325, which was filed in the North Carolina General Assembly on March 13, 2013 under the short title "Wake County School Board Districts."

18. "State Board of Elections" means the North Carolina State Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

19. "Wake County" includes unincorporated Wake County and all municipalities located within Wake County.

20. "Wake County Board of Elections" means the Wake County Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

21. "Wake County Commission" means the Wake County Board of Commissioners, its individual commissioners, and associated staff members.

22. "Wake County School Board" means the Wake County Board of Education, its individual members, and associated staff members.

23. "Voter" means any registered voter in North Carolina and all persons who may properly register to vote in the 2016 primary election in North Carolina.

24. "You" and "your" mean John Chadwick Barefoot, the recipient of the accompanying subpoena, and any of your employees, agents, representatives, or other personnel involved in the functions or duties of your legislative office.

INSTRUCTIONS

1. In responding to this Subpoena, you must furnish all requested information, not subject to valid objection, that is known by, possessed by, available to, or subject to reasonable access or control by you or any of your attorneys, consultants, representatives, investigators, agents, and all others acting on your behalf.

2. Words used in singular form shall include the plural form, and words used in the plural form include the singular form.

3. The connectives "and" and "or" will be construed either disjunctively or conjunctively as necessary to bring within the scope of each description below of documents to be produced ("request") all responses that otherwise might be construed to be outside of its scope.

4. A reference to an entity shall be construed to include its officers, directors, partners, members, managers, employees, representatives, agents, consultants, or anyone acting on its behalf.

5. If you contend that it would be unreasonably burdensome to obtain and provide all of the documents called for in response to this Subpoena or any part thereof, then in response:

(a) produce all such documents as are available to you without undertaking what you contend to be an unreasonable request; (b) describe with particularity the efforts made by you or on your behalf to produce such documents, including identification or persons consulted, description of files, records, and documents reviewed, and identification of each person who participated in the gathering of such documents, with specification of the amount of time spend and the nature of work done by such person; and (c) state with particularity the grounds upon which you contend that additional efforts to produce such documents would be unreasonable.

6. For any document no longer in your possession, custody, or control, identify the document and the type of information contained within it, state whether it is missing, lost, destroyed, transferred to others or otherwise disposed of, and identify any person who currently has custody or control of the document or who has knowledge of the contents of the document.

7. If any documents, communications, information, or other items are withheld on the ground of any privilege, provide a description of the basis for the claimed privilege and all information necessary for the requesting parties to assess the claim or privilege, including but not limited to the following:

a. the names and addresses of the speaker or author of the communication or document;

b. the date of the communication or document;

c. the name and address of any person to whom the communication was made or the document was sent, or to whom copies were sent or circulated at any time;

d. the name and address of any person currently in possession of the information or document or a copy thereof; and

e. the privilege claimed and specific grounds therefor.

8. Documents are to be produced in their original format as they are kept by you, provided that documents or records shall be produced as described hereinafter, and hard-copy documents may be produced in electronic format. To the extent documents can be accurately represented in black and white, they should be produced in single-page Tagged Image File Format ("TIFF"), together with any related field-delimited load files (e.g., Concordance DAT, CSV, OPT, LOG). Each TIFF document shall be produced with an image load file in standard Opticon (*.log) format that reflects the parent / child relationship and also includes begin Bates number; end Bates number; begin Attachment Bates number; end Attachment Bates number; custodian; date sent (for email messages); date modified (for email and non-email messages where information is available); author (for email and non-email messages); and subject (for email messages). The TIFF images shall also be accompanied by extracted text or, for those files that do not have extracted text upon being processed (such as hard copy documents), optical character recognition ("OCR") text data; such extracted text or OCR text data shall be provided in document level form and named after the TIFF image. Documents that contain redactions shall be OCR'd after the redaction is applied to the image, and the OCR will be produced in place of extracted text at the document level.

9. For documents produced in TIFF format that originated in electronic form, metadata shall be included with the data load files described above, and shall include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared drive or server); and MD5 hash

value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name(s) and address(es); "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

10. Unless otherwise limited or expanded by a particular request, the requests apply to the period from November 1, 2012, through the present.

DOCUMENTS TO BE PRODUCED

1. All documents and communications received or created by you that reflect or discuss the rationale or purpose for enacting or supporting any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

2. All documents concerning communications between you and any constituent or non-employee third party regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

3. All documents reflecting any communications between you and the Office of the Governor of North Carolina regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election

method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

4. All documents reflecting any communications between you and any North Carolina state or county agency, including but not limited to the State Board of Elections and Wake County Board of Elections, regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

5. All documents reflecting any communications between you and any lobbyist, political organization, or public interest group or individual regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance in Wake County elections of candidates or electoral districts, the Wake County Commission or its election method, or the Wake County School Board or its election method.

6. All documents and communications referring or relating to any estimate, research, report, study, or analysis received or created by you related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

7. All documents and communications related to any polls or surveys conducted by you or brought to your attention related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Raleigh Wake Citizens Ass'n, et al.
Plaintiff
v.
Wake County Board of Elections
Defendant

Civil Action No. 5:15-cv-156 (5:13-cv-607)

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

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

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

Place:	Date and Time:
Southern Coalition for Social Justice 1415 W. N.C. Highway 54, Suite 101 Durham, NC 27707	11/4/2015 10:00 AM

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

Place:	Date and Time:

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

Date: 10/21/2015

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

s/ Anita S. Earls
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs Raleigh Wake Citizens Ass'n, et al., who issues or requests this subpoena, are:

Anita Earls, Southern Coalition for Social Justice, 1415 W. Hwy 54, Ste. 101, Durham NC 27707, anita@scsj.org, 919-323-3380

Notice to the person who issues or requests this subpoena

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

Civil Action No. 5:15-cv-156 (5:13-cv-607)

PROOF OF SERVICE

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

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

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

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

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0 .

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

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

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

(c) Place of Compliance.

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

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

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

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

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

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

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

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

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

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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

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

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

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

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

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

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

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

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

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

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

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

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

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

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

(i) expressly make the claim; and

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

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

(g) Contempt.

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

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A TO PLAINTIFFS' SUBPOENA TO DAVID RAY LEWIS

DEFINITIONS

Except as specifically defined below, the terms used in this Attachment to Plaintiffs' Subpoena shall be construed and defined in accordance with the Federal Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

1. "2013 N.C. Sess. Laws 110" means Session Law 2013-110/Senate Bill 325 ratified by the General Assembly on June 13, 2013.

2. "2015 N.C. Sess. Laws 4" means Session Law 2015-4/Senate Bill 181 ratified by the General Assembly on April 2, 2015.

3. "Any" and "all" mean "any and all."

4. "Communication" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfers of information via email, report, letter, text message, voicemail message, written memorandum, note, summary, and other means.

5. "Date" means the exact day, month, and year, if ascertainable, or, if not, the best available approximation (including relationship to other events).

6. "Document" is synonymous in meaning and scope to the term "document" as used under Federal Rule of Civil Procedure 24 and the phrase "writings and recordings" as defined in Federal Rule of Evidence 1001, and includes, but is not limited to, any computer discs, tapes, and printouts, emails, databases, and any handwritten, typewritten, printed, electronically recorded, taped, graphic, machine-readable, or other material, of whatever nature and whatever form, including all non-identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

7. "Election method" includes but is not limited to the structure, election system, election districts, and timing of elections for any elected board in Wake County, including the Wake County Commission and Wake County School Board.

8. "Governor" means the office of the Governor of North Carolina and any of its agents, representatives, employees, members, or other persons acting or purporting to act on its behalf.

9. "Including" means "including but not limited to."

10. "Minority" means any group of voters that is a statistical minority in Wake County, including but not limited to non-white voters.

11. "Election history or political performance of candidates or electoral districts" means any data or information relating to the political party registration or political affiliation of voters and elected officials in Wake County, election results or political party registration in any electoral district or countywide election in Wake County, or relating to the partisan composition of elected bodies of government in Wake County, including but not limited to the Wake County Commission and Wake County School Board.

12. "Person" means not only natural persons, but also firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, trusts, groups, and organizations; federal, state, or local governments or government agencies, offices, bureaus, departments, or entities; other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof.

13. "Redistricting legislation" means any proposed or enacted legislation concerning changes to the structure, election method, election districts, or timing of elections or candidate

filing for the Wake County Commission, Wake County School Board, or any other elected body in Wake County, including but not limited to 2013 N.C. Sess. Laws 110 and 2015 N.C. Sess. Laws 4.

14. "Relating to," "regarding," or "reflecting" and their cognates are to be understood in their broadest sense, and shall be construed to include pertaining to, commenting on, memorializing, reflecting, recording, setting forth, describing, evidencing, or constituting.

15. "Relative voting strength" means the level of representation, electoral power, or ability to elect candidates of their choice of voters who reside in unincorporated Wake County or in municipalities other than Raleigh.

16. "S.B. 181" means Senate Bill 181, which was filed in the North Carolina General Assembly on March 4, 2015 under the short title "Wake County Commissioner Districts."

17. "S.B. 325" means Senate Bill 325, which was filed in the North Carolina General Assembly on March 13, 2013 under the short title "Wake County School Board Districts."

18. "State Board of Elections" means the North Carolina State Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

19. "Wake County" includes unincorporated Wake County and all municipalities located within Wake County.

20. "Wake County Board of Elections" means the Wake County Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

21. "Wake County Commission" means the Wake County Board of Commissioners, its individual commissioners, and associated staff members.

22. "Wake County School Board" means the Wake County Board of Education, its individual members, and associated staff members.

23. "Voter" means any registered voter in North Carolina and all persons who may properly register to vote in the 2016 primary election in North Carolina.

24. "You" and "your" mean David Ray Lewis, the recipient of the accompanying subpoena, and any of your employees, agents, representatives, or other personnel involved in the functions or duties of your legislative office.

INSTRUCTIONS

1. In responding to this Subpoena, you must furnish all requested information, not subject to valid objection, that is known by, possessed by, available to, or subject to reasonable access or control by you or any of your attorneys, consultants, representatives, investigators, agents, and all others acting on your behalf.

2. Words used in singular form shall include the plural form, and words used in the plural form include the singular form.

3. The connectives "and" and "or" will be construed either disjunctively or conjunctively as necessary to bring within the scope of each description below of documents to be produced ("request") all responses that otherwise might be construed to be outside of its scope.

4. A reference to an entity shall be construed to include its officers, directors, partners, members, managers, employees, representatives, agents, consultants, or anyone acting on its behalf.

5. If you contend that it would be unreasonably burdensome to obtain and provide all of the documents called for in response to this Subpoena or any part thereof, then in response:

(a) produce all such documents as are available to you without undertaking what you contend to be an unreasonable request; (b) describe with particularity the efforts made by you or on your behalf to produce such documents, including identification or persons consulted, description of files, records, and documents reviewed, and identification of each person who participated in the gathering of such documents, with specification of the amount of time spend and the nature of work done by such person; and (c) state with particularity the grounds upon which you contend that additional efforts to produce such documents would be unreasonable.

6. For any document no longer in your possession, custody, or control, identify the document and the type of information contained within it, state whether it is missing, lost, destroyed, transferred to others or otherwise disposed of, and identify any person who currently has custody or control of the document or who has knowledge of the contents of the document.

7. If any documents, communications, information, or other items are withheld on the ground of any privilege, provide a description of the basis for the claimed privilege and all information necessary for the requesting parties to assess the claim or privilege, including but not limited to the following:

a. the names and addresses of the speaker or author of the communication or document;

b. the date of the communication or document;

c. the name and address of any person to whom the communication was made or the document was sent, or to whom copies were sent or circulated at any time;

d. the name and address of any person currently in possession of the information or document or a copy thereof; and

e. the privilege claimed and specific grounds therefor.

8. Documents are to be produced in their original format as they are kept by you, provided that documents or records shall be produced as described hereinafter, and hard-copy documents may be produced in electronic format. To the extent documents can be accurately represented in black and white, they should be produced in single-page Tagged Image File Format ("TIFF"), together with any related field-delimited load files (e.g., Concordance DAT, CSV, OPT, LOG). Each TIFF document shall be produced with an image load file in standard Opticon (*.log) format that reflects the parent / child relationship and also includes begin Bates number; end Bates number; begin Attachment Bates number; end Attachment Bates number; custodian; date sent (for email messages); date modified (for email and non-email messages where information is available); author (for email and non-email messages); and subject (for email messages). The TIFF images shall also be accompanied by extracted text or, for those files that do not have extracted text upon being processed (such as hard copy documents), optical character recognition ("OCR") text data; such extracted text or OCR text data shall be provided in document level form and named after the TIFF image. Documents that contain redactions shall be OCR'd after the redaction is applied to the image, and the OCR will be produced in place of extracted text at the document level.

9. For documents produced in TIFF format that originated in electronic form, metadata shall be included with the data load files described above, and shall include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared drive or server); and MD5 hash

value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name(s) and address(es); "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

10. Unless otherwise limited or expanded by a particular request, the requests apply to the period from November 1, 2012, through the present.

DOCUMENTS TO BE PRODUCED

1. All documents and communications received or created by you that reflect or discuss the rationale or purpose for enacting or supporting any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

2. All documents concerning communications between you and any constituent or non-employee third party regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

3. All documents reflecting any communications between you and the Office of the Governor of North Carolina regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election

method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

4. All documents reflecting any communications between you and any North Carolina state or county agency, including but not limited to the State Board of Elections and Wake County Board of Elections, regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

5. All documents reflecting any communications between you and any lobbyist, political organization, or public interest group or individual regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance in Wake County elections of candidates or electoral districts, the Wake County Commission or its election method, or the Wake County School Board or its election method.

6. All documents and communications referring or relating to any estimate, research, report, study, or analysis received or created by you related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

7. All documents and communications related to any polls or surveys conducted by you or brought to your attention related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Raleigh Wake Citizens Ass'n, et al.
Plaintiff
v.
Wake County Board of Elections
Defendant

Civil Action No. 5:15-cv-156 (5:13-cv-607)

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

To: Robert A. Rucho
(Name of person to whom this subpoena is directed)

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

Place:	Date and Time:
Southern Coalition for Social Justice 1415 W. N.C. Highway 54, Suite 101 Durham, NC 27707	11/4/2015 10:00 AM

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

Place:	Date and Time:

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

Date: 10/21/2015

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

s/ Anita S. Earls
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs Raleigh Wake Citizens Ass'n, et al., who issues or requests this subpoena, are:

Anita Earls, Southern Coalition for Social Justice, 1415 W. Hwy 54, Ste. 101, Durham NC 27707, anita@scsj.org, 919-323-3380

Notice to the person who issues or requests this subpoena

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

Civil Action No. 5:15-cv-156 (5:13-cv-607)

PROOF OF SERVICE

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

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

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

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

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0 .

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

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

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

(c) Place of Compliance.

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

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

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

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

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

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

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

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

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

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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

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

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

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

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

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

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

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

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

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

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

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

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

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

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

(i) expressly make the claim; and

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

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

(g) Contempt.

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

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A TO PLAINTIFFS' SUBPOENA TO ROBERT A. RUCHO

DEFINITIONS

Except as specifically defined below, the terms used in this Attachment to Plaintiffs' Subpoena shall be construed and defined in accordance with the Federal Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

1. "2013 N.C. Sess. Laws 110" means Session Law 2013-110/Senate Bill 325 ratified by the General Assembly on June 13, 2013.

2. "2015 N.C. Sess. Laws 4" means Session Law 2015-4/Senate Bill 181 ratified by the General Assembly on April 2, 2015.

3. "Any" and "all" mean "any and all."

4. "Communication" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfers of information via email, report, letter, text message, voicemail message, written memorandum, note, summary, and other means.

5. "Date" means the exact day, month, and year, if ascertainable, or, if not, the best available approximation (including relationship to other events).

6. "Document" is synonymous in meaning and scope to the term "document" as used under Federal Rule of Civil Procedure 24 and the phrase "writings and recordings" as defined in Federal Rule of Evidence 1001, and includes, but is not limited to, any computer discs, tapes, and printouts, emails, databases, and any handwritten, typewritten, printed, electronically recorded, taped, graphic, machine-readable, or other material, of whatever nature and whatever form, including all non-identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

7. "Election method" includes but is not limited to the structure, election system, election districts, and timing of elections for any elected board in Wake County, including the Wake County Commission and Wake County School Board.

8. "Governor" means the office of the Governor of North Carolina and any of its agents, representatives, employees, members, or other persons acting or purporting to act on its behalf.

9. "Including" means "including but not limited to."

10. "Minority" means any group of voters that is a statistical minority in Wake County, including but not limited to non-white voters.

11. "Election history or political performance of candidates or electoral districts" means any data or information relating to the political party registration or political affiliation of voters and elected officials in Wake County, election results or political party registration in any electoral district or countywide election in Wake County, or relating to the partisan composition of elected bodies of government in Wake County, including but not limited to the Wake County Commission and Wake County School Board.

12. "Person" means not only natural persons, but also firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, trusts, groups, and organizations; federal, state, or local governments or government agencies, offices, bureaus, departments, or entities; other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof.

13. "Redistricting legislation" means any proposed or enacted legislation concerning changes to the structure, election method, election districts, or timing of elections or candidate

filing for the Wake County Commission, Wake County School Board, or any other elected body in Wake County, including but not limited to 2013 N.C. Sess. Laws 110 and 2015 N.C. Sess. Laws 4.

14. "Relating to," "regarding," or "reflecting" and their cognates are to be understood in their broadest sense, and shall be construed to include pertaining to, commenting on, memorializing, reflecting, recording, setting forth, describing, evidencing, or constituting.

15. "Relative voting strength" means the level of representation, electoral power, or ability to elect candidates of their choice of voters who reside in unincorporated Wake County or in municipalities other than Raleigh.

16. "S.B. 181" means Senate Bill 181, which was filed in the North Carolina General Assembly on March 4, 2015 under the short title "Wake County Commissioner Districts."

17. "S.B. 325" means Senate Bill 325, which was filed in the North Carolina General Assembly on March 13, 2013 under the short title "Wake County School Board Districts."

18. "State Board of Elections" means the North Carolina State Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

19. "Wake County" includes unincorporated Wake County and all municipalities located within Wake County.

20. "Wake County Board of Elections" means the Wake County Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

21. "Wake County Commission" means the Wake County Board of Commissioners, its individual commissioners, and associated staff members.

22. "Wake County School Board" means the Wake County Board of Education, its individual members, and associated staff members.

23. "Voter" means any registered voter in North Carolina and all persons who may properly register to vote in the 2016 primary election in North Carolina.

24. "You" and "your" mean Robert A. Rucho, the recipient of the accompanying subpoena, and any of your employees, agents, representatives, or other personnel involved in the functions or duties of your legislative office.

INSTRUCTIONS

1. In responding to this Subpoena, you must furnish all requested information, not subject to valid objection, that is known by, possessed by, available to, or subject to reasonable access or control by you or any of your attorneys, consultants, representatives, investigators, agents, and all others acting on your behalf.

2. Words used in singular form shall include the plural form, and words used in the plural form include the singular form.

3. The connectives "and" and "or" will be construed either disjunctively or conjunctively as necessary to bring within the scope of each description below of documents to be produced ("request") all responses that otherwise might be construed to be outside of its scope.

4. A reference to an entity shall be construed to include its officers, directors, partners, members, managers, employees, representatives, agents, consultants, or anyone acting on its behalf.

5. If you contend that it would be unreasonably burdensome to obtain and provide all of the documents called for in response to this Subpoena or any part thereof, then in response:

(a) produce all such documents as are available to you without undertaking what you contend to be an unreasonable request; (b) describe with particularity the efforts made by you or on your behalf to produce such documents, including identification or persons consulted, description of files, records, and documents reviewed, and identification of each person who participated in the gathering of such documents, with specification of the amount of time spend and the nature of work done by such person; and (c) state with particularity the grounds upon which you contend that additional efforts to produce such documents would be unreasonable.

6. For any document no longer in your possession, custody, or control, identify the document and the type of information contained within it, state whether it is missing, lost, destroyed, transferred to others or otherwise disposed of, and identify any person who currently has custody or control of the document or who has knowledge of the contents of the document.

7. If any documents, communications, information, or other items are withheld on the ground of any privilege, provide a description of the basis for the claimed privilege and all information necessary for the requesting parties to assess the claim or privilege, including but not limited to the following:

a. the names and addresses of the speaker or author of the communication or document;

b. the date of the communication or document;

c. the name and address of any person to whom the communication was made or the document was sent, or to whom copies were sent or circulated at any time;

d. the name and address of any person currently in possession of the information or document or a copy thereof; and

e. the privilege claimed and specific grounds therefor.

8. Documents are to be produced in their original format as they are kept by you, provided that documents or records shall be produced as described hereinafter, and hard-copy documents may be produced in electronic format. To the extent documents can be accurately represented in black and white, they should be produced in single-page Tagged Image File Format ("TIFF"), together with any related field-delimited load files (e.g., Concordance DAT, CSV, OPT, LOG). Each TIFF document shall be produced with an image load file in standard Opticon (*.log) format that reflects the parent / child relationship and also includes begin Bates number; end Bates number; begin Attachment Bates number; end Attachment Bates number; custodian; date sent (for email messages); date modified (for email and non-email messages where information is available); author (for email and non-email messages); and subject (for email messages). The TIFF images shall also be accompanied by extracted text or, for those files that do not have extracted text upon being processed (such as hard copy documents), optical character recognition ("OCR") text data; such extracted text or OCR text data shall be provided in document level form and named after the TIFF image. Documents that contain redactions shall be OCR'd after the redaction is applied to the image, and the OCR will be produced in place of extracted text at the document level.

9. For documents produced in TIFF format that originated in electronic form, metadata shall be included with the data load files described above, and shall include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared drive or server); and MD5 hash

value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name(s) and address(es); "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

10. Unless otherwise limited or expanded by a particular request, the requests apply to the period from November 1, 2012, through the present.

DOCUMENTS TO BE PRODUCED

1. All documents and communications received or created by you that reflect or discuss the rationale or purpose for enacting or supporting any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

2. All documents concerning communications between you and any constituent or non-employee third party regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

3. All documents reflecting any communications between you and the Office of the Governor of North Carolina regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election

method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

4. All documents reflecting any communications between you and any North Carolina state or county agency, including but not limited to the State Board of Elections and Wake County Board of Elections, regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

5. All documents reflecting any communications between you and any lobbyist, political organization, or public interest group or individual regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance in Wake County elections of candidates or electoral districts, the Wake County Commission or its election method, or the Wake County School Board or its election method.

6. All documents and communications referring or relating to any estimate, research, report, study, or analysis received or created by you related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

7. All documents and communications related to any polls or surveys conducted by you or brought to your attention related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Raleigh Wake Citizens Ass'n, et al.
Plaintiff
v.
Wake County Board of Elections
Defendant

Civil Action No. 5:15-cv-156 (5:13-cv-607)

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

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

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

Place:	Date and Time:
Southern Coalition for Social Justice 1415 W. N.C. Highway 54, Suite 101 Durham, NC 27707	11/4/2015 10:00 AM

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

Place:	Date and Time:

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

Date: 10/21/2015

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

s/ Anita S. Earls
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs Raleigh Wake Citizens Ass'n, et al., who issues or requests this subpoena, are:

Anita Earls, Southern Coalition for Social Justice, 1415 W. Hwy 54, Ste. 101, Durham NC 27707, anita@scsj.org, 919-323-3380

Notice to the person who issues or requests this subpoena

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

Civil Action No. 5:15-cv-156 (5:13-cv-607)

PROOF OF SERVICE

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

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

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

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

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0 .

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

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

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

(c) Place of Compliance.

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

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

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

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

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

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

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

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

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

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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

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

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

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

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

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

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

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

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

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

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

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

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

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

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

(i) expressly make the claim; and

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

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

(g) Contempt.

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

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A TO PLAINTIFFS' SUBPOENA TO PAUL STAM

DEFINITIONS

Except as specifically defined below, the terms used in this Attachment to Plaintiffs' Subpoena shall be construed and defined in accordance with the Federal Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

1. "2013 N.C. Sess. Laws 110" means Session Law 2013-110/Senate Bill 325 ratified by the General Assembly on June 13, 2013.

2. "2015 N.C. Sess. Laws 4" means Session Law 2015-4/Senate Bill 181 ratified by the General Assembly on April 2, 2015.

3. "Any" and "all" mean "any and all."

4. "Communication" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfers of information via email, report, letter, text message, voicemail message, written memorandum, note, summary, and other means.

5. "Date" means the exact day, month, and year, if ascertainable, or, if not, the best available approximation (including relationship to other events).

6. "Document" is synonymous in meaning and scope to the term "document" as used under Federal Rule of Civil Procedure 24 and the phrase "writings and recordings" as defined in Federal Rule of Evidence 1001, and includes, but is not limited to, any computer discs, tapes, and printouts, emails, databases, and any handwritten, typewritten, printed, electronically recorded, taped, graphic, machine-readable, or other material, of whatever nature and whatever form, including all non-identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

7. "Election method" includes but is not limited to the structure, election system, election districts, and timing of elections for any elected board in Wake County, including the Wake County Commission and Wake County School Board.

8. "Governor" means the office of the Governor of North Carolina and any of its agents, representatives, employees, members, or other persons acting or purporting to act on its behalf.

9. "Including" means "including but not limited to."

10. "Minority" means any group of voters that is a statistical minority in Wake County, including but not limited to non-white voters.

11. "Election history or political performance of candidates or electoral districts" means any data or information relating to the political party registration or political affiliation of voters and elected officials in Wake County, election results or political party registration in any electoral district or countywide election in Wake County, or relating to the partisan composition of elected bodies of government in Wake County, including but not limited to the Wake County Commission and Wake County School Board.

12. "Person" means not only natural persons, but also firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, trusts, groups, and organizations; federal, state, or local governments or government agencies, offices, bureaus, departments, or entities; other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof.

13. "Redistricting legislation" means any proposed or enacted legislation concerning changes to the structure, election method, election districts, or timing of elections or candidate

filing for the Wake County Commission, Wake County School Board, or any other elected body in Wake County, including but not limited to 2013 N.C. Sess. Laws 110 and 2015 N.C. Sess. Laws 4.

14. "Relating to," "regarding," or "reflecting" and their cognates are to be understood in their broadest sense, and shall be construed to include pertaining to, commenting on, memorializing, reflecting, recording, setting forth, describing, evidencing, or constituting.

15. "Relative voting strength" means the level of representation, electoral power, or ability to elect candidates of their choice of voters who reside in unincorporated Wake County or in municipalities other than Raleigh.

16. "S.B. 181" means Senate Bill 181, which was filed in the North Carolina General Assembly on March 4, 2015 under the short title "Wake County Commissioner Districts."

17. "S.B. 325" means Senate Bill 325, which was filed in the North Carolina General Assembly on March 13, 2013 under the short title "Wake County School Board Districts."

18. "State Board of Elections" means the North Carolina State Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

19. "Wake County" includes unincorporated Wake County and all municipalities located within Wake County.

20. "Wake County Board of Elections" means the Wake County Board of Elections and any of its agents, representatives, employees, members, or any other person acting or purporting to act on its behalf.

21. "Wake County Commission" means the Wake County Board of Commissioners, its individual commissioners, and associated staff members.

22. "Wake County School Board" means the Wake County Board of Education, its individual members, and associated staff members.

23. "Voter" means any registered voter in North Carolina and all persons who may properly register to vote in the 2016 primary election in North Carolina.

24. "You" and "your" mean Paul Stam, the recipient of the accompanying subpoena, and any of your employees, agents, representatives, or other personnel involved in the functions or duties of your legislative office.

INSTRUCTIONS

1. In responding to this Subpoena, you must furnish all requested information, not subject to valid objection, that is known by, possessed by, available to, or subject to reasonable access or control by you or any of your attorneys, consultants, representatives, investigators, agents, and all others acting on your behalf.

2. Words used in singular form shall include the plural form, and words used in the plural form include the singular form.

3. The connectives "and" and "or" will be construed either disjunctively or conjunctively as necessary to bring within the scope of each description below of documents to be produced ("request") all responses that otherwise might be construed to be outside of its scope.

4. A reference to an entity shall be construed to include its officers, directors, partners, members, managers, employees, representatives, agents, consultants, or anyone acting on its behalf.

5. If you contend that it would be unreasonably burdensome to obtain and provide all of the documents called for in response to this Subpoena or any part thereof, then in response:

(a) produce all such documents as are available to you without undertaking what you contend to be an unreasonable request; (b) describe with particularity the efforts made by you or on your behalf to produce such documents, including identification or persons consulted, description of files, records, and documents reviewed, and identification of each person who participated in the gathering of such documents, with specification of the amount of time spend and the nature of work done by such person; and (c) state with particularity the grounds upon which you contend that additional efforts to produce such documents would be unreasonable.

6. For any document no longer in your possession, custody, or control, identify the document and the type of information contained within it, state whether it is missing, lost, destroyed, transferred to others or otherwise disposed of, and identify any person who currently has custody or control of the document or who has knowledge of the contents of the document.

7. If any documents, communications, information, or other items are withheld on the ground of any privilege, provide a description of the basis for the claimed privilege and all information necessary for the requesting parties to assess the claim or privilege, including but not limited to the following:

a. the names and addresses of the speaker or author of the communication or document;

b. the date of the communication or document;

c. the name and address of any person to whom the communication was made or the document was sent, or to whom copies were sent or circulated at any time;

d. the name and address of any person currently in possession of the information or document or a copy thereof; and

e. the privilege claimed and specific grounds therefor.

8. Documents are to be produced in their original format as they are kept by you, provided that documents or records shall be produced as described hereinafter, and hard-copy documents may be produced in electronic format. To the extent documents can be accurately represented in black and white, they should be produced in single-page Tagged Image File Format ("TIFF"), together with any related field-delimited load files (e.g., Concordance DAT, CSV, OPT, LOG). Each TIFF document shall be produced with an image load file in standard Opticon (*.log) format that reflects the parent / child relationship and also includes begin Bates number; end Bates number; begin Attachment Bates number; end Attachment Bates number; custodian; date sent (for email messages); date modified (for email and non-email messages where information is available); author (for email and non-email messages); and subject (for email messages). The TIFF images shall also be accompanied by extracted text or, for those files that do not have extracted text upon being processed (such as hard copy documents), optical character recognition ("OCR") text data; such extracted text or OCR text data shall be provided in document level form and named after the TIFF image. Documents that contain redactions shall be OCR'd after the redaction is applied to the image, and the OCR will be produced in place of extracted text at the document level.

9. For documents produced in TIFF format that originated in electronic form, metadata shall be included with the data load files described above, and shall include (at a minimum) the following information: file name (including extension); original file path; page count; creation date and time; last saved date and time; last modified date and time; author; custodian of the document (that is, the custodian from whom the document was collected or, if collected from a shared drive or server, the name of the shared drive or server); and MD5 hash

value. In addition, for email documents, the data load files shall also include the following metadata: sent date; sent time; received date; received time; "to" name(s) and address(es); "from" name(s) and address(es); "cc" name(s) and address(es); "bcc" name(s) and address(es); subject; names of attachment(s); and attachment(s) count. All images and load files must be named or put in folders in such a manner that all records can be imported without modification of any path or file name information.

10. Unless otherwise limited or expanded by a particular request, the requests apply to the period from November 1, 2012, through the present.

DOCUMENTS TO BE PRODUCED

1. All documents and communications received or created by you that reflect or discuss the rationale or purpose for enacting or supporting any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

2. All documents concerning communications between you and any constituent or non-employee third party regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

3. All documents reflecting any communications between you and the Office of the Governor of North Carolina regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election

method, the Wake County School Board or its election method, and/or any provision in 2015 N.C. Sess. Laws 4 and/or 2013 N.C. Sess. Laws 110.

4. All documents reflecting any communications between you and any North Carolina state or county agency, including but not limited to the State Board of Elections and Wake County Board of Elections, regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history and political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

5. All documents reflecting any communications between you and any lobbyist, political organization, or public interest group or individual regarding minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance in Wake County elections of candidates or electoral districts, the Wake County Commission or its election method, or the Wake County School Board or its election method.

6. All documents and communications referring or relating to any estimate, research, report, study, or analysis received or created by you related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

7. All documents and communications related to any polls or surveys conducted by you or brought to your attention related to minority voters or the relative voting strength of non-Raleigh voters in Wake County, election history or political performance of candidates or electoral districts in Wake County elections, the Wake County Commission or its election method, or the Wake County School Board or its election method.

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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, et al., Defendants.	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	1:13CV861

ORDER

These cases come before the Court following a hearing held on February 21, 2014, regarding various discovery disputes and motions. The present Order addresses a Motion to

Quash filed by various state legislators on January 20, 2014, and a Motion to Compel filed by Plaintiffs on February 10, 2014, both raising issues of legislative immunity and legislative privilege.

This matter presently involves three consolidated cases. In the first case (1:13CV658), the North Carolina State Conference of the NAACP and other individuals and churches (collectively, "the NAACP Plaintiffs") challenge portions of recent North Carolina state legislation ("House Bill 589") pursuant to the federal Voting Rights Act, 42 U.S.C. § 1973, and pursuant to the Fourteenth and Fifteenth Amendments to the Constitution. In the second case (1:13CV660), the League of Women Voters of North Carolina and other individuals and groups (collectively, "the League Plaintiffs") raise similar challenges under the Voting Rights Act, 42 U.S.C. § 1973 and § 1973a, and under the Fourteenth Amendment. Finally, in the third case (1:13CV861), the United States of America, represented by the U.S. Department of Justice, ("the U.S. DOJ Plaintiff") also raises similar challenges pursuant to the Voting Rights Act, 42 U.S.C. § 1973. In all three cases, the claims are asserted against the State of North Carolina, the members or director of the State Board of Elections, and/or North Carolina Governor McCrory (collectively, "the Defendants").

On January 10, 2014, various state legislators filed a Motion to Quash, seeking to quash subpoenas served upon them that requested the production of various documents related to House Bill 589. The NAACP Plaintiffs and the League Plaintiffs subsequently filed a Motion to Compel on February 10, 2014, seeking to compel Defendants to produce similar documents that were withheld on the basis of claims of legislative immunity. These matters came before

the Court at the hearing on February 21, 2014. After hearing from the parties, the Court allowed both sides an additional period to file supplemental briefs related to the issues raised during the hearing. Those supplemental briefs were filed on February 26, 2014, and the Court has considered the matters raised in the supplemental briefing and during the hearing. Having considered the parties' contentions, the Court concludes that both motions should be granted in part and denied in part. Specifically, the Court concludes that while the judicially-created doctrine of "legislative immunity" provides individual legislators with absolute immunity from liability for their legislative acts, that immunity does not preclude all discovery in the context of this case; instead, claims of legislative immunity or privilege in the discovery context must be evaluated under a flexible approach that considers the need for the information in the context of the particular suit presented, while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process.

In reaching this conclusion, the Court notes first that while federal legislators enjoy the protections of the U.S. Constitution's Speech and Debate Clause, those Constitutional protections do not apply to state legislators. However, the courts have created doctrines of "legislative immunity" and "legislative privilege" to provide similar protections to legislators at the state and local levels. See Tenney v. Brandhove, 341 U.S. 367, 373 (1951); see also United States v. Gillock, 445 U.S. 360, 374 (1980). Under the common law doctrine of "legislative immunity," legislators are entitled to absolute immunity from civil claims against them arising out of their actions in a legislative capacity. Roberson v. Mullins, 29 F.3d 132, 134 (4th Cir. 1994). With respect to the parallel concept of "legislative privilege," courts have recognized that

"[l]egislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege." Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 297 (D. Md. 1992). In this regard, "legislative privilege against compulsory evidentiary process exists to safeguard this legislative immunity and to further encourage the republican values it promotes." EEOC v. Washington Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011).

In applying these doctrines in the present case, the Court is guided in particular by the decision in Marylanders for Fair Representation, Inc. v. Schaefer, specifically in the approach set out by Judge Murnaghan and Judge Frederick Motz for the 3-judge panel in that case. See Marylanders, 144 F.R.D. at 302 n.19 (noting that the opinion by J. Murnaghan and J. Motz "reflects their majority, and thus prevailing, views" on the point addressed in their opinion). That opinion in Marylanders noted that "a less categorical, more flexible, approach" should be taken in shaping the scope of discovery in a case under the Voting Rights Act involving issues of legislative testimonial privilege, and in reaching this conclusion the majority stated:

> The doctrine of legislative immunity (both in its substantive and testimonial aspects) itself embodies fundamental public policy. It insulates legislators from liability for their official acts and shields them from judicial scrutiny into their deliberative processes. The doctrine is a bulwark in upholding the separation of powers. It does not, however, necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy. The Supreme Court has recognized that "[i]n some extraordinary instances the members [of a legislative body] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268, 97 S. Ct. 555, 565, 50 L.Ed.2d 450 (1977); see also South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1259 (4th Cir.1989), cert. denied, 493 U.S. 1077, 110 S. Ct. 1129, 107 L. Ed.2d 1035 (1990) (recognizing that judicial inquiry into legislative motive is appropriate where "the very nature of the constitutional question requires an inquiry

into legislative purpose," quoting from United States v. O'Brien, 391 U.S. 367, 383 n. 30, 88 S. Ct. 1673, 1682 n. 30, 20 L. Ed. 2d 672 (1968), but not specifically holding that the inquiry may be made through legislators' testimony).

Marylanders, 144 F.R.D. at 304.[1] The court in Marylanders concluded that some discovery could be allowed in the context of a claim under the Voting Rights Act given the "unique nature of legislative redistricting and the fact that testimonial legislative immunity is not an absolute." Id. However, the court in Marylanders further noted that even when legislative motive is put at issue, 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. at 305; see also Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996). The Fourth Circuit has subsequently confirmed the importance of legislative privilege in cases raising challenges to legislative budget enactments, where an individual claims that the budget was enacted based on an improper motive or purpose. See McCray v. Maryland Dep't of Transp., 741 F.3d 480, 487 (4th Cir. 2014) (noting that legislative immunity would preclude claims and related discovery with respect to legislative activity involved in enacting a budget, but would not preclude discovery related to non-legislative acts); EEOC v. Washington Suburban Sanitary Comm'n, 631 F.3d at 183 (noting that legislative privilege would preclude potential inquiry into motives for the "quintessentially legislative" act of passing a budget, but refusing to quash subpoenas that targeted administrative personnel decisions and did not require testimony of legislators or

[1] During the hearing on February 21, 2014, Defendants acknowledged that this "carve-out" would allow "more leeway" in discovery as to legislative motive in cases involving redistricting claims under the Voting Rights Act, as set out in Marylanders. However, Defendants argued that this "carve-out" should be limited only to redistricting cases under the Voting Rights Act, not the types of claims asserted here. However, the Court concludes that there is no basis to treat these claims differently, where they are all based on the Voting Rights Act and where the enactment of voting rules and requirements in both instances "involves the establishment of the electoral structure by which the legislative body becomes duly constituted." Marylanders, 144 F.R.D. at 304.

diversion of time away from legislative duties); Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty., Md., 684 F.3d 462, 468-69 (4th Cir. 2012) (upholding dismissal of First Amendment § 1983 claim raising challenge to legislative budget that was "facially valid," and refusing to "rely on alleged improper legislative motives to strike down an otherwise valid statute").

Nevertheless, as discussed in Marylanders, where Congress has acted to place legislative motive directly at issue, the judicially-created doctrine of legislative privilege should not absolutely preclude all discovery, as long as sufficient protection for legislators and legislative independence is preserved. As noted in Marylanders, some may contend that "considerations of federalism and the separation of powers should have persuaded the Supreme Court and the Congress never to confer jurisdiction upon the federal courts" to review state voting laws. Marylanders, 144 F.R.D. at 305. "However, that jurisdiction has been created, and we should not *de facto* abdicate our responsibility to exercise it. The promise having been made, we must provide an opportunity for its fulfillment. We should not simply rely upon bright line tests which have been developed in other contexts to bar virtually all discovery of relevant facts. Rather, we must accept the task . . . of closely monitoring the discovery process" and considering the testimonial and evidentiary issues presented. Id.

Thus, the Court must consider the context of this suit under the Voting Rights Act in making a particularized determination of the extent of any privilege, balancing the need for obtaining the information with the impact on legislative sovereignty and the need to "insure that legislators are not distracted from or hindered in the performance of their legislative tasks." Doe

v. Pittsylvania Cnty., Va., 842 F. Supp. 2d 906, 916 n.6 (W.D. Va. 2012). In undertaking this inquiry, the Court notes that many of the documents requested by the subpoenas and discovery requests involve communications with outside parties or are other documents that are considered public records under state law. Requiring production of those documents is not unduly burdensome or invasive of the legislative process. However, other categories of documents may require further scrutiny in balancing the competing interests. In addition, the protections of the attorney-client privilege and work product doctrine can also be claimed by the individual legislators, and those issues have not been addressed in detail as to the specific requests presented. In their briefing and at the hearing, Defendants requested the opportunity to be heard further as to the particular types or categories of documents involved, and Plaintiffs agreed that the parties would still need to address the various categories of documents on a more specific basis. Therefore, the Court will direct the parties to meet and confer to determine what agreement can be reached regarding the requested documents and information, in light of the Court's general conclusions above, with respect to: (1) categories of documents that will be produced, including those outside the scope of a qualified legislative privilege or for which the privilege has been or will be waived; (2) categories of documents to be reflected on a privilege log claiming legislative privilege, attorney-client privilege, or work product protection, so that individual review and challenges can be raised; and (3) categories of documents that could be excluded from the privilege log requirement in order to provide the legislators with sufficient protection from unduly burdensome or invasive inquiry. Specifically as to the third category of documents, the Court notes that the parties agreed in their Electronic Discovery Agreement that

certain categories of documents and communications could be exempt from the privilege log requirement, particularly with respect to attorney-client communications in connection with this litigation. The Court notes that it may be appropriate to include a similar provision for attorney-client communications with individual legislators. The Court further notes that this protection from the privilege log requirement may also be particularly appropriate as to internal documents and communications that were created and circulated only by and between individual legislators and their staff, to prevent unwarranted intrusion and burdensomeness that would accompany even the preparation of a privilege log for these internal deliberations and communications.[2] It may also be that each individual legislator could specifically assert a privilege for these internal communications and deliberations by general category, without requiring an itemizing of all such documents. However, because the parties have not addressed in detail these potential categories, the Court will allow the parties an opportunity to attempt to reach an agreement in light of this Order, and to present any narrowed remaining disputes with respect to particular categories and types of documents for further resolution by the Court. To the extent any dispute remains as to particular categories of documents, the parties should submit a joint status report on or before April 7, 2014, and may submit individual briefing if necessary for consideration of any remaining issues. The joint status report should include deadlines for any agreed-upon

[2] As to these types of documents, the Court notes that the legislative privilege is similar to the "deliberative process privilege," but with the particular need to protect legislative sovereignty and prevent inquiry that would chill legislative action. Cf. Doe v. Nebraska, 788 F. Supp. 2d 975, 985-986 (D. Neb. 2011); Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections, Case No. 11 C 5065, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011); Favors v. Cuomo, 285 F.R.D. 187, 210 and n.22 (E.D.N.Y. 2012).

production, deadlines for preparation of privilege logs, and a proposed briefing schedule to the extent needed as to any remaining, particular categories or issues still in dispute.[3]

Finally, the Court notes that, as discussed during the hearing, legislative immunity or privilege may be waived by any individual legislator. See Marylanders, 144 F.R.D. at 298. Therefore, by April 14, 2014, Defendants must notify Plaintiffs of the identity of any legislator on whom they will rely in response to any preliminary injunction motion, whether by affidavit, testimony, or documentary evidence otherwise subject to legislative privilege, in order to allow Plaintiffs sufficient time to undertake additional discovery with respect to any legislator waiving the legislative privilege.

IT IS THEREFORE ORDERED that the Motions to Quash and Motion to Compel are GRANTED IN PART AND DENIED IN PART to the extent that the Court will not quash the subpoenas in their entirety, nor will the Court compel responses to all of the Plaintiffs' requests, and instead the Court concludes that Defendants' claims of legislative immunity or privilege must be evaluated under a flexible approach that considers the need for the information while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process, as further set out above.

[3] It appears that documents in possession of the State would be subject to production pursuant to the discovery served in this case, while documents in the possession of individual legislators would be subject to production pursuant to the subpoenas, with the same limitations and protections noted above, so the Court has not distinguished between the two. To the extent any issues remain on this point, the parties may address those issues further if necessary in the joint status report.

IT IS FURTHER ORDERED that on or before April 7, 2014, the parties must file a joint report as set out above, presenting any narrowed remaining disputes with respect to particular categories and types of documents for further resolution by the Court.

FINALLY, IT IS ORDERED that on or before April 14, 2014, Defendants must notify Plaintiff of the identity of any legislator on whom they will rely in response to any preliminary injunction motion, whether by affidavit, testimony, or documentary evidence otherwise subject to legislative privilege, in order to allow Plaintiffs sufficient time to undertake additional discovery with respect to any legislator waiving the legislative privilege.

This, the 27th day of March, 2014.

/s/ Joi Elizabeth Peake
United States Magistrate Judge

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

NORTH CAROLINA STATE CONFERENCE, OF THE NAACP, et al., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his Official capacity as Governor of North Carolina, et al., Defendants.	)	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	)	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	)	1:13CV861

MEMORANDUM ORDER

THOMAS D. SCHROEDER, District Judge.

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

I. BACKGROUND

A. Nature of the Claims and Procedural Background

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

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

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

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

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

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

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

B. Subpoenas to Third-Party Legislators

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

C. The Magistrate Judge's Order

The Magistrate Judge held a hearing on the various motions

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

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

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

D. Legislators' Objections

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

In the second area of objection, the legislators take issue

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

II. ANALYSIS

A. Standard of Review

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

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

B. Scope of the Magistrate Judge's Order

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

> Specifically, the Court concludes that while the judicially-created doctrine of 'legislative immunity' provides individual legislators with absolute immunity from liability for their legislative acts, that immunity does not preclude all discovery in the

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

> context of this case; instead, claims of legislative immunity or privilege in the discovery context must be evaluated under a flexible approach that considers the need for the information in the context of the particular suit presented, while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process.

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

C. First Group of Objections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] The Fourth Circuit later relied upon Arlington Heights in stating that one method of proving discriminatory intent in Equal Protection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The doctrine of legislative immunity (both in its substantive and testimonial aspects) itself embodies fundamental public policy. It insulates legislators from liability for their official acts and shields them from judicial scrutiny into their deliberative processes. The doctrine is a bulwark in upholding the separation of powers. It does not, however, necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy.

Id. at 304 (opinion of Judges Murnaghan and Motz) (footnote omitted). Because of the "unique nature of legislative redistricting and the fact that testimonial legislative immunity

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

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

legislator source, the Marylanders court required the plaintiffs to pursue that before seeking to impinge upon the privilege.[9]

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

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

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

[11] In assessing need, many courts have applied a five-factor balancing test:

> (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the

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

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

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

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

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

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

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

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

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

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

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

This is the extent of the narrow question before the court at this time. Therefore, the parties should resume their effort to meet and confer to attempt to comply with the Order, consistent with this Memorandum Order. Whether Plaintiffs' requests seek a document or group of documents that implicates the legislative privilege will be for the Magistrate Judge to determine, keeping in mind the relevant authorities, the purpose of the legislative privilege, evidence that the legislators' compliance would divert them from their legislative duties and/or impose an impermissible burden upon them, and the possibility of waiver as to any document, among other things.[15]

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

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

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

D. Other Objections

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

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

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

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

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

III. CONCLUSION

For the reasons set forth above,

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

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

IT IS FURTHER ORDERED that the Order's deadline of April 14 is reset to noon on May 19, 2014, by which Defendants must notify Plaintiffs of the identity of any legislator on whom they intend to rely in response to any preliminary injunction motion, whether by affidavit, testimony, or documentary evidence otherwise subject to the legislative privilege, in order to allow Plaintiffs sufficient time to undertake additional discovery with respect to those legislators.

/s/ Thomas D. Schroeder
United States District Judge

May 15, 2014