No. 201P2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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MARGARET DICKSON, *et al.*, *Plaintiffs*, v. ROBERT RUCHO, *et al.*, *Defendants*.	)	**From Wake County** 11 CVS 16896 11 CVS 16940 (*Consolidated*)
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*, *Plaintiffs*, v. THE STATE OF NORTH CAROLINA, *et al.*, *Defendants*.	)	

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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR STAY

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No. 201P12 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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MARGARET DICKSON, *et al.*, *Plaintiffs*, v. ROBERT RUCHO, *et al.*, *Defendants*.	)	**From Wake County** 11 CVS 16896 11 CVS 16940 (*Consolidated*)
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RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR STAY

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Respondents in these consolidated cases respectfully submit this response in opposition to the Petition for Writ of Supersedeas and Motion for

Temporary Stay of Defendant-Petitioners Thom Tillis, Philip E. Berger, Bob Rucho, and David Lewis ("Legislative Defendants").

STATEMENT OF THE CASE

Plaintiffs challenge the constitutionality of the State House, State Senate and Congressional redistricting legislation enacted by the General Assembly in July 2011 and numerous districts contained within that legislation. 2011 S.L. 402, 403 and 404, all as amended, respectively, by 2011 S.L 413, 414 and 415. The legal basis for these complaints include violations of the constitutional principles established by this Court and the United States Supreme Court in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*") and *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2004) ("*Stephenson II*"), *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), and *Shaw v. Reno*, 509 U.S. 630 (1993). The factual basis for these complaints include the General Assembly's decisions in enacting this legislation to ignore county lines, gerrymander African-American citizens into segregated districts and engage in the wholesale splitting of precincts.

Upon the filing of the complaints, pursuant to N.C. Gen. Stat. § 1-267.1 the Chief Justice entered an order appointing Superior Court Judges Paul Ridgeway, Alma Hinton and Joseph Crosswhite as the members of the three-judge panel

required by that statute to serve as the trial court to hear challenges to redistricting legislation.

Discovery began on November 8, 2011 when Plaintiffs served Requests for Production of Documents on Defendants pursuant to Rule 34 of the North Carolina Rules of Civil Procedure for all communications concerning the enactment of the redistricting legislation. These requests were based on the principles codified in Article 17 of Chapter 120 of the General Statutes: upon the enactment of legislation all citizens have the right to know all the information available to the General Assembly when enacting legislation generally, N.C. Gen. Stat. § 120-131, and when enacting redistricting legislation particularly, N.C. Gen. Stat. § 120-133.

On January 13, 2012, Defendants objected to these requests and asserted generally that some documents sought were "protected by attorney-client privilege or legislative privilege, or [are] otherwise privileged, or [are] attorney work product." These privileged documents were not identified and no objections were made on the grounds of relevance.[1] On February 24, 2012, Defendants amended these general objections to describe some broad categories of documents withheld on the grounds of privilege. These documents as identified by Defendants consist

[1] The test for relevance with regard to a motion to compel the production of documents is whether the document likely will lead to the discovery of admissible evidence. N.C. Gen. Stat. § 1A-1, Rule 26.

primarily of emails between counsel and legislators or their staff regarding the impact of census data on redistricting plans, the legal requirements for legislative and congressional districts, and advice regarding public statements.

On February 29, 2012, Plaintiffs moved pursuant to Rule 37 of the Rules of Civil Procedure for an order compelling Defendants to produce all documents withheld. On April 20, 2012, the trial court concluded that the provisions of N.C. Gen. Stat. § 120-133 are plain and unambiguous and issued a unanimous order granting Plaintiffs' motion and ordering Defendants to produce all documents withheld. Specifically the trial court concluded:

> Although certain communications by and between members of the General Assembly and legal counsel pertaining to redistricting plans may have originally been cloaked with privilege, the General Assembly, by enacting N.C. Gen. Stat. § 120-133 expressly waived any and all such privileges once those redistricting plans were enacted into law.
>
> This waiver is clear and unambiguous; it is applicable "notwithstanding any other provision of law." The waiver applies regardless of whether the privilege is claimed under a theory of attorney-client privilege, the work-product doctrine or legislative privilege.

(April 20, 2012 Order ¶¶ 20-21.) On April 24, 2012, the Defendants filed notice of appeal to this Court and asked the trial court to stay its order pending appeal. The trial court issued a temporary stay of its April 20 Order pending a response to

Defendants' stay motion from Plaintiffs. Following Plaintiffs' response, the trial court unanimously denied the stay requested by Defendants on the grounds that their appeal was insubstantial.

ARGUMENT

I. No Harm Will Result to the Legislative Defendants by Complying with a Statute Enacted by the General Assembly.

The statute principally at issue here, N.C. Gen. Stat. § 120-133, was enacted in 1983 by the General Assembly. The title to that legislation was "An Act to Provide Confidentiality In Legislative Communications." 1983 S.L. 900. This legislation balanced the right of citizens to know the advice that members of the General Assembly have received in enacting legislation against the interest of individual legislators in protecting the privacy of their communications with legislative staff and consultants and advisors paid with taxpayer funds. That balance was plainly struck by this legislation: before a bill becomes law all communication between legislators and legislative committees and their staff or their advisors paid with taxpayer funds are confidential and not available to any citizens; once the bill becomes law those communications lose their confidentiality and immediately become available for inspection by all citizens. The statute only makes public, and the trial court only ordered the production of, written

communications and documents prepared by state-paid employees and consultants prior to the enactment of the redistricting plans.

In the extraordinary motion now before the Court, the four members of the General Assembly who are Defendants in these matters assert that they will "suffer irreparable harm" if this Court does not ignore the balance long ago struck by the General Assembly itself between the interests of individual legislators in keeping communications confidential until legislation is enacted and the public's right to know the information available to legislators once the legislation is enacted. (Defs.' Pet. 8.) These four defendants are in effect asking this Court to second-guess the legislature and rewrite the statute. Separation of powers principles prevent this Court from second-guessing the balance struck by the General Assembly and delaying the right of citizens, including the citizens who are Plaintiffs in these cases, to access these materials wrongly withheld for months by Defendants. Absent some constitutional defect in this long-standing legislation—and there is none—this Court has no power to rebalance the interests struck by the General Assembly in 1983 in this manner requested by the Legislative Defendants. As this Court explained in *Person v. Watts*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922):

> The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government. They do not assume to direct the course of legislation or to share in the making of the laws or to exercise any power to repeal a statute. They concede that the fundamental law guarantees to the Legislature the inherent right to discharge its functions and to regulate its internal concerns in accordance with law without interference by any other department of the government, and that their jurisdiction is limited to interpreting and declaring the law as it is written. It is only when the Legislature transcends the bounds prescribed by the Constitution, and the question of the constitutionality of a law is directly and necessarily involved that the courts may say, "Hitherto thou shalt come, but no further."

Cases such as *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002), evaluating the interests of private litigants in protecting the privacy of their privileged communications pending appeal, simply have no relevance to these cases where the interests of citizens have been balanced by the General Assembly itself against the interests now asserted by four of the 170 members of the General Assembly.

II. <u>The Public Will be Harmed if a Stay is Issued.</u>

Defendants contend they will be harmed if they are not granted a stay. In fact, it is the Plaintiffs and the citizens of North Carolina who will suffer if a stay is entered. In the context of redistricting litigation, there exists a "substantial public interest in early resolution of challenges affecting the fundamental electoral processes." *Stephenson I* at 368 n.2, 562 S.E.2d at 388 n.2 (2002) (quoting

Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983) (declining to abstain from ruling upon a state-law issue where application of such state law was "not sufficiently uncertain")). Consistent with this principle, the trial court issued a scheduling order providing for final resolution of this matter at the trial level by the fall of 2012. Exhibit A. In this case, a delay to allow for the appeal from an order of the trial court, which held that N.C. Gen. Stat. § 120-133 "clearly" and "unambiguously" requires the production of the requested documents, makes compliance with the scheduling order impossible and eliminates the possibility of any relief for the citizens of North Carolina, including the Plaintiffs, in time for the 2014 elections. Delaying this litigation to that extent would mean that the voters of North Carolina would experience two election cycles under an unconstitutional redistricting scheme. Here, justice delayed truly is justice denied.

III. The Legislative Defendants' Assertion that the Relevant Documents are Privileged is Contrary to the Plain Meaning of N.C. Gen. Stat. § 120-133.

The General Assembly has in plain and unambiguous terms waived any privileges that may exist as to communications concerning redistricting between legislators and legislative employees. N.C. Gen. Stat. § 120-133 provides that:

> Notwithstanding any other provision of law, all drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the

> North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant district plan becoming law.[2]

N.C. Gen. Stat. § 120-133 (emphasis added). The term "legislative employees" has been further specifically defined to include lawyers and consultants advising legislators, legislative committees and the legislature itself with regard to redistricting so long as they are "paid with state funds." N.C. Gen. Stat. § 120-129 defines the term "legislative employee" as used in N.C. Gen. Stat. § 120-133 to include "consultants and counsel to members and committees of either house of the General Assembly or of legislative commissions who are paid by State funds." Where the legislature defines a word used in a statute, that definition is controlling even though the meaning may be contrary to its ordinary and accepted definition. *State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981). In short, there is simply nothing to suggest that the trial court erred when it gave effect to a "clear" and "unambiguous" reading of N.C. Gen. Stat. § 120-133.

A. The statute applies to all privileges, not just legislative privilege.

The Legislative Defendants claim that they are likely to succeed on the merits of their appeal because the trial court erroneously construed the statute as

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[2] As the Court of Appeals has noted, the term "notwithstanding" means "in spite of, nevertheless, or in spite of the fact that, depending upon whether it is used as a preposition, an adverb, or a conjunctive." *Yan-Min Wang v. UNC-CH Sch. of Med.*, ___ N.C. App. ___, 716 S.E.2d 646, 652 (2011).

waiving all privileges, rather than just the legislative privilege. The Legislative Defendants cite no authority for this proposition, despite the statute's broad mandate that "notwithstanding any other provision of law upon enactment "all...documents prepared by legislative employees for legislators concerning redistricting...are no longer confidential and become public records." Had the Legislature intended the result the Legislative Defendants are seeking, it would have defined the term "confidential" to include only the legislative privilege and not attorney-client or the attorney work-product privileges. The absence of any limiting language and the inclusion of "consultants and counsel" in the definition of a "legislative employee" foreclose the Legislative Defendants' argument that the statute does not waive the attorney-client privilege for members of the General Assembly.

Additionally, the Legislative Defendants contend the trial court interpreted N.C. Gen. Stat. § 120-133 as stripping legislators of their legislative privilege even after the enactment of the plans, but as discussed in Part IV, *infra*, the trial court's order does not have that effect. In fact, the trial court concluded that "[t]he waiver of confidentiality of drafting requests, information requests and documents became effective upon the ratification of 2011 S.L. 402, 2011 S.L. 403 and 2011 S.L. 404 in July 2011." (April 20, 2012 Order ¶ 23.) There is no basis in either the

unambiguous language of the statute or the trial court's Order for the position taken by the Legislative Defendants.

B. Because the language of the statute is clear, the Court should not apply rules of statutory construction; there is no ambiguity for the Court to construe.

The Legislative Defendants wrongly contend that this Court should apply the rule that statutes in derogation of the common law must be strictly construed. (Defs.' Pet. 11.) When statutes are plain on their face, there are no rules of statutory construction to apply. "The primary goal of statutory construction is to ensure that the purpose of the legislature is accomplished. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Investigation of the Death of Miller*, 357 N.C. 316, 324, 584 S.E.2d 772, 780 (2003) (internal citations omitted) (holding that a decedent's personal representative had no power to waive the decedent's attorney-client privilege, where such power was not specifically enumerated in a statute).

To the extent that any rule of statutory construction applies, it is that the public records laws must be construed liberally. N.C. Gen. Stat. § 120-133 provides that all documents prepared by legislative employees for legislators are no

longer confidential and become public records once the redistricting plans become law. This Court described other public records law as fostering transparency in government, stating "the general rule in the American political system must be that the affairs of government be subject to public scrutiny." *News & Observer Pub. Co., Inc. v. Poole,* 330 N.C. 465, 475, 412 S.E.2d 7, 13 (2002). Recognizing that the people must have access to the information used by those who govern, North Carolina's courts have repeatedly construed the public records law liberally while narrowly reading its exceptions. *News & Observer Pub. Co., Inc v. Baddour,* 10 CVS 1941 (N.C. Super. Ct. May 12, 2011). This Court should do the same in this case involving matters of great public importance.

C. The trial court's order is internally consistent.

The Legislative Defendants contend that the trial court's Order is internally inconsistent because it first construes the statute as a waiver of both the attorney-client privilege and work-product doctrine, but then allows the legislative defendants to assert a limited common law work product privilege. However, Defendants misconstrue the Order. The trial court held that under the plain words of N.C. Gen. Stat. § 120-133 all documents concerning a proposed redistricting plan are confidential until the plan is enacted, and that upon enactment of a plan all of those documents become non-confidential and public. The trial court did

observe that N.C. Gen. Stat. § 120-133 should not be interpreted to make public non-privileged, post-enactment communications Defendants had with their lawyers about these lawsuits. In the words of the trial court, the waiver established by N.C. Gen. Stat. § 120-133 does not apply to "documents prepared solely in connection with the *redistricting litigation*, and such documents would remain confidential under the attorney-client privilege or the work-product doctrine." (April 20, 2012 Order ¶ 10) (emphasis in original). This portion of the trial court's order is entirely consistent with Plaintiffs' position. They did not seek, and the court did not order, Defendants to turn over post-enactment attorney-client privileged or work-product protected documents related to these lawsuits.

The trial court further observed that it needed the parties' assistance in determining where to draw the pre-enactment, post-enactment line. But this was not because of any ambiguity or uncertainty in N.C. Gen. Stat. § 120-133; rather, it was because the plans had been enacted twice—first in July and then re-enacted in November to cure defects in the original enactments. These dual enactment dates thus required the parties and, if necessary, the court to examine documents falling within the July-November timeframe to decide whether they related to enactment of the revised legislation or to these lawsuits.

IV. Even had N.C. Gen. Stat. § 120-133 not been enacted, the Legislative Defendants' Claim of Work Product Protection from March of 2011 is Unfounded.

Ignoring the plain language of N.C. Gen. Stat. § 120-133, the Legislative Defendants argue that all documents and communications before the first enactment of the redistricting legislation in July 2011 were created "in anticipation of litigation" and are therefore privileged.

The Legislative Defendants have presented no evidence to satisfy their burden of showing that the documents were prepared in anticipation of litigation. *Cf. Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 310, 628 S.E.2d 851, 864 (2006) (observing that it "is well established, even with respect to claims of work product and attorney-client privilege, that 'orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion'"). The Legislative Defendants have provided no detailed privilege log and have identified in only the most cursory terms the identity of the persons who created or received the documents withheld on the basis of privilege, namely Tom Farr, Phil Strach, Alec Peters, Tiare Smiley, Michael Carvin, and Michael McGinley, and legislators Bob Rucho, David Lewis, Thom Tillis, Phil Berger, and legislative staff, as well as to redact parts of the invoices for their lawyers' services.

During discovery, Plaintiffs requested and received from Defendants contracts and invoices for redistricting services rendered to and paid for by the state, copies of which are attached hereto as Exhibit B. These contracts and invoices reveal that legal advice and services regarding redistricting were provided to legislators and legislative committees by several members of the Ogletree firm and Jones Day firm including Tom Farr, Phil Strach, Michael Carvin and Michael McGinley and that these firms were paid for those services with state funds. These invoices further reveal that legal advice and services regarding redistricting were provided to legislators and legislative committees by members of the Attorney General's staff, specifically Alec Peters and Tiare Smiley. They, of course, were paid for those services with state funds.

As of the end of July 2011, more than three months before the above-captioned civil actions were filed, the Ogletree Deakins firm had billed the state for 455 hours of legal services, in the total amount of $147,259. Importantly, billing records from Ogletree Deakins show that the first reference to "litigation" does not appear to have occurred until November 4, 2011, which coincides with the filing of the above-captioned lawsuits.[3] The specter of litigation in redistricting matters

[3] The *Dickson* Complaint was filed on November 3, 2011, and the *NC NAACP* Complaint was filed on November 4, 2011.

cannot excuse total non-compliance with the unambiguous words of the statute. The federal district court for the Eastern District of Wisconsin declined to so hold in the redistricting litigation of *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 U.S. Dist. LEXIS 146869, at *7-8 (E.D. Wis. Dec. 20, 2011) (attached as Exhibit C):

> To do so would be a slap in the face to Wisconsin's citizens: essentially, the Court would be saying that the Legislature could shield all of its actions from any discovery. The Legislature could *always* have a reasonable belief that *any* of its enactments would result in litigation. That is the nature of the legislative process: it often involves contentious issues that the public may challenge as being unconstitutional. As such, if the Legislature wished to obscure its legislative actions from the public eye then, conceivably, all it would need to do would be to retain counsel or other agent that it termed to be 'in anticipation of litigation.' The Court is unwilling to travel that road, for it would be 'both unseemly and a misuse of public assets' to permit an individual hired with taxpayer money 'to conceal from the taxpayers themselves otherwise admissible evidence' of allegedly unconstitutional motives affecting their voting rights.

V. Even in the Absence of N.C. Gen. Stat. § 120-133, the Legislative Defendants' Claim of Privilege is Defective.

The Three-Judge Panel found that a plain reading of N.C. Gen. Stat. § 120-133 shows the Legislature intended a waiver of all forms of privilege, including attorney-client, that is "clear and unambiguous." (April 20, 2012 Order ¶ 21.) The Legislature's statutory policy and the Panel's reading underscore the necessity of

transparency in the redistricting process, a process where the actions of one legislative session affect the rights of voters for a decade.

Even states without such a clear and emphatic statutory waiver have also held that a legislature cannot cloak its actions in privilege when it employs outside law firms in the redistricting process. In Wisconsin, a federal three-judge panel found that the documents created by a private lawyer hired by the Wisconsin Legislature to provide legal advice related to redistricting were not privileged. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2012 U.S. Dist. LEXIS 501 (E.D. Wis. Jan. 3, 2012) (attached as Exhibit D). The Wisconsin plaintiffs made claims "under the both the Voting Rights Act and the Equal Protection Clause, claims where proof of a legislative body's discriminatory intent is relevant and extremely important as direct evidence in both types of claims." *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 2011 U.S. Dist. LEXIS 146869, at *5-6 (E.D. Wis. Dec. 20, 2011). To obtain this evidence, the plaintiffs subpoenaed the lawyer to provide "any and all documents used by [him] or members of the Legislature to draw the 2011 redistricting maps." *Id.* at *1. In three separate orders, the court repeatedly rejected the legislative defendants' claim of privilege to documents created by the outside counsel. *Id.* Ordering the defendants to produce the requested documents, the Wisconsin court explained:

> The fact does not change that the Legislature has continued its path of opposition to the plaintiffs' discovery efforts by claiming privilege at multiple turns. Those argued privileges, though, exist in derogation of the truth. *See, e.g., In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000); *see also Jaffee v. Redmond*, 518 U.S. 1, 9, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996) (citing *United States v. Bryan,* 339 U.S. 323, 331, 70 S. Ct. 724, 94 L. Ed. 884 (1950), *United States v. Nixon*, 418 U.S. 683, 709, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980), and *Elkins v. United States*, 364 U.S. 206, 234, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960), all for the principle that privileges are generally disfavored and justified only by grand public goods). And the truth here—regardless of whether the Court ultimately finds the redistricting plan unconstitutional—is extremely important to the public, whose political rights stand significantly affected by the efforts of the Legislature. On the other hand, no public good suffers by the denial of privilege in this case. Thus, as it has already done twice, the three-judge panel again declines to hold that Mr. Handrick or any of his documents are entitled to any of the privileges being asserted.

Baldus v. Members of the Wis. Gov't Accountability Bd., 2012 U.S. Dist. LEXIS 501, at *12-13 (E.D. Wis. Jan. 3, 2012). The Wisconsin court further held that the defendants' claims of attorney-client privilege were an "attempt to cover up a process that should have been public from the outset, despite the Legislature's concerted efforts to mask the process behind the closed doors of a private law firm." *Id.* at *17. In the case now before the Court, Defendants similarly try to

obscure the information that the General Assembly relied upon when redistricting by claiming a privilege already extinguished by N.C. Gen. Stat. § 120-133.

Here, as in the Wisconsin case, the information requested by Plaintiffs is important to the public and will help determine the constitutionality of the plans. Plaintiffs allege that the redistricting plans violate the Equal Protection Clauses of the state and federal constitutions by intentionally discriminating against African-American voters. Determining the basis for legislative decisions plays an important role in determining legislative intent. *Arlington Heights v. Met. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Further, the Defendants have raised compliance with the Voting Rights Act as a defense to Plaintiffs' racial gerrymandering, Whole County Provision, and *Stephenson*-based claims. Understanding what the legislature understood about the governing legal standards at the time it was drawing the redistricting plans is key to assessing the merit of the proffered defenses. The discovery materials being withheld are relevant to Plaintiffs' claims and contain information that Plaintiffs cannot discover in any other manner.

VI. The Legislative Defendants are not Entitled to a Stay Pursuant to N.C. Gen. Stat. § 1-294.

The Legislative Defendants argue that they have filed an interlocutory appeal as of right and that the trial court erred when it did not issue an automatic

stay pursuant to N.C. Gen. Stat. § 1-294. That argument is not well-founded. As a general matter, an interlocutory order is immediately appealable only if such order affects a substantial right of the parties involved. *See* N.C. Gen. Stat. §§ 1-277(a); 7A-27(d). "[T]he appellants must do more than merely assert that the order affects a substantial right; they must show why the order affects a substantial right. 'Where the appellant fails to carry the burden of making such a showing to the Court, the appeal will be dismissed.'" *Pigg v. Massagee*, 196 N.C. App. 348, 350, 674 S.E.2d 686, 688 (2009) (dismissing appeal from denial of Rule 60(b) motion) (internal citations omitted). "The trial court has the authority ... to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable. Pursuant to Appellate Rule 8, a party may apply to the appellate courts for a stay when the trial court chooses to proceed with the matter." *RPR & Associates v. UNC*, 153 N.C. App. 342, 348, 570 S.E.2d 510, 514 (2002).

While there is authority for the proposition that an order requiring the production of allegedly-privileged material is immediately appealable, even though interlocutory, *see, e.g.*, *In re Investigation of the Death of Miller*, 357 N.C. 316, 584 S.E.2d 772 (2003), this Court has emphasized that this rule does not apply

where the assertion of such privilege is "frivolous or insubstantial." *Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999).[4]

The Legislative Defendants argue that "there is no dispute that orders compelling the production of information which *may* be protected by common law or statutory privileges affect a substantial right." (Defs.' Pet. 15) (emphasis supplied). However, the trial court found that "the General Assembly, by enacting N.C. Gen. Stat. § 120-133, expressly waived any and all such privileges once those redistricting plans were enacted into law" and "[t]his waiver is *clear and unambiguous*." (April 20, 2012 Order ¶¶ 20-21.) In other words, the probability that the Legislative Defendants' documents "may" be protected by the attorney-client privilege is very small, especially in light of the rule that it "is well established, even with respect to claims of work product and attorney-client privilege, that 'orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion.'" *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 310, 628 S.E.2d 851, 864 (2006). Thus, in order to prevail on any appeal, the Legislative Defendants would have to show that the trial court abused its discretion in holding

[4] *Sharpe* involved a statutory privilege, but the same rule applies to common-law privileges as well. *See Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782 (2001).

that N.C. Gen. Stat. § 120-133 "clearly" and "unambiguously" waived the attorney-client privilege. Here, such an assertion of privilege is "insubstantial" or "frivolous," per the rule in *Sharpe v. Worland*, and the Legislative Defendants are not entitled to an automatic stay pursuant to N.C. Gen. Stat. § 1-294.

CONCLUSION

For the reasons herein stated, the Plaintiffs respectfully request that this Court deny the Defendants' Petition for Writ of Supersedeas and deny the Motion for Temporary Stay.

Respectfully submitted, this the 9th day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing ***PLAINTIFFS' RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR STAY*** on counsel by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses:

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Additionally, a copy of the foregoing document was served on counsel for Plaintiffs in *NAACP v. State of North Carolina*, Wake County Superior Court Case No. 11-CVS-16940, via e-mail to the following e-mail addresses:

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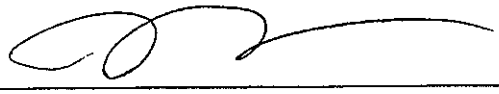
This the 9th day of May, 2012.



Edwin M. Speas