IN THE
Supreme Court of Virginia

RECORD NO. 160643

JOHN S. EDWARDS, *et al.*,

Appellants,

v.

RIMA FORD VESILIND, *et al*.,

Appellees.

REPLY BRIEF OF APPELLANTS JOHN S. EDWARDS, *et al.*

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INTRODUCTION

The Virginia Senators have exercised their rights guaranteed to them under the Speech or Debate Clause of Virginia's Constitution. For exercising their constitutional rights, the Vesilind Appellees cast unsupported aspersions, claiming that the Virginia Senators want to dramatically expand the Speech or Debate Clause to 'cloak in secrecy' all of their communications that tangentially relate to the redistricting process. This unsupported claim has no basis in the record as the Virginia Senators ask only that this Court apply the Speech or Debate Clause in its long-established and existing form. By contrast, the Vesilind Appellees seek to narrow the scope of Speech or Debate Clause through claims, for example, that the Speech or Debate Clause categorically never applies to communications with third parties or to persons not paid from a specific state budget line item.

The Vesilind Appellees' subpoena cuts right to the heart of what the Speech or Debate Clause protects, namely, the crafting, drafting, deliberating, and amending legislation that is constitutionally committed to the General Assembly. Existing case law supports the application of the legislative privilege in this case and thus the Virginia Senators do not seek to expand the scope of the Speech or Debate Clause.

Instead, it is the Vesilind Appellees' who are attempting to narrow the Clause's scope in the service of their preferred policy agenda claiming that redistricting legislation warrants different treatment by the courts. (App. Opp.'n Br. 6, 18 n.4 30). The Vesilind Appellees stated need for invading the legislative sphere is to determine whether the Virginia Senators failed to make a good-faith effort in their crafting, drafting, deliberating and amending the compactness of districts. (App. Opp.'n Br. 4). But the application of the Speech or Debate Clause is not at the mercy of the pleader. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Furthermore, determining the good-faith of the Virginia Senators is bereft of judicially manageable standards. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring) (noting that without judicially manageable standards to determine a partisan gerrymander inconsistent results are likely). Thus, the Court should grant the requested relief. (Va. Sen. Op. Br. 50).[1]

[1] Contrary to the Vesilind Appellees' characterization (App. Opp.'n Br. 5 n.2), the Virginia Senators recognize that the Supreme Court has ruled that the scope of the constitutionally based Speech or Debate Clause is as broad as the common law. *Supreme Court v. Consumers Union of United States*, 446 U.S. 719, 733 (1980). The Virginia Senators, however, dispute Vesilind's reliance on the holdings of *Page* and *Bethune-Hill*, because both of those cases purported to apply the common law privilege but applied it narrowly, like the spousal privilege, and balanced the need of the plaintiffs against application of the privilege. *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 660-63 (E.D. Va. 2014); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015). This is error. *See Eastland v.*

ARGUMENT

"[T]hroughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. 169, 178 (1966). Furthermore, the Clause "serves the *additional function* of *reinforcing* the separation of powers..." *See id*. (emphasis added).

Despite our Founding Fathers' fear of legislative overreach, (App. Opp.'n Br. 11), they "carefully protected" legislative freedom with the Speech or Debate Clause, the protections of which were subsequently adopted by the states as well. *See Tenney,* 341 U.S. at 375. That our system of government's separation of powers has proven successful, (App. Opp.'n Br. 12-13), does not mean that we may now dismiss the framers' concerns that led to the unanimous adoption—without debate—of the Speech or Debate Clause. *See United States v. Brewster*, 408 U.S. 501, 508 (1972); *Johnson*, 383 U.S. at 177.

United States Servicemen's Fund, 421 U.S. 491, 503, 509 n.16 (1975) (privilege applies broadly and absolutely, without balancing).

I. AOE 1: Communications With Consultants Are Protected.

A. Application Of The Speech Or Debate Clause Depends On The Act In Question, Not The Actor.

The Virginia Senators demonstrated that in determining whether the Speech or Debate Clause applies, the Supreme Court analyzes the act in question, not the actor. *See* (Va. Sen. Op. Br. 36). *See McSurely v. McClellan*, 553 F.2d 1277, 1288, n.36 (D.C. Cir. 1976) (*en banc*) ("[S]ubsequent decisions of the Court make clear that the immunity available is defined by the nature of the act involved, not the status of the actor.") (citing three U.S. Supreme Court cases). The Vesilind Appellees do not respond to this argument.

The U.S. Supreme Court, along with several other federal and state courts, previously held that the Speech or Debate Clause "protects communications that are within the legislative sphere that are between legislators and consultants." (Va. Sen. Op. Br. 28-31, 33) (citing cases from the U.S. Supreme Court, federal district courts, and two state appellate courts). These prior decisions recognize that, for example, communications between legislators and the executive director of partisan organizations like

a local Republican Party, are protected. *See Almonte v. City of Long Beach*, 478 F.3d 100, 104, 107 (2d Cir. 2007) (*Almonte II*).[2]

B. *Page*'s 'Paid-For-By' Test Should Not Be Adopted.

Because the application of the Speech or Debate Clause turns on the act in question, and not the actor, how the actor is paid is irrelevant. (Va. Sen. Op. Br. 27-28, 36). The Vesilind Appellees' claim that the legislative committee in *Doe* paid the consultant citing solely an unsupported and qualified footnote in *Page*. (App. Opp.'n Br. 25); *Page v. Va. State Bd. Of Elections*, 15 F. Supp. 3d 657, 662 n.2 (E.D. Va. 2014) (noting that the committee in *Doe* "appeared" to have retained the consultant). Reliance on this qualified and unsupported speculation is misplaced. The suggestion that

[2] The Vesilind Appellees attempt to draw a distinction between the scope of legislative privilege and legislative immunity without any citation of authority. (App. Opp.'n Br. 18, 25-26). But Speech or Debate Clause immunity and privilege are two sides of the same coin and are therefore discussed interchangeably. *See Lee v. Va. State Bd. of Elections*, No. 15-357, 2015 U.S. Dist. LEXIS 171682 *8 (E.D. Va. Dec. 23, 2015); *see Simpson v. City of Hampton*, 166 F.R.D. 16, 18 (E.D. Va. 1996); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95 (S.D.N.Y. 2003). Legislative privilege exists to protect legislative immunity. *See EEOC v. Wash. Suburban Sanitary Comm'n,* 631 F.3d 174, 181 (4th Cir. 2011) (*WSSC II*). The two have the same scope because discovery procedures can prove just as cumbersome and distracting as being named parties to a lawsuit. *See id.*

the legislative committee retained the consultant is either erroneous, irrelevant, or both.[3]

The Virginia Senators refuted the necessity and propriety of *Page's* extra-textual 'paid-for-by' test in their opening brief. *See* (Va. Sen. Op. Br. 34-37). Without addressing these arguments, the Vesilind Appellees nevertheless insist that this Court graft *Page's* extra-textual 'paid-for-by' test onto the Speech or Debate Clause to determine whether the Clause's protections apply to any given act. (App. Opp.'n Br. 29-30). As noted previously, (Va. Sen. Op. Br. 26-27), the Supreme Court did not address the employment status or compensation package of either the consultant or the investigator in *Doe v. McMillan.* The Supreme Court's analysis begins and ends with whether the *act*, not the actor, is fairly within the legislative sphere. *See Tenney*, 341 U.S. at 378. If the act falls fairly within the legislative sphere, then the privilege applies absolutely and without regard to the various contextual and policy-related concerns raised by the Vesilind Appellees. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975).

[3] Vesilind Appellees' complaint notwithstanding (App. Opp.'n Br. 23), the Virginia Senators explained their citation of *Gravel* in support of the assertion that the Speech or Debate Clause protects consultants. (Va. Sen. Op. Br. 26-27) (noting that Dr. Rodberg was an 'aide' that Senator Gravel 'hired' the same day as the Pentagon Papers were published and further noted that his role seemed limited and temporary to that project).

Similarly, the Vesilind Appellees attempt to distinguish *Ariz. Indep. Redistricting Comm'n.,* from the present case because there the Commission had constitutional authority to hire consultants. (App. Opp.'n Br. 26-27). Although true, the court there did not rely on this provision to justify its holding. Instead, the court relied on *Gravel* and analyzed the function the consultant served, as well as the act in question, and held that the Speech or Debate Clause protected communications between the Commission and the consultant. *See Ariz. Indep. Redistricting Comm'n v. Fields,* 206 Ariz. 130, 139-40, 75 P.3d 1088, 1097-98 (Ariz. Ct. App. 2003) ("The manner of employment does not affect the consultant's function within the legislative process.").[4]

C. <u>Vesilind Appellees' Cited Cases Are Of Dubious Validity.</u>

The Vesilind Appellees cite no fewer than four cases for the proposition that the Speech or Debate Clause never protects communications between legislators and 'knowledgeable outsiders' as a categorical matter. (App. Opp.'n Br. 28). Each case cited, however, relies on

[4] The Rhode Island Supreme Court held that the Speech or Debate Clause protected communications with the consultant to the General Assembly's redistricting commission. *See Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984). That the Supreme Court did not analyze the consultant's employment status or compensation package, (App. Opp.'n Br. 27), demonstrates that those facts were irrelevant to finding the Speech or Debate Clause protected communications with the consultant.

precedent of dubious validity. *See N.C. State Conf. of the NAACP v. McCrory,* No. 13-6581, 2014 U.S. Dist. LEXIS 185130 *22-23 (M.D.N.C. Nov. 20, 2014) (citing *Almonte v. Long Beach*, No. CV 04-4192, 2005 U.S. Dist. LEXIS 46320 (E.D.N.Y. July 27, 2005) (*overruled by Almonte II*, 478 F.3d at 104, 107)).[5] Furthermore, the court's reliance on *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174 (4th Cir. Md. 2011) ('*WSSC II*') non-exhaustive list of legislative acts, *id*. at *22-23, is also misplaced because *WSSC II* cannot conflict with *Bruce v. Riddle*'s holding that the Speech or Debate Clause protected communications between county council members and local interest groups. *Bruce v. Riddle*, 631 F.2d 272, 279-80 (4th Cir. 1980).[6]

The Vesilind Appellees also rely on *ACORN v. County of Nassau*, No. 05-2301, 2007 U.S. Dist. LEXIS 71058 *19 (E.D.N.Y. Sept. 25, 2007), for the same proposition. However, the magistrate judge's ruling there was modified by the district judge, who ruled that the Speech or Debate Clause protected communications with the consultant *after* the consultant submitted their initial report. *See ACORN v. County of Nassau*, No. 05-2301, 2009 U.S. Dist.

[5] The holding in *Almonte II* also makes questionable the statement in *Rodriguez v. Pataki*, that communications with "knowledgeable outsiders" are not protected under the Speech or Debate Clause. *See Rodriguez v. Pataki* , 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003).

[6] *See Busby v. Crown Supply*, 896 F.2d 833, 840-841 (4th Cir. 1990) (noting that circuit court panels cannot overrule each other).

LEXIS 82405 at *24-25 (E.D.N.Y. Sept. 10, 2009) (*ACORN II*) (citing *Almonte II*, 478 F.3d at 107); *see also Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-5065, 2011 U.S. Dist. LEXIS 117656 (N.D. Ill. Oct. 12, 2011) (stating that communications with outsiders are not privileged but relying on the first *ACORN* decision, modified in *ACORN II*, and the *Rodriguez* decision, overruled by *Almonte II*). Additionally, for the same proposition, *Page* also relies on *Comm. for a Fair & Balanced Map*, and *Rodriguez*. *See Page*, 15 F. Supp. 3d at 662-63. These cases are therefore of dubious validity.[7]

II. **AOE 2: Communications With Constituents And Interest Groups Are Protected.**

Relying on this Court's precedent in *Story v. Norfolk-Portsmouth Newspapers, Inc.*, 202 Va. 588, 590, 118 S.E.2d 668, 669 (Va. 1961), the Bedford County Circuit Court held that a letter concerning a judicial candidate from the mayor of Bedford to the Virginia Courts of Justice Committee was absolutely privileged. *See Mills v. Shelton*, 66 Va. Cir. 415, 416-17 (Va. Cir. Ct. 1998) (Bedford County); *see also* (Va. Sen. Op. Br. 41-

[7] The Virginia Senators accurately paraphrased *WSSC II*'s discussion of legislative privilege and immunity. *But see* (App. Opp.'n Br. 18). The Fourth Circuit discusses both legislative immunity and privilege and states that the privilege exists to protect the and encourage the republican values the immunity promotes. *See WSSC II*, 631 F.3d at 181. The value of the privilege is therefore difficult to overstate.

42). The Vesilind Appellees' attempts to minimize this precedent are unavailing. Although true the court does not explicitly reference the Speech or Debate Clause, (App. Opp.'n Br. at 31), the court does cite *Story's* recognition that the "proceedings of legislative bodies" are one of three types of communications that are absolutely privileged. *See Mills*, 66 Va. Cir. at 416. The court then, contrary to Vesilind Appellees, (App. Opp.'n Br. at 31), applies this privilege to the case and notes that sound public policy supports the application. *See id*. Then, analogizing to a Supreme Court case upholding a similar absolute privilege, the court said the rule should be the same for legislative proceedings. *See id*. at 416-17.

Contrary to the Vesilind Appellees' assertions (App. Opp.'n Br. 32 and n.8), legislators' independence is most certainly implicated with respect to communications between legislators and constituents. Legislators may curtail or censor their speeches and actions within the legislative sphere to avoid having to disclose the identity of a constituent source in subsequent litigation. Constituents will also be reluctant to engage legislators to freely discuss issues or provide pertinent facts or data, causing a loss in legislative information and harming the deliberative process. *See Miller v. Transamerican Press, Inc*., 709 F.2d 524, 530-31 (9th Cir. 1983). Therefore, protecting constituent communications that are fairly within the legislative

sphere is fully consistent with the purposes and recognized scope of the Speech or Debate Clause.[8]

A. <u>Meetings With Interest Groups Are Similarly Protected</u>.

Contrary to the Vesilind Appellees' characterization for why the Virginia Senators cited *Bruce v. Riddle* and *Almonte II,* (App. Opp.'n Br. 34-35), the Virginia Senators cited these cases to demonstrate that the courts held that county council members were immune for their legislative actions, including those private meetings with interest groups, because it is in those meetings that legislators receive information that could assist in the crafting, drafting, amending, and deliberating over legislation. (Va. Sen. Op. Br. 44-45); *see Almonte II,* 478 F.3d at 104, 107 (holding that legislative immunity applied to Republican council members' conduct, even secret meetings with third parties including the local Republican Party director).[9]

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[8] The Vesilind Appellees reliance on *Doe v. Reed* is misplaced, (App. Opp.'n Br. 32 n.9), because *Doe* involved election-related disclosure, not pure speech. *See Doe v. Reed*, 561 U.S. 186, 216 (2010) (Stevens, J., concurring). *Compare* w*ith McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (extolling the right to anonymous speech).

[9] Contrary to the Vesilind Appellees' unsupported assertion, (App. Opp.'n Br. 33-34), the privilege applies—with or without an expectation of privacy—when the *act* at issue is within the legislative sphere. *See Eastland*, 421 U.S. at 503. Therefore disclosure to the Attorney General is irrelevant. *See Minpeco, S.A v. Conticommodity Services, Inc.,* 844 F.2d 856, 862 (D.C. Cir. 1988) (holding that the Speech or Debate Clause protected communications within the legislative sphere despite the fact that the communications were transmitted to the Attorney General).

Furthermore and contrary to the Vesilind Appellees (App. Opp.'n Br. 35), the holding in *Bruce* is easily administered. *See Jewish War Veterans of the United States of Am., Inc. v. Gates,* 506 F. Supp. 2d 30, 59-60 (D.D.C. 2007) (holding that the Speech or Debate Clause protected communications between city officials and congressional members if communications were to gather information for potential legislative acts, but not protected if they concerned media appearances or political rallies); *Government of Virgin Islands v. Lee*, 775 F.2d 514, 522 (3d Cir. 1985) (remanding to district court to determine if communications between a legislator and officials were fact-finding, and therefore within the legislative sphere, or personal or political, and therefore not protected).

Additionally, *Bruce* is consistent with *Brewster. Brewster* does not stand for the proposition that communications with constituents and interest groups are outside the legislative sphere. (App. Opp.'n Br. 35). This view conflicts with the Supreme Court's emphasis on whether the *act* is within the legislative sphere. *See, e.g., McSurely*, 553 F.2d at 1288, n.36. *Brewster* simply notes that constituent newsletters are not within the legislative sphere because they are used to develop electoral support. *Brewster*, 408 U.S. at 512.

B. The Speech Or Debate Clause Protects Fact-Finding.

Legislatures are vested with the authority to investigate because the legislature needs information to legislate effectively. *Eastland*, 421 U.S. at 504. Accordingly, the Speech or Debate Clause also protects informal fact finding. (Va. Sen. Op. Br. at 39-40). The D.C. Circuit, Second Circuit, Third Circuit, Fourth Circuit, and the Ninth Circuit recognize this principle.[10] If the legislator is acting within the legitimate legislative sphere, then the act in question is protected. *See, e.g., Walker v. Jones*, 733 F.2d 923, 929 (D.C. Cir. 1984) (R.B. Ginsburg, J.).

Contrary to the Vesilind Appellees' assertion (App. Opp.'n Br. 36-37 n.12), *Dombrowski v. Eastland*, 387 U.S. 82 (1967) and the Court's comments in *Gravel*, 408 U.S. at 620-21, stand for the unremarkable proposition that criminal acts and unconstitutional investigatory tactics are beyond the scope of the Speech or Debate Clause. *See Brewster*, 408 U.S. at 526; *see Gravel*, 408 U.S. at 618-621. If the legislator or the legislator's

[10] *See McSurely v. McClellan,* 553 F.2d 1277, 1286 (D.C. Cir. 1976) (*en banc*) ("We have no doubt that information gathering, whether by issuance of subpoenas or field work by a Senator or his staff, is essential to informed deliberation over proposed legislation."); *United States v. Biaggi*, 853 F.2d 89, 103 (2d Cir. 1988); *Gov't of the V.I. v. Lee,* 775 F.2d 514, 521 (3d Cir. 1985) (stating that the Speech or Debate Clause protects informal investigations because they are essential prerequisites to drafting and deliberating over legislation); *Bruce*, 631 F.2d at 279-80; *see Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983).

aide is engaged in legislative fact-finding, an act that is within the legislative sphere, then the Speech or Debate Clause protects that act regardless of the identity of the actor providing the information. *See, e.g., Bogan v. Scott-Harris,* 523 U.S. 44, 54 (U.S. 1998).

Vesilind Appellees' reliance on *Bastien v. Office of Campbell*, 390 F.3d 1301 (10th Cir. 2004) is misplaced. (App. Opp.'n Br. at 37). The court there ruled that the allegedly discriminatory firing of a legislative employee was not a legislative act. *See id*. at 1304-05, 1318-19. Thus, the court's discussion of potential fact-finding communications with constituents was dicta. *See id*. at 1319.

III. **AOE 3: Communications With DLS Are Protected.**

The Virginia Senators incorporate by reference the reply brief of the Division of Legislative Services. Contrary to the Vesilind Appellees' argument that the Speech or Debate Clause can only be applied to the legislature, (App. Opp.'n Br. 38), the Supreme Court has ruled that the Speech or Debate Clause protects the legislative acts of officials in the executive and judicial branches. *See Supreme Court v. Consumers Union of United States*, 446 U.S. 719 (1980); *see Bogan*, 523 U.S. at 55. Furthermore, the federal constitution also vests Congress with all legislative power. *Compare* U.S. Const. art. I, § 1 *with* Va. Const. art. IV, § 1. Federal

courts have ruled that communications with the GAO and CRS are protected. *See Chapman v. Space Qualified Systems Corp.*, 647 F. Supp. 551 (N.D. Fla. 1986); *Webster v. Sun Co.*, 731 F.2d 1 (D.C. Cir. 1984). Neither opposition brief addresses this argument. (Va. Sen. Op. Br. 47-48).

CONCLUSION

For the foregoing reasons and the reasons stated in their opening brief, the Virginia Senators ask this Court to vacate the circuit court's holding the Virginia Senators in contempt of court, reverse the circuit court's February 16, 2016 order, and quash the subpoenas issued to the Virginia Senators.

Respectfully submitted on this 1st day of July, 2016

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, ten (10) copies of this Opening Brief of Appellant, and one electronic copy (via email or CD) have been filed with the Clerk of the Supreme Court of Virginia and one (1) copy, and one electronic copy, have been mailed postage prepaid to the following on this 1st day of July 2016.

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CV 05-2301 (JFB)(WDW)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 71058

September 25, 2007, Decided
September 25, 2007, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *ACORN v. County of Nassau, 2008 U.S. Dist. LEXIS 20266 (E.D.N.Y., Mar. 14, 2008)* Motion to modify denied by *ACORN v. County of Nassau, 2009 U.S. Dist. LEXIS 82405 (E.D.N.Y., Sept. 10, 2009)*

PRIOR HISTORY: *ACORN v. County of Nassau, 2006 U.S. Dist. LEXIS 50217 (E.D.N.Y., July 21, 2006)*

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JUDGES: William D. Wall, United States Magistrate Judge.

OPINION BY: William D. Wall

OPINION

ORDER

WALL, Magistrate Judge:

By letter dated January 3, 2007, plaintiffs moved to compel certain deposition testimony and documents from defendants the Incorporated Village of Garden City and the Garden City Board of Trustees (collectively, "Garden City"), their employees, and consultants. *See* Docket Entry ("DE") [58]. The Garden City defendants submitted opposition, DE [60], and a conference before the undersigned was held at which the court requested additional briefs from the parties. DE [64]. Those submissions have been received and reviewed by the court.

This case involves the rezoning of the former "Social Services site" located at 101 County Seat Drive in Garden City. Plaintiffs seek discovery regarding Garden City's "true reasons for blocking the proposed zoning that would have permitted construction of more affordable multi-family housing, and whether justifications enunciated were simply a pretext for discriminatory [*4] animus." *See* Letter Motion, DE [58] at 2. Defendant Garden City seeks to assert "legislative privilege" on behalf of members of the Board of Trustees, as well as Michael Filippon, the Garden City Building Superintendent, Robert Schoelle, the Garden City Village Administrator, and personnel from the firm of Buckhurst, Fish and Jacquemart, Inc. ("BFJ"), retained by Garden City as a land use/zoning specialist. *See* Letter in Opp., DE [60] at 2.

The issue of the extent to which legislative privilege is available in this case first arose during the deposition of Frank Fish of BFJ. During that proceeding, Garden City asserted the legislative privilege on several occasions, at which point Mr. Fish's attorney directed him not to answer. Mr. Fish's attorney at one point stated that the legislative privilege "is not our privilege to assert, and we are respecting Garden City's right to raise the privilege and holding off on answering any questions until so directed." Fish Dep. at 45:9-13. In their motion to compel, plaintiffs indicate that Mr. Fish was instructed not to answer questions about the following issues:

> 1. BFJ's development of zoning proposals for the site;
>
> 2. Garden City's objections [*5] to BFJ's proposed zoning, and the basis for these objections by both Garden City and its residents;
>
> 3. involvement by local community organizations in the rezoning of the site;
>
> 4. Garden City's rezoning of the property previously owned by Doubleday & Co.; and
>
> 5. Garden City's hiring of a public relations consultant regarding the Social Services site rezoning.

Garden City's position is that testimony regarding any non-public communications between or among Board members and BFJ personnel, Mr. Fillippon, and/or Mr. Schoelle are protected from disclosure by legislative privilege. Garden City has indicated that it will, consistent with this position, instruct all witnesses not to answer such questions until it has received direction from

the court. Plaintiffs have moved to compel the testimony of Mr. Fish as well as testimony from future deponents on the grounds that the legislative privilege does not apply, or if it does apply, that it has been waived. For the following reasons, plaintiffs' motion is granted in part and denied in part.

DISCUSSION

Since this case arises under the Fair Housing Act and thus involves federal questions, any asserted privilege "shall be governed by the principles [*6] of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Fed. R. Evid. 501*. Generally, testimonial privileges are not favored because they "contravene the fundamental principle that 'the public . . . has the right to every man's evidence.'" *Trammel v. United States, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* (quoting *United States v. Bryan, 339 U.S. 323, 331, 70 S. Ct. 724, 94 L. Ed. 884 (1950))*. Garden City asserts legislative privilege as to any testimony or document production that would reveal the deliberative process underlying the decision made by the Board regarding the rezoning of the Social Services site.

The concept of legislative privilege arises from, and is often discussed interchangeably with, the concept of legislative immunity. Legislative immunity, which provides absolute immunity from suit, has been extended to protect local legislators from suit for acts taken in their legislative capacity. *Searingtown Corp. v. Incorporated Village of North Hills, 575 F. Supp. 1295, 1298 (E.D.N.Y. 1981)*. [1] As to legislative privilege, "the purpose in preventing inquiry into motivation of legislative acts is to shield legislators from civil proceedings which disrupt and [*7] question their performance of legislative duties to enable them to devote their best efforts and full attention to the 'public good.'" *Id. at 1298-99* (citations omitted). The Supreme Court has, however, "rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege." *Manzi v. DiCarlo, 982 F. Supp. 125, 129 (E.D.N.Y. 1997)* (citing *United States v. Gillock, 445 U.S. 360, 374, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980))*. The legislative privilege is qualified, not absolute, "'and must therefore depend on a balancing of the legitimate interests on both sides.'" *Rodriguez v. Pataki, 280 F. Supp. 2d 89, 96 (S.D.N.Y. 2003)*, *aff'd 293 F. Supp. 2d 302*, (quoting *Fla. Ass'n of Rehab. Facs. v. Fla. Dep't of Health & Rehab. Servs., 164 F.R.D. 257, 267 (N.D. Fla. 1995))*. The threshold issue raised by plaintiffs is whether legislative privilege can be applied in this particular case.

1 Since there are no individual defendants named in the complaint, there are no claims for legislative immunity in the instant case.

I. Applicability of Qualified Legislative Privilege

The only privilege raised by Garden City is legislative privilege. [2] As this is a qualified privilege, the court must balance [*8] the extent to which the production of the disputed evidence would have a chilling effect on the Garden City Board against those factors favoring disclosure. "Among the factors that a court should consider in arriving at such a determination are: '(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.'" *Rodriguez, 280 F. Supp. 2d at 100-01* (quoting *In re Franklin Nat'l Bank Secs. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979))*.

2 Garden City has not asserted a deliberative process privilege, perhaps in light of the uncertainty as to whether such a privilege is available in the legislative context. *See, e.g., Manzi, 982 F. Supp. at 130* (stating that the application of the deliberative process privilege to state legislators "remains an 'open question.'"). Since that question is not currently before it, the court makes no determination as to whether that privilege is available to the Garden City defendants. [*9] Courts addressing the question of legislative privilege have, however, utilized criteria established in deliberative process privilege cases. *See Rodriguez, 280 F. Supp. 2d at 100-01*; *Manzi, 982 F. Supp. at 130*.

The plaintiffs in this case claim that Garden City's zoning decision was motivated by discriminatory animus. Defendants in opposition do not seriously challenge the relevancy of the information sought, but rather suggest that it should be protected by legislative privilege. The court finds that the discovery sought is clearly relevant to the claims at issue.

The most significant factors to be considered in this case are the availability of other evidence and the seriousness of the litigation. To prevail in their case, plaintiffs will have to prove the discriminatory intent of the defendants. Plaintiffs' needs are in conflict with a legislator's need to be free to act without worry about inquiry into deliberations. The tension between these two conflicting needs has been previously noted --"even where the plaintiff must prove invidious purpose or intent, and judicial inquiry into legislative motive cannot be avoided, as in a racial discrimination cases such as *Village of Arlington* [*10] *Heights,* the Supreme Court has indicated that only in 'some extraordinary instances [legislators] 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.'" Orange v. County of Suffolk, 855 F. Supp. 620, 623 (E.D.N.Y. 1994)* (quoting *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)* (emphasis added)).

Plaintiffs suggest that given the seriousness of this litigation concerning fair housing rights, this may be one of the extraordinary cases in which plaintiffs' needs override the testimonial privilege. In support of their argument, plaintiffs rely exclusively on the *Manzi* case in which the court found that the privilege, asserted as to two documents which were unrelated to the passage of legislation, fell in the face of that plaintiff's need to protect her statutory rights. *Manzi, 982 F. Supp. at 130*. However, neither plaintiffs' submissions nor the court's own research has identified a single case in which the seriousness of the litigation overrode the assertion of legislative privilege as to testimony regarding a legislator's motivations. [*11] Moreover, plaintiffs cannot point to any independent evidence of a discriminatory motive that would convince the court that this is an "extraordinary instance" in which such inquiry should be allowed. Although the court recognizes the difficulty of plaintiffs' burden of proving discriminatory intent, they have not produced a compelling reason sufficient to overcome the legislative privilege.

Although testimony regarding a legislator's stated motivation might be the most direct form of evidence, there are other paths of discovery available to plaintiffs. Although assertion of a legislative privilege may bar inquiry into deliberations, it would not bar inquiry regarding the materials and information available at the time a decision was made. *See Arlington Heights,* 429 U.S. at n. 20 (noting that plaintiffs "were allowed, both during the discovery phase and at trial, to question Board members fully about materials and information available to them at the time of decision"). Substantial documentary evidence has also been made available to plaintiffs.

The court has considered the remaining two factors, the role of the government in the litigation and the possible chilling effect on legislators, [*12] and finds that they do not tip the balance significantly in favor of either party. Balancing all the factors, the court concludes that legislative privilege may be asserted in this case.

II. Assertion of Qualified Legislative Privilege

Having concluded that legislative privilege may be asserted in this case, the court turns to consideration of who is entitled to assert that privilege. The legislative privilege "is a personal one and may be waived or asserted by each individual legislator." *Marylanders for Fair Representation, Inc. v. NAACP, Inc., 144 F.R.D. 292, 298 (D. Md. 1992)*. Thus, "it is not up to the [Board] to assert or waive the privilege; the [Board members] must do so for themselves." *Almonte v. City of Long Beach,2005 U.S. Dist. LEXIS 46320, 2005 WL 1796118, at n. 2 (E.D.N.Y. July 27, 2005)*. Plaintiffs have not challenged Garden City's assertion of privilege on behalf of the individual Board members, and the court will assume, for purpose of this motion, that the privilege is being asserted on behalf of them individually. It must be noted, however, that there may well come a time in this litigation where each Board member will need to appear and individually determine whether to assert legislative privilege [*13] as to his or her testimony. *See A Helping Hand LLC v. Baltimore County, Md., 295 F. Supp. 2d 585, 590 (D. Md. 2003)* (noting that plaintiff was free to serve deposition notices on each legislator "and to require each of those persons to assert the privilege on his own behalf").

Assuming legislative privilege has been properly asserted, the court addresses plaintiffs' argument that the privilege has been waived as to communications made in the presence of non-legislators. As with many testimonial privileges, the legislative privilege may be waived as to communications made in the presence of third parties. *Almonte v. City of Long Beach, 2005 U.S. Dist. LEXIS 37528, 2005 WL 1971014, at *3 (E.D.N.Y. Aug. 16, 2005)*. Thus, the court must determine whether the

presence of certain non-legislators caused a waiver in this matter.

A. Fillippon and Schoelle

Plaintiffs argue that the presence of Michael Fillippon and/or Robert Schoelle at any meeting, or the dissemination of any document to either of them, causes a waiver as to that evidence. Defendants claim that Fillippon and Schoelle are akin to legislative staff members in that they work closely with the Garden City Board in its decision-making process and that therefore [*14] their presence does not effect a waiver of privilege. Where a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator. *See U.S. v. Gravel, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972)*. [3] As one court noted, "it is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." *Id. at 616-17*. Although Schoelle and Fillippon work for the Village and not exclusively for the Board members, the court will examine the extent to which they act as legislative staff members.

> 3 Although this case construes privileges and immunities under the *Speech and Debate Clause of the United States Constitution*, the rationale employed is applicable to state and local legislators as well. For the sake of brevity, the court will not repeat the line of cases and reasoning that lead to this conclusion. A review of that reasoning can be found in *Rodriguez, 280 F. Supp. 2d at 94-96*.

Schoelle, [*15] Garden City's Village Administrator, has submitted an affidavit describing his duties as prescribed in the Code of the Village of Garden City, including the making of reports and recommendations to the Board of Trustees. Schoelle Aff., P2, DE [69-2]. Schoelle further notes that the Board members are elected officials who perform their official duties on a part time, volunteer basis, and that he acts as a "liaison between the Board members and those involved in various legislative activities." *Id.* P3. Fillippon, the Superintendent of the Village's Building Department, has also submitted an affidavit regarding his duties, including the making of recommendations regarding zoning laws or for the adoption of new laws. Fillippon Aff., P2, DE [69-3].

As defendants note, the Board members perform their legislative functions on a voluntary, part time basis. In such a situation, it is impracticable if not impossible for such a legislator to perform his duties without assistance. Defendants have established that in the Village of Garden City, such assistance is given by Village employees including the Village Administrator and the Superintendent of the Building Department. *Cf. Almonte, 2005 U.S. Dist. LEXIS 46320, 2005 WL 1796118, at * 3* [*16] (citing lack of evidence to support proposition that City Manager had a legislative role). Michael Fillippon and Robert Schoelle are determined to be legislative staff members and as such, may assert legislative privilege as to their acts performed in furtherance of their legislative duties. Accordingly, the presence of either does not act as a waiver of the privilege.

B. BFJ Firm

Garden City also claims that any communications with the BFJ consulting firm should be protected by legislative privilege. Plaintiffs argue that BFJ employees are not legislators, staffers or Village employees, but rather outside advisors who not only are not entitled to legislative privilege, but whose presence waives any such privilege held by the Board members.

In support of its position that BFJ personnel are covered by legislative privilege, Garden City cites a single Appellate Division case, *Campaign for Fiscal Equity, Inc. v. State, 265 A.D.2d 277 (1st Dep't 1999)*. In that case, the court found that inquiry into communications between an official with the State Education Department and state legislators was barred by legislative privilege. This case is distinguishable, in part because it involved communications [*17] between the executive and legislative branches of government, not between the legislator and non-government persons. Moreover, the holding in that case and the limited discussion of the court's reasoning is, by itself, simply insufficient to support the expansion of legislative privilege suggested by defendants. The court finds the *Rodriguez* case to be of more value.

In *Rodriguez,* the state legislature created a Task Force on Demographic Research and Reapportionment ("LATFOR") to provide technical assistance with respect

to the task of redistricting congressional districts. *Rodriguez, 280 F. Supp. 2d at 92*. LATFOR consisted of six members, four legislators and two non-legislators, had a staff, was authorized to hold public and private hearings, and had all the powers of a legislative committee. *Id.* LATFOR published its proposed redistricting plan which was later adopted by the New York State Legislature. The plaintiffs in *Rodriguez* "sought information concerning the process by which the 2002 redistricting maps were drawn and subsequently adopted by the Legislature." *Id. at 93*. In examining the question of whether the activities of LATFOR were covered by legislative privilege, the court [*18] noted that LATFOR's workings were "more akin to a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up a legislation-a session for which no one could seriously claim privilege." *Id. at 101*. The court ultimately granted plaintiffs' motion to compel to the extent it sought information pertaining to the operation of LATFOR, but denied the motion to the extent it sought information concerning "the actual deliberations of the Legislature-or individual legislators-which took place outside LATFOR, or after the proposed redistricting plan reached the floor of the Legislature." *Id. at 102-03*. The legislative privilege did not bar all inquiry into the workings of LATFOR, an entity with far greater legislative ties than BFJ.

Presumably, the Board members had not pre-determined their positions, and retained BFJ to provide them with information from which they could begin their deliberations regarding the rezoning of the Social Services site. From the record currently before the court, it is unclear whether BFJ issued its own report or whether its activities were limited to commenting upon plans for the site issued by Nassau County. Not unlike LATFOR, which [*19] had a much stronger legislative mandate and powers, BFJ presumably investigated and prepared a report from which legislation was introduced. Communications prior to the issuance of the report are more like conversations between legislators and knowledgeable outsiders and therefore are discoverable. Accordingly, the court finds that until such a report, if any, was presented to the Board, no privilege existed. Taking the presentation of a report upon which legislation was based as the necessary starting point of the Board's deliberations, any communications subsequent to that event that reflect a legislator's deliberation or motivation are deemed to be covered by legislative privilege. If necessary, the court will make a determination regarding production of post-report documents on a case by case basis after in camera review.

The court notes that a contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity. While legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view. Defendants have not cited any caselaw that [*20] suggests otherwise, and the court is simply unwilling to approve such an unprecedented expansion of the qualified legislative privilege.

III. Documents Submitted for In Camera Review

Defendants have submitted documents withheld on the basis of privilege for the court's review. The court has, by this order, established essentially a temporal marker for the assertion of legislative privilege as to work performed by BFJ. Accordingly, defendants shall provide the undersigned with a date upon which BFJ submitted its report to the Board. At that time, the court will issue further rulings regarding the documents submitted for in camera review.

CONCLUSION

Plaintiffs' motion to compel is granted in part and denied in part. Plaintiffs' request to compel testimony and document production over the assertion of legislative privilege is denied. Legislative privilege is available to protect inquiry into the actual deliberation and motivations of legislators in this case.

Plaintiffs' request to compel testimony and document production on the grounds that legislative privilege has been waived is granted as to any communications or documents produced or shared with BFJ personnel prior to issuance of its [*21] report, if any, to the Board. Any BFJ documents prepared subsequent to that date shall be reviewed in camera for a determination of privilege consistent with the rulings made above. Plaintiffs' request is denied on the additional grounds asserted by them.

Dated: Central Islip, New York

September 25, 2007

SO ORDERED:

/s/ William D. Wall

United States Magistrate Judge

ACORN (THE NEW YORK ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW), NEW YORK ACORN HOUSING COMPANY, INC., VIC DEVITA, AND NATALIE GUERRIDO, Plaintiffs, VERSUS COUNTY OF NASSAU, INCORPORATED VILLAGE OF GARDEN CITY, AND GARDEN CITY BOARD OF TRUSTEES, Defendants.

No 05-CV-2301 (JFB) (WDW)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 82405

September 10, 2009, Decided
September 10, 2009, Filed

SUBSEQUENT HISTORY: Motion granted by *ACORN v. County of Nassau, 2010 U.S. Dist. LEXIS 59368 (E.D.N.Y., June 15, 2010)*

PRIOR HISTORY: *ACORN v. County of Nassau, 2007 U.S. Dist. LEXIS 71058 (E.D.N.Y., Sept. 25, 2007)*

COUNSEL: [*1] For Plaintiffs: Frederick K. Brewington, Esq., Law Offices of Frederick K. Brewington, Hempstead, New York; Paul B. Sweeney, Kim F. Bridges, Cynthia Dorsainvil Sleet, Jenny Rubin Robertson, Stanley Joseph Brown, Toby William Smith, Sabrina Helene Cochet, Esqs., Hogan & Hartson LLP, New York, New York; Peter Joseph Dennin, Esq., Simpson, Thacher & Bartlett LLP, New York, New York; Joseph D. Rich, Esq., Lawyers' Committee for Civil Rights, Washington, D.C.

For County of Nassau, Defendant: Andrew Reginald Scott, Ralph J. Reissman, David Bruce Goldin, Karen Schmidt, Esqs., Nassau County Attorney's Office, Mineola, New York.

For Incorporated Village of Garden City, and Garden City Board of Trustees, Defendants: James G. Ryan and Jennifer A. McLaughlin, Esqs., of Cullen & Dykman LLP, Garden City, New York.

JUDGES: JOSEPH F. BIANCO, United States District Judge.

OPINION BY: JOSEPH F. BIANCO

OPINION

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge:

Plaintiffs The New York Association of Community Organizations for Reform Now, New York ACORN Housing Company, Inc., Francine McCrary, and Vic DeVita (collectively, "plaintiffs"), [1] brought this civil rights action against defendants the County of Nassau, the Incorporated Village [*2] of Garden City, and the Garden City Board of Trustees (collectively, "defendants"), alleging that defendants have engaged in a long-standing pattern and practice of preventing African-American and other minority persons from residing in predominantly white communities. Specifically, plaintiffs allege that defendants have

engaged in exclusionary zoning procedures that prevented the development of affordable multi-family housing opportunities on a 25-acre parcel of County-owned property in Garden City, New York, in violation of the Fair Housing Act ("the FHA"), *42 U.S.C. § 3601, et seq.*, the Civil Rights Act of 1866, *42 U.S.C. §§ 1981*, *1982*, and *1983*, the Civil Rights Act of 1964, *42 U.S.C. § 2000d, et seq.*, and the *Equal Protection Clause of the Fourteenth Amendment*. On March 10, 2006, the County and the Garden City defendants moved separately to dismiss the action, for lack of standing and failure to state a claim. By Memorandum and Order dated July 21, 2006, this Court denied both motions in their entirety. *See ACORN v. County of Nassau, No. 05 Civ. 2301 (JFB) (WDW), 2006 U.S. Dist. LEXIS 50217, 2006 WL 2053732 (E.D.N.Y. July 21, 2006)*. Familiarity with that underlying decision is presumed.

1 The original complaint, [*3] filed on May 12, 2005, included individual plaintiffs Daphne Andrews, Vernon Ghullkie and Natalie Guerrido, as well. (Docket Entry No. 1.) The Amended Complaint, filed November 30, 2005, dropped Daphne Andrews as an individual plaintiff and added Lisbett Hunter as an individual plaintiff. (Docket Entry No. 24.) By Stipulation and Order dated October 24, 2006, Guerrido dismissed all claims against the defendants. (Docket Entry No. 51.) By Stipulation and Order filed May 22, 2008, Ghullkie and Hunter dismissed all claims against the defendants. (Docket Entry No. 114.)

Pending before the Court is plaintiffs' motion, pursuant to *Rule 72(a) of the Federal Rules of Civil Procedure*, to "set aside or modify a portion" of the September 25, 2007 discovery order of Magistrate Judge William D. Wall (hereinafter, "the Order") which granted in part and denied in part plaintiffs' motion to compel testimony withheld by the Garden City defendants on the grounds of legislative privilege. Specifically, Magistrate Judge Wall held: (1) legislative privilege is available to protect inquiry into the actual deliberation and motivations of legislators of the Garden City Board of Trustees in this case; (2) the [*4] privilege extends to both documents and testimony reflecting such deliberations and motivations; (3) the privilege extends to the Village Administrator and the Superintendent of the Village's Building Department, to the extent that they were communicating with the Village Board or performing acts in furtherance of their legislative duties (and their presence during conversations does not act as a waiver of the privilege); and (4) the privilege extends to a consulting firm retained by Garden City as a land use/zoning specialist, but did not apply to communications or documents produced or shared with the firm's personnel prior to the issuance of the firm's report to the Village Board (*i.e.*, May 14, 2003). Defendants have submitted 22 documents for *in camera* review that they assert are subject to the privilege.

For the reasons set forth below, this Court finds no error in the thorough and well-reasoned Order issued by Magistrate Judge Wall and, therefore, plaintiffs' motion is denied. This Court requests that Magistrate Judge Wall review the documents *in camera* within the framework set forth in his Order, with the additional instruction that any documents illustrating that racial considerations [*5] were part of the legislative deliberations in the zoning decision at issue in this case must be produced because, with respect to any such documents (if they exist), the seriousness of the litigation and the issues involved, including the critical national interest in civil rights enforcement, outweigh the other factors favoring the application of the qualified legislative privilege.

I. Background

A. The September 25, 2007 Order

On January 3, 2007, plaintiffs moved, pursuant to *Federal Rule of Civil Procedure 37(a)*, to compel both documentary and testimonial evidence from the Garden City defendants withheld on the grounds of legislative privilege. (*See* Docket Entry No. 58.) Specifically, plaintiffs sought evidence regarding communications between the Garden City Board of Trustees, Garden City employees and the outside consulting firm of Buckhurst Fish & Jacquemart, Inc. ("BFJ") as it related to the re-zoning of the Social Services site. (*See id*. at 1.) Plaintiffs argued that the legislative privilege, as asserted by the Garden City defendants prior to and during the scheduled deposition of BFJ representative Frank Fish, is inapplicable because the public's interest in obtaining the requested [*6] information outweighs any governmental interest in protecting the confidentiality of the legislative process. (*See id*. at 2-3.) Plaintiff further asserted that, even if the privilege was properly invoked, it was waived by the Board of Trustees' inclusion of non-legislative personnel in its deliberative communications. (*See id*. at 3.) The Garden City defendants argued that the balancing test weighs in favor of the privilege and that it was not

waived by the presence of non-Board employees and BFJ, as the former served as legislative aides and the latter acted as legislative consultants. (*See* Docket Entry No. 60.)

By Order dated September 25, 2007, Magistrate Judge Wall granted in part and denied in part plaintiffs' motion to compel discovery materials withheld by the Garden City defendants on the assertion of legislative privilege related to the Board, as well as Garden City Building Superintendent Filippon, Garden City Administrator Schoelle, and personnel from BFJ. (*See* Docket Entry No. 87, hereinafter the "Order.") Recognizing that the legislative privilege is a qualified one, Magistrate Judge Wall identified the five factors courts consider when weighing the assertion of legislative [*7] privilege, specifically:

> (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 v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003) (quoting *In re Franklin Nat'l Bank Secs. Litig., 478 F. Supp. 577, 583 (E.D.N.Y. 1979))*. Magistrate Judge Wall determined that "the most significant factors to be considered" in the instant case were the availability of other evidence and the seriousness of the litigation. (Order at 5.) [2] As to the former, Magistrate Wall determined that it did not weigh in favor of piercing the privilege because plaintiffs could access "the materials and information available [to the Board] at the time a decision was made," and indeed, had already obtained "[s]ubstantial documentary evidence." (*Id*. at 6.) Regarding the latter, Magistrate Wall noted that, although the matter involves alleged race-based discrimination and the alleged violation of plaintiffs' civil rights, plaintiffs [*8] had failed to identify any case where "the seriousness of the litigation overrode the assertion of legislative privilege as to testimony regarding a legislator's motivations." (*Id*.) Furthermore, Magistrate Judge Wall stated that "plaintiffs cannot point to any independent evidence of a discriminatory motive that would convince the court that this is an 'extraordinary instance' in which such inquiry should be allowed." (*Id*.) In short, Magistrate Judge Wall concluded that "[a]lthough the court recognizes the difficulty of plaintiffs' burden of proving discriminatory intent, they have not produced a compelling reason sufficient to overcome the legislative privilege." (*Id*.)

> 2 The Order also noted that the Supreme Court addressed the tension between plaintiffs' need for evidence and a legislator's need to act free of worry about inquiry into deliberations, stating: "[I]n 'some extraordinary instances [legislators] 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*.'" (Order at 5 (quoting *Vill. of Arlington Heights v. Metro. Hous.Dev Corp.., 429 U.S. 252, 268, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)* (emphasis [*9] added by Order).)

Magistrate Judge Wall next addressed plaintiffs' argument that Garden City employees and BFJ were not entitled to invoke the privilege, as they are not legislators. Noting that the employees at issue both provide reports and recommendations to the Board members related to the passage of legislation and that those Board members are particularly reliant on such assistance because they perform their official duties on a volunteer, part-time basis, Magistrate Judge Wall determined that the employees were entitled to invoke the privilege as "legislative staff members." (*See id*. at 9 ("[The employees] are determined to be legislative staff members and as such, may assert legislative privilege as to their acts performed in furtherance of their legislative duties.").) Regarding BFJ, Magistrate Judge Wall determined that they, too, could invoke the privilege, because in their work on the Social Services re-zoning project, they acted as legislative consultants. However, "[c]ommunications prior to the issuance of the report [we]re more like conversations between legislators and knowledgeable outsiders and [we]re therefore discoverable." (*Id*. at 11.) Magistrate Judge Wall set [*10] that temporal marker as May 14, 2003, the date on which BFJ submitted its first report to the Board. (*See* Docket Entry No. 96.) However, Magistrate Judge Wall stated that "if necessary, [he would] make a determination regarding production of post-report documents on a case by case basis after *in camera* review." (Order, at 11.) The 22 documents at issue have been submitted to Magistrate Judge Wall for review

pending the outcome of this appeal of his Order.

B. Procedural History

On October 10, 2007, plaintiffs appealed the Order of Magistrate Judge Wall granting in part and denying in part their motion to compel certain documents from the Garden City defendants. On October 19, 2007, the Garden City defendants opposed plaintiffs' appeal. On October 26, 2007, plaintiffs submitted their reply. Oral argument was heard on August 21, 2009. This matter is fully submitted.

II. STANDARD OF REVIEW

Rule 72(a) states that a district court shall only set aside a discovery order of a magistrate judge when it has been shown that the magistrate's order is "clearly erroneous or contrary to law." *See also 28 U.S.C. § 636(b)(1)(A)*. Indeed, it is well-settled that "[a] magistrate judge's resolution of discovery [*11] disputes deserves substantial deference." *Weiss v. La Suisse, 161 F. Supp. 2d 305, 321 (S.D.N.Y. 2001)*; *see also Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 124 F.R.D. 75, 77 (S.D.N.Y. 1989)* ("[I]n resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused.") (quotations omitted).

III. DISCUSSION

The Court has carefully reviewed the parties' submissions related to plaintiffs' appeal, as well as the September 25, 2007 Order, and finds no grounds to disturb that ruling, as set forth in more detail below.

A. The Magistrate Judge's Order Properly Applied the Qualified Legislative Privilege to Documents Evincing Legislative Intent

Plaintiffs first object to the Order on the grounds that it improperly extended the legislative privilege beyond subjects addressed in deposition testimony to documentary evidence. Specifically, they argue that the "seriousness of the litigation," *i.e.*, the civil rights implicated, outweighs any qualified legislative privilege as to documentary evidence. As set forth below, and for the reasons outlined in the Magistrate Judge's Order, the Court concludes that Magistrate Judge Wall did not err in ruling [*12] that the legislative privilege would apply not only to testimony into the actual deliberation and motivations of legislators of the Garden City Board of Trustees in this case, but also to documents reflecting the same.

In their objections, plaintiffs rely heavily upon the ruling in *Manzi v. DiCarlo, 982 F. Supp. 125, 129 (E.D.N.Y. 1997)*, wherein the magistrate judge permitted plaintiff to examine documents pertaining to the funds allocated to legislator defendants for staff members, despite defendants' assertion of legislative privilege. However, that case is inapposite to the instant matter, as the allocation of funds was deemed to be "within the discretion of the Senate Majority leader and not related to the passage of legislation." *Id*. The court thus determined that, because defendants' "claim of confidentiality appear[ed] to be based, in large part, on the State's interest in preserving the secrecy of an allocation process that has historically been separate from general Senate proceedings and protected from disclosure" and not on the legislative process, the legislative privilege was not implicated. *Id*. The court further ruled that, even if it was related to the legislative process, [*13] plaintiff's interest in enforcing her federal rights would outweigh that privilege because it was "not apparent how removal of the confidential designation would disrupt the legislative process." *Id. at 130*. Finally, before ordering the production of the documents, the court in *Manzi* first conducted an *in camera* review of the documentary evidence.

In the instant case, unlike in *Manzi,* the documents that Magistrate Judge Wall found would be precluded directly implicate the legislative process -- namely, the Village Board's communications with its consultant on a zoning issue, including any documents that would reflect the deliberations and motivations of the Village Board. For such core documents, the seriousness of the litigation, by itself, is insufficient to overcome the other compelling factors (outlined by Magistrate Judge Wall) that support application of the legislative privilege in this particular case. Thus, the *Manzi* decision provides limited guidance to the issues presented by the instant matter and Magistrate Judge Wall correctly distinguished it.

Plaintiffs further rely upon the ruling in *Rodriguez v. Pataki, 02-CV-618 (RMB) (FM), 02 Civ. 3239 (RMB) (FM), 2003 U.S. Dist. LEXIS 15934, 2003 WL 22109902, at *2-3 (S.D.N.Y. Sept. 10, 2003)* [*14] (Maas, M.J.), *aff'd*, *293 F. Supp. 2d 313 (S.D.N.Y. 2003)*, in which the magistrate judge ordered the production of a single document (out of numerous documents) withheld on the

grounds of legislative privilege because it revealed that defendant legislators impermissibly considered race as a factor in legislative redistricting. Plaintiffs argue that because race-based discrimination is also alleged in the instant action, the circumstances herein require the same outcome. However, the court in *Rodriguez* made that determination after it conducted an *in camera* review. *See Rodriguez, 2003 U.S. Dist. LEXIS 15934, 2003 WL 22109902, at *2*. The Court agrees with plaintiffs (and, in fact, defendants conceded this point at oral argument) that, if any of the withheld documents reveal that racial considerations played any role in the legislative deliberations regarding the re-zoning of the Social Services site, then the factors regarding legislative privilege would warrant production of those documents, as in *Rodriguez*. Moreover, the Court also agrees with plaintiffs that, even where the legislative privilege bars questioning or production of documents revealing a legislator's deliberations, it does not also prohibit inquiries [*15] into documents and information available to the legislators at the time the decision was made. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.20, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)*. Any objection to Magistrate Judge Wall's Order on that basis is ill-founded because Magistrate Judge Wall made clear that documents can only be withheld if they reflect a legislator's deliberation or motivation with respect to the zoning decision. [3]

> 3 Plaintiffs also argue that the legislative redistricting case of *Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292 (D. Md. 1992)* requires production of the withheld documents, because the three-judge district court panel in that case stated that defendants would be required to "produce any documents prepared by [the Governor's] Committee during the course of its deliberations which [we]re requested by plaintiffs, subject . . . to the assertion of any other privilege . . . ." *Id. at 302 n.20*. In doing so, the panel determined that the legislative privilege was not applicable to any documents generated prior to a bill's first introduction to the floor of the legislature. This determination implicates two issues -- one, whether documents [*16] reflecting legislative intent can be somehow distinguished from deposition testimony regarding the same, and two, at what point in the legislative process those documents reflect non-discoverable deliberative processes. As to the first issue, the Court sees no reason why documents evincing legislative intent should be more discoverable than deposition testimony reflecting the same, as both implicate the same interests. Regarding the second issue, as the *Rodriguez* court noted in distinguishing its own decision to extend the privilege to certain documents generated by an outside committee prior to the official introduction of a piece of legislation: "the [*Schaefer*] court acknowledged that any changes that may have been made to a proposed redistricting plan once it reaches the floor of the legislature, and the rationale therefore, fall squarely within the legislative or deliberative process privilege. Nevertheless, actions which are legislative do not begin only when a bill reaches the floor of the legislature. As every high school student knows, the process of drafting legislation is also an important part of how a bill becomes law." *Rodriguez, 280 F. Supp. 2d at 101* (internal citations [*17] and quotation marks omitted). The Court finds the *Rodriguez* analysis to be persuasive in this regard and determines, as discussed in further detail *infra*, that the fact-finding and analysis preceding the first draft of a bill can, depending on the circumstances, trigger the privilege before that draft is ultimately introduced. *See, e.g., Kay v. City of Racho Palos Verdes, No. CV 02-03922 MMM RZ, 2003 U.S. Dist. LEXIS 27311, 2003 WL 25294710, at *11 (C.D. Cal. Oct. 10, 2003)* ("Requiring testimony about communications that reflect objective facts related to legislation subjects legislators to the same burden and inconvenience as requiring them to testify about subjective motivations -- 'the why questions.' Creating an 'objective facts' exception to the legislative process privilege thus undermines its central purpose.").

In sum, the Court concludes that Magistrate Judge Wall did not err in concluding that the qualified legislative privilege applied to testimony and documents reflecting a legislator's deliberations or motivations relating to the Board's zoning decision. Thus, Magistrate Judge Wall shall review the 22 documents to determine whether the documents reflect a legislator's deliberation or motivation relating [*18] to the zoning decision. Any such documents can be withheld under the legislative privilege, unless any of the withheld documents reveal that racial considerations played any role in the

legislative deliberations regarding the zoning decision, in which case such documents must be produced. This framework will ensure that the factors relating to the qualified legislative privilege are properly balanced, including the "seriousness of the litigation and the issues involved" and "the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable."

B. The Magistrate's Order Properly Extended the Qualified Legislative Privilege to Non-Legislators Performing Legislative Functions

Plaintiffs also seek reversal of Magistrate Judge Wall's determination that the legislative privilege applies to two non-legislative Garden City employees -- the Superintendent of the Village's Building Department (Michael Filippon) and the Garden City Village Administrator (Robert Schoelle) -- and BFJ, which was the private consulting firm hired by Garden City in connection with the zoning issues. Specifically, plaintiffs assert that Schoelle and Filippon do not [*19] qualify as "legislative staff members" simply because they provided recommendations to legislators regarding the re-zoning of the Social Services site, and that BFJ does not qualify as a legislative committee because it simply served as an outside consultant with expertise in technical zoning matters. As set forth below, the Court concludes that Magistrate Judge Wall did not err in his rulings regarding the application of the legislative privilege to communications between the Village Board and the aforementioned parties.

As noted in the Order, it is well-settled that "[w]here a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator." (Order at 8 (citing *United States v. Gravel, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972)*.) Because the legislative members in the instant action perform their duties on a part-time volunteer basis and therefore rely upon Schoelle and Filippon for assistance in carrying out their legislative functions, Magistrate Judge Wall concluded that these two Village employees properly qualify as legislative aides and are entitled [*20] to assert the privilege insofar as it relates to acts "performed in furtherance of their legislative duties." (*Id*. at 9.) Plaintiffs argue that these individuals may not assert the privilege because they do not claim to be "personal staff member[s] for any particular Garden City legislator." [4] In doing so, plaintiffs stress form over substance, as the appropriate inquiry does not focus on the technical titles of the individuals at issue, but rather the nature of the functions that they performed. *See, e.g., Johnson v. Metro. Gov. of Nashville and Davidson County, Nos. 3:07-0979, 3:08-0031, 2009 U.S. Dist. LEXIS 56538, 2009 WL 1952780, at *4 (M.D. Tenn. July 2, 2009)* ("When evaluating whether there is a claim for legislative immunity, courts are to evaluate the 'function' performed by the individual claiming the privilege, that is, whether the function performed was 'legislative' or 'administrative,' not whether the entity in which the individual was operating was necessarily solely a legislative body.") (citing *Bogan v. Scott-Harris, 523 U.S. 44, 54-55, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998)*). Here, Schoelle and Fillippon have submitted sworn statements regarding the nature of their duties as Garden City employees, which include providing assistance [*21] to the Board members in performing their legislative functions. *Cf. Almonte v. City of Long Beach, No. 04-CV-4192 (JS) (JO), 2005 U.S. Dist. LEXIS 46320, 2005 WL 1796118, at *3 (E.D.N.Y. July 27, 2005)* (in denying extension of privilege to city manager, noted that "defendants make no effort to show that [the city manager], in the words of *Bogan*, 'performs legislative functions' or took any 'actions [that] were legislative because they were integral steps in the legislative process.'"). Accordingly, these individuals may properly assert privilege related to those duties. [5]

4 Plaintiffs argue that the decision in *Fla. Ass'n of Rehab. Fac., Inc. v. State of Fla. Dep't of Health and Rehab. Servs., 164 F.R.D. 257, 267 (N.D. Fla. 1995)* supports their argument in this regard, as the court in that case restricted the legislative privilege "to communications between an elected legislative member and his or her personal staff members involving opinions, recommendations or advice about legislative decisions." *Id. at 267*. However, that court stated that the purpose of extending such a privilege to such individuals was to "protect the confidentiality of communications with the office-holder involving the discharge of his or [*22] her office." *Id*. The affidavits submitted by Schoelle and Filippon indicate that their duties as Village employees involve these very types of communications. (*See, e.g*., Docket Entry No. 69, Ex. 1, Schoelle Aff. PP 2-3 (duties include

making reports to Board for "considering and reviewing potential new legislation"); Ex. 2, Filippon Aff. P 2 ("The Superintendent of a Village Building Department is required to, among other things, make 'recommendations . . . for adoption of new laws.'") (quoting County of Nassau Civil Service job description).) Moreover, the *Florida Association* court refused to extend the privilege to the outside committee at issue because that committee was, by specific statute, excluded from the legislative branch. There is no such clear delineation here. Accordingly, the court's reasoning in the aforementioned case does not require a different outcome in the instant action.

5 Of course, to the extent that these individuals may possess other relevant information that was not acquired pursuant to their legislative functions for the Board, but rather was obtained pursuant to their other job responsibilities for the Village, such information would not be protected by [*23] the legislative privilege.

Finally, plaintiffs argue that the privilege should not extend to BFJ because it functioned, at all times relevant to this litigation, solely as a "knowledgeable outsider" and, therefore, its testimony would not intrude into the legislature's prerogatives. As all parties concede, "fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity." *Government of Virgin Islands v. Lee, 775 F.2d 514, 521 (3d Cir. 1985)*. The parties disagree as to the extent that BFJ provided these services. [6] Magistrate Judge Wall determined that BFJ's activities prior to the presentation of its first report to the Board were more akin to "conversations between legislators and knowledgeable outsiders" (as in *Rodriguez, 280 F. Supp. 2d at 101*) and were, therefore, discoverable. However, Magistrate Judge Wall further concluded that "[t]aking the presentation of a report upon which legislation was based as the necessary starting [*24] point of the Board's deliberations," all communications thereafter that reflected any legislative intent were privileged. (Order at 11.) The Court concurs in this analysis. As stated *supra*, "actions which are legislative do not begin only when a bill reaches the floor of the legislature," *Rodriguez, 280 F. Supp. 2d at 101*, and the Garden City defendants have established that communications between the Board members and BFJ that followed the submission of the first report should be protected to the extent that such communications reflected legislative deliberations or motivations (with the exception of communications reflecting racial considerations). Legislators must be permitted to have discussions and obtain recommendations from experts retained by them to assist in their legislative functions, without vitiating or waiving legislative privilege. To hold otherwise under the particular circumstances of this case would impair the legislative function by requiring them to exclude their own retained experts from the critical legislative conversations about the precise issues the experts were hired to address. *See generally Almonte v. City of Long Beach, 478 F.3d 100, 107 (2d Cir. 2007)* [*25] ("Meeting with persons outside the legislature -- such as executive officers, partisans, political interest groups, or constituents -- to discuss issues that bear on potential legislation, and participating in party caucuses to form a united position on matters of legislative policy, assist legislators in the discharge of their legislative duty. These activities are also a routine and legitimate part of the modern-day legislative process."). Accordingly, those communications are covered by the qualified legislative privilege and subject to the balancing test outlined above, which this Court finds weighs in favor of protection for the reasons outlined by Magistrate Judge Wall.

6 Specifically, plaintiffs argue, that because the outside committee in *Rodriguez* had "greater legislative ties than BFJ," (Order at 10), and the magistrate judge in that case ordered the production of certain documents created by that committee, BFJ, by extension, should produce all of its documents. The Court finds this argument unpersuasive. Although the court in *Rodriguez* found that certain information regarding the operation of a task force with four legislators and two non-legislators was not subject to legislative [*26] privilege, the court also denied the motion to compel information to the extent it sought information concerning "the actual deliberations of the Legislature -- or individual legislators -- which took place outside [the Task Force], or after the proposed redistricting plan reached the floor of the Legislature." *280 F. Supp. 2d at 103*. Therefore, neither the facts nor the result in *Rodriguez* suggest that no legislative privilege

> should attach at all to the Board's communications with BFJ, and Magistrate Judge Wall did not err in establishing a temporal marker (combined with *in camera* review) to distinguish documents that did not implicate legislative processes from those that did.

In sum, having considered plaintiffs' objections, Magistrate Judge Wall did not err in concluding that (1) the legislative privilege extends to the Village Administrator and the Superintendent of the Village's Building Department, to the extent they were communicating with the Village Board or performing acts in furtherance of their legislative duties (and their presence during conversations does not act as a waiver of the privilege), and (2) the privilege extends to the consulting firm retained by Garden City [*27] as a land use/zoning specialist, but does not apply to communications or documents produced or shared with the firm's personnel prior to the issuance of the firm's report to the Village Board (*i.e.*, May 14, 2003).

IV. CONCLUSION

The Court recognizes that the allegations in the instant matter, of race-based housing discrimination, are serious indeed, and that the legislative privilege is a qualified one. However, it is plain to the Court from its review of Magistrate Judge Wall's Order, as well as relevant case law, that the Order struck the appropriate balance between the competing interests implicated and, therefore, is not "clearly erroneous" or "contrary to law." Moreover, if Magistrate Judge Wall's *in camera* inspection reveals evidence of racial considerations in the decision-making process, they shall be produced. This framework will ensure that the balance is maintained, and that the privilege is not asserted at the expense of inviolable civil rights.

Accordingly, for the reasons set forth above, plaintiffs' motion seeking to set aside the September 25, 2007 discovery order of Magistrate Judge Wall is denied. Magistrate Judge Wall can now expeditiously review *in camera* the twenty-two [*28] documents submitted by the Garden City defendants. The documents will be reviewed within the framework set forth in the September 25, 2007 Order, with the additional instruction that any documents illustrating that racial considerations were part of the legislative deliberations must also be produced.

SO ORDERED.

JOSEPH F. BIANCO

United States District Judge

Dated: September 10, 2009

Central Islip, New York

MARIA ALMONTE, et al., Plaintiffs, - against - THE CITY OF LONG BEACH, et al., Defendants.

CV 04-4192 (JS) (JO)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2005 U.S. Dist. LEXIS 46320

July 27, 2005, Decided
July 27, 2005, Filed

SUBSEQUENT HISTORY: Reconsideration denied by *Almonte v. City of Long Beach, 2005 U.S. Dist. LEXIS 37528 (E.D.N.Y., Aug. 16, 2005)*

COUNSEL: [*1] Charles T. Theofan, Movant, Pro se, Freeport, NY.

For Maria Almonte, Mary Cammarato, Barbara Davis, Peter Snow, Plaintiffs: Louis D. Stober, Jr., LEAD ATTORNEY, Law Offices of Louis D. Stober, Jr., LLC, Garden City, NY.

For The City of Long Beach, Mona Goodman, James P. Hennessy, Thomas Sofield, Jr., individually and as members of the Council of the City of Long Beach, Glen Spiritis, as Manager of the City of Long Beach, Defendants: John S Ciulla, LEAD ATTORNEY, Ronald J. Rosenberg, LEAD ATTORNEY, Rosenberg Calica & Birney LLP, Garden City, NY.

JUDGES: JAMES ORENSTEIN, U.S. Magistrate Judge.

OPINION BY: JAMES ORENSTEIN

OPINION

MEMORANDUM AND ORDER

JAMES ORENSTEIN, Magistrate Judge:

By letter motion dated July 20, 2005, Docket Entry ("DE") 45, the plaintiffs seek to compel defendant Glen Spiritis ("Spiritis") to answer certain questions that he refused to answer on the basis of his invocation of legislative privilege when he was deposed in this action on June 29, 2005. In a responsive letter dated July 25, 2005, counsel for all defendants opposes the application. DE 48. For the reasons set forth below, I now grant the plaintiffs' application. [1]

1 While this Memorandum and Order was in draft form *in computero,* I became [*2] aware that the plaintiffs had submitted a letter in reply, DE 50, to which the defendants in turn responded, DE 51. Because my individual rules prohibit such additional submissions, I have considered neither.

I. Background

The general factual and procedural background of this case is set forth in my Memorandum and Order of July 12, 2005, DE 38, with which I assume the reader's familiarity. Additional background information is provided below as relevant. The only matter worth recounting here is the telephone conference that the parties refer to in their letters on the instant application. As the defendants' counsel correctly notes, the parties'

counsel did call me on July 1, 2005, to seek a ruling on Spiritis' invocation of legislative privilege at his deposition. Assuming that the parties were acting in accord with the provisions of *Local Civil Rule 37.3(b)*, I initially thought the deposition was proceeding at that time. When counsel revealed that the deposition had concluded earlier in the week, I reminded them of the local rule, informed them that I would make no ruling during the telephone call, and invited them to pursue the matter in an appropriate manner if they so desired. Not [*3] having made any ruling and having determined that the proceeding was improper, I made no entry on the docket. I thus treat the telephone call as a nullity that has no bearing on the instant application.

II. Discussion

The defendants raise four arguments in support of their contention that Spiritis should be permitted to avoid answering certain questions on the basis of his invocation of privilege: (1) all discovery is currently stayed; (2) the plaintiffs' application, being nine pages long, violates *Local Civil Rule 37.3* and Rule III.A of my own individual practice rules; (3) the application "runs afoul of the Individual Defendants' legislative immunity and legislative privilege; and (4) the Individual Defendants did not waive theirs [sic] rights to legislative privilege." DE 48 at 1. I address each argument in turn below.

A. The Stay Of Discovery

On July 18, 2005, the parties filed a stipulation and proposed order that would, among other things, stay discovery pending the court's resolution of potentially dispositive motions, and thereafter require the parties to complete discovery within 90 days. DE 42. I ordered a stay pending resolution of some of the subject motions, and required [*4] discovery to be completed 30 days after the lifting of the stay.

The instant application does not strike me as inconsistent with the stay, but instead merely asks me to make a ruling so that the parties can more easily complete discovery on schedule once the stay is lifted. I do not contemplate that Spirits will continue his deposition and answer the questions at issue before the stay is lifted, although I will certainly endorse any application to lift the stay for such purposes should the parties agree to make one.

Further, I ordered the stay based on the parties' stipulation. Any party is free to withdraw from that stipulation and seek to have the stay lifted if it believes its adversary is violating the terms of the parties' agreement. I offer no opinion on whether such relief is warranted under the circumstances, but merely note that the instant ruling does nothing to prejudice such an application.

2. The Length Of The Plaintiffs' Letter

Local Civil Rule 37.3(c), in pertinent part, allows the plaintiffs to make the instant application by submitting a "letter not exceeding three pages in length outlining the nature of the dispute and attaching relevant materials." Similarly, Rule III.A.3 [*5] of my individual practice rules provides: "All letters submitted pursuant to this rule shall be no longer than three pages in length, exclusive of attachments." The defendants object that the plaintiffs have violated those rules by submitting a letter-motion that is nine pages in length.

The letter-motion from the plaintiffs' counsel consists of two paragraphs of introductory text on the first page, three paragraphs of concluding text spread across the final two pages, and a transcript of the testimony at issue that begins on the first page and ends on the eighth. DE 45. The defendants' objection thus plainly exalts form over substance, in that the exact same application could have been made by placing the transcript of the testimony at issue in an attachment rather than reprinting it in the body of the letter, and the letter would then have been well within the page limits.

I could of course require the plaintiffs to resubmit their motion in a form that complies with the rules, and then further require the defendants to resubmit their response. Such a vindication of the defendants' vigorous policing of rules intended to streamline litigation and ease the burden on courts would simply [*6] increase the parties' burden without affecting in the slightest the substance of the arguments presented in support of or in opposition to the instant application. Rather than engage in such a purposeless exercise, I will proceed to the merits.

3. Legislative Immunity

Spiritis was the City Manager and not a member of the City Council. Unlike the Council Member defendants, he did not invoke legislative immunity to resist appearing at a deposition altogether. At his deposition, he answered a variety of questions, but declined to answer others on

the basis of privilege. In doing so, he did not cite legislative immunity as an independent basis for refusing to answer, *see* DE 45 at 1-8. The objection based on immunity as such has therefore been waived.

Reliance on legislative immunity is in any event misplaced. Counsel argues that legislative immunity extends to "executives, outside the legislative branch of local government, as long as they exercise discretionary functions which fall within the legitimate sphere of legislative-related activities." DE 48 at 2. He goes on to cite several cases, one of which is even controlling authority. *See id.* (quoting *Bogan v. Scott-Harris, 523 U.S. 44, 55, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1988)* [*7] (non-legislative officials "are entitled to legislative immunity when they perform legislative functions, ... Bogan's actions were legislative because they were integral steps in the legislative process.")).

Without questioning the validity or applicability of the cited authority, I note that the defendants make no effort to show that Spiritis, in the words of *Bogan,* "performs legislative functions" or took any "actions [that] were legislative because they were integral steps in the legislative process." Indeed, their argument in that regard is unavailing for two reasons. First, they seek to place the burden on the plaintiffs to prove that Spiritis is not entitled to invoke legislative immunity. As it is Spirits who seeks to avoid answering an otherwise appropriate question at a deposition, he bears the burden of persuasion, which in this case means he must point out the evidence in the record that establishes his legislative role.

Second, the defendants do not explain what evidence in the record supports the proposition that Spiritis had a legislative role, as opposed to his executive role as erstwhile City Manager. No such evidence has been brought to my attention. The only evidence [*8] of which I am aware that even suggests the possibility that he had a legislative role is his deposition testimony about meetings held at the private home of Charles Theofan, who was then the Long Beach Corporation Counsel, see DE 36 at 2, and has since succeeded Spiritis as City Manager. Present at these meetings were three Council Members (defendants Mona Goodman, James P. Hennessy, and Thomas Sofield, Jr.), two officials who were not members of the legislature (Spiritis and Theofan), and one private citizen, James Moriarty, who apparently was a political affiliate of the others. *See id.* Nothing in the record suggests that the meetings were legislative in nature or that they were "integral step in the legislative process." Moriarty's presence suggests otherwise. Legislative and executive officials are certainly free to consult with political operatives or any others as they please, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative process or the basis on which to invoke privilege.

4. Waiver Of Legislative Privilege

The defendants next take issue with the proposition that, by including Moriarty in their discussions, [*9] they waived their legislative privilege. Or at least that is what their counsel's letter purports to do - but in fact it returns once again to the more familiar (albeit still inapposite) subject of immunity. DE 48 at 2-3. Such argument entirely misses the point. If Spiritis, or any other individual defendant, had a legislative privilege, it means they were entitled not to divulge their reasons for supporting or opposing legislation, and not to discuss such matters with outsiders. It does not mean they were entitled to discuss those matters with some outsiders but then later invoke the privilege as to others.

Equally inapposite is the defendants' argument that "the privilege is personal to each legislator" and that "a waiver can only be found if each of the Individual Defendants made an 'explicit and unequivocal renunciation' of the privilege." DE 48 at 3. There are two disturbingly obvious flaws with this argument. First, each individual defendant who was present with Moriarty and discussed assertedly privileged matters with him breeched the privilege. Second, the language about "explicit and unequivocal renunciation" that counsel quotes is taken out of context when applied to the issue [*10] of privilege. What the Supreme Court wrote is: "we perceive no reason to decide whether an individual Member may waive the *Speech or Debate Clause*'s *protection against being prosecuted for a legislative act.* Assuming that is possible, we hold that waiver can be found only after explicit and unequivocal renunciation *of the protection." United States v. Helstoski, 442 U.S. 477, 490, 99 S. Ct. 2432, 61 L. Ed. 2d 12 (1979)* (emphasis added). [2]

2 Less obvious but equally flawed is counsel's argument that the personal nature of the privilege means that each holder of the privilege must waive it before any can testify. As the court

reasoned, in language the defendants quote only in part (*see* DE 48 at 3):

> The privilege, however, is personal: it belongs to the individual members of a local legislature, not the municipality as a whole. *See Berkley v. Common Council of the City of Charleston, 63 F.3d 295, 296 (4th Cir. 1995)* (en banc) (holding that a municipality is not immune from suit based on the actions of the local legislature); *Burtnick [v. McLean, 76 F.3d 611, 613 (4th Cir. 1996)]* (indicating that local legislators have a "testimonial privilege" but "[t]his privilege may be waived" by members of the local legislature). It [*11] follows, in this case, that it is not up to the Council to assert or waive the privilege; the councilors must do so for themselves. Indeed, even before the Fourth Circuit's en banc ruling in *Berkley,* the District of Maryland held that "[t]he privilege is a personal one and may be waived or asserted by each individual legislator." *[Marylanders For Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 298 (D. Md. 1992)]*. Accordingly, Helping Hand, like previous litigants before this court, will be "free to notice for deposition individual ... legislators and to require each of those persons to assert the privilege on his own behalf." *Id. at 299 n.16*.

A Helping Hand, LLC v. Baltimore County, Md., 295 F. Supp.2d 585, 590 (D. Md. 2003).

Aside from its misapplication of the language in *Helstoski,* Counsel makes no attempt to support the surprising assertion that a privilege can be waived only through explicit and unequivocal renunciation, and it would be an affectation of research to cite the many cases supporting the general proposition that a privilege can be waived when the parties holding the privilege share their communications with an outsider. With respect to the particular issue of legislative [*12] privilege, I am aware of no case law holding that a waiver is effective only if made in the form of an explicit and unequivocal renunciation. To the contrary, it appears that it is the invocation of privilege that must be explicit:

> A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him.... But every privileged person must, at a proper time, and in a proper manner, claim the benefit of his privilege. The judges are not bound, judicially, to notice a right of privilege, nor to grant it without a claim. In the present instance, neither the defendant, nor his attorney, suggested the privilege, as an objection to the trial of the cause: and this amounts to a waiver, by which the party is forever concluded.

Geyer's Lessee v. Irwin, 4 U.S. 107, 107-08, 1 L. Ed. 762, 4 Dall. 107 (1790); *see also Trombetta v. Board of Educ., Proviso Tp. High School Dist. 209, 2004 U.S. Dist. LEXIS 6916, 2004 WL 868265, *5 (N.D. Ill. Apr. 22, 2004)* (legislative privilege "is waivable and is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters").

Carried to its logical consequence, the defendants' [*13] reasoning would mean that they could invoke legislative privilege to prevent a private citizen such as Moriarty from divulging what they told him, or what he told them, in unofficial conversations in a private home that excluded some of the legislators who purportedly shared in the privilege. The proposition is not only repugnant to the policy of liberal discovery embraced by the Federal Rules of Civil Procedure, but is also one that has been explicitly rejected. *See Cano v. Davis, 193 F. Supp.2d 1177, 1179 (C.D. Cal. 2002)* ("The legislative privilege does not bar ... a third party non-legislator, from testifying to conversations with legislators and their staffs.") (citing *Gravel v. United States, 408 U.S. 606, 629, n.18, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972))*.

Spiritis, who is not a legislator, discussed the events

at issue in this case with five other persons, some of whom were not legislators (including one who had no governmental position), to the exclusion of some members of the legislature. It would make a mockery of the concept of legislative privilege to hold that Spiritis could invoke it in these circumstances. Accordingly, once the stay of discovery ends, Spiritis must answer the questions he previously declined [*14] to answer on the basis of privilege.

III. Conclusion

For the reasons set forth above, the plaintiffs' motion to compel defendant Glen Spiritis to answer certain questions notwithstanding his claim of privilege is GRANTED.

SO ORDERED.

Dated: Central Islip, New York

July 27, 2005

/s/ James Orenstein

JAMES ORENSTEIN

U.S. Magistrate Judge

COMMITTEE FOR A FAIR AND BALANCED MAP, JUDY BIGGERT, ROBERT J. DOLD, RANDY HULTGREN, ADAM KINZINGER, DONALD MANZULLO PETER J. ROSKAM, BOBBY SCHILLING, AARON SCHOCK, JOHN M. SHIMKUS, JOE WALSH, RALPH RANGEL, LOU SANDOVAL, LUIS SANABRIA, MICHELLE CABALLERO, EDMUND BRENZINSKI, and LAURA WAXWEILER, Plaintiffs, v. ILLINOIS STATE BOARD OF ELECTIONS, WILLIAM M. MCGUFFAGE, JESSE R. SMART, BRYAN A. SCHNEIDER, BETTY J. COFFRIN, HAROLD D. BYERS, JUDITH C. RICE, CHARLES W. SCHOLTZ, and ERNEST L. GOWEN, Defendants.

No. 11 C 5065

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2011 U.S. Dist. LEXIS 117656

October 12, 2011, Decided
October 12, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part, Count dismissed at *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, 2011 U.S. Dist. LEXIS 126278 (N.D. Ill., Nov. 1, 2011)*

COUNSEL: [*1] For Committee For A Fair And Balanced Map, Judy Biggert, Robert J Dold, Randy Hultgren, Adam Kinzinger, Donald Manzullo, Peter J Roskam, Bobby Schilling, Aaron Schock, John M Shimkus, Joe Walsh, Ralph Rangel, Lou Sandoval, Luis Sanabria, Michelle Caballero, Edmund Brezinski, Laura Waxweiler, Plaintiffs: John Albert Janicik, LEAD ATTORNEY, Dana S Douglas, Joshua D Yount, Thomas Vangel Panoff, Tyrone C. Fahner, Lori E. Lightfoot, Mayer Brown LLP, Chicago, IL.

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JUDGES: JOAN HUMPHREY LEFKOW, United States District Judge. JUDGE JOHN DANIEL TINDER. [*3] JUDGE ROBERT L. MILLER, United States District Judge.

OPINION BY: JOAN HUMPHREY LEFKOW

OPINION

OPINION AND ORDER

This matter is before the court on plaintiffs' motion to compel enforcement of third party subpoenas [Dkt. No. 52] and certain non-parties' motion to quash subpoenas and for a protective order [Dkt. No. 58]. The motions raise legislative privilege issues rarely addressed by the courts because they pertain to the redistricting activity that follows each decennial census. For this reason, this opinion is more lengthy than the typical ruling on discovery issues.

BACKGROUND

The United States Constitution requires Illinois lawmakers to redraw the state's congressional district boundaries after each decennial census. *U.S. CONST. ART. I, § 2*; *id. amend. XIV, §§ 1 & 2*; *id. AMEND. XV*; *Ryan v. State Bd. of Elections of State of Ill., 661 F.2d 1130, 1132 (7th Cir. 1981)*. Pursuant to this authority, the Illinois General Assembly drafted, debated, and passed the Illinois Congressional Redistricting Act of 2011 (the "Redistricting Act") (P.A. 97-14). The Redistricting Act eliminates one congressional seat, as required by the 2010 United States Census results, and establishes boundaries for the state's eighteen [*4] remaining congressional districts.

Beginning on March 28, 2011, and continuing through May 2, 2011, members of the Illinois House of Representatives and the Illinois Senate held a series of public hearings at locations around the state where members of the public were allowed to comment on the redistricting process. *See 10 Ill. Comp. Stat. 125/10-5*. On May 27, 2011, the Democratic leadership of the Illinois House and Senate Redistricting Committees released the congressional redistricting plan ("2011 Map") on its website. Three days later, the Illinois House of Representatives passed the Redistricting Act, and the next day the Illinois Senate followed suit. On June 24, 2011, the Governor signed the Redistricting Act into law, and the present litigation ensued.

The plaintiffs comprise three groups: The Committee for a Fair and Balanced Map, a not-for-profit organization created by Illinois citizens concerned about the congressional redistricting process in Illinois; nine Republican Congressmen and one Republican Congresswoman; and six registered voters, four of whom are identified as Latino and two as Republican (collectively "plaintiffs"). The defendants include the Illinois State Board [*5] of Elections, the agency charged with implementing the 2011 Map, and its individual members (collectively "defendants").

Plaintiffs allege that the 2011 Map discriminates against Latino and Republican voters, and they seek to invalidate the redistricting plan in whole or in part. Specifically, plaintiffs allege that the 2011 Map violates the Voting Rights Act of 1965, *42 U.S.C. § 1973* ("VRA") (Count I), the *Fourteenth Amendment* (Count II) and the *Fifteenth Amendment* (Count III) by diluting the voting strength of Latino voters. Plaintiffs also claim that the 2011 Map constitutes an impermissible racial gerrymander in violation of the *Fourteenth Amendment* (Count IV) and a partisan gerrymander in violation the *First Amendment* (Count V) and *Fourteenth Amendment* (Count VI).

The parties have engaged in expedited discovery. Pursuant to *Federal Rule of Civil Procedure 45*, plaintiffs served thirty subpoenas *duces tecum* [1] on a number of non-party entities and individuals, including the (i) Illinois House of Representatives (through Tim Mapes, Chief of Staff); (ii) Office of the Speaker of the Illinois House of Representatives (through Tim Mapes, Chief of Staff); (iii) Illinois House Redistricting [*6] Committee (through Barbara Flynn Currie, Chairperson); (iv) Illinois Senate (through Jillayne Rock, Secretary of the Senate);

(v) Office of the Senate President (through Andrew Manar, Chief of Staff); (vi) Illinois Senate Redistricting Committee (through Kwame Raoul, Chairperson); and (vii) various legislative staffers with knowledge of the reapportionment scheme (collectively "Non-Parties"). The subpoenas contain twenty-one requests for production encompassing documents and communications related to the 2011 Map. Non-Parties refused to comply with plaintiffs' requests, claiming that legislative immunity, the deliberative process privilege, the attorney-client privilege and/or the work-product doctrine protect the documents from disclosure.

1 The United States District Court for the Central District of Illinois issued twenty-five of the thirty subpoenas served by plaintiffs because most of subpoenaed witnesses reside in Springfield, Illinois. The remaining five subpoenas were issued by the United States District Court for the Northern District of Illinois. According to Non-Parties, the Northern District of Illinois subpoenas capture all of the documents within the scope of the Central [*7] District of Illinois subpoenas, including those possessed by the Illinois House and Senate Redistricting Committees and individual staff members.

On September 15, 2011, plaintiffs filed a motion to compel enforcement of the third party subpoenas. The next day, the President of the Illinois Senate, the Speaker of the Illinois House of Representatives, and the chairpersons of the Illinois House and Senate Redistricting Committees moved to quash. Each party was allowed to file a response and this three-judge court heard arguments on September 29, 2011.

ANALYSIS

I. Relevance of Requested Discovery

Plaintiffs have served Non-Parties with twenty-one document requests.

A. Requested Documents

Plaintiffs seek a plethora of documents concerning the planning, development, negotiation, and drawing of the 2011 Map. [2] These documents can be broadly categorized as (1) information concerning the motives, objectives, plans, reports, and/or procedures used by lawmakers to draw the 2011 Map; [3] (2) information concerning the identities of persons who participated in decisions regarding the 2011 Map; [4] (3) the identities of experts and/or consultants retained to assist in drafting the 2011 Map and contractual [*8] agreements related thereto; [5] and (4) objective facts upon which lawmakers relied in drawing the 2011 Map. [6]

2 Plaintiffs' document requests include:

> 1. All documents related to the state of Illinois legislative and/or congressional redistricting process which led to the planning, development, negotiation, drawing, revision or redrawing of the 2011 Map.
>
> 2. All documents, including, but not limited to, reports, analyses, election results or other election data, and communications pertaining or relating to the planning, development, negotiation, drawing, revision or re-drawing of the 2011 Map.
>
> 3. All documents regarding any communications, discussions, meetings and/or conversations, pertaining or relating to the planning, development, negotiation, drawing, revision or re-drawing of the 2011 Map with any of the following: Defendants; Democratic Congressional Campaign Committee or anyone else acting on its behalf; Illinois House and Senate Redistricting Committees; any member of the Illinois General Assembly or anyone acting on their behalf; any current or former member of Congress and anyone acting on their behalf; any interest groups that testified at the redistricting hearings.
>
> 4. All documents, [*9] communications or other matter, including all data files or other data type related to election and/or

voter data; election redistricting software; and all 2010 Census data used for the purpose of planning and drawing the 2011 Map or any other potential congressional plan that was not adopted.

5. All documents, communications or other matter, that constitute, refer or relate to data files and drafts of data files used to formulate the composition of Districts 3, 4, 5 of the 2011 Map.

6. Any draft drawings of any Districts of the 2011 Map.

7. All documents which reflect the identity of any and all persons who assisted in the drawing of Districts 3, 4, and 5 of the 2011 Map.

8. All documents which reflect when the planning and drawing of Districts 3, 4, and 5 of the 2011 Map were finalized.

9. All documents which reflect the identity of person(s) who made or participated in the decision to have the Latino Voting Age Population ("VAP") in District 3 as 24.64%.

10. All documents which reflect the identity of person(s) who made or participated in the decision to have the Latino VAP in District 4 as 65.92%.

11. All documents which reflect the identity of person(s) who made or participated in the [*10] decision to have the Latino VAP in District 5 as 16.05%.

12. All documents which reflect the identity of any expert or consultant who reviewed, commented on, advised or otherwise rendered any advice or opinion concerning the 2011 Map.

13. All documents which reflect the identity of any expert or consultant who conducted any racial bloc voting or racial polarization analysis concerning the 2011 Map.

14. Documents which reflect any racial bloc voting or racial polarization analysis conducted by any expert or consultant.

15. All documents or communications pertaining or relating to any analysis, review, study or consideration undertaken by any expert, consultant, scholar or other person regarding whether the 2011 Map complies with the VRA, the U.S. Constitution, or the Illinois Constitution.

16. All documents which consist of reports or opinions of any expert or consultant used to support the composition of the entire 2011 Map.

17. All documents which reflect any and all analysis concerning the viability of drawing two Latino congressional Districts, whether the Districts be considered majority or influence districts.

18. Any engagement letters provided to experts or consultants engaged for [*11] the purposes of planning, preparing, drawing, and analyzing or providing supporting evidence for the 2011 Map.

19. All records of payment to any experts or consultants.

20. All documents identifying any person(s) involved in the

> decision to post the proposed congressional plan on the Illinois Senate website during the early morning hours of May 27, 2011.
>
> 21. All documents identifying any person(s) who actually posted the congressional plan on the Illinois Senate website during the early morning hours of May 27, 2011.

3 *See* Req. Nos. 1-6, 8, 14-17. [Doc. No. 52-1.]
4 *See* Req. Nos. 7, 9-11, 20-21. [Doc. No. 52-1.]
5 *See* Req. Nos. 12-13, 18-19. [Doc. No. 52-1.]
6 *See* Req. Nos. 2 & 4. [Doc. No. 52-1.]

B. Relevancy of Requested Documents

Under Rule 26 of the Federal Rules of Civil Procedure, parties may obtain discovery of any nonprivileged matter that is relevant to any party's claim or defense. Plaintiffs make six claims related to the 2011 Map. *See* Compl. ¶¶ 108-38. Proof of discriminatory intent is required for plaintiffs to prevail on their *Fourteenth* and *Fifteenth Amendment* racial discrimination claims. [7] It has also been found sufficient, though not necessary, to sustain a VRA claim. *See United States v. Irvin, 127 F.R.D. 169, 171 (C.D. Cal. 1989)* [*12] (after the 1982 amendments to the VRA, "plaintiffs may carry their burden by fulfilling *either* the more restrictive intent test or the results test") (internal quotation marks and citations omitted); *accord Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990)*.

> 7 The test for plaintiffs' partisan gerrymandering claims is unsettled. *See Vieth v. Jubelirer, 541 U.S. 267, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004)*.

To demonstrate intentional discrimination, however, plaintiffs need not offer direct evidence of discriminatory intent. Direct evidence includes statements made by the decision making body or members thereto. *See, e.g., ACORN v. County of Nassau, No. 05-2301, 2007 U.S. Dist. LEXIS 71058, 2007 WL 2815810, at *3 (E.D.N.Y. Sept. 25, 2007)* (*ACORN I*) ("testimony regarding a legislator's stated motivation might be the most direct form of evidence" of discriminatory intent.) Instead, plaintiffs may rely on circumstantial evidence to show that lawmakers purposefully discriminated against Latino and/or Republican voters in enacting the 2011 Map. *See Ketchum v. Byrne, 740 F.2d 1398, 1406 (7th Cir. 1984)* ("In *Rogers*, the [Supreme] Court affirmed the district court's finding of intentional discrimination based [*13] on indirect and circumstantial evidence and endorsed its reliance on a 'totality of the circumstances' approach.") (citing *Rogers v. Lodge, 458 U.S. 613, 622-27, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982))*.

For example, to evaluate claims of racial vote dilution under the *Fourteenth Amendment*, courts rely on the totality of the circumstances test. *See Rogers, 458 U.S. at 618*. Under this test, courts may infer discriminatory intent from a variety of circumstantial factors. These factors include, but are not limited to, bloc voting along racial lines; low minority voter registration; exclusion from the political process; unresponsiveness of elected officials to needs of minorities; and depressed socio-economic status attributable to inferior education and employment and housing discrimination. *Ketchum, 740 F.2d at 1406* (citing *Rogers, 458 U.S. at 622-27*). Other factors include the historical background of the decision; the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; minority retrogression (i.e. a decrease in the voting strength of a cohesive voting bloc over time); and manipulation of district boundaries to adjust the [*14] relative size of minority groups, including the "packing" of minority voters. *See Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 267-68, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)*; *Rybicki v. State Bd. of Elections, 574 F. Supp. 1082, 1108-12 (N.D. Ill. 1982)*. Thus, under the totality of the circumstances test, the court may infer an "invidious discriminatory purpose . . . from the totality of the relevant facts," including the discriminatory effect of the redistricting scheme. *Rogers, 458 U.S. at 618* (citation omitted).

Plaintiffs allege many of these circumstantial factors in their Complaint. *See* Compl. ¶¶ 38-45 (events leading up to enactment); ¶ 60 (history of discrimination); ¶¶ 52-54 (manipulating district boundaries); ¶ 57 (racial polarization of elections). Yet many of plaintiffs' document requests solicit direct, not circumstantial, evidence of legislative intent, by demanding documents that contain communications between lawmakers and their staff. *See, e.g.*, Req. Nos. 1-5 & 8. These documents

are likely to contain the motives, impressions and/or opinions of those responsible for drafting the 2011 Map. Other requests seek the identities of those who made [*15] or participated in key decisions, suggesting an attempt by plaintiffs to gain insight to the thought processes of these individuals, if not now, then perhaps later through depositions. *See, e.g.*, Req. Nos. 7, 9-13.

To be sure, statements made by members of the decision-making body are relevant to show discriminatory intent. *See Village of Arlington Heights, 429 U.S. at 268*. But this is but one factor among many that plaintiffs may use to prove their claims. As acknowledged by the Supreme Court,

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to [*16] enact it, and the stakes are sufficiently high for us to eschew guesswork.

Hunter v. Underwood, 471 U.S. 222, 228, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985) (quoting *United States v. O'Brien, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 1682-1683, 20 L. Ed. 2d 672 (1968)*; *see also Palmer v. Thompson, 403 U.S. 217, 224, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971)* ("no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it"); *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm., 536 F. Supp. 578, 586 (D. Pa. 1982)* (holding that discriminatory statements made by the chairman of a city redistricting committee were insufficient to prove discriminatory intent absent a showing that the state legislative body adopted the chairman's views). Thus, the individual motivations and objectives of those who drafted the 2011 Map, although relevant, are not critical to the outcome of this case.

The remainder of plaintiffs' document requests pertain to facts, plans, reports or procedures created, formulated or used by lawmakers to draft the 2011 Map. Objective facts, such as United States Census reports and [*17] election returns, are highly relevant to plaintiffs' claims and necessary to prove many of the totality of the circumstances factors, including racial bloc voting, retrogression and manipulation of district boundaries. The actual facts upon which lawmakers relied, however, are less relevant because they say little as to whether the overall effect of the 2011 Map is discriminatory. Lawmakers may have considered a lot of facts and drawn a discriminatory map, or considered no facts and drawn a perfectly constitutional map. The proof, so they say, is in the pudding; and the pudding is the 2011 Map.

Finally, to the extent that the plans, reports and procedures used by lawmakers to draw the 2011 Map shed light on the sequence of events leading up to its enactment, this information may be relevant to plaintiffs' claims. The most important events, however, are those undertaken by the legislative body, such as public hearings, committee meetings and floor debates. The deliberations of individual lawmakers, even those who helped draw the 2011 Map, are less probative of the totality of the circumstances test. Nevertheless, because most of plaintiffs' requests seek material relevant within Rule 26, [*18] the court will consider whether any of these documents are privileged from disclosure.

II. Identification of Nonprivileged Matter

The issue before this court is the extent to which legislative immunity shields non-party state lawmakers from providing evidence in a civil lawsuit related to their legislative activities. Plaintiffs argue that the privilege is qualified and narrow. Non-Parties argue that it is absolute.

A. Absolute Legislative Immunity

The *Speech or Debate Clause of the United States Constitution* grants federal lawmakers absolute legislative immunity from civil suit for their legitimate legislative activities. The Clause states that "for any Speech or Debate in either House," Senators and Representatives "shall not be questioned in any other Place." *U.S. CONST. ART. I, § 6, cl. 1*. When applied, this provision

shields federal lawmakers "engaged in the sphere of legitimate legislative activity" from being sued for prospective relief or damages. *Supreme Ct. of Va. v. Consumers Union of U.S., 446 U.S. 719, 732, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980)* (quoting *Tenney v. Brandhove, 341 U.S. 367, 376, 71 S. Ct. 783, 95 L. Ed. 1019 (1951))*. It also mandates an evidentiary privilege [*19] that prevents the legislative acts of a member of Congress from being used against him or her in court. *See United States v. Helstoski, 442 U.S. 477, 488-89, 99 S. Ct. 2432, 61 L. Ed. 2d 12 (1979)*. Finally, it provides a testimonial privilege that protects a member or the member's aides from judicial questioning regarding the member's legislative acts. *Gravel v. United States, 408 U.S. 606, 616, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972)*. "In sum, the *Speech or Debate Clause* prohibits inquiry . . . into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States v. Brewster, 408 U.S. 501, 512, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972)*.

The *Speech or Debate Clause*, by its terms, does not apply at all to state and local legislators. *See, e.g., Fla. Ass'n of Rehab. Fac., Inc. v. State of Fla. Dep't of Health & Rehab. Servs., 164 F.R.D. 257, 266 (N.D. Fla. 1995)*. Instead, the federal common law applies. [8] Applying the federal common law, the Supreme Court in *Tenney* held that members of a state legislative committee were immune from civil liability for allegedly violating an individual's civil rights [*20] by calling him before the committee to testify in an effort to interfere with his *First Amendment* rights. *341 U.S. at 376-77*. Since *Tenney*, it is clear that under the federal common law "state and local officials are absolutely immune from federal suit for personal damages for their legitimate legislative activities." *Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 527 (7th Cir. 2011)* (citations omitted), *partially vacated and decided on unrelated grounds by Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 651 F.3d 722 (7th Cir. 2011)*; *see also Tenney, 341 U.S. at 376-77*. This immunity also extends to "legislative staff members, officers, or other employees of a legislative body, although it is considered less absolute as applied to these individuals." *Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 298 (D. Md. 1992)* (internal quotation marks and citations omitted).

8 This case presents federal questions and therefore the federal common law applies. *Fed. R. Evid. 501*; *see generally* 3 WEINSTEIN'S EVIDENCE § 501.02[2][b][i] [*21] (1997) (in federal question cases, federal privilege law, rather than the privilege law of the forum state, generally applies).

The scope of the federal common law is not entirely settled, however. The Supreme Court has held that in a federal criminal prosecution, a state legislator did not have an absolute evidentiary privilege based in legislative immunity from introduction of evidence of his legislative acts. *United States v. Gillock, 445 U.S. 360, 373, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980)*. *Gillock* carved out an exception from *Tenney*, reasoning that "the cases in this court which have recognized an immunity from civil suit for state officials have presumed the existence of federal criminal liability as a restraining factor on the conduct of state officials." *445 U.S. at 372*. *See Fla. Ass'n of Rehab. Fac., Inc, 164 F.R.D. at 267* ("legislators and some of their staff members may be immune to civil process in a suit directly against them . . . [but this immunity] is not an evidentiary privilege").

Since *Gillock*, a number of courts have "rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege." *Manzi v. DiCarlo, 982 F. Supp. 125, 129 (E.D.N.Y. 1997)* [*22] (citations omitted); *see Cano v. Davis, 193 F. Supp. 2d 1177, 1180 (C.D. Cal. 2002)* ("state legislators do not enjoy the type of absolute protection afforded members of the Congress under the *Speech or Debate Clause*"); *In re Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987)* ("Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the *Speech or Debate Clause*.").

The issue before this court is whether common law legislative immunity absolutely shields non-party state lawmakers from providing evidence in a civil lawsuit related to their legislative activities. Given the federal interests at stake in redistricting cases, this court concludes that common law legislative immunity does not entirely shield Non-Parties here. In *Gillock*, the Supreme Court noted that "where important federal interests are at stake, such as in the enforcement of federal criminal statutes, comity yields." *445 U.S. at 373*. The federal government's interest in enforcing voting

rights statutes is, without question, important. *See, e.g., Irvin, 127 F.R.D. at 174* [*23] ("The federal interest in the present case is compelling. The Voting Rights Act forbids local practices that abridge the fundamental right to vote. This Act requires vigorous and searching federal enforcement."); *Bartlett v. Strickland, 556 U.S. 1, ___, 129 S. Ct. 1231, 1240, 173 L. Ed. 2d 173 (2009)* ("Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote."). Voting rights cases, although brought by private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions. Thus, much as in *Gillock*, "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government." *Gillock, 445 U.S. at 373*.

Moreover, the Supreme Court has stated that evidentiary privileges must be "strictly construed" and 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 [*24] truth." *Trammel v. United States, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980)* (citation omitted). This court therefore does not find in the common law an absolute immunity for non-party state lawmakers that protects them from producing documents in federal redistricting cases. Instead, Non-Parties' privilege claims are best analyzed under the doctrine of legislative privilege.

B. Legislative Privilege

Other courts in different contexts have applied a qualified legislative privilege to protect state lawmakers from producing documents related to their legislative activities. This privilege is similar to the deliberative process privilege, which is also qualified, but the deliberative process privilege applies to the executive branch, not the legislature. The legislative privilege does not shield lawmakers from being sued, but rather protects them from producing documents in certain cases. *See Lindley v. Life Ins. Co. of Am., No. 08-CV-379, 2009 U.S. Dist. LEXIS 64338, 2009 WL 2245565, at *9 (N.D. Okla. Jul. 24, 2009)* ("Generally, legislators' immunity from suit is referred to as 'legislative immunity,' and the evidentiary privilege accorded legislators is referred to as the 'legislative privilege.'"). [*25] Under the federal common law, legislative privilege is qualified, not absolute, and may be overcome by a showing of need. *In re Grand Jury, 821 F.2d at 958*; *Joseph's House & Shelter, Inc. v. City of Troy, N.Y., 641 F. Supp. 2d 154, 158 n.3 (N.D.N.Y. 2009)*.

In determining whether and to what extent a state lawmaker may invoke legislative privilege, the court will 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 v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003)* (citing *In re Franklin Nat'l Bank Sec. Litigation, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)*; *see also ACORN v. County of Nassau, No.05-2301, 2009 U.S. Dist. LEXIS 82405, 2009 WL 2923435, at *2 (E.D.N.Y. Sept. 10, 2009)* (*ACORN II*); *Joseph's House & Shelter, Inc, 641 F. Supp. 2d at 158 n.3*. In considering these factors, the court's goal is to determine whether the need for disclosure and accurate fact finding outweighs the legislature's [*26] "need to act free of worry about inquiry into [its] deliberations." *ACORN II, 2009 U.S. Dist. LEXIS 82405, 2009 WL 2923435, at *2 n.2*. [9]

> 9 These factors are also used by some courts to evaluate the availability and scope of the deliberative process privilege. *See, e.g., Doe v. Nebraska, Nos. 8:09CV456, 4:09CV3266, 4:10CV3005, 788 F. Supp. 2d 975, 2011 U.S. Dist. LEXIS 42526, 2011 WL 1480483, at *7 (D. Neb. Apr. 19, 2011)*. The deliberative process privilege prohibits discovery of communications that are used by governmental bodies in formulating policy. *United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993)*. The key difference between the deliberative process privilege and the legislative privilege is that the former protects executive and administrative deliberations, and the latter safeguards legislative independence. *See Kay v. City of Rancho Palos Verdes, No. CV 02-3922, 2003 U.S. Dist. LEXIS 27311, 2003 WL 25294710, at *15 (C.D. Cal. Oct. 10, 2003)*.

Some courts considering the scope of the

deliberative process privilege have applied the same legislative privilege factors discussed herein. *See, e.g, Doe, 2011 U.S. Dist. LEXIS 42526, 2011 WL 1480483, at *7*; *Kay, 2003 U.S. Dist. LEXIS 27311, 2003 WL 25294710, at *18*. In this respect, "the balancing tests that courts have suggested for challenges to both the legislative privilege [*27] and the deliberative process privilege are quite similar and functionally interchangeable." *Kay, 2003 U.S. Dist. LEXIS 27311, 2003 WL 25294710, at *17* (collecting cases).

Several cases in the Northern District of Illinois, however, have required a particularized showing to invoke the deliberative process privilege. *See, e.g., Buonauro v. City of Berwyn, No. 08-C-6687, 2011 U.S. Dist. LEXIS 56194, 2011 WL 2110133, at *2 (N.D. Ill. May 25, 2011)* ("In order to invoke the privilege, a party must show three elements: (1) the department head with control over the information has made a formal claim of privilege; (2) the responsible official must demonstrate, usually by affidavit, the reasons for preserving the confidentiality of the documents; and, (3) the official must specifically identify and describe the documents in question.") (citing *Ferrell v. U.S. Dep't Hous. & Urban Dev., 177 F.R.D. 425, 428 (N.D. Ill. 1998)*; *see also Parvati Corp. v. City of Oak Forest, No. 08-C-702, 2010 U.S. Dist. LEXIS 72536, 2010 WL 2836739, at *5 (N.D. Ill. July 19, 2010)*.

Because Non-Parties are members of the legislative branch, not the executive branch, and because they have not made the particularized showing required to invoke the deliberative process privilege, the deliberative process [*28] privilege does not apply. This court will consider cases in other courts analyzing the deliberative process privilege only to the extent that they bear on the scope of the legislative privilege.

C. Balancing of Interests

1. The Seriousness of the Litigation and the Issues Involved, and the Role of the Government in the Litigation

In balancing the relevant interests, the first two factors weigh in favor of disclosure. There can be little doubt that plaintiffs' allegations are serious. Plaintiffs raise profound questions about the legitimacy of the redistricting process and the viability of the 2011 Map. Moreover, the legislators' role in the allegedly unlawful conduct is direct. The General Assembly, through its members, aides and consultants, was primarily responsible for drafting, revising and approving the 2011 Map. These actions are under scrutiny. This is not, then, "the usual 'deliberative process' case in which a private party challenges governmental action . . . and the government tries to prevent its decision-making process from being swept up unnecessarily into [the] public [domain]." *United States v. Bd. of Ed. of City of Chicago, 610 F. Supp 695, 700 (N.D. Ill. 1985)*. Rather, [*29] "the decisionmaking process . . . [itself] *is* the case," at least to the extent that plaintiffs allege that the General Assembly intentionally discriminated against Latino and/or Republican voters. *Id.* (emphasis in original). The seriousness of the litigation and the role of Non-Parties militate in favor of disclosure.

2. The Relevance of the Evidence Sought to be Protected and the Availability of Other Evidence

As discussed in Part I.B. the evidence plaintiffs seek is relevant, although it is not central to the outcome of this case. Moreover, the availability of other evidence favors non-disclosure. Plaintiffs already have considerable information at their fingertips. This includes public hearing minutes, special interest group position papers, statements made by lawmakers during debate, committee reports, press releases, newspaper articles, census reports, registered voter data and election returns. These documents and data are a matter of public record. As such, these factors weigh against disclosure.

3. The Possibility of Future Timidity by Government Employees

Finally, the need to encourage frank and honest discussion among lawmakers favors nondisclosure. Plaintiffs claim that disclosure [*30] of the subpoenaed documents will not unduly chill legislators in their future communications because Non-Parties are not defendants in the present litigation and there is little danger that any discovered material would be used against them in a later criminal prosecution. Plaintiffs also claim that because this case involves redistricting--a task not oft performed by legislators--permitting discovery will not work to chill the day-to-day functioning of the legislature.

The Redistricting Act, however, evolved from the same legislative process as any other law. Legislators negotiated the law in private and debated it in public. Infrequency is therefore irrelevant. In addition, the need for confidentiality between lawmakers and their staff is of utmost importance. Legislators face competing demands from constituents, lobbyists, party leaders, special interest groups and others. They must be able to confer with one another without fear of public disclosure.

In this respect, the legislature is not unlike other branches of government. As noted by the Third Circuit, a "legislator's need for confidentiality is similar to the need for confidentiality in communications between judges, between executive [*31] officials, and between a President and his aides." *In re Grand Jury, 821 F.2d at 957* (citations omitted); *see also Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit, 783 F.2d 1488, 1520 (11th Cir. 1986)* (judicial privilege applies where matters under inquiry implicate communications among a judge and his staff concerning official judicial business such as "the framing and researching of opinions, orders and rulings"); *N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975)* (executive privilege for agency officials applies to documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated") (citation omitted).

Failure to protect confidential communications between lawmakers and their staff will not only chill legislative debate, it will also discourage "earnest discussion within governmental walls." *Doe, 2011 U.S. Dist. LEXIS 42526, 2011 WL 1480483, at *6* (citations omitted). In the redistricting context, full public disclosure would hinder the ability of party leaders to synthesize competing interests of constituents, [*32] special interest groups and lawmakers, and draw a map that has enough support to become law. This type of legislative horse trading is an important and undeniable part of the legislative process.

Courts have recognized that disclosure of confidential documents concerning intimate legislative activities should be avoided. *See Rodriguez, 280 F. Supp. 2d at 102*; *Kay, 2003 U.S. Dist. LEXIS 27311, 2003 WL 25294710, at *14*. Courts applying this approach have held that a qualified privilege protects documents "created prior to the passage and implementation [of a bill] that involve opinions, recommendations or advice about legislative decisions between legislators or between legislators and their aides." *Doe, 2011 U.S. Dist. LEXIS 42526, 2011 WL 1480483, at *8*; *see generally City of Las Vegas v. Foley, 747 F.2d 1294, 1297 (9th Cir. 1984)* ("The Court prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task.") (citations omitted).

By limiting privileged documents to those that contain "opinions, recommendations or advice," courts have allowed discovery of "documents containing factually based information used in the decision-making process or disseminated to legislators or committees, such as committee [*33] reports and minutes of meetings." *2011 U.S. Dist. LEXIS 42526, [WL] at *6* (citations omitted). Courts have also required disclosure of "the materials and information available [to lawmakers] at the time a decision was made." *ACORN I, 2007 U.S. Dist. LEXIS 71058, 2007 WL 2815810, at *4* (citing *Village of Arlington Heights, 429 U.S. at n.20*).

This approach strikes the proper balance between the need for public accountability and the desire to avoid future timidity of lawmakers. Although always accountable to the public, lawmakers must be able to confer in private. This court therefore concludes that the legislative privilege shields from disclosure pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation. It does not protect facts or information available to lawmakers at the time of their decision.

In terms of the categories identified above, (1) information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers to draw the 2011 Map; and (2) information concerning the identities of persons who participated in decisions regarding the 2011 Map, the need for the information is outweighed by the purposes of the qualified privilege. The [*34] contrary is true of (3) the identities of experts and/or consultants retained to assist in drafting the 2011 Map and contractual agreements related thereto; and (4) objective facts upon which lawmakers relied in drawing the 2011 Map. Indeed, much of this information is discoverable under *Rule 26(a)(2)(B)(ii)* should defendants' experts chose to rely on it.

D. Waiver

As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider. *See ACORN I, 2007 U.S. Dist. LEXIS 71058, 2007 WL 2815810, at *4* ("the legislative privilege may be waived as to communications made in the presence of third parties") (citation omitted). "Where a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator." *Id.* (citation omitted). Thus, communications between Non-Parties and their staff retain their privileged status. *See 2007 U.S. Dist. LEXIS 71058, [WL] at *5*.

Communications between Non-Parties and outsiders to the legislative process, however, do not. This includes lobbyists, members of Congress and the Democratic Congressional [*35] Campaign Committee ("DCCC"). Although these groups may have a heightened interest in the outcome of the redistricting process, they could not vote for or against the Redistricting Act, nor did they work for someone who could. As such, the legislative privilege does not apply. *See Rodriguez, 280 F. Supp. 2d at 101* ("a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation [is] a session for which no one could seriously claim privilege").

The same rule applies to experts and/or consultants retained or utilized by Non-Parties to assist in the redistricting process. "While legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view. . . . [A] contrary ruling would allow a legislator to cloak any communication with legislative privilege by simply retaining an outsider in some capacity." *ACORN I, 2007 U.S. Dist. LEXIS 71058, 2007 WL 2815810, at *6*. Thus, to the extent that Non-Parties relied on reports or recommendations generated by outside consultants to draft the 2011 Map, they waived their legislative privilege as to these documents.

Finally, Non-Parties cannot invoke the privilege [*36] as to themselves yet allow others to use the same information against plaintiffs at trial. *See, e.g., Brown v. City of Detroit, 259 F. Supp. 2d 611, 623-24 (E.D. Mich. 2003)*; *Pacific Gas & Elec. Co. v. Lynch*, No. C-01-3023, 2002 WL 32812098, at *3 (N.D. Cal. Aug. 19, 2002). As such, any communications disclosed by Non-Parties to defendants or their trial experts, upon which defendants or their experts intend to rely, must be disclosed to plaintiffs. *See Fed. R. Civ. P. 26(a)(2)(B)(ii)*. [10]

10 Non-Parties indicated that to the extent the legislative privilege did not shield them from discovery, they would likely assert attorney-client privilege or work product immunity. This decision addresses only the legislative privilege raised in the motions. If Non-Parties have a serious basis for asserting any other privilege, this decision does not foreclose them.

ORDER

Plaintiffs' motion to compel enforcement of third party subpoena [Dkt. No. 52] and certain non-parties' motion to quash subpoenas and for a protective order [Dkt. No. 58] are granted in part and denied in part, respectively. Non-parties are directed to comply with this order by October 19, 2011, specifically as follows:

To the extent [*37] that plaintiffs seek documents containing the (1) motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the 2011 Map prior to the passage of the Redistricting Act; [11] or (2) identities of persons who participated in decisions regarding the 2011 Map, [12] their requests are denied and the subpoenas are quashed. Plaintiffs are also prohibited from subpoenaing the aforementioned documents from individual members of the General Assembly unless the member affirmatively waives his or her legislative privilege in writing.

11 *See* Req. Nos. 1- 6, 8, 14-17. [Doc. No. 52-1.]
12 *See* Req. Nos. 7, 9-11, 20-21. [Doc. No. 52-1.]

The motion to compel is granted and the motion to quash is denied as to documents containing objective facts upon which lawmakers relied in drawing the 2011 Map; [13] documents available to members of the General Assembly at the time the Redistricting Act was passed; the identities of experts and/or consultants retained by Non-Parties to assist in drafting the 2011 Map and contractual agreements related thereto; [14] and any documents that do not contain information concerning categories (1) or (2) above or to which Non-Parties have waived [*38] their legislative privilege. This order is applicable only to those parties served with subpoenas issued by the Northern District of Illinois.

13 *See* Req. Nos. 2 & 4. [Doc. No. 52-1.]
14 *See* Req. Nos. 12-13, 18-19. [Doc. No. 52-1.]

All documents withheld as privileged under this order shall be identified in a privilege log that contains (1) the name and capacity of each individual from whom or to whom a document was communicated; (2) the date of the document and attachments; (3) the type of document; (4) Bates number identification; and (5) a description of the subject matter in sufficient detail to allow the receiving parties to determine whether the privilege claim should be challenged. *See Petrovic v. City of Chicago, No. 06-C-611, 2007 U.S. Dist. LEXIS 61245, 2007 WL 2410336, at *2 (N.D. Ill. Aug. 21, 2007)*.

Enter: October 12, 2011

/s/ John Daniel Tinder

JUDGE JOHN DANIEL TINDER

United States Court of Appeals for the Seventh Circuit

/s/ Robert L. Miller

JUDGE ROBERT L. MILLER

United States District Court for the Northern District of Indiana

/s/ Joan Humphrey Lefkow

JUDGE JOAN HUMPHREY LEFKOW

United States District Court for the Northern District of Illinois

BARBARA LEE, et al., Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Civil Action No. 3:15CV357 (HEH-RCY)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

2015 U.S. Dist. LEXIS 171682

December 23, 2015, Decided
December 23, 2015, Filed

PRIOR HISTORY: *Lee v. Virginia State Bd. of Elections, 2015 U.S. Dist. LEXIS 118647 (E.D. Va., Sept. 4, 2015)*

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For Virginia State Board of Elections, James B. Alcorn, in his capacity as Chairman of the Virginia State Board of Elections, Dr. Clara Belle Wheeler, in her capacity as Vice-Chair of the Virginia State Board of Elections, Singleton B. McAllister, in her capacity as Secretary of the Virginia State Board of Elections, Virginia Department of Elections, Edgardo Cortes, in his capacity as Commissioner of the Virginia Department of Elections, Defendants: Dana Johannes Finberg, Arent Fox (CA), San Francisco, CA; Mark Fernlund (Thor) Hearne, II, PRO HAC VICE, Arent Fox LLP (NA-MO), Clayton, MO NA; Stephen Gerard Larson, PRO HAC VICE, Arent Fox LLP (CA-NA), Los Angeles, CA NA.

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JUDGES: Roderick C. Young, United States Magistrate Judge.

OPINION BY: Roderick C. Young

OPINION

MEMORANDUM OPINION

On Legislative Nonparties' Motion for Stay of Discovery and Motion to Quash Subpoenas and/or Motion for Protective Order

This matter is before the Court for resolution of non-dispositive matters pursuant to *28 U.S.C. § 636(b)(1)(A)* [*3] on the Legislative Nonparties' Motion for Stay of Discovery and Motion to Quash Subpoenas and/or Motion for Protective Order ("Mot. to Quash," ECF No. 71). Plaintiffs have served subpoenas on several nonparty current, or former, members of the Virginia General Assembly ("Nonparty Legislators").[1] Through these subpoenas, Plaintiffs seek to compel the Nonparty Legislators to produce communications between themselves and various other persons; these communications involve several senate bills and related topics discussed by the Virginia Senate. (*See* Notice of Additional Attach. to Mot. to Quash, ECF No. 73, Subpoena to Senator Bryce E. Reeves, Attach. A ("Reeves Subpoena") at 5, ECF No. 73-1;[2] *see also* Non-Party Legislators' Mem. of P. & A. in Supp. of Legislators' Mot. to Quash ("Legs.' Mem. Supp."), ECF No. 72, Attach. 3, Decl. of Sen. Jill Holtzman Vogel ("Vogel Decl.") P 4, ECF No. 72-3.) The Nonparty Legislators refused to produce these communications, arguing that the communications are protected by legislative privilege and that production would be unduly burdensome. (*See* Legs.' Mem. Supp. at 3-4.)

1 Plaintiffs have served subpoenas on the following Nonparty Legislators: Speaker of the Virginia House of Delegates William Howell; Majority Leader of the Virginia Senate Kirk Cox; Delegate Tim Hugo; Delegate Rob Bell; Delegate Margaret Ransone; Delegate Randy Minchew; Delegate David Ramadan; Delegate Buddy Fowler; Delegate Mark Cole; Delegate John O'Bannon; Delegate Nick Rush; Delegate Joseph Yost; Delegate Israel O'Quinn; Delegate Riley Ingram; Delegate Dave Albo; Delegate Steve Landes; Delegate Chris Jones; Senator Jill Vogel; Senator Bryce Reeves; Senator John Cosgrove; Senator Bill Carrico; Senator Mark Obenshain; Senator Steve Martin; Senator Dick Black; and Senator Jeffrey McWaters. (Legs.' Mot. to Quash at 1 n.1.)

Plaintiffs also have served subpoenas on Delegate John Cox, Delegate Jackson Miller, Delegate Thomas Garrett, and Senator Ralph Smith. [*4] These four legislators have not joined the Motion to Quash as they either have no responsive documents or do not object to the subpoenas. (*See* Pls.' Mem. Opp'n to Mot. to Quash ("Pls.' Opp'n") at 3 n. 2, ECF No. 82.)

2 For all citations, the Court uses the pagination of the documents themselves, rather than the ECF pagination.

Having reviewed the submissions by Plaintiffs and the Legislative Nonparties, and for the reasons discussed herein, the Court holds (1) that legislative privilege precludes the production of communications between and among the Nonparty Legislators and any persons in the employ of the Nonparty Legislators ("Legislative Employees"); (2) that legislative privilege does not preclude the production of communications between and among the Nonparty Legislators and third parties, such as state agencies, constituents, and lobbyists, among others ("Third Parties"); (3) that legislative privilege does not preclude the production of communications between and among the Legislative Employees and Third Parties; and, (4) given the limitations noted below and the fact that discovery is broad in scope and freely permitted, that the production of communications with Third Parties [*5] is not unduly broad or burdensome.[3] Accordingly, the Court will grant the Motion to Quash to the extent set forth herein and otherwise will deny the Motion to Quash.

3 Because the Court finds that communications between and among the Nonparty Legislators and the Legislative Employees are privileged the Court will deny the Motion to Quash to the extent it seeks a protective order. Furthermore, because this Court has ruled on the Motion to Dismiss, (see Order, ECF No. 111), the Court will deny as moot the Motion to Quash to the extent it seeks a stay of discovery pending the resolution of the Motion to Dismiss.

I. BACKGROUND

Barbara H. Lee, Gonzalo J. Aida Brescia, and the Democratic Party of Virginia ("Plaintiffs") have brought this suit against the Virginia State Board of Elections and its officers as well as the Virginia Department of Elections and its commissioner (collectively, "Defendants"). Plaintiffs allege that Virginia's

recently-passed Voter Identification Law ("Voter ID Law") violates the Federal Constitution, violates the Voting Rights Act ("VRA"), and results in impermissible Partisan Fencing. (*See* Am. Compl. PP 100-11, 114-126, ECF No. 36.) Therefore, Plaintiffs ask the Court [*6] for declaratory and injunctive relief with regard to Virginia's Voter ID Law.[4] (*See* Am. Compl. at 38-39, PP A-D.)

> 4 Plaintiffs originally also brought a claim regarding the re-enfranchisement of non-violent felons. (*See* Am. Compl. PP 112-13.) Plaintiffs have since voluntarily dismissed this claim. (Stipulation for Dismissal Pursuant to *Rule 41(a)(1)*, ECF No. 97; *see* Order Dismissing part of Count II of the Am. Compl., ECF No. 98.)
>
> Plaintiffs also originally brought claims regarding alleged "long wait times to vote." (*See* Am. Compl. PP 105-07, 116, 119, 121, 124-26.) However, the Court has since dismissed Plaintiffs' long-line claims. (*See* Order, ECF No. 111.)

In seeking evidence of the "legislative intent" of the Voter ID Law, Plaintiffs served the Nonparty Legislators with subpoenas, demanding the production of "[a]ll communications between any person and [the legislator], and/or [the legislator's] employees, staff, agents, vendors, or consultants, regarding or related to . . . "[v]oter identification, including free voter ID" and Senate Bills 1, 663, and 1256--enacted by the General Assembly in 2013 (collectively, "Voter ID Communications"). (*See* Reeves Subpoena at 5; *see also* Vogel Decl. 14.)[5]

> 5 The subpoenas also [*7] demanded communications regarding original demanded communications regarding Senate Bills 702, 964, and 1150; "[v]oter wait times and/or lines at the polls;" and "re-enfranchisement of non-violent felons." (*See* Reeves Subpoena at 11; *see also* Vogel Decl. P 4.) As Plaintiffs' claims regarding voter wait times and re-enfranchisement have been dismissed, *see supra* note 4, the Court will quash the subpoenas to the extent they demand communications regarding Senate Bills 702, 964, and 1150; voter wait time and/or lines at the polls; and, re-enfranchisement of non-violent felons.

The Nonparty Legislators refused to produce the Voter ID Communications demanded in the subpoenas and subsequently filed their Motion to Quash (ECF No. 71). For the reasons discussed below, the Court finds that all communications between and among the Nonparty Legislators and the Legislative Employees are protected by legislative privilege. The Court also finds, however, that communications between and among Nonparty Legislators and/or Legislative Employees and third parties are not protected by legislative privilege. Accordingly, the Court grants in part and denies in part the Nonparty Legislators' Motion to Quash (ECF [*8] No. 71).

II. DISCUSSION

A. Legislative Immunity and Legislative Privilege

The Court begins by noting that "[l]egislative privilege clearly falls within the category of accepted evidentiary privileges." *EEOC v. Washington Suburban Sanitary Comm'n, ("WSSC II") 631 F.3d 174, 180 (4th Cir. 2011)* (citing *Burtnick v. McLean, 76 F.3d 611, 613 (4th Cir. 1996))*. Legislative privilege derives from the doctrine of legislative immunity, and the twin doctrines are the two sides of the same coin. As the Fourth Circuit has stated, "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." *Id. at 181*. As this Court has previously held, "[legislative] privilege is rooted in the absolute immunity granted to federal legislators . . . and exists to safeguard that immunity." *Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 661 (E.D. Va. 2014)* (quoting *WSSC II, 631 F.3d at 180*). Moreover, as the United States District Court for the District of Maryland has noted, "[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)* (Smalkin, J.) (emphasis added). "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 [*9] acts and *shields them from judicial scrutiny into their deliberative process*. The doctrine is a bulwark in upholding the separation of powers." *Id. at 304 (Mumaghan, J., & Motz, J.)* (emphasis added). In short, the doctrine of legislative privilege--which extends equally to testimony and other evidence--exists to safeguard legislative immunity. *See Simpson v. City of Hampton, 166 F.R.D. 16, *19 (E.D. Va. 1996)* ("Pursuant to the Fourth Circuit['s holding in *Burtnick*,] the Court DENIES Plaintiff's Motion to Compel Discovery of the

council members' *personal notes and files, as they are protected by testimonial legislative privilege*." (citing *Burtnick, 76 F.3d 611*) (emphasis added)).

B. Legislative Immunity Applies to State Legislators

Federal legislators enjoy legislative immunity and legislative privilege that derives from the *"Speech or Debate Clause" of the Federal Constitution*.[6] *WSSC II, 631 F.3d at 180* ("The *Speech or Debate Clause* provides [legislative] immunity to federal legislators."); *see also Dombrowski v. Eastland, 387 U.S. 82, 84-85, 87 S. Ct. 1425, 18 L. Ed. 2d 577 (1967)* ("It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the *Speech or Debate Clause of the Constitution*, that legislators engaged 'in the sphere of legitimate legislative activity,' should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."). State legislators also enjoy legislative immunity and legislative privilege; however, insofar [*10] as state legislators may employ these protections in federal court, the protections are grounded in federal common law.[7] *See Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951)* (recognizing legislative immunity for state legislators sued for violating the Civil Rights Act of 1871); *see also WSSC II, 631 F.3d at 180-81* ("In recognition of the immunity's historical pedigree and practical importance the Supreme Court has extended it to a wide range of legislative actors." (citing *Tenney, 341 U.S. at 372-76*, for the proposition that the immunity has been extended to state legislators)); *Page, 15 F. Supp. 3d at 661* ("In *Tenney v. Brandhove*, the Supreme Court of the United States found that the *Speech or Debate Clause* was part of a broader common law 'tradition [of legislative privilege] . . . well grounded in history' and extended the benefit of that tradition (though not the *Speech or Debate Clause* itself) to state legislators." (quoting *Tenney, 341 U.S. at 372-76*)). Moreover, state legislators enjoy the benefits of legislative immunity and legislative privilege regardless of whether they are named as parties to the underlying lawsuit. *Schlitz v. Virginia, 854 F.2d 43,46 (4th Cir. 1988)* ("[W]e reject plaintiff's argument that he can circumvent the doctrine of legislative immunity by declining to name as defendants individual legislators. The purpose of the doctrine is to prevent legislators from having to testify regarding matters of legislative [*11] conduct, whether or not they are testifying to defend themselves.").

6 "[The Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." *U.S. Const, art. I, § 6, cl. 1*.

7 The Nonparty Legislators argue that they have a separate legislative privilege stemming from the Virginia *Constitution's Speech or Debate Clause*. (*See* Legs.' Mem. Supp. at 7-8 (quoting *Va. Const. art IV, § 9* ("Members of the General Assembly shall, an all cases, except treason, felony, or breach of the peace, be privileged from arrest during the sessions of their respective houses; and for any speech or debate in either house shall not be questioned in any other place.")).) The Court, however, does not separately analyze the claim of privilege under the Virginia Constitution as the analysis is substantially similar to that under the federal common law, wherein privilege for state legislators ultimately relates back to the *Speech or Debate clause of the Federal Constitution*. *See Greenburg v. Collier, 482 F. Supp. 200, 202 (E.D. Va. 1979)* ("The [Virginia] and federal immunities are very similar in their wording. Further, they appear to be based upon the [*12] same historical and public policy considerations."). Furthermore, because the Court--using Supreme Court and Fourth Circuit precedent interpreting both the federal common law and the Federal *Speech or Debate Clause*--ultimately finds that internal legislative communications are privileged, but that third-party communications are not, the Court does not undertake a separate analysis under the Virginia *Speech or Debate Clause*, which is substantially coterminous with its federal analog. *See id. at 202-04* (discussing the Virginia *Speech or Debate Clause* and analyzing a privilege claim thereunder using Supreme Court precedent based on the Federal *Speech or Debate Clause*, ultimately holding that state legislators enjoyed legislative privilege and did not need to produce internal legislative communications that related to the motive underlying the passage of a Virginia state law) (citing *United States v. Brewster, 408 U.S. 501, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972))*.

The Supreme Court and the Fourth Circuit have addressed the doctrine of legislative immunity in a number of cases. In what seems to be the first Supreme Court case to explicitly recognize federal common law legislative immunity for state legislators, *Tenney v. Brandhove*, the Supreme Court explicitly ruled "that it was not consonant with our scheme of government for a court to inquire into the motives of legislators." [*13] *Tenney, 341 U.S. at 377*. In that case, the Supreme Court found that state legislators enjoyed immunity for conduct that was alleged to have violated a civil rights statute passed in 1871 and aimed at enforcing the *Fourteenth Amendment to the Federal Constitution*. *Id. at 378*; *see also Bogan v. Scott-Harris, 523 U.S. 44, 49, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998)* ("Recognizing this venerable tradition [of legislative immunity], we have held that state and regional legislators are entitled to *absolute immunity from liability* under *§ 1983* for their legislative activities." (emphasis added) (citing *Tenney, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019*)); *United States v. Gillock, 445 U.S. 360, 371-72, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980)* (discussing *Tenney*). In so doing, the Supreme Court explained the dangers of curtailing legislative immunity by explicitly stating that "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed . . . [and that c]ourts are not the place for such controversies." *Tenney, 341 U.S. at 378*.

Later, in *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, the United States Supreme Court reiterated its holding that state legislators enjoy legislative immunity by stating "[i]n *Tenney* we concluded that Congress did not intend *§ 1983* to abrogate the common-law immunity of state legislatures. Although *Tenney* involved an action for damages under *§ 1983*, its holding is equally applicable to *§ 1983* actions seeking declaratory or injunctive [*14] relief." *Supreme Court of Va., 446 U.S. 719, 732, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980)* (recognizing a federal common law legislative immunity and legislative privilege for state legislators). The Supreme Court also reaffirmed that legislative privilege is an essential derivative of legislative immunity, stating that in order "[t]o preserve legislative independence, we have concluded that 'legislators engaged "in the sphere of legitimate legislative activity," should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id. at 732* (quoting *Dombrowski, 387 U.S. at 85* (quoting *Tenney, 341 U.S. at 376*)). The Supreme Court went so far as to declare that state legislators enjoy absolute immunity, at least in *§ 1983* civil claims, by noting that

> there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, *the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity*.

Id. at 733-34 (emphasis added). The parties have not proffered, and this Court is not aware of, any subsequent Supreme Court decision that has [*15] overturned the holdings in either *Tenney* or *Supreme Court of Virginia*.[8]

> 8 As discussed below, the Court notes that in *United States v. Gillock, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980)*, the United States Supreme Court recognized an exception to the doctrine of legislative immunity insofar as a state legislator did not enjoy absolute legislative immunity or legislative privilege in the case of a criminal prosecution for violation of federal law. As discussed below, this Court is not convinced that the Supreme Court intended *Gillock* to create a broad carve-out to the doctrine of legislative immunity for state legislators. Indeed, in *Supreme Court of Virginia*, immediately prior to noting that Virginia legislators "could successfully have sought dismissal [of a *§ 1983* case] on the grounds of *absolute legislative immunity*," *Supreme Court of Va., 446 U.S. at 734* (emphasis added), the United States Supreme Court recognized its holding in *Gillock* as only curtailing immunity for state legislators in the criminal context, *id. at 733* ("the separation-of-powers doctrine justices a broader privilege for Congressmen than for state legislators in criminal actions") (citing *Gillock, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454*).

Likewise, the Fourth Circuit has consistently held that state legislators enjoy legislative immunity and legislative privilege. Indeed, the Fourth [*16] Circuit has explicitly stated that legislative immunity "allows

[legislators] to focus on their public duties by removing the costs and distractions attending lawsuits . . . [and legislative immunity] shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *WSSC II, 631 F.3d at 181*. Furthermore, "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." *Id.* Applying this safeguard in *Washington Suburban Sanitary Commission*, the Fourth Circuit specifically recognized that "if the [government agency] or private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply." *Id.* (citing *Burtnick, 76 F.3d at 613*) (ADEA case brought by the EEOC).

In the earlier case of *Burtnick v. McLean*, the Fourth Circuit also recognized that legislative immunity applied to individual state and local legislators sued under *§ 1983*. The Fourth Circuit specifically held that "McLean, in her individual capacity as a legislator, is still immune from suit under the legislative immunity doctrine." *Burtnick, 76 F.3d at 613* (citations omitted). [*17] The Fourth Circuit further reinforced this holding by noting that "local legislators are *entitled to absolute immunity* when acting in a legislative capacity." *Id.* (citation omitted) (emphasis added). Noting that "[t]he existence of testimonial privilege is the prevailing law in [the Fourth Circuit]" and that "this privilege [is] still viable," the Fourth Circuit held that the plaintiff's "attempt to establish a prima facie case [of discrimination] will have to be accomplished without the testimony of members of the Board as to their motives." *Id.* (citations omitted).

Moreover, in rejecting an argument that legislative immunity for state legislators is not absolute, the Fourth Circuit has held that "where . . . the suit would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force." *Schlitz, 854 F.2d at 45* (citing *Dombrowski, 387 U.S. at 85*). In reaching that holding, the Fourth Circuit specifically stated that--in the course of ADEA litigation--an inquiry into "whether [the Virginia General] Assembly's purported motives for declining to reelect [a state judge] are a pretext for age discrimination" was an inquiry that ran "squarely afoul of the doctrine of legislative [*18] immunity." *Id. at 45*.

Likewise, in *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., 684 F.3d 462 (4th Cir. 2012)*, the Fourth Circuit held that a district court did not err "in refusing to inquire into the allegedly unconstitutional motive behind the County's budget." *Kensington, 684 F.3d at 467*. In reaching this holding, the Fourth Circuit expounded on Supreme Court precedent and "warned that it was a 'hazardous matter' to inquire into legislative motives because '[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.'" *Kensington, 684 F.3d at 468* (quoting *United States v. O'Brien, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968))*.

In summation, the Fourth Circuit and Supreme Court have consistently held that state legislators enjoy both legislative immunity and its supporting doctrine, legislative privilege.

C. Recognized Exceptions to Legislative Immunity for State Legislators

The United States Supreme Court has recognized a specific exception to the doctrines of legislative immunity and legislative privilege. In *United States v. Gillock*, the Supreme Court held that a state legislator could not invoke legislative privilege in a case wherein the state legislator was being prosecuted for violation of a federal criminal statute. *Gillock, 445 U.S. at 361-62, 374*. Specifically, the Supreme Court concluded [*19]

> 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. . . . Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

Id. at 373. In reaching its decision, the Supreme Court distinguished its holding in *Tenney*, explaining that legislators enjoy immunity in civil cases, but that legislators cannot utilize the "judicially fashioned doctrine of official immunity . . . to immunize criminal conduct proscribed by an Act of Congress." *Id. at 372*

(quoting *O'Shea v. Littleton, 414 U.S. 488, 503, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974)* (quoting *Gravel v. United States, 408 U.S. 606, 627, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972))*. Moreover, the Supreme Court further seemed to limit its holding in *Gillock* to criminal matters, stating explicitly that "*Tenney* and subsequent cases on official immunity have drawn the line at civil actions." *Id. at 373*.

Citing the Supreme Court's holding in *Gillock*, some in-circuit district courts have found a limited exception to legislative privilege in cases involving legislative redistricting. [*20] *See Bethune-Hill v. Va. State Bd. of Elections, No. 3:14CV852, 114 F. Supp. 3d 323, 2015 U.S. Dist. LEXIS 68054, 2015 WL 3404869, *9 (E.D. Va. May 26, 2015)*; *Page, 15 F. Supp. 3d at 657, 665*; *Schaefer, 144 F.R.D. at 292, 304*. These courts have all noted, essentially, that "[l]egislative redistricting is a *sui generis* process." *Schaefer, 144 F.R.D. at 304*; *see Bethune-Hill, 2015 U.S. Dist. LEXIS 68054, 2015 WL 3404869, at *9*; *Page, 15 F. Supp. 3d at 665* (quoting *Schaefer, 144 F.R.D. at 304*). In ordering limited production in *Bethune-Hill*, this Court explained the unique nature of redistricting cases by noting that they are "extraordinary" and that "the natural corrective mechanisms built into our republican system of government offer little check upon the very real threat of "legislative self-entrenchment." *Bethune-Hill, 2015 U.S. Dist. LEXIS 68054, 2015 WL 3404869, at *9*. Likewise, in *Page*, this Court found that "a consultant who was employed by a partisan political committee" could not claim legislative privilege. *Page, 15 F. Supp. 3d at 662*. The Court determined, however, that even were the partisan consultant eligible to assert legislative privilege, the privilege would yield because of the *sui generis* nature of the redistricting claims brought in that case. *See id. at 665* (quoting *Schaefer, 144 F.R.D at 304*). This court specifically held that the "significant difference [of redistricting cases] prompted the [*Schaefer*] court to require a flexible approach to resolving discovery objections based on legislative privilege." *Id.* Ultimately, based on the unique nature of redistricting cases, the *Bethune-Hill, Page*, and [*21] *Schaefer* courts held that a flexible, qualified privilege analysis was required with regard to legislative privilege.

The Court is unconvinced, however, that the same flexible approach is appropriate in the instant case. First, this Court's holding in *Page* was ultimately based on the unremarkable proposition that a consultant hired by a partisan political caucus and "paid as an independent contractor" by a partisan political campaign committee was ineligible to claim legislative privilege. *See Page, 15 F. Supp. 3d at 660, 664*. Second, this Court reached its holding in *Bethune-Hill*, based on the "extraordinary" nature of legislative redistricting cases. *Bethune-Hill, 2015 U.S. Dist. LEXIS 68054, 2015 WL 3404869, at *9*. Moreover, even accounting for that "extraordinary" nature, this Court still did not order a general production of all legislative communication, but rather still limited the scope of production, in part due to "the importance of the legislative privilege." *2015 U.S. Dist. LEXIS 68054, [WL] at *15-*17*. Finally, while the *Schaefer* court also ordered the limited production of communications due to the unique nature of legislative redistricting cases, one member of the three-judge panel stated that "[i]t is evident that any action (or inaction) taken by the Maryland Legislature after the Governor's plan was introduced [*22] on January 8, 1992 falls within the scope of legislative immunity." *Schaefer, 144 F.R.D. at 299*. Likewise, the other two judges on the panel stated that they

> would flatly prohibit [the legislators'] depositions from being taken as to any action which they took after the redistricting legislation reached the floor of the General Assembly 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. at 305.

In summation, this Court is not persuaded by Plaintiffs' argument that these in-circuit district court cases compel the broad production of documents sought in the instant case, especially in light of binding Fourth Circuit precedent that warns of the "hazardous" nature of inquiring into legislative motive, *Kensington, 684 F.3d at 468* (quoting *O'brien, 391 U.S. at 383-84*), and that continues to hold that "[t]he existence of testimonial privilege is the prevailing law in [the Fourth Circuit]," *Burtnick, 76 F.3d at 613* (citations omitted).[9]

> 9 The Court notes that, even if it were to adopt a "qualified analysis" as used in the redistricting cases, it would still ultimately reach the same

holding it reaches without adopting the qualified analysis. The [*23] Court would reach the same conclusion in large part for the reasons articulated by Judge Peake in *North Carolina State Conf. of the NAACP v. McCrory, No. 1:13CV658, ECF No. 207, Slip Op. at 5-15, 2014 U.S. Dist. LEXIS 185130 (M.D.N.C. Nov. 20, 2014)*. *In N.C. NAACP*, Judge Peake addressed subpoenas for legislative communications and a motion to quash in a case involving a challenge to a state voter identification law. *See 2014 U.S. Dist. LEXIS 185130, [slip op.] at 1-5*. In analyzing the discovery disputes, Judge Peaked essentially adopted the same qualified privilege analysis that the *Bethune-Hill, Page*, and *Schaefer* courts utilized. *See 2014 U.S. Dist. LEXIS 185130, [slip op.] at 5*. Judge Peake characterized this analysis as "a flexible approach that considers the need for the information while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process." *Id.* After performing the qualified analysis, Judge Peak ultimately concluded "that communications between legislators and third parties are not ordinarily within the scope of legislative privilege, [and] that any such privilege has been waived as to those communications." *2014 U.S. Dist. LEXIS 185130 at *31-32*. However, Judge Peake also concluded that legislative privilege did apply "to purely internal legislative communications (i.e., communications [*24] solely among legislators and communications between legislators and legislative staff)." *Id.* Ultimately, therefore, this Court notes that it would reach the same result either under the qualified privilege analysis stemming from the redistricting cases or under the absolute privilege analysis, "the existence [of which] is the prevailing law in [the Fourth Circuit]." *Burtnick, 76 F.3d at 613* (citations omitted).

D. Legislative Privilege and Production in the Instant Case

Ultimately, adhering to the Fourth Circuit's ruling that legislative privilege is "still viable" in this Circuit, *see Burtnick, 76 F.3d at 613* (citations omitted), the Court will briefly discuss the extent to which the Nonparty Legislators and the Legislative Employees may claim that privilege.

First, the Court concludes that the Legislative Employees are in substantially the same position as the Nonparty Legislators themselves in terms of eligibility to claim legislative privilege. *See, e.g., Gravel v. United States 408 U.S. 606, 616-17, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972)* (discussing legislative privilege and noting that a legislator "and his aide are to be 'treated as one' and that the refusal to recognize legislative privilege for aides would frustrate the purpose of legislative privilege for the legislator); *see, e.g., also, N.C. NAACP, No. 1:13CV658, ECF No. 207, 2014 U.S. Dist. LEXIS 185130 at *31-32* [*25] (concluding that communications between legislators and legislative staff are privileged under the doctrine of legislative privilege).

Second, the Court concludes that the Nonparty Legislators were acting in a legislative capacity by passing the Senate Bills in question and debating the topic of voter identification. That is, the Nonparty Legislators were engaged in "the adop[tion of] prospective, legislative-type rules . . . that establish[] . . . a general policy affecting the larger population." *WSSC II, 631 F.3d at 184* (quoting *Alexander v. Holden, 66 F.3d 62, 66-67 (4th Cir. 1995)* (citation omitted)) (internal quotation marks omitted) (alterations in original).

Third, the Court concludes that any communications the Nonparty Legislators or the Legislative Employees made with Third Parties--such as state agencies, constituents, lobbyists, and other third parties--are not protected by legislative privilege. The Nonparty Legislators and the Legislative Employees may not claim legislative privilege with regard to communications made to or from third parties because the involvement of third parties inherently destroyed any privilege that may or may not have existed. *See Alexander, 66 F.3d at 68 n.4* (noting that it is possible to waive the legislative privilege [*26] (quoting *Schaefer, 144 F.R.D at 298*)); *N.C. NAACP, No. 1:13CV658, ECF No. 207, 2014 U.S. Dist. LEXIS 185130 at *23* ("[Legislative] privilege was waived when the communications were shared with non-legislative outside parties." (citing *Alexander, 66 F.3d at 68 n.4*)).

Fourth, noting that the Senate Bills in question were introduced in early 2013 and maintaining consistency with the scope of discovery previously ordered by this Court, (*see* Order, ECF No. 105), the Court will limit the time period for production of any communications to

2012 through the date on which the Complaint was filed, June 11, 2015.

Fifth, given the limited scope of time, the limitations imposed by the application of privilege, the fact that the communication records are apparently searchable electronically, and the fact that "[d]iscovery . . . is broad in scope and freely permitted," *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003)*, this Court concludes that the productions ordered herein are not unduly broad or burdensome, *cf. N.C. NAACP, No. 1:13CV658, ECF No. 207, 2014 U.S. Dist. LEXIS 185130 at *32*.

III. CONCLUSION

Having considered the Parties' motions, briefs, and controlling Fourth Circuit and Supreme Court law, and for the reasons discussed above, the Court holds (1) that legislative privilege precludes the production of communications between and among the [*27] Nonparty Legislators and the Legislative Employees; (2) that legislative privilege does not preclude the production of communications between and among the Nonparty Legislators and Third Parties, such as state agencies, constituents, and lobbyists, among others; (3) that legislative privilege does not preclude the production of communications between and among the Legislative Employees and Third Parties; and, (4) given the limitations noted above and the fact that discovery is broad in scope and freely permitted, that the production of communications with Third Parties is not unduly broad or burdensome. Accordingly, the Court will grant the Motion to Quash (ECF No. 71) to the extent set forth herein and otherwise will deny the Motion to Quash.

An appropriate Order shall issue.

Let the Clerk file this Memorandum Order electronically and notify all counsel accordingly.

/s/ Roderick C. Young

Roderick C. Young

United States Magistrate Judge

Richmond, Virginia
Date: December 23, 2015

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. LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants. UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, et al., Defendants.

1:13CV658,1:13CV660,1:13CV861

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

2014 U.S. Dist. LEXIS 185130

November 20, 2014, Decided
November 20, 2014, Filed

PRIOR HISTORY: *United States v. N.C., 2014 U.S. Dist. LEXIS 14787 (M.D.N.C., Feb. 6, 2014)*

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For PHILIP E. BERGER, THOM TILLIS, JAMES BOLES, TOM APODACA, THOM GOOLSBY, RALPH E HISE, ROBERT A. RUCHO, DAVID R. LEWIS, TIM MOORE, TOM MURRY, LARRY PITTMAN, RUTH SAMUELSON, HARRY WARREN, Movants (1:13-cv-00658-TDS-JEP): ALEXANDER MCCLURE PETERS, N.C. DEPARTMENT OF JUSTICE, RALEIGH, NC; THOMAS A. FARR, OGLETREE DEAKINS NASH SMOAK & STEWART, P.C., RALEIGH, NC.

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For A. Philip Randolph Institute, Unifour Onestop Collaborative, Common Cause North Carolina, Kay Brandon, Octavia Rainey, Sara Stohler, Hugh Stohler, Plaintiffs (1:13cv660): ALLISON JEAN RIGGS, ANITA S. EARLS, LEAD ATTORNEYS, SOUTHERN COALITION FOR SOCIAL JUSTICE, Durham, NC USA; CHRISTOPHER [*9] A. BROOK, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, Raleigh, NC USA; DALE E. HO, AMERICAN CIVIL LIBERTIES UNION, New York, NY USA; JULIE A. EBENSTEIN, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, NY USA; MOFFATT LAUGHLIN MCDONALD, SR., AMERICAN CIVIL LIBERTIES UNION VOTING RIGHTS PROJECT, Atlanta, GA USA.

For Goldie Wells, Plaintiff (1:13cv660): ALLISON JEAN RIGGS, ANITA S. EARLS, LEAD ATTORNEYS, SOUTHERN COALITION FOR SOCIAL JUSTICE, Durham, NC USA; CHRISTOPHER A. BROOK, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, Raleigh, NC USA; DALE E. HO, AMERICAN CIVIL LIBERTIES UNION, New York, NY USA; EDWIN M. SPEAS, JR., POYNER SPRUILL, LLP, USA; JULIE A. EBENSTEIN, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, NY USA; MOFFATT LAUGHLIN MCDONALD, SR., AMERICAN CIVIL LIBERTIES UNION VOTING RIGHTS PROJECT, Atlanta, GA USA.

For Louis M. Duke, Intervenor Plaintiff (1:13cv660): JOHN M. DEVANEY, MARC E. ELIAS, LEAD ATTORNEYS, ELISABETH C. FROST, PERKINS COIE, LLP, Washington, DC USA; CAROLINE P. MACKIE, EDWIN M. SPEAS, JR., JOHN WARD O'HALE, POYNER SPRUILL, LLP, Raleigh, NC USA; JOSHUA L. KAUL, PERKINS COIE LLP, Madison, WI.

For Charles M. Gray, Asgod Barrantes, Josue E. [*10] Berduo, Brian M. Miller, Intervenor Plaintiffs (1:13cv660): JOHN M. DEVANEY, MARC E. ELIAS, ELISABETH C. FROST, LEAD ATTORNEYS, PERKINS COIE, LLP, Washington, DC USA; CAROLINE P. MACKIE, EDWIN M. SPEAS, JR., JOHN WARD O'HALE, POYNER SPRUILL, LLP, Raleigh, NC USA; JOSHUA L. KAUL, PERKINS COIE LLP, Madison, WI USA.

For State of North Carolina, Joshua B. Howard, in his official capacity as a member of the State Board of Elections, Rhonda K. Amoroso, in her official capacity as a member of the State Board of Elections, Joshua D. Malcolm, in his official capacity as a member of the State Board of Elections, Paul J. Foley, in his official capacity as a member of the State Board of Elections, Maja Kricker, in her official capacity as a member of the State Board of Elections, Defendants (1:13cv660): ALEXANDER MCCLURE PETERS, LEAD ATTORNEY, KATHERINE A. MURPHY, N.C. DEPARTMENT OF JUSTICE, Raleigh, NC USA; THOMAS A. FARR, LEAD ATTORNEY, MICHAEL DOUGLAS MCKNIGHT, PHILLIP JOHN STRACH, OGLETREE DEAKINS NASH SMOAK & STEWART, P.C., Raleigh, NC USA; AMY M. POCKLINGTON, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Richmond, VA USA; KARL S. BOWERS, BOWERS LAW OFFICE LLC, Columbia, SC USA.

For Patrick [*11] L. Mccrory, in his official capacity as Governor of the state of North Carolina, Defendant (1:13cv660): KARL S. BOWERS, LEAD ATTORNEY, BOWERS LAW OFFICE LLC, Columbia, SC USA; ALEXANDER MCCLURE PETERS, N.C. DEPARTMENT OF JUSTICE, Raleigh, NC USA; AMY M. POCKLINGTON, THOMAS A. FARR, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Richmond, VA USA; ROBERT C. STEPHENS, OFFICE OF THE GENERAL COUNSEL, Office Of The Governor, Raleigh, NC USA.

For United States of America, Movant (1:13cv660): CATHERINE MEZA, LEAD ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC USA; JOHN A. RUSS, IV, LEAD ATTORNEY, U.S. DEPARTMENT OF JUSTICE, Civil Rights Division, Voting Section, Washington, DC USA.

For North Carolina State Conference of The Naacp, Emmanuel Baptist Church, New Oxley Hill Baptist Church, Bethel A. Baptist Church, Covenant Presbyterian Church, Clinton Tabernacle Ame Zion Church, Barbee's Chapel Missionary Baptist Church, Inc., Rosanell Eaton, Armenta Eaton, Carolyn Coleman, Baheeyah Madany, Jocelyn Ferguson-Kelly, Faith Jackson, Mary Perry, Movants (1:13cv660): DANIEL T. DONOVAN, LEAD ATTORNEY, KIRKLAND & ELLIS, LLP, Washington, DC USA.

For Philip E. Berger, Thom Tillis, James Boles, [*12]

Tom Apodaca, Thom Goolsby, Ralph E Hise, Robert A. Rucho, David R. Lewis, Tim Moore, Tom Murry, Larry Pittman, Ruth Samuelson, Harry Warren, Movants (1:13cv660): ALEXANDER MCCLURE PETERS, N.C. DEPARTMENT OF JUSTICE, Raleigh, NC USA; THOMAS A. FARR, OGLETREE DEAKINS NASH SMOAK & STEWART, P.C., Raleigh, NC USA.

For Tom Apodaca, Thom Goolsby, Ralph Hise, Robert A. Rucho, Movants (1:13cv660): ALEXANDER MCCLURE PETERS, N.C. DEPARTMENT OF JUSTICE, Raleigh, NC USA.

JUDGES: Joi Elizabeth Peake, United States Magistrate Judge.

OPINION BY: Joi Elizabeth Peake

OPINION

ORDER

These cases come before the Court for resolution of an ongoing discovery dispute regarding the application of legislative privilege to certain of Plaintiffs' document production requests on Defendants and Plaintiffs' subpoenas *duces tecum* on various North Carolina state legislators. For the reasons that follow, the Court concludes that legislative privilege does not preclude production of communications between legislators and third parties. In addition, the Court concludes that legislative privilege does not preclude creation of a privilege log for communications between legislators and outside counsel prior to the commencement of this litigation, if those [*13] communications are withheld based on a claimed privilege. However, in light of the protections afforded by the doctrine of legislative privilege, the Court will decline to order the production of, or the creation of a privilege log regarding, communications solely among legislators or between legislators and legislative staff, and any subpoena or request for production of such internal communications will be quashed.

I. PROCEDURAL HISTORY

This matter arises in three consolidated cases involving claims by the North Carolina State Conference of the NAACP and other individuals and churches, the League of Women Voters of North Carolina and other individuals and groups, and the United States of America (collectively, "Plaintiffs") against the State of North Carolina, the members or director of the State Board of Elections, and/or North Carolina Governor Patrick McCrory, challenging portions of North Carolina legislation (referred to as "House Bill 589") pursuant to the federal Voting Rights Act, *42 U.S.C. § 1973* and *§ 1973a*, and the *Fourteenth* and *Fifteenth Amendments*. After discovery began, Plaintiffs served production requests on Defendants and served subpoenas on certain non-party state legislators requesting, inter alia, communications [*14] by the state legislators regarding House Bill 589 and any other proposed election law reforms. In response to these discovery requests, Defendants objected on the basis of legislative immunity and legislative privilege, and Plaintiffs filed a Motion to Compel. The state legislators also filed a Motion to Quash the subpoenas based on legislative immunity or legislative privilege. Following a hearing on this issue, the undersigned issued an Order rejecting the contention that legislative privilege barred all discovery into the legislators' communications. Rather, the undersigned adopted "a flexible approach that considers the need for the information while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process." (March 27, 2014 Order [Doc. #94] at 9.)[1]

1 All citations to the docket refer to the docket as it appears in Case No. 1:13CV658.

Defendants objected to that Order, and those objections were subsequently overruled by the United States District Judge. (May 15, 2014 Order [Doc. #105] at 25.) The District Judge observed that the Supreme Court has not addressed the scope of the legislative privilege as applied to requests for documents [*15] in a civil case, and that "decisions of the Fourth Circuit, while highly protective of the privilege, also do not provide controlling guidance." (Id. at 24.) However, based on a review of relevant authority, the District Judge concluded that "[a]s with other privileges, the court cannot say that [the legislative privilege] is absolute." (Id. at 25.) Accordingly, the parties were ordered to meet and confer and "file [a] report . . . presenting any remaining disputes with particular categories and types of documents for further resolution by the court." (Id. at 28.) The District Judge directed that any future determinations of proper application of the privilege "keep[] in mind the relevant authorities, the purposes 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." (Id. at 25.)

The Parties subsequently filed a Joint Status Report indicating that Defendants agreed to produce documents in the custody of any state agency reflecting communications with any state legislator or legislative staff, and that Plaintiffs agreed not to seek communications [*16] solely between legislators and their attorneys created after this litigation began, or communications solely between a legislator and his or her personal aide. (See Joint Status Report [Doc. #126] at 3-4.) However, the Parties remained unable to agree on the application of legislative privilege as to four categories of documents. (See id. at 4-5.) Specifically, Plaintiffs seek, and Defendants and the state legislators resist, discovery regarding: (1) communications between legislators and third parties such as constituents, lobbyists, and public interest groups; (2) communications solely among legislators; (3) communications between legislators and legislative staff; and (4) communications between legislators and outside counsel prior to the commencement of this litigation. In light of their ongoing disagreement, the Parties requested the opportunity to further brief the legislative privilege issue. (Id.)

Defendants and the legislators, the United States, and the NAACP and League Plaintiffs filed briefs setting forth their positions on the application of legislative privilege to the disputed categories of documents. [Doc. #133, #134, #135.] Each of those groups subsequently filed responses. [Doc. [*17] #150, #152, #153.] The discovery dispute was effectively stayed while the Parties separately litigated Plaintiffs' request for a preliminary injunction, and the undersigned subsequently held a telephonic status conference on November 7, 2014, to address discovery matters and scheduling, and to allow the Parties the opportunity to address the pending discovery dispute in light of subsequent proceedings and developments in this case. This matter is now ripe for consideration.

II. ANALYSIS

As an initial matter, the Court notes that the Parties have not presented any basis to revisit the conclusions reached in the prior Orders addressing legislative privilege. Thus, the Court concludes now, as it did previously, that legislative privilege is not absolute, but rather requires "a flexible approach that considers the need for the information while still protecting legislative sovereignty and minimizing any direct intrusion into the legislative process." (March 27, 2014 Order [Doc. #94] at 9.) In assessing the need for the information under this flexible approach, "many courts have applied a five-factor balancing test:

> (i) the relevance of the evidence sought to be protected;
>
> (ii) the availability [*18] 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."

(May 15, 2014 Order [Doc. #105] at 25 n.11 (quoting *Committee for a Fair and Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 U.S. Dist. LEXIS 117656, 2011 WL 4837508 at *7 (N.D. Ill. Oct. 12, 2011))*.)

The Court can consider these factors as to each of the disputed categories of documents in this case, also taking into account "the purpose of the legislative privilege, evidence that the legislator's 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." (Id.)

In undertaking this analysis, the Court notes that many of the relevant factors apply generally across the disputed categories of documents. For example, with respect to the relevance of the evidence sought to be protected, Defendants contend that the requested documents are not relevant. However, nothing Defendants offer suggests that the documents sought are irrelevant in the discovery context in this case. Indeed, pertinent authority suggests that legislator communications may be relevant both to motive and to [*19] providing context for legislative actions. See, e.g.,

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (providing that "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" and "[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"); *South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1259 & n.6 (4th Cir. 1989)* (recognizing that judicial inquiry into legislative motive is appropriate where "the very nature of the constitutional question requires an inquiry into legislative purpose"); see also *Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 304 (D. Md. 1992)* (opinion of Judges Murnaghan and Motz) (noting that legislative privilege "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."). Defendants contend that Arlington Heights, and the Fourth Circuit decision in *Sylvia Development Corporation v. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995)*, which cites Arlington Heights, suggest that the legislative record alone is all the evidence relevant to Plaintiffs' claims. However, Plaintiffs note that in Voting Rights Act cases, courts often look to legislative evidence outside [*20] the formal legislative record.[2] (See United States' Response [Doc. #152] at 3-6.) Moreover, in the discovery context, "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Fed. R. Civ. P. 26(b)(1)*. Besides addressing motive and offering context for legislative history, the communications at issue are, at the very least, reasonably calculated to lead to admissible evidence regarding the same.

> 2 Indeed, in considering the request for a preliminary injunction in this case, the District Court and the Fourth Circuit cited to emails between various sponsors of House Bill 589 and the North Carolina State Board of Elections. The citations to these emails offer at least some suggestion that the requested legislative communications are potentially relevant. (See, e.g., Aug. 8, 2014 Ord. [Doc. #184] at 59-61; Oct. 10, 2014 Opinion [Doc. #199] at 9-10, 13.)

With respect to the second factor, the availability of other evidence, Defendants have not shown that the requested documents are available elsewhere, nor have Defendants otherwise provided a viable alternative for obtaining the documents from other sources. With respect to the [*21] seriousness of the litigation and the issues involved, there is no question that the present litigation involves serious and important questions affecting the constitutional rights of North Carolinians and the integrity of North Carolina elections. Cf. *Page v. Virginia State Bd. of Elections, 15 F. Supp. 3d 657, 667 (E.D. Va. 2014)* ("The right to vote and the rights conferred by the *Equal Protection Clause* are of cardinal importance. And, there is no dispute over the seriousness of the Plaintiffs' claims."). With respect to the role of the government in the litigation, the government is directly involved in the litigation, in the alleged constitutional violations, and in any potential remedy that is sought.

In light of these general conclusions, the Court will further consider the various factors as to the following four disputed categories of documents: (1) communications between legislators and third parties; (2) communications solely among legislators; (3) communications between legislators and legislative staff; and (4) legislator communications with outside counsel prior to the commencement of litigation on August 12, 2013. Plaintiffs seek production of the first category of documents (i.e., legislator to third party communications) and a privilege log as to the remaining three [*22] categories. Defendants and the state legislators seek to restrict disclosure of all categories of documents and further argue that application of the privilege is so clear that the documents at issue are not subject to a privilege log requirement.[3]

> 3 The Parties have not raised any distinctions between documents sought from Defendants in discovery requests and documents sought from non-party legislators by subpoena. The Court therefore addresses legislative privilege issues raised in either context, whether by Motion to Quash or in response to Plaintiffs' Motion to Compel.

A. Communications between Legislators and Third Parties

With respect to communications between legislators and third parties, such communications are not ordinarily the type of legislative acts that the privilege is designed to protect. See *E.E.O.C. v. Washington Suburban Sanitary*

Comm'n, 631 F.3d 174, 184 (4th Cir. 2011) ("Legislative acts, the ones for which the immunity and privilege are granted, typically involve the adoption of prospective, legislative-type rules, rules that establish a general policy affecting the larger population. They also generally bear the outward marks of public decisionmaking, including the observance of formal legislative procedures." (internal quotation marks, citations, [*23] and alterations omitted)); *Almonte v. Long Beach, No. CV 04-4192, 2005 U.S. Dist. LEXIS 46320, 2005 WL 1796118 at *3 (E.D.N.Y. July 27, 2005)* ("Legislative and executive officials are certainly free to consult with political operatives or any others as they please, and there is nothing inherently improper in doing so, but that does not render such consultation part of the legislative process or the basis on which to invoke privilege.").

Moreover, even to the extent such communications can be argued to encompass the type of legislative acts protected by the legislative privilege, that privilege was waived when the communications were shared with non-legislative outside parties. See *Alexander v. Holden, 66 F.3d 62, 68 n.4 (4th Cir. 1995)* (quoting *Marylanders for Fair Representation v. Schaefer, 144 F.R.D. 292, 298 (D. Md. 1992)*, for the proposition that legislative privilege "'is a personal one and may be waived or asserted by each individual legislator'"); see also *Perez v. Perry, No. SA-11-CV-360, 2014 U.S. Dist. LEXIS 1838, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014)* ("To the extent, however, that any legislator, legislative aide, or staff member had conversations or communications with any outsider (e.g. party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications."); *Favors v. Cuomo, 285 F.R.D. 187, 212 (E.D.N.Y. 2012)* ("The law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."); [*24] *Committee for a Fair and Balanced Map, 2011 U.S. Dist. LEXIS 117656, 2011 WL 4837508, at *10* ("As with any privilege, the legislative privilege can be waived when the parties holding the privilege share their communications with an outsider."); *Doe v. Nebraska, 788 F. Supp. 2d 975, 987 (D. Neb. 2011)* ("[Documents that] were communicated to or shared with non-legislative members . . . shall be produced."); *Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003)* (describing, in dicta, "conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation" as "a session for which no one could seriously claim privilege").

The Court is left unpersuaded by Defendants' assertion that, because the legislators communicated with third parties with an expectation of privacy, the privilege should apply. Defendants have cited no authority that the legislative privilege attaches simply because a lawmaker expected privacy in his or her communications. Indeed, such a standard would seemingly allow protection of any communication on the mere assertion of privacy by a legislator and would, in turn, convert the legislative privilege into an absolute -- a position the Court has previously rejected. Moreover, the legislators' expectation of privacy itself is questionable as it relates to communications with third parties outside the legislators' control.[4] Thus, there is [*25] no basis to conclude that requiring production of the communications with third parties would result in future timidity in communications, as the possible sharing or publication of these documents would not be unexpected.

> 4 Not only could the third party share or publish the communication, legislators would also have reason to expect that communications with third parties may be considered public records under state law. For example, the North Carolina Attorney General's Office, by way of advisory opinion, has addressed whether communications between legislators and members of the public in the redistricting context would constitute public records. That advisory opinion noted that the North Carolina General Statutes did not provide for confidentiality of communications between a legislator and a member of the public and that "the courts ordinarily construe legislative silence with regard to the confidentiality of a record to constitute an intention by the legislature to make the record a public record." *Attorney General Legal Op., 2002 N.C. AG LEXIS 11, 2002 WL 544469, at *1 (Feb. 14, 2002)*. The Advisory Opinion concluded that, absent the awareness of any countervailing rule, "written and electronic communications between a legislator and a member of the public about redistricting [*26] are generally public records." Id.

Finally, the Court concludes that Defendants have not shown that requiring production of these communications would impose a heavy burden on them or divert the state legislators from their duties. The Parties have indicated that all of the communications are in the possession of counsel for Defendants, and it

appears that the documents can be sorted electronically by sender and recipient to retrieve and produce communications with third parties without substantially burdening the legislators. Accordingly, the Motion to Quash and discovery objections based on legislative privilege will be denied as to communications between legislators and third parties.[5]

> 5 During the telephonic status conference held on November 7, 2014, counsel for Defendants generally asserted that the *First Amendment* may also protect the legislators' communications with third parties. However, Defendants have cited no authority for this contention, and this objection has not been presented as part of the Motion to Quash or discovery objections presently before the Court.

B. Communications Solely Among Legislators and Communications between Legislators and Legislative Staff

With respect to communications [*27] solely among legislators or communications between legislators and legislative staff, Plaintiffs seek creation of a privilege log with detailed information regarding the communications, including the participants in the communication and a description of all subjects addressed. In considering this request, the Court notes first that requiring production of communications solely among legislators raises serious concerns regarding the direct intrusion into internal legislative affairs and the potential to "inhibit full and frank deliberations" in legislative activity. *Favors, 285 F.R.D. at 220*; see also *Committee for a Fair and Balanced Map, 2011 U.S. Dist. LEXIS 117656, 2011 WL 4837508, at *7* ("[T]he court's goal [in determining whether and to what extent a lawmaker may invoke legislative privilege] is to determine whether the need for disclosure and accurate fact finding outweighs the legislature's need to act free of worry about inquiry into its deliberations." (internal quotation marks omitted)). These concerns also exist with respect to communications between legislators and legislative staff. Although Plaintiffs attempt to make a distinction between "personal aides" and general legislative staff, the legislative staff system established for the General Assembly provides for a centralized, nonpartisan [*28] legislative staff. Individual legislators utilize the services of the centralized legislative staff, with strict confidentiality protections under state law. *N.C. Gen. Stat. § 120-130*, *§ 120-131*. In the circumstances, and based on the information presently before the Court, the Court finds no basis here to distinguish between the types of legislative staff members involved in communications with legislators. Cf. *Marylanders, 144 F.R.D. at 298* ("It is the function of the government official that determines whether or not he is entitled to legislative immunity, not his title.").

To the extent Plaintiffs request only the creation of a privilege log, the Court concludes that a privilege log, particularly one containing the level of detail requested by Plaintiffs, would itself significantly intrude into the legislative sphere, and would also place a heavy burden on the legislators in contravention of one of the aims of the legislative privilege. See *Powell v. Ridge, 247 F.3d 520, 530 (3d Cir. 2011)* (Roth, J., concurring) ("If legislative privilege from civil discovery exists, for either party, as in the instant case, or for a non-party as it may arise in the future, it exists to protect legislators from the burden of having to respond to discovery and of having to deal with the distractions and disruptions [*29] that discovery imposes on their ability to carry out their governmental functions."); see also *Washington Suburban, 631 F.3d at 181* (noting burden as relevant factor in consideration of legislative privilege); May 15, 2014 Order [Doc. #105] at 25 (directing the Court to "keep[] in mind . . . evidence that the legislators' compliance would divert them from their legislative duties and/or impose an impermissible burden upon them"). For instance, it would seem unavoidable, as Defendants note, that the creation of a privilege log would entail the extensive involvement of the legislators in order to assist in determining the context of any communications, and would require review of potentially thousands of documents. Plaintiffs have not demonstrated the value of the proposed privilege log outweighs these concerns.[6] Therefore, the Motion to Quash and corresponding discovery objections will be allowed to the extent Plaintiffs seek communications solely between legislators or solely between legislators and legislative staff, and Defendants need not create a privilege log with respect to these communications.

> 6 To the extent that Plaintiffs contend that communications prior to introduction of House Bill 589 or after passage of House [*30] Bill 589 are not within the scope of privileged "legislative activity," the Court concludes that based on the information before the Court, it appears that

> legislative communications relevant to the present suit would be within the scope of the legislative privilege. Moreover, attempting to draw such distinctions would require substantial details, which would intrude into legislative affairs and impose a significant burden on legislators. Therefore, on balance, the possibility that there may be a communication that is relevant but not within the scope of legislative privilege does not outweigh the significant burden and intrusion involved in preparing a privilege log.

C. Communications between Legislators and Attorneys

Finally, with respect to communications between legislators and outside counsel prior to the commencement of litigation on August 12, 2013,[7] the Court concludes that this category of documents does not raise the same concerns regarding direct intrusion into legislative affairs, as these communications involve third parties outside the legislative process. However, Defendants are entitled to make assertions of attorney-client privilege or other claimed privilege. As in any [*31] case, production of a privilege log allows the Parties and the Court to evaluate such claims of privilege. Under these circumstances, no undue burden is imposed by the creation of a privilege log, since the privilege log would be limited to a relatively small category of documents, that is, documents withheld from production because they involve communications with attorneys not employed by the legislature. Therefore, the Motion to Quash and discovery objections as to legislative communications with outside counsel prior to August 12, 2013, will be denied to the extent they are based on a blanket claim of legislative privilege, but Defendants may assert claims of privilege, including work product and attorney-client privilege, by providing a detailed privilege log claiming that privilege.

> 7 Plaintiffs are not seeking the production of, or a privilege log regarding, communications between legislators and their attorneys created after August 12, 2013.

III. CONCLUSION

For the reasons set forth above, the Court concludes that communications between legislators and third parties are not ordinarily within the scope of legislative privilege, that any such privilege has been waived as to those [*32] communications, that production of such communications is not unduly burdensome, and that on balance, given the potential relevance of the documents and the importance of the issues raised in this case, the communications with third parties should be produced. However, as to purely internal legislative communications (i.e., communications solely among legislators and communications between legislators and legislative staff), the intrusion caused by creation of a privilege log and the significant burden imposed, on balance, lead the Court to conclude that legislative privilege applies and that no privilege log is required. As to communications between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013, a privilege log will assist the Parties and the Court in determining whether any privilege applies, and any burden imposed by the creation of a privilege log in this context does not warrant foregoing its creation.

IT IS THEREFORE ORDERED that, with respect to communications between legislators and third parties, the Motions to Quash and related discovery objections are DENIED, Plaintiffs' Motion to Compel is GRANTED, and Defendants must produce [*33] communications with third parties as requested by Plaintiffs.

IT IS FURTHER ORDERED that, with respect to communications between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013, the Motion to Quash and discovery objections as to these requests based on a blanket claim of legislative privilege is DENIED and Plaintiffs' Motion to Compel is GRANTED to the extent that a privilege log must be prepared setting out sufficient details as to any such document withheld on the basis of privilege.

However, IT IS ORDERED that, with respect to internal legislative communications solely among North Carolina state legislators or North Carolina state legislators and legislative staff, the Motion to Quash and discovery objections based on legislative privilege are GRANTED, the Motion to Compel is DENIED, and Defendants need not produce, nor create a privilege log regarding, communications solely among legislators or communications between legislators and legislative staff.

This, the 20th day of November, 2014.

/s/ Joi Elizabeth Peake

United States Magistrate Judge