IN THE SUPREME COURT OF THE UNITED STATES

No. 16-833

STATE OF NORTH CAROLINA, *ET AL.*,

Petitioners

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRIVATE RESPONDENTS' OPPOSITION TO THE STATE'S "OBJECTION" AND "CONDITIONAL MOTION TO ADD THE NORTH CAROLINA GENERAL ASSEMBLY AS AN ADDITIONAL PETITIONER"

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INTRODUCTION

Petitioners in this case have abandoned their petition for a writ of *certiorari*. In an attempt to salvage that abandoned petition, the "leadership" of the North Carolina General Assembly has filed two motions that hinge on esoteric provisions of North Carolina law. First, the General Assembly argues that it—not the North Carolina Governor or the North Carolina Attorney General—represents the State, and that the General Assembly wishes to proceed with this case. *See* Obj. to Mot. to Withdraw ("Obj."). Second, notwithstanding its explicit arguments below that it was not a party to the litigation, the General Assembly also seeks to intervene in this dispute at the eleventh hour. *See* Conditional Mot. to Add ("Mot.") at 1.

The Private Respondents adopt the arguments made by the North Carolina Attorney General with respect to the General Assembly's Objection filing, which raises the question of what entity properly speaks for the State of North Carolina pursuant to State law. The Private Respondents also emphasize that this dispute over the interpretation of State law presents a serious complication and makes the case an unsuitable vehicle for this Court's review. With respect to the General Assembly's Motion to Add, the Private Respondents oppose that Motion because addition or intervention at this late stage of litigation is both unauthorized and prejudicial. The General Assembly affirmatively asserted its status as a non-party in order to gain a tactical advantage and successfully resist discovery in the lower courts; it now seeks to reverse course and obtain party status in order to maintain a petition that the actual Petitioners have sought to withdraw. The General Assembly's Motion should be denied and, with it, the pending petition for *certiorari*.

I. UNDERLYING THRESHOLD QUESTIONS OF STATE LAW MAKE THIS CASE AN IMPROPER VEHICLE FOR CERTIORARI REVIEW.

The General Assembly's briefs attempt to inject into this case complex questions of State law. Because this Court would have to delve into and resolve these State law questions in order to take up review, this case is an inappropriate vehicle for consideration of the questions presented by the petition for *certiorari*.

As set forth in detail in the General Assembly's Objection, North Carolina law establishes certain procedures for the retention of private counsel when "'the validity or constitutionality of an act of the General Assembly' is challenged." Obj. at 3 (quoting N.C. Gen. Stat. § 120-32.6(b)). Citing no authority from the North Carolina courts, the General Assembly asks this Court to hold as a matter of first impression that North Carolina law requires the North Carolina Attorney General to relinquish final authority over the State's litigation position to private counsel. Obj. at 9 (citing N.C. Gen. Stat. § 120-32.6(c)). Separately, in connection with its Motion to Add, and again citing no authority from the North Carolina courts, the General Assembly asks this Court to interpret another North Carolina statute—governing intervention in State court—to permit the General Assembly to intervene in this litigation. Mot. at 1-2 (citing N.C. Gen. Stat. § 1-72.2). But the General Assembly leadership offers no precedent for either proposition and, as explained *infra*, the latter statute by its terms authorizes intervention only in State courts, not federal courts.

Granting either the pending Motion to Add or the pending petition for *certiorari* would therefore require this Court to decide matters of first impression

under State law. These State law questions do not implicate federal law, and this Court "does not sit to determine matters of state law." *Dixon v. Duffy*, 344 U.S. 143, 144 (1952); *see also Danforth v. Minnesota*, 552 U.S. 264, 291-92 (2008) (Roberts, C.J., dissenting) ("State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law."). These questions of North Carolina law are particularly inappropriate for this Court's review because they involve the complex relationship between a State's executive and legislative branches.[1] *See Younger v. Harris*, 401 U.S. 37, 44 (1971); *see also Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring) ("Intervention in such a controversy [between the Legislative and Executive Branches] would risk damaging the public confidence that is vital to the functioning of the Judicial Branch."); *Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 578 n.5 (8th Cir. 1998) ("Federal courts should exercise this same caution when, as in this case, there exists a political interbranch controversy between state legislators and a state executive branch . . . ."). Because "[f]ederal courts lack competence to rule definitively on the meaning of state legislation," *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997), the Court should decline to decide these novel questions of State law and should therefore decline to grant the petition for *certiorari*.

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[1] Indeed, the allocation of power in North Carolina between the legislative and executive branches is still evolving and is the subject of ongoing dispute. *See, e.g., Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct.) (dispute between North Carolina General Assembly and Governor of North Carolina regarding control over State Board of Elections); *State ex rel. McCrory v. Berger*, 781 S.E.2d 248 (N.C. 2016) (dispute between North Carolina General Assembly and Governor of North Carolina regarding scope of appointment power under State Constitution).

II. THE COURT SHOULD DENY THE MOTION TO ADD.

The Court should also deny the General Assembly's "conditional" motion to be added as a petitioner. More than three years after this suit was initiated—and after arguing explicitly on numerous occasions that they were ***not*** parties to the case—the Speaker of the North Carolina House of Representatives and the President *Pro Tempore* of the North Carolina Senate now move on behalf of the North Carolina General Assembly, at the last possible moment, to be added as a party. The Motion should be denied for two reasons. *First*, the Speaker and the President *Pro Tempore* are not authorized to intervene on behalf of the General Assembly. Their reliance on a North Carolina State intervention statute is misplaced, as that law authorizes intervention only in State court, not federal court. *Second*, even if the Speaker and President *Pro Tempore* were authorized to intervene, their last-minute intervention would cause Respondents unfair prejudice. Having purposefully remained on the sidelines throughout the litigation to avoid discovery—in a case about legislative intent, no less—by, *inter alia*, arguing that North Carolina legislators were non-parties, the General Assembly should not now be permitted to become a party to this case. *See* Fed. R. Civ. P. 21.[2]

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[2] Although the General Assembly's Motion is framed as a Motion to Add under Federal Rule of Civil Procedure 21, what the General Assembly seeks in practice is tardy intervention under Federal Rule of Civil Procedure 24, relying heavily on a North Carolina statute that allegedly allows such intervention. Mot. at 1-2 (citing N.C. Gen. Stat. § 1-72.2). Because the General Assembly's efforts to join this litigation are unauthorized, untimely, and would prejudice Respondents, their Motion fails whether evaluated through the lens of Rule 21 or Rule 24.

A. The North Carolina General Assembly Is Not Authorized By State Law To Intervene In This Litigation.

This Court has held repeatedly that "[s]tanding to defend on appeal in the place of an original defendant . . . demands that the litigant possess 'a direct stake in the outcome.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013) (citing *Arizonans for Official English*, 520 U.S. at 64); *Diamond v. Charles*, 476 U.S. 54, 62 (1986). State legislators "***may*** satisfy standing requirements," but only if "authorized by state law to represent the State's interest" in federal court. *Hollingsworth*, 133 S. Ct. at 2666 (emphasis added); *see also Arizonans for Official English*, 520 U.S. at 65 ("[S]tate legislators have standing to contest a decision holding a state statute unconstitutional if state law authorizes legislators to represent the State's interests."). No such path to standing is available to the Speaker and the President *Pro Tempore* here, however, because no North Carolina statute authorizes them (in their individual or representative capacities) to represent the State in federal court.

Movants attempt to avoid their lack of authority by selectively quoting N.C. Gen. Stat. § 1-72.2, the only North Carolina statute addressing the standing of legislators to intervene on behalf of the General Assembly in judicial proceedings challenging North Carolina statutes. *See* Mot. at 1 (arguing that N.C. Gen. Stat. § 1-72.2 authorizes the Speaker and the President *Pro Tempore* "to jointly intervene 'on behalf of the General Assembly . . . in any judicial proceeding challenging a North Carolina statute'"). But Movants ignore that the statute's text requires

intervention by the legislators to proceed pursuant to ***State*** rules of civil and appellate procedure, making no mention of intervention in ***federal*** court:

> The procedure for interventions at the trial level in ***State court*** shall be that set forth in Rule 24 of the Rules of Civil Procedure. The procedure for interventions at the appellate level in ***State court*** shall be by motion in the appropriate appellate court or by any other relevant procedure set forth in the Rules of Appellate Procedure.

N.C. Gen. Stat. § 1-72.2 (emphases added). State procedures do not apply to the federal court system, which is governed by the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Rules of this Court. In providing only for intervention in State court—without ***any*** reference to federal courts—the statute does not purport to confer standing to intervene in federal courts. *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) ("[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.").[3] And absent any State law explicitly "authoriz[ing] legislators to represent the State's interests" in federal court, the Speaker and the Senate *Pro Tempore* have no standing to pursue the petition for *certiorari* before this Court. *Arizonans for Official English*, 520 U.S. at 65.

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[3] The legislative history of the statute only confirms what the text makes clear. Section 1-72.2 was amended in 2014. *See* 2014 N.C. Sess. Law 115, § 18. Prior to the amendment, the statute read "[t]he procedure in State court shall be that set forth in Rule ***29*** of the Rules of Civil Procedure." *Id.* (emphasis added). In correcting the reference to Rule 29—an unrelated rule that pertains to discovery—the General Assembly expanded the statute to include instructions and references to trial and appellate rules in State court. *See id.* However, the legislature chose not to extend the right of intervention to federal courts, which confirms that the General Assembly intended the bill to grant standing to the legislature only in State court proceedings.

The novel question of whether the North Carolina General Assembly may intervene in federal litigation only underscores that this case is an improper vehicle for the questions presented in the petition for *certiorari*. Respondents are unaware of any decision by a North Carolina State court interpreting N.C. Gen. Stat. § 1-72.2 to authorize intervention in federal litigation, much less one definitively resolving this question in Movants' favor.[4] Any question as to the scope of the intervention right under N.C. Gen. Stat. § 1-72.2 should be resolved by North Carolina courts, as "[f]ederal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans for Official English*, 520 U.S. at 48. As such, the Court should deny both the Motion to Add and the pending petition for *certiorari*, as granting either request would require this Court to rule on a novel question of State law with no guidance from State courts. *See id.* at 48-49.

B. Intervention At This Late Stage Of Litigation Would Prejudice Respondents.

Even if the General Assembly leadership had authority as a matter of North Carolina law to intervene in federal litigation, there are no "just terms" permitting

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[4] One federal district court has relied on N.C. Gen. Stat. § 1-72.2 in deciding to permit what it considered timely intervention by the North Carolina General Assembly leadership in an ongoing case. *See Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 703 (M.D.N.C. 2014). As an initial matter, the district court's interpretation of the North Carolina statute is not definitive. *See Arizonans for Official English*, 520 U.S. at 48. Moreover, the district court recognized that the question of whether the General Assembly had a right to intervene was "a very close issue" and "conclude[d] that the motion to intervene should be granted, but only for the purpose of lodging an objection and preserving that objection." *Fisher-Borne*, 14 F. Supp. 3d at 710. Notwithstanding the district court's decision in *Fisher-Borne*, the General Assembly's authority to intervene in federal litigation remains, at best, unsettled under North Carolina law.

the General Assembly to intervene and be added as Petitioner now. *See* Fed. R. Civ. P. 21.[5] Movants cite *Mullaney v. Anderson*, 342 U.S. 415 (1952), in support of their motion, *see* Mot. at 2-5, but the reasoning in that case counsels against the relief that Movants seek. The Court there permitted the addition of new parties at the *certiorari* stage only because it found that a "change in the parties would not have 'affected the course of the litigation' if it had occurred at some earlier point, and would not 'embarrass the [non-moving party].'" *Newman-Green, Inc.*, 490 U.S. at 833 (discussing *Anderson*). Given those facts, the Court concluded that "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Anderson*, 342 U.S. at 417.

Here, those same factors—whether an earlier joinder would have "affected the course of the litigation" and whether the present joinder would "embarrass" or unfairly prejudice the other party—warrant denial of the Motion. *Newman-Green, Inc.*, 490 U.S. at 833; *see also* Fed R. Civ. P. 24 ("[T]he court must consider whether

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[5] As a threshold matter, it is not clear whether the Federal Rules of Civil Procedure, which typically apply only in district courts, would allow such addition in this Court. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 500 (2009) (explaining that Rule 21 does not permit joinder of parties *"after the trial is over, judgment has been entered, and a notice of appeal has been filed"*); *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 840 (1989) (Kennedy, J., dissenting) ("Even on the assumption, however, that Rule 21 provides the district courts with the necessary authority to dismiss a nondiverse party at any stage of the litigation for the sole purpose of creating jurisdiction where none existed before, it is just not possible to rely on that Rule as the source of authority for appellate courts. For notwithstanding some rather odd language to the contrary in *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) . . . , it is well settled that 'the Federal Rules of Civil Procedure . . . apply only in the federal district courts.'").

the intervention will . . . prejudice the adjudication of the original parties' rights."). *First*, had the Speaker and the President *Pro Tempore* sought to add the General Assembly as a party at an earlier point, the "course of the litigation"—one involving a claim of discriminatory purpose on the part of the General Assembly in enacting the challenged voting laws—would have been substantially different. Throughout the case, Petitioners' counsel—who, according to Movants, had been retained by the General Assembly "for years[,] up to and including the pending petition for certiorari," Mot. at 1—repeatedly argued that individual legislators, and the General Assembly as a whole, were ***non-parties*** in order to escape discovery. For instance:

- In opposing Respondents' motion to compel discovery from legislators and the General Assembly, the State explicitly argued that "[n]o individual legislators are a named party in this action" and that "the General Assembly itself is not a named party in the action." Opp'n to Pls.' Mots. to Compel at 7 n.4, *N.C. State Conference of NAACP v. McCrory*, No. 1:13-cv-00658-TDS-JEP (M.D.N.C. Feb. 18, 2014), ECF No. 76 (attached hereto as Exhibit A). The State then concluded that "[s]imply serving 'the State of North Carolina' with a document request cannot compel legislators, who as independently elected officials are the custodians of their own documents, to produce documents in a civil action of which they are not a party." *Id.*

- When invoking the legislative privilege to avoid discovery, the State emphasized that "[n]o legislators have been named as parties in any of the cases consolidated in this matter." Suppl. Br. in Supp. of Legislative Immunity & Legislative Privilege at 14, *N.C. State Conference of NAACP v. McCrory*, No. 1:13-cv-00658-TDS-JEP (M.D.N.C. Feb. 26, 2014), ECF No. 85 (attached hereto as Exhibit B). The State also argued that "the 'State of North Carolina' is not the custodian of [the legislators'] documents." *Id.*

- At a hearing on plaintiffs' motion to compel discovery from State lawmakers, the State again argued that "the legislature is not a party to this action" and that the legislators "are not parties to the case." Feb. 21, 2014 Mot. Hr'g Tr. 70:14-25, *N.C. State Conference of NAACP v. McCrory*, No. 1:13-cv-00658-TDS-JEP (M.D.N.C. filed Mar. 20, 2014), ECF No. 90 (excerpt attached hereto as Exhibit C).

Contrary to Movants' contentions, these statements make clear that the General Assembly was not, in fact, "a lower-court participant seek[ing] to become a party on Supreme Court review," nor was it "the undisputed leader of the litigation defense from its inception until literally last week." Mot. at 3-4. Indeed, had the legislators and the General Assembly been added to the litigation "at some earlier point," *Newman-Green, Inc.*, 490 U.S. at 833, they would not have been able to hide behind their non-party status to avoid document discovery, depositions, and trial testimony. Such discovery and testimony, in a case about legislative intent, surely would have "affected the course of the litigation." *Anderson*, 342 U.S. at 417.[6]

Second, as the Fourth Circuit noted in the decision below, the legislature's successful evasion of discovery meant that there was little "testimony as to the purpose of the challenged legislation." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 229 (4th Cir. 2016). The record included "statements from only a few legislators, or those made by legislators after the fact," which were "of limited value" to the intent analysis. *Id.* Nonetheless, Respondents prevailed below, and the current Petitioners subsequently decided not to pursue further their request for *certiorari* review. Adding the General Assembly now as the lone continuing Petitioner would permit the very parties who purposefully stood in the shadows—in order to foreclose access to direct evidence of discriminatory legislative intent—to

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[6] To the extent the Court evaluates the General Assembly's Motion as a request to intervene pursuant to Rule 24, the General Assembly's delay in seeking intervention is fatal to its efforts. *See NAACP v. New York*, 413 U.S. 345, 366-69 (1973) (deeming untimely attempts to intervene in lower courts mere days after entry of judgment, even where denial of intervention would terminate the litigation).

carry on a challenge to the sufficiency of that intent evidence in this Court. That tactic would result in substantial prejudice to Respondents. *See Anderson*, 342 U.S. at 417.

Third, Respondents' repeated attempts to involve the General Assembly in this litigation are a far cry from the kind of "silent concurrence" that supported the joining of additional petitioners in *Anderson*.[7] *Id.*; Mot. at 4-5. As noted above, Respondents sought to obtain discovery from the State, but were turned away by the General Assembly's shield of non-party status. The legislature here avoided probative document discovery by arguing that they were non-parties; but now, having obtained the benefit of their non-party status to evade discovery, the General Assembly seeks to reverse course at the eleventh hour and become a party. *See Newman-Green, Inc.*, 490 U.S. at 838 (cautioning that appellate courts should "carefully consider" whether the exercise of Rule 21 authority "will prejudice any of the parties in the litigation" by allowing the moving party to reverse a position that it previously took in order to generate a "tactical advantage"). The Court should not reward these tactics and prolong a case where every party has decided not to pursue the appeal.

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[7] Indeed, both cases upon which the General Assembly relies are cases where petitioners' standing was in question. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 565 U.S. 1154 (2012); *Anderson*, 342 U.S. at 416-17. That is not the case here, where Petitioners undoubtedly have standing; they simply seek to withdraw the *certiorari* petition. Moreover, the *Sebelius* order, entered without explanation in a case where *certiorari* had already been granted, hardly provides any meaningful support for the arguments made by the General Assembly.

CONCLUSION

For the foregoing reasons, the Court should not add the General Assembly as the sole remaining Petitioner in this case and should deny the petition for *certiorari*.

March 9, 2017

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EXHIBIT A

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

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

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL

INTRODUCTION

In one of the leading cases in the Fourth Circuit recognizing and applying legislative immunity, the Fourth Circuit put it plainly: state legislators are often subjected to "political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). Plaintiffs' desire in this case to subject state legislators to enormously burdensome discovery clearly shows the wisdom of the Fourth Circuit's adoption of broad legislative immunity.

VIVA

Plaintiffs filed three separate actions challenging the legality of 2013 N.C. Sess. Laws 381, known as the "Voter Information Verification Act, or "VIVA" (sometimes referred to by its bill designation, HB 589): *United States v. North Carolina*, No. 1:13-cv-861 (M.D.N.C.) (hereinafter "*United States*"); *North Carolina State Conference of the NAACP v. McCrory*, No. 1:13-cv-658 (M.D.N.C.) (hereinafter "*NAACP*"); and *League of Women Voters of North Carolina v. North Carolina*, No. 1:13-cv-660 (M.D.N.C.) (hereinafter "*LWV*"). The instant consolidated response relates to separately filed but nearly identical motions to compel by the Plaintiffs on the issue of legislative immunity. *United States* D.E. 54; *NAACP* D.E. 68; *LWV* D.E. 70.[1]

[1] For ease of reference, when referring to the Motions to Compel in this response, Defendants will refer to the motion filed by the NAACP plaintiffs at DE 68.

Plaintiffs' claims focus on VIVA's elimination of practices adopted by the General Assembly within the last decade. For instance, in 2000, the General Assembly allowed voters to cast "no-excuse" in-person absentee ballots at county sites prior to election day – one-stop absentee voting. Later that decade, the General Assembly adopted same-day registration – allowing first time voters to register to vote (after normal registration had closed twenty-five days before an election) during one-stop voting. Finally, during the past decade, the General Assembly allowed out-of-precinct voting – where voters may vote on Election Day at a precinct other than the precinct to which they have been assigned (provided it is within the same county as his or her assigned precinct).

VIVA reduced the number of days for one-stop in-person absentee voting from 17 to 10 while mandating that the total hours of one-stop voting in each county be at least the same in 2014 as the number of hours available in 2010, and that the number of hours available in presidential elections be at least the same as the number of hours available in each county for the 2012 election. This change takes effect in 2014.

VIVA also eliminated same-day registration and out-of-precinct voting effective in 2014. In making this change, North Carolina has returned to prior, long-standing practices, which are consistent with the majority of the states which do not allow out-of-precinct voting or same-day registration.

VIVA also establishes a photo ID requirement for one-stop voting and in-person voting on Election Day. Except for first-time voters who are registering by mail and voting for the first time, mail-in absentee voters are not required to submit an ID when they make their application for an absentee ballot or return their marked ballot to the

county board of elections. Unlike the other provisions challenged by Plaintiffs, the photo ID requirement does not go into effect until 2016.[2]

VIVA also eliminates a recently enacted program that allowed 16-year-olds to "pre-register." In making this change, VIVA returned North Carolina to prior practices consistent with the vast majority of other states. Moreover, even under VIVA, 17-year-olds are still able to register and vote provided they will turn 18 years old prior to the general election. This change is effective in 2014.

STATEMENT OF THE RELEVANT FACTS

On 20 December 2013, Plaintiffs served requests for production on Defendants. As noted in Plaintiffs' Motion to Compel, these document requests related to "the information available to legislators and the circumstances surrounding the passage of HB 589." (DE 68 at p. 2) As of the date of the instant response, no legislators have waived their immunity to the production of the documents requested by Plaintiffs, and to Defendants' knowledge, no legislators have produced documents to Plaintiffs.

ARGUMENT

I. Legislative Immunity Broadly Protects Legislators From Discovery in Civil Cases Regarding Their Legislative Activities.

Plaintiffs purport to seek information from members of the North Carolina General Assembly, their staffs, and others who communicated with these legislators and their staffs in the performance of legislative activities. There is no question that Plaintiffs

[2] North Carolina's photo ID requirement is less restrictive than other such requirements which have been held constitutional by the United States Supreme Court. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

cannot seek this information from legislators, who are entitled to absolute legislative immunity. [3]

The United States Supreme Court has long recognized a broad right "of legislators to be free from arrest or *civil process* for what they do or say in legislative proceedings." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (emphasis added). The Supreme Court has expressly extended this protection to state legislators, *Tenney*, 341 U.S. at 372-76, with respect to actions within the "sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 377. As the Fourth Circuit has emphasized:

> Legislative immunity's practical import is difficult to overstate. As members of the most representative branch, legislators bear significant responsibility for many of our toughest decisions, from the content of the laws that will shape our society to the size, structure, and staffing of the executive and administrative bodies carrying them out. Legislative immunity provides legislators with the breathing room necessary to make these choices in the public's interest, in a way uninhibited by judicial interference and undistorted by the fear of personal liability. It allows them to focus on their public duties by removing the costs and distractions attending lawsuits. It shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box . . . Legislative immunity thus reinforces representative democracy, fostering public decision making by public servants for the right reasons.

Wash. Suburban Sanitary Comm'n, 631 F.3d at 181.

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[3] Chapter 120, Article 17 of the North Carolina General Statutes addresses legislative confidentiality, which is distinct from the common law protection of legislative immunity afforded to legislators. The North Carolina Supreme Court has found that Article 17 was enacted as an aspect of the North Carolina General Assembly's internal operations to protect certain defined legislative communications from disclosure. *Dickson v. Rucho*, 366 N.C. 332, 343, 737 S.E.2d 362, 370 (2013).

Importantly, legislative immunity frees legislators not only from the consequences of litigation, it also frees them "from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). "Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been sued." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. "The purpose of the doctrine [of legislative immunity] is to prevent legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves." *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1988).

The scope of legislative immunity is broad and absolute. The United States Supreme Court has mandated that legislative immunity, and privileges flowing from it, must be interpreted "broadly to effectuate its purposes." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975). Unlike many privileges, it does not simply attach to the content of communications. Rather, it encompasses all aspects of the legislative process and forbids plaintiffs from seeking *any* production at all from the legislators. "Where, as here, 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. Indeed, speaking specifically in the context of a federal agency—the Equal Employment Opportunity Agency—attempting to subpoena a local governmental unit for records, the Fourth Circuit stated "[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes" and held that "if the EEOC or private plaintiffs sought to compel information from legislative actors about their

legislative activities, *they would not need to comply*." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 (emphasis added); *Gravel v. United States*, 408 U.S. 606, 616, 628 (1972) (approving of protective order forbidding any questioning "concerning communications between the Senator and his aides during the term of their employment and related to [any] legislative act of the Senator"); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 532 (9th Cir. 1983) (affirming denial of motion to compel former federal legislator to testify in deposition about legislative matters).

The law is therefore clear that the Defendants are not required and cannot be required to comply with document requests that seek the information sought by Plaintiffs. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. Legislative immunity provides legislators with absolute protection from the discovery sought by plaintiffs. For this reason, the Court should deny Plaintiffs' motions to compel.[4]

II. Plaintiffs' Arguments Regarding Legislative Immunity and Privilege are Without Merit.

In their Motions to Compel, Plaintiffs claim that legislative immunity is inapplicable – a position clearly at odds with controlling United States Supreme Court and Fourth Circuit precedent. Indeed, Plaintiffs' asserted need for this information demonstrates why they their motion is without merit. Plaintiffs cite *Vill. of Arlington*

[4] In any event, Plaintiffs' production requests served pursuant to Rule 34, Fed. R. Civ. P. are not sufficient to compel individual legislators to produce documents in this action absent a validly served subpoena pursuant to Rule 45, Fed. R. Civ. P. No individual legislators are a named party in this action. Indeed, the General Assembly itself is not a named party in the action. Simply serving "the State of North Carolina" with a document request cannot compel legislators, who as independently elected officials are the custodians of their own documents, to produce documents in a civil action of which they are not a party.

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) and claim that this discovery is warranted because that case supposedly authorizes discovery on "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially . . . [any] contemporary statements by members of the decisionmaking body." (DE 68 at p. 6 (citing *Arlington Heights*, at 267-68))

Significantly, *all* of the information purportedly made relevant by *Arlington Heights* that Plaintiffs claim they could glean from rifling through legislative email accounts *has already been provided to Plaintiffs.* In their Initial Disclosures and subsequent productions, Defendants provided the "specific sequence of events" leading up to the enactment of VIVA. Any supposed "departures" could be ascertained by Plaintiffs simply reviewing the Standing Rules of each chamber of the General Assembly and reviewing the history of other enacted legislation which is fully available on the website of the General Assembly. Finally, Defendants have also provided transcripts from all floor and committee debates regarding VIVA, from which Plaintiffs may ascertain any "contemporary statements by members of the decisionmaking body" regarding VIVA. Thus, even under Plaintiffs' supposed rationale for disrupting the centuries-established precedent of legislative immunity and privilege, Plaintiffs have already been provided with all of the information they claim to need.

Next, Plaintiffs claim that there is no "absolute evidentiary privilege for state legislators." (DE 68 at p. 7) Plaintiffs' claim is in complete contravention of *Tenney* where the United States Supreme Court clearly extended the privilege to state legislators

in federal civil actions. In civil actions, the immunity is absolute and Plaintiffs have cited no case to the contrary from the United States Supreme Court.

Instead, Plaintiffs continue to rely erroneously on *United States v. Gillock*, 445 U.S. 360, 373 (1980), and other cases relying on *Gillock*. *Gillock* involved consideration of legislative immunity as applied to a *criminal indictment*, not a "federal civil action," and as such it, and other cases that rely on it, is plainly inapplicable here, particularly in the face of *Tenney*.

Plaintiffs also attempt to characterize the immunity as "qualified" but again the authority they cite misses the mark. (DE 68 at pp. 9, 14-15) For instance, *Ala. Educ. Ass'n v. Bentley*, 2013 WL 124306 (N.D. Ala. Jan. 3, 2013), relies on *Small v. Hunt*, 152 F.R.D. 509 (E.D.N.C. 1994), also cited by Plaintiffs. However, *Small* was a prison overcrowding case where the magistrate judge was deciding whether documents held by a "Settlement Committee", which happened to have as members some legislators, could be discovered in an action by the defendants to modify a prior settlement agreement. *Small* itself relied on *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992), which involved a party seeking discovery from a statewide redistricting committee appointed by the Governor and including as members both legislators and private citizens. None of these cases involved an attempt to seek discovery from legislators for actions taken by them directly related to quintessentially legislative conduct – voting in their legislative capacities on the floors of the legislative chambers on bills duly introduced and debated in the halls of a state legislature.

Moreover, both *Small* and *Marylanders for Fair Representation* pre-date the controlling Fourth Circuit authority here: *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181.

Plaintiffs also cite *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y 2012) and *Rodriguez v. Pataki*, 293 F.Supp.2d 302 (S.D.N.Y. 2003). Both *Favors* and *Rodriguez* rely, however, on *In re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987), which considered legislative immunity as applied in the context of a *criminal prosecution*. While the scope of legislative immunity may or may not be "qualified" in the context of a criminal indictment or prosecution, nothing in *Tenney* or *Wash. Suburban Sanitary Comm'n*, where the privilege was considered in civil cases such as this one, is so limited. The same is true for the other cases cited by Plaintiffs. *Perez v. Perry*, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (not citing *Tenney* and instead relying on *Gillock*); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011) (relying on cases that rely on *Gillock* and not *Tenney*).

Indeed, in a case cited by Plaintiffs, *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), the court acknowledged that in *Gillock*, the U.S. Supreme Court "carved out an exception from *Tenney*" in cases involving "federal criminal liability." *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *6. The Supreme Court has never carved out any other exceptions from *Tenney* and this Court should decline to do so here.

Moreover, Plaintiffs' claim that the privilege is "waived with regard to documents shared with third parties" (DE 68 at p. 10) is a gross overstatement. Plaintiffs completely ignore that the United States Supreme Court has included within the privilege anything

that is legislative in nature, including all communications engaged in as preparation for and deliberation over legislative issues. *Gravel*, 408 U.S. at 625. Other courts have recognized that the privilege applies to efforts to gather and process information for possible legislative action. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (protecting the information-gathering process, including lawmakers' sources of information); *Miller*, 709 F.2d at 530-31 (legislator's receipt of "information pertinent to potential legislation or investigation" is protected part of the legislative process). The cases cited by Plaintiffs are not to the contrary. *Baldus*, and *Comm. for a Fair & Balanced Map* involved communications with outside experts for drawing redistricting maps. No such communications are at issue in this case. In fact, no communications with experts are involved at all. Instead, Plaintiffs seek quintessentially legislative communications by legislators attempting to do their job to research, formulate and then enact election law reforms. Accordingly, Plaintiffs' motion should be denied.

III. Because the Applicability of Legislative Immunity is So Clear, a Privilege Log Should Not be Required.

Finally, in cases involving privileges analogous to legislative immunity, courts often recognize that preparing a privilege log is not necessary where the communications are plainly protected from disclosure. *Ryan Investment Corp. v. Pedregal De Cabo San Lucas*, 2009 WL 5114077, at *3 (N.D. Cal. Dec. 18, 2009) ("counsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log"); *Capitol Records, Inc. v. MP3Tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. 2009); *United States v.*

Bouchard Transportation, 2010 WL 1529248, at *2 (E.D.N.Y. Apr. 14, 2010) ("privilege logs are commonly limited to documents created before the date litigation was initiated. This is due to the fact that, in many situations, it can be assumed that all documents created after charges have been brought or a lawsuit has been filed and withheld on the grounds of privilege were created 'because of' that pending litigation"); *Frye v. Dan Ryan Builders, Inc.*, 2011 WL 666326, at *7 (N.D. W. Va. Feb. 11, 2011).

In fact, creation of a privilege log can itself erode the inviolate protections afforded by the legislative immunity. *Stix Products, Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 339 (S.D.N.Y 1969) ("even the identification of a communication between attorney and client in terms of the date and subject might well tend to defeat the very purpose of the privilege"). Accordingly, no privilege log should be required.

The cases cited by Plaintiffs again are not to the contrary. To the extent that courts have required privilege logs in those cases, it was because the court erroneously characterized the privilege as "qualified" in reliance on cases involving federal criminal liability and not in the civil context. As described above, those cases are unhelpful to this Court in deciding the issue before it under established United States Supreme Court and Fourth Circuit authority affirming a broad legislative immunity in federal civil cases.[5]

[5] Plaintiffs also cite N.C. Gen. Stat. § 120-132(c) (2010) for the proposition that North Carolina state law "presumes some areas of disclosure by legislative employees." (DE 68, p. 14) What Plaintiffs fail to emphasize is that the statute they cite specifically instructs that it is "[s]ubject to . . . the common law of legislative privilege and legislative immunity" and therefore it is irrelevant to the issues before the Court.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motions to Compel should be denied.

This the 18th day of February, 2014.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTIONS TO COMPEL** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This, the 18th day of February, 2014.

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EXHIBIT B

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

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

SUPPLEMENTAL BRIEF IN SUPPORT OF LEGISLATIVE IMMUNITY AND LEGISLATIVE PRIVILEGE

INTRODUCTION

The practical import of legislative immunity and legislative privilege cannot be overstated. That message was sent by the Fourth Circuit on this issue just a few years ago, and the underlying doctrine is centuries old; neither Plaintiffs' passion nor the passage of time dilutes its strength. Nor should it. Legislative immunity and privilege are blind to the politics of the party in power; they transcend electoral majorities. The reason immunity and privilege are absolute and enduring, as demonstrated below, is because a qualified immunity—one where legislators, regardless of party, work knowing that their quiet study and contemplation is liable to exposure for all the world to see—stifles legislative deliberation generally. It stifles the give and take of negotiation among legislators. It stifles legal research and likely rules out the employment of professional, non-partisan staff. It stifles constituent and stakeholder input.

The adverse effect on the quality of legislative output of an uncertain privilege would be no different from the burden on the judiciary were litigants losing at trial to have access on appeal to communications between the trial court and its law clerks. The doctrines of separation of power and federalism are premised on the bedrock principle that the people act through their legislature convened. Plaintiffs seek to delve into the minds of *individual* legislators and extrapolate from that the legislative *body's* reasoning. Legislative immunity is merely a long-standing recognition that such an effort is futile and indeed harmful because no one legislator speaks for the body convened but

all legislators—regardless of party—need the freedom to deliberate privately on the weighty policy choices they face.

ARGUMENT

I. The Importance of Legislative Immunity and Privilege.

The doctrines of absolute legislative immunity and legislative privilege have withstood the test of time. The reason for their longevity lies in the chilling effect a qualified immunity would have in civil cases challenging duly enacted laws by the State's legislature.

Put simply, anything less than absolute immunity and privilege in civil cases challenging legislative action would amount to a plaintiffs' veto. If state legislators considering and deliberating over important public policies must worry that their political adversaries through civil litigation will be able to discover their confidential deliberations, they will decline to engage in the robust discussion and research necessary for the enactment of laws important to the entire State. Thus, having lost at the ballot box, having lost in legislative committees, and having lost a floor vote on a particular policy choice, political adversaries of the legislative majority may be empowered to effectively inhibit legislators—the direct representatives of the people—from making public policy decisions they deem to be in the best interests of the State. As stated by the Supreme Court, "[t]he claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377

(1951). Legislative immunity exists to preclude what amounts to a veto by those on the losing end of public policy decisions. Legislative immunity "prevents those who were defeated in elections from waging political war through litigation." *McCray v. Md. Dep't of Transp.*, 2014 WL 323272, at *4 (4th Cir. Jan. 30, 2014).

The Fourth Circuit has repeatedly and recently recognized that political losers should not be able to chill or deter the enactment of legislative policy:

> Legislative immunity's practical import is difficult to overstate. As members of the most representative branch, legislators bear significant responsibility for many of our toughest decisions, from the content of the laws that will shape our society to the size, structure, and staffing of the executive and administrative bodies carrying them out. Legislative immunity provides legislators with the breathing room necessary to make these choices in the public's interest, in a way uninhibited by judicial interference and undistorted by the fear of personal liability. It allows them to focus on their public duties by removing the costs and distractions attending lawsuits. It shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box . . . Legislative immunity thus reinforces representative democracy, fostering public decision making by public servants for the right reasons.

EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011); *McCray*, 2014 WL 323272, at *4.

Just as a judge is allowed to research and craft judicial opinions without fear of discovery by others of his or her deliberative process, the deliberative process of legislators must be protected to ensure the smooth functioning of our system of government. Legislators must be allowed to deliberate more thoughtfully and with greater autonomy about the "tough decisions" the Fourth Circuit has recognized they are charged with making for the State. If every e-mail and document in the possession of a

legislator became subject to public scrutiny simply because someone filed a civil lawsuit and requested it in discovery, the State would have a very difficult time enacting laws. Legislative immunity and privilege protects the majority and the minority, the legislators central to moving legislation and those on the periphery, and even those ordinary citizens who choose to participate in the process by petitioning their legislator, but who might be deterred from doing so if they thought their communications with their legislators could end up as evidence in a court proceeding.

Undermining the bedrock democratic policies necessitating the immunity and privilege is particularly inappropriate where, as here, a civil litigant has already been provided all of the information he needs to challenge the legislative motive of a duly enacted law. Defendants have provided thousands of pages of documents to Plaintiffs here constituting the entire legislative record of the challenged law, including the following:

- All public versions of the bill, including all filed bills, introduced committee or floor amendments (introduced and passed, introduced and failed or introduced and withdrawn), committee substitutes and enrolled and ratified versions, as well as voting results and fiscal notes on the bill;
- Transcripts and audio files of all committee hearings, committee debates and floor debates on the bill;
- Available voting records and minutes for committee consideration of the bill;

- Notices of committee meetings or hearings;
- Relevant House Journal entries;
- Relevant Senate Journal entries;
- Relevant House Principal Clerk's Log entries;
- Relevant Senate Principal Clerk's Log entries;
- Public sign-up sheets for committee meetings on the bill; and
- Documents and information provided by members of the public testifying at legislative hearings on the bill.

The legislature acts as one body and not as individual members. Each member of the House of Representatives and of the Senate may have a different motivation for voting for or against any particular piece of legislation; it is the intent of the General Assembly as a whole, then, and not the motivation of any particular legislator that is relevant to the purpose of a law. Every document that could possibly shed light on the legislature's motive as a body has been provided to Plaintiffs.

Full recognition of absolute immunity and privilege here will not harm Plaintiffs' ability to prepare their case or seek injunctive relief. To the extent that *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), provides any basis for discovery on legislative intent, it is limited to the legislative and public record. While Plaintiffs repeatedly refer to *Arlington Heights'* statement that "contemporary statements" by legislators may be relevant, they fail to note the context of that statement. The Supreme Court explained 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." *Arlington Heights*, 429 U.S. at 268 (emphasis added). Thus, the "contemporaneous statements" language was used expressly in the context of the legislative history, not in a discussion of rifling through public servants' private files or electronic correspondence. Moreover, the Court noted in the context of the same discussion on legislative history that the legislative history may, in some "extraordinary circumstances" require testimony "at trial" regarding the purpose of official action. *Id.* Nothing in *Arlington Heights* suggests the right to conduct any discovery against legislators outside of the available legislative record.[1] Moreover, Plaintiffs have not cited any cases in which *Arlington Heights* is used as a basis for overruling legislative immunity or privilege in cases under the Voting Rights Act.

II. Legislative Immunity is Absolute. The *Only* Exception is Criminal Cases.

Except where the Supreme Court or the Fourth Circuit have carved out an exception, the default rule is that legislative immunity is broad and absolute for state legislators on matters involving their legislative activity. *Tenney*, 341 U.S. at 372, 377 (recognizing broad right of state legislators to absolute immunity for actions within the

[1] Indeed, other courts in North Carolina have recognized this very point. In *Waste Industries USA, Inc. v. State of North Carolina*, 725 S.E.2d 875 (N.C. App. 2012), the North Carolina Court of Appeals considered whether a legislative enactment unconstitutionally discriminated against out-of-state business interests. Plaintiffs in *Waste Industries* attempted to admit stray comments by legislators purporting to support their claims using the same argument Plaintiffs here make – that *Arlington Heights* makes such statements relevant to determining legislative motive. The North Carolina court flatly rejected the argument. Because the alleged statements were "not part of any legislative history or any other official reporting of legislators' positions and views" they were not relevant under *Arlington Heights*. *Waste Industries*, at 883.

"sphere of legitimate legislative activity"); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975) (mandating that legislative immunity, and the privileges flowing from it, be interpreted "broadly to effectuate its purposes"); *accord Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181.

The only exception that has been carved out of the broad legislative immunity recognized by *Tenney* is for criminal cases. *United States v. Gillock*, 445 U.S. 360, 373 (1980). *Gillock* involved consideration of legislative immunity as applied to a *criminal indictment*, not a "federal civil action," and as such it, and other cases that rely on it, is plainly inapplicable here, particularly in the face of *Tenney*. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011) (acknowledging that in *Gillock*, the U.S. Supreme Court "carved out an exception from *Tenney*" in cases involving "federal criminal liability"); *United States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Cal. 1989) (erroneously failing to rely on or even cite *Tenney*, but acknowledging that *Gillock* "plainly does not control" a civil discovery question).

The Supreme Court has never carved out any other exceptions from *Tenney*. The Fourth Circuit has never carved out any other exceptions from the right recognized in *Tenney*. Instead, as to matters involving legislative activity, the Fourth Circuit continues to recognize and enforce absolute legislative immunity. *McCray*, 2014 WL 323272, at *4. Where the Supreme Court and the Fourth Circuit have mandated that legislative immunity is broad except in criminal cases, this Court must decline Plaintiffs' invitation to create a new exception to legislative immunity for election law cases.

A. No Exception Exists for Redistricting Cases.

Plaintiffs have cited cases in the redistricting context and implied that courts have carved out an exception to legislative immunity, in effect creating a qualified immunity, for redistricting cases. That is not accurate. In North Carolina legislators have routinely invoked legislative immunity to avoid testifying and other discovery obligations in redistricting cases. In the 2011 cycle of redistricting, two Republican legislators, Rep. David Lewis and Sen. Bob Rucho, voluntarily waived their immunity in order to testify about the redistricting plans and one other Republican legislator, Rep. Ruth Samuelson, waived her immunity to testify on one issue at trial. In addition, two Democratic legislators, Sen. Dan Blue and Rep. Larry Hall, also waived their immunity to testify at trial. However, no other legislator waived immunity in that case. Moreover, in *Cromartie v. Hunt*, No. 4:96-CV-104-BO, a redistricting case out of the 1990 redistricting cycle involving allegations of intentional discrimination because of race, legislators used legislative immunity to block certain testimony. For instance, then-Senator Roy Cooper agreed to waive his personal legislative immunity to testify in a deposition and then asserted the immunity during the deposition when asked questions that might cause him to reveal statements made by other legislators to Sen. Cooper. Excerpts from the deposition during which this immunity was asserted are attached as Exhibit 1.[2]

[2] The Attorney General has also previously instructed General Assembly staff attorneys to not answer questions about their conversations with General Assembly members who had not waived their legislative immunity. Excerpts from a deposition in the *Cromartie* case where such an instruction was given are attached as Exhibit 2.

Moreover, none of the cases cited by Plaintiffs hold that redistricting cases are an exception to the broad immunity legislators enjoy under *Tenney*. In *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wisc. Dec. 8, 2011), the issue was whether an outside expert the General Assembly had hired to draw its redistricting plans could avail himself of legislative immunity, not an actual legislator. The court held that immunity did not apply because the legislature waived it to the extent it used an outside expert to draw its plans. *Baldus*, 2011 WL 6122542, at *2. The court did not purport to consider, and did not hold, that redistricting cases are an exception to the general rule of *Tenney*. Similarly, in *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011), the court simply erroneously relied on *Gillock* to impose a qualified immunity. That court did not cite any authority other than *Gillock* justifying or supporting its opinion on the immunity issue. In *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y 2012), the court considered the immunity issue in the context of a redistricting commission containing legislator and non-legislator members. Obviously, service by a legislator on a commission with non-legislators is not an inherent legislative function such as the enactment of legislation. The *Favors* court found that legislative immunity was, in fact, absolute but, relying on cases interpreting the privilege in the criminal context, found that legislative *privilege* was qualified. *Favors*, 285 F.R.D. at 209. The *Favors* court's approach directly conflicts with the Fourth Circuit's precedent, discussed below, that the legislative privilege is as extensive as the legislative immunity and, like *Comm. for a Fair & Balanced Map*, cites no

controlling authority for its decision to import a rule applying only in criminal cases into the civil context.

B. No Exception Exists for Voting Rights Act Cases.

Plaintiffs have cited no relevant authority for their breathtaking and unprecedented argument that the Voting Rights Act operates as a waiver of legislative immunity or privilege or otherwise constitutes an exception carved out from *Tenney*. In fact, to the contrary, the court in *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 n.12 (D. Md. 1992) refused to recognize any such exception.[3] Moreover, despite Plaintiffs' suggestion, not even Section 5 of the Voting Rights Act has been used to justify such an enormous departure from the immunity mandated by *Tenney*. For instance, in *Texas v. United States*, 279 F.R.D. 24 (D.D.C. 2012), a Section 5 case, the court found that legislative immunity or privilege did not apply because it had been *waived*. *Texas*, 279 F.R.D. at 31. Moreover, inexplicably, the *Texas* court did not discuss or even cite *Tenney* in its decision. Plainly, the court was not creating an exception to *Tenney*. Nor was the court in *Perez v. Perry*, 2014 WL 106927 (W.D. Tex. Jan. 8, 2014) (three-judge court) doing so – it, like almost all of the other cases cited by Plaintiffs, simply erroneously removed *Gillock* from the criminal indictment context it addresses to conclude that the federal legislative immunity or privilege is qualified in

[3] As noted during the hearing on this matter on 21 February 2014, two judges on the three-judge panel wrote a concurring opinion urging a "less categorical" approach to the immunity issue. However, even those two judges were willing to allow only non-legislator members of the redistricting commission at issue in that case to be deposed. The concurring opinion also made it clear that they would "flatly prohibit" any depositions of legislators regarding the actual enactment of the bill.

civil actions. No authority supports Plaintiffs' argument that this Court should create a new exception to *Tenney*. In the absence of such an exception, *Tenney* controls.[4]

III. In the Fourth Circuit, Legislative Immunity and Legislative Privilege are Co-Extensive and Both Absolute.

The Fourth Circuit has made it clear that legislative privilege exists to safeguard legislative immunity.[5] Legislative immunity would be nearly useless if private litigants could initiate civil actions and harass legislators with civil process and other discovery actions. As that Court has put it: "Legislative *privilege* against compulsory evidentiary process *exists to safeguard* this legislative *immunity* and to further encourage the republican values it promotes." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181 (emphasis added). The Court also cited with approval *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C. Cir. 1988) for the proposition that "[d]iscovery procedures can prove just as intrusive" as being named as a party to a suit.

---

[4] The Court would be wading into a complicated thicket if it attempts to rank the "importance" of federal statutes in assessing whether one statute or the other justifies imposition of a qualified instead of absolute privilege. In *Wash. Suburban Sanitary Comm'n*, the Fourth Circuit has already decided that discrimination claims under Title VII do not warrant undermining absolute legislative immunity or privilege.

[5] Neither legislative immunity nor legislative privilege, which are grounded in the common law, should be confused with legislative confidentiality required, subject to criminal penalties, of legislative employees by N.C. GEN. STAT. § 120-129 *et seq*. This statutory imposition of confidentiality exists to safeguard legislative immunity by protecting communications between legislators and "legislative employees," whether those employees work for one legislator or whether as part of a central staff they work at different times for different legislators. Like legislative immunity and legislative privilege, this statutory confidentiality can only be waived by the legislator involved. Notably, while N.C. GEN. STAT. § 120-132(c) allows a court to compel testimony that otherwise would be confidential if "the disclosure is necessary for the proper administration of justice," the ability of a court to do so is specifically made subject to "the common law of legislative privilege and legislative immunity."

Wash. Suburban Sanitary Comm'n, 631 F.3d at 181. Finally, the Court made it clear that if the EEOC had sought "to compel information from legislative actors about their legislative activities, they would not need to comply." *Id.*

The Fourth Circuit's approach is consistent with the U.S. Supreme Court's approach in *Eastland*, 421 U.S. at 501. There the Court held that any "interference" from civil litigation is barred by legislative immunity. 421 U.S. at 503. Accordingly, the Court quashed a subpoena to federal legislators holding that they were "completely immune" from it. *Id.* at 506. Other circuit courts have held similarly. In *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995), the Court held that a party is "no more entitled to compel [legislators'] testimony – *or production of documents* – than it is to sue [legislators]." *Id.* at 421 (emphasis added). Rather, there is no "difference in the vigor" with which the privilege deriving from the immunity protects document production and testimony versus protection against the suit itself. *Id.*

IV. Rule 34 Production Requests to the State are Insufficient to Compel Legislators to Produce Documents.

Plaintiffs seek to compel individual legislators to produce documents by serving a Rule 34 production request on the State of North Carolina. However, each legislator is a constitutionally elected and separate office and therefore the custodian of his or her own records. The State of North Carolina does not have the authority to compel any legislator to produce documents.

Indeed, General Assembly policy recognizes that legal possession of each member's electronic and other records rests with the member only. In a policy entitled

"Custodianship of Legislator E-mail and other Electronic Documents", attached hereto as Exhibit 3, the General Assembly recognizes that "the member shall be the custodian of documents that are made or received by the member or the personnel in the member's office and that are contained in the General Assembly's computer system under their accounts." Thus, each individual legislator has the exclusive legal right to access and produce his or her own documents. No legislators have been named as parties in any of the cases consolidated in this matter and the "State of North Carolina" is not the custodian of their documents. Accordingly, to the extent Plaintiffs seek to compel documents from legislators pursuant to a Rule 34 production request, such request should be denied.

CONCLUSION

For the foregoing reasons, the legislative movants' Motion to Quash Subpoenas to State Legislators should be granted and Plaintiffs' Motion to Compel should be denied.

This the 26th day of February, 2014.

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This, the 26th day of February, 2014.

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/s/ Thomas A. Farr
Thomas A. Farr

17198818.1

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

EASTERN DIVISION

MARTIN CROMARTIE, et al., Plaintiffs, v. JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, et al., Defendants, and ALFRED SMALLWOOD, et al., Defendant-Intervenors.	No. 4:96-CV-104-BO(3)

DEPOSITION OF ROY ASBERRY COOPER, III

THURSDAY, SEPTEMBER 9, 1999

Conference Room 301

Sam Ervin Justice Building

114 West Edenton Street

Raleigh, North Carolina

1:30 p.m.

Volume 1 of 1

Pages 1 through 160

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Also Present:

Gerry Cohen

PROCEEDINGS

(This deposition was taken by agreement and pursuant to the Federal Rules of Civil Procedure.)

(Whereupon,

ROY ASBERRY COOPER, III

was called as a witness, duly sworn, and testified as follows:)

Ms. Smiley: Before you start the questions, I want to make one statement for the record. Senator Cooper has agreed to waive his legislative immunity, and that is a personal waiver.

Mr. Everett: Thank you very much, Senator. Let me note how pleased we are that you have waived it because that will enable us to get to the facts a little bit more readily. Shall I go ahead and begin now?

Ms. Smiley: Uh-huh.

DIRECT EXAMINATION 1:31 p.m.

By Mr. Everett:

Q Please state your full name, residence, and occupation.

A Roy Asberry Cooper, III; I live at 308 Gravely Drive, G-r-a-v-e-l-y Drive, in Rocky Mount, North Carolina. I am an attorney.

Q Are you in Nash County or Edgecombe?

A I am in Nash County.

that one specifically.

Q And you said Senator Leslie Winner. In order to avoid any confusion, is she--was she then a state senator and someone different from Dennis Winner?

A Yes, she was a state senator, and like in some ways and in some ways not.

Q And Dennis Winner, was he still serving in the Senate or had he finished his service?

A No, he had not. He was no longer serving.

Q Had Leslie Winner previously been involved actively in the redistricting process--that is, say back in 1991, 1992?

A I don't know personally what her role was. I know that she was an attorney involved in the case before she was a state senator.

Q I see.

A But I don't--I am not quite sure what her role was.

Q Do you know whether in that connection as an attorney she had been an attorney with the Legal--had worked with the Legal Defense Fund of the NAACP?

A I am really not sure who her employer was. I know that she was involved as an attorney in the case.

Q What was her role in preparing any of the plans that may bear the designation Cooper/Winner?

Ms. Smiley: I am not sure that Senator Cooper can waive Senator Winner's legislative immunity. If you want to

ask him not anything she said---

Mr. Everett: (interposing) Sure.

Ms. Smiley: ---but you need to be very careful that he can't waive her immunity.

Mr. Everett: That's fine.

Ms. Smiley: In terms of his perception of maybe what she did or something or her role, but her actual acts or conversations would not be open for disclosure.

Mr. Everett: Okay.

By Mr. Everett:

Q What did you do in relation to the formulation of this plan?

A Well, she is one of the brightest senators in the Senate and she was one of the senators that I talked to about redistricting.

Q And she had had a lot of experience with it; correct?

A She had had experience with it, yes.

Q And we won't ask you to refer to her attitudes in that regard since that might waive her privilege, but did you find that she had some input that was significant?

A I would say that yes, she played a significant role in the redistricting process; yes.

Q And in playing that role, were there situations where you and she were together with Gerry Cohen working on a plan? Were there situations of that sort?

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

EASTERN DIVISION

MARTIN CROMARTIE, et al., Plaintiffs, v. JAMES B. HUNT, in his official capacity as Governor of the State of North Carolina, et al., Defendants, and ALFRED SMALLWOOD, et al., Defendant-Intervenors.	No. 4:96-CV-104-BO(3)

DEPOSITION OF LINWOOD LEE JONES

WEDNESDAY, SEPTEMBER 22, 1999

Conference Room 301

Sam Ervin Justice Building

114 West Edenton Street

Raleigh, North Carolina

11:00 a.m.

Volume 1 of 1

Pages 1 through 180

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Also Present:

Martin Cromartie

PROCEEDINGS 11:14 a.m.

(This deposition was taken by agreement and pursuant to the Federal Rules of Civil Procedure.)

(Whereupon,

LINWOOD LEE JONES

was called as a witness, duly sworn, and testified as follows:)

DIRECT EXAMINATION 11:14 a.m.

By Mr. Everett:

Q Would you please state your name, residence, and occupation?

A It is Linwood Lee Jones. My residence is 4501 Eliot Place, Raleigh, North Carolina 27609. And my occupation is a staff attorney for the North Carolina General Assembly.

Q How long have you held that position?

A For 15 years.

Q And what training did you have for that position?

A I went to undergraduate school at the University of North Carolina at Chapel Hill and law school at the University of North Carolina at Chapel Hill.

Q And when did you graduate at those locations?

A From undergraduate school in December of 1980, from law school in May of 1984.

Q And so you came here almost immediately after graduation?

told you he doesn't know if they are concentrated anywhere.

A I don't recall.

Q Now, in connection with the 1990 redistricting, did you play any role in formulating the redistricting plan enacted by the General Assembly in 1991?

A Yes.

Q And what was that role?

A I was staff counsel to the House redistricting committee, or one of the staff counsels to the House redistricting committee, and worked with several other people in drawing the state House plan. I did not work on the state Senate plan.

Q When you say several other people, to whom are you referring?

A Bill Gilkeson was involved some with it. Carolyn Johnson, who is no longer with our office, was involved with Robeson County. Leslie Winner was special counsel to the House committee at that time, so she was involved with it. And Gerry Cohen was involved with it.

Q Now, at that particular time was Leslie Winner in private practice, or do you know?

A She was not in the legislature. I do not know whether she was actually in private practice.

Q And if she were in private practice, you would not know what firm she was with at that particular time?

to give a definition of geographic compactness, would you do so for the record?

A I don't have a definition that would be based on area dispersion or perimeter dispersion. I am not familiar with that.

Q How about any other--I mean, just tell me, what is geographic compactness?

A It is the drawing of a district in a particular area of the state and the grouping of counties or precincts that are within that general area.

Q Now, have you ever heard a term called "functional compactness"?

A Yes.

Q In what context and when did you first hear the term "functional compactness"?

A I don't recall.

Q Long ago and far away or pretty recently?

A I can't recall. I have heard the term.

Q Do you remember whether or not as one of the stated objectives of the 1997 plan there was any reference to functional compactness?

A Any reference where or when?

Q In the--well, let me put it this way. Did the legislature or the committee when they had just started drawing the 1997 plan in either committee, to your knowledge,

say "What are our goals?" Was there any statement of goals?

A In 1997?

Q Yeah, in connection with the drawing of the plan.

A I don't recall a public statement of goals in the beginning.

Q How about at the end or anytime along the way?

A There were statements, I believe, made during the course of committee meetings about what the goals were.

Q Was geographic compactness ever stated as a goal---

Ms. Harrell: (interposing) Objection.

Q ---to your recollection?

Ms. Harrell: Unless you are talking about public statements or statements by a legislator who has waived his legislative immunity, we would object and instruct him not to answer regarding any statements by a legislator who made a statement in a closed session or not in a public forum unless he has waived his legislative immunity.

And to my knowledge, the only ones that have are Representative McMahan and Senator Cooper. After that, if you can remember the question, you can go ahead and answer it.

Mr. Everett: Okay.

A I believe Representative McMahan at one or more times during public committee meetings referred to compactness.

Q Compactness, just compactness, or was there any

reference to geographic compactness you recall by anybody in a public session?

A My recollection is he just used the word "compact" or "compactness."

Q Do you recall any reference to functional compactness in the public record at any point?

A I don't recall that term as part of our public deliberations.

Q I am going to ask you a question as to which legislative privilege is being claimed and I understand you won't answer it. But I am going to ask you whether in any other session, closed or otherwise, you heard any reference by a legislator, including the chair, to geographic compactness.

Ms. Harrell: Objection and instruct the witness not to answer as to any closed session or any nonpublic forum in which there was any comment by or to a legislator who has not waived his privilege.

Mr. Everett: Fine.

Ms. Harrell: Other than that, you can answer.

A I don't think I--I don't think I can answer about a closed session by any other legislators.

Q Sure. And I am going to ask you the same question with respect to functional compactness, that term. And I realize that will be subject to the same objection, but for

the record I am asking the question.

Ms. Harrell: And I am going to make the same objection. You can only--please answer only as to public statements or as to Representative McMahan or Senator Cooper.

A I don't recall specifically that term coming up with the two of them and I have no comment on anyone else.

Q Now, in 1997 when the plan was being formulated, were there some precincts that were not even loaded in the State's computer system at that time?

Ms. Harrell: Objection unless he knows.

Q If you know.

A Yeah; there were some counties, primarily smaller ones, where we did not have digitized precinct information.

Q As I understand it, then, at that point you had only the computer information that had been put in as of 1990; right?

A That is right.

Q And that did not show the precincts in a number of counties; is that correct?

A That is correct.

Q How did you go about in 1997 trying to assure that no precincts would be split as the plan was being drawn?

A Are we referring to the precincts in our database or the actual precincts in use?

Q The actual precincts in use; if some were not in your

EXHIBIT 3

North Carolina General Assembly	**Legislative Services Commission** **Policy**	Adopted: January 2002 Reviewed: February 2012 Revised: February 2006
	Title: Custodianship of Legislator E-mail and other Electronic Documents	

Purpose: To establish custodianship of Legislator E-mail and other electronic documents

Scope: This policy applies to all electronic documents residing in the General Assembly's computer system that are made or received by members or personnel in the member's office

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POLICY STATEMENT

Because legislative immunity may shield some of the documents received or made by a member of the General Assembly and contained in the General Assembly's computer system, the member shall be the custodian of documents that are made or received by the member or the personnel in the member's office and that are contained in the General Assembly's computer system under their accounts.

In the event that a member leaves office, the aforementioned documents shall be made available to the member upon request.

In the event of a member's death while in office, the ISD Director shall provide the Personal Representative of the deceased legislator's estate with an electronic copy of the documents received or made by the legislator or personnel in the legislator's office and contained in the General Assembly's computer system:

- Upon the request of the Personal Representative within 90 days of the deceased legislator's death, and
- The presentation of certified copies of letters testamentary or of administration to the ISD director.

ISD Shall, after 90 days of the member's leaving office, or death in office, remove all of the member's documents from the General Assembly's computer system.

EXHIBIT C

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

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, vs. PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, et al., Defendants.	*	Case No. 1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, ET AL., Plaintiffs, vs. STATE OF NORTH CAROLINA, et al., Defendants.	*	Case No. 1:13CV660
UNITED STATES OF AMERICA, Plaintiff, vs. STATE OF NORTH CAROLINA, et al., Defendants.	*	Case No. 1:13CV861

TRANSCRIPT OF MOTION HEARING HELD 2/21/14
WINSTON-SALEM, NORTH CAROLINA
BEFORE THE HONORABLE JOI ELIZABETH PEAKE
UNITED STATES MAGISTRATE JUDGE

Proceedings recorded by stenotype reporter.
Transcript produced by Computer-Aided Transcription.

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(A morning recess was taken from 11:34 a.m. until 11:57 a.m.; all parties present.)

THE COURT: All right. I think we're now ready to take up the motion to quash the subpoenas that were issued by the NAACP and I will ask you as we do that whether it makes sense to also at the same time consider the motion to compel by the League of Women Voters.

It looks like we had a change in counsel. Who do we have now for the plaintiff NAACP?

MS. EBENSTEIN: Julie Ebenstein for the League of Women Voters.

THE COURT: All right.

MS. EBENSTEIN: And we're happy to have the two motions considered together. We may reference our specific request for production over the course of the argument, but otherwise we're happy to combine the two motions and discuss legislative issues as one issue.

THE COURT: All right. Yes, ma'am.

MS. LIEBERMAN: Good morning, Your Honor. Denise Lieberman with Advancement Project on behalf of the NAACP Plaintiffs and I have with me my colleague Penda Hair.

THE COURT: All right. And then, Ms. Meza, are you still going to be for the U.S. Department of Justice?

MS. MEZA: Yes, Your Honor.

THE COURT: All right. And do you see any reason,

Ms. Meza, not to take up those in combination?

MS. MEZA: No, Your Honor. That's fine.

THE COURT: All right. Yes, sir, Mr. Strach or Mr. Peters.

MR. PETERS: It's me for this one, Your Honor.

THE COURT: All right.

MR. PETERS: And we also think it makes sense to take them up together because I think the answer to our motion to quash is largely determinative of the answer to the question on the motion to compel. If legislative immunity applies, legislative immunity applies across the board.

And we think it's clear, Your Honor, that legislative immunity does apply in this case and I think we've laid it out in our briefs why and I think it's a fairly straightforward -- I think fairly open-and-shut analysis despite the arguments that the Plaintiffs have made. When you look at the cases they cite, they don't really apply in this situation and they don't affect the bottom line rulings.

The two main cases I think for the Court to look at here are the *Tenney v. Brandhove* case of the United States Supreme Court, which not only holds that the legislative immunity recognized in the federal courts applies to state legislators, but it has quite a discussion on the reason for

legislative immunity and the origins of it. It makes clear that it arises not only out of the Speech or Debate Clause of the United States Constitution, but it's grounded in the common law and that --

THE COURT: Didn't the Supreme Court I think in *Gillock* clarify that it was not constitutional as to state legislators? It was really just a judicially created common law separate and apart from the Speech or Debate?

MR. PETERS: Yes, Your Honor, I think it's a common law there and I think it's also a separation-of-powers issue in terms of -- and perhaps in an instance like this, perhaps a federalism issue in terms of a judiciary analyzing the workings of a legislature.

THE COURT: Certainly that would be an issue or a concern, but isn't that addressed by the fact that Congress enacted Section 2 of the Voting Rights Act and created this cause of action?

MR. PETERS: I don't think it is, Your Honor, and the reason for that is because legislative immunity trumps the Section 2 considerations in this case -- in this instance.

THE COURT: Legislative immunity for individual legislators, but it wouldn't then create legislative immunity that would create immunity for the General Assembly's actions to the extent it's asserted against the

State.

MR. PETERS: Well, Your Honor, for the General Assembly -- the General Assembly is the legislators combined; and in this particular instance, there is the legislative immunity for the legislators themselves.

THE COURT: Well, that's the distinction I think I'm trying to make with you. The legislative immunity, if it really is legislative immunity, would that be then more the basis of a motion to dismiss, that this action couldn't be brought at all because the legislature is immune from any challenge to its duly enacted laws? I don't think that's what Section 2 has been interpreted or the legislative immunity has been interpreted as under this law.

MR. PETERS: ** and I don't think it is because the legislature is not a party to this action.

THE COURT: So the immunity, though, would not *be for the cause of action. It's for the individual legislators.

MR. PETERS: Correct. The case law is clear a legislator -- immunity is individual to a legislator. The legislator may assert it or -- or may waive it at the choice of that legislator. And what we have here are thirteen legislators who have been subpoenaed by the Plaintiffs. They are not parties to the case and they have been subpoenaed.

THE COURT: Well, then this goes again -- and maybe I'm just jumping ahead of where you're headed. The distinction between immunity and privilege, to the extent it's not a question of immunity to the extent that the legislators individually are not here as individual parties, you're not seeking to dismiss claims against the legislators on the basis of immunity. It's the corollary legislative privilege that really is more at issue here.

MR. PETERS: No, Your Honor, I think it's both.

THE COURT: All right. And tell me about that then.

MR. PETERS: Because I think the legislative immunity is clearly at issue when a plaintiff serves subpoenas on the legislators demanding that they produce documents that they collected as legislators and in their position -- in their possession in their capacity as legislators. That is an action against the legislator.

THE COURT: So you would treat that as a claim from which they're immune, the issuance of the subpoenas, rather than a privilege?

MR. PETERS: I would -- I would probably describe it as a process of the court from which they are immune, not a claim per se, not in the sense of a cause of action but a claim. The immunity means that legislators are immune not only from being sued but from having to answer in court.

I think the Fourth Circuit has addressed this very question and it did so in the *EEOC versus Washington Suburban Sanitary Commission* decision where -- and that was in 2011 -- where in that case the EEOC, a government agency, was -- subpoenaed documents from members of the Commission. The Commission sought protection from having to respond to those subpoenas. And what the Fourth Circuit said is if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, they would not need to comply.

THE COURT: And I'm trying to as I read these cases reconcile that with the remainder of the case law that's out there in terms of whether there's a distinction there because the claims themselves were ultimately subject to legislative immunity to the extent they implicated legislative acts. If it was a Title VII claim, then that claim was subject to dismissal to the extent it was a legislative act.

And I think the more recent -- there's a -- the *McCray* case from January, a few weeks ago, where legislative immunity was at issue in a Title VII case and it was the issue of discovery was moot or irrelevant because the immunity itself was what applied.

So trying to read those together and determine how those fit or relate to the context of the Section 2 case

that we're at here is really what I want to try and get at.

MR. PETERS: Let me see if I can head straight to that, Your Honor, and I think that's answered both by the -- looking at the *Marylanders for Fair Representation versus Schaefer* case from the District of Maryland. That was a three-judge panel case. Judge Murnaghan from the Fourth Circuit was on that case, as well as --

THE COURT: Judge Motz as well.

MR. PETERS: Well, that was Judge Motz -- the District Court Judge Motz, I believe.

THE COURT: All right.

MR. PETERS: I got thrown by that at first, too.

THE COURT: All right. So it was District Judge Motz, Judge Murnaghan, and District Judge Smalkin, but all with separate opinions --

MR. PETERS: Well --

THE COURT: -- or concurring opinions with Judge Murnaghan.

MR. PETERS: There was a concurring opinion but -- Judge Motz I believe wrote that Judge Murnaghan joined in, but that opinion isn't -- doesn't address the specific issue we're talking about here because that concurring opinion dealt with members of a commission, not with legislators.

THE COURT: Well, it does seem to pretty directly say that legislative immunity is distinct from legislative

privilege; that they did not take a categorical approach; and that -- that in some instances members of a legislative body might be called to stand trial or testify; and that the unique language of legislative, at least in that case redistricting, was that one of those types of cases.

MR. PETERS: Right. But the Court also said that Section 2 is not one of those cases.

THE COURT: Where is that?

MR. PETERS: That is in Footnote 12.

THE COURT: Footnote 12, that's not the concurring opinion.

MR. PETERS: That's not the concurring opinion, but it is the part of the opinion -- if you read the beginning of the concurring opinion, Judge Murnaghan and Motz say: We agree with almost all that Judge Smalkin has written in his thorough and scholarly opinion and then we believe, however, that a less categorical, more flexible approach should be taken to the question of testimonial legislative immunity in shaping the scope of discovery. But then what they go on to discuss is discovery in terms of members of the commission, not of the legislature -- not of the legislators who were in the action.

THE COURT: Well, then ultimately concluding they would prohibit depositions as to action which took place after the legislation reached the floor because of the

intrusion. But that still seems more limited or at least -- and I'll put it this way. I certainly understand the importance of the issues here in terms of protecting the scope of the legislative privilege. My primary concern today is whether it is as absolute, as you would contend, so that we don't even get to a privilege log or some more particular determination of the types of documents for which privilege is claimed.

MR. PETERS: Right. And I think in this case it is, Your Honor, and that turns partly on the reason that the discovery is sought. You know, the Plaintiffs have said here that they're seeking this discovery because they need to learn the intent of the legislature and the evidence that was before that body at the time the challenged statute was enacted, and they want to look at contemporaneous statements and viewpoints held by the decision-makers. Essentially what that boils down to is that means for the thirteen subpoenaed legislators they are saying, Tell us why you voted the way you voted. And if there is anything to which legislative immunity applies, that's what it is.

THE COURT: Well, I'm looking at the particular request, though. The particular request includes communications and documents on information along a much broader range. I don't know that that's as narrow as a -- say a deposition as to your motive in particular of -- or

that you held when you were working on this piece of legislation.

MR. PETERS: Well, Your Honor, I'm going with what the Plaintiffs are saying as to their reason for needing this. They're saying that's why they need this information is to know why these legislators voted the way they did.

And I think there are two issues involved there. One is legislative immunity. There is no question that what the Supreme Court has said and the Fourth Circuit has said is that if we're looking into something dealing with the legislative process -- and that's what we're talking about here, what they have described is quintessentially the legislative process -- then the legislator has immunity from even being questioned about it in court, even being required to produce documents.

They've cited the *Arlington Heights* case to say we're told we can -- this is the kind of information that we need to get to, but *Arlington Heights* even says in some extraordinary instances -- they say extraordinary -- the members might be called to the stand at trial to testify concerning the purpose of an official action even though such testimony frequently will be barred by privilege.

And I do want to point out here, Your Honor, it's my -- how should I say this. Reading through a lot of the cases, I think at least at times there is a going back and forth

between immunity and privilege without necessarily drawing clear distinctions between what is immune -- what is immunity and what is a privilege that the legislator may assert.

But in the *Marylanders* case, it goes on to say: Plaintiffs cannot inquire into legislative motive if such an inquiry would necessitate an aberration of legislative immunity. It specifically says: Thus, legislative immunity, if found, would bar inquiry into legislative motive regarding Section 2 violations, just as it would prohibit certain discovery regarding plaintiff's other claims.

I think this goes to another aspect of the discovery, Your Honor, which indicates why -- another reason that the immunity attaches in this way, because, as Mr. Strach pointed out earlier, what we're talking about is an act of the General Assembly and so what is at issue in terms of the claims that the Plaintiffs have is the motivation of the House of Representatives and the motivation of the Senate, what each of those bodies intended when they passed this bill. What an individual legislator thought on that is not only irrelevant, it is not evidence of what the General Assembly intended. Even if it's the legislator who drafted the bill, who proposed it, it is not evidence of what the General Assembly intended.

THE COURT: What do you make then of the cases that seem to incorporate some reference to those types of things into an analysis of the legislators or legislative motive? There might be a reference in some cases to an e-mail exchange or to an individual legislator's position statement. What do you make of those if that's the case?

MR. PETERS: Your Honor, the cases that I'm familiar with, the ones that the Plaintiffs have cited that do that, are in the context of redistricting.

The concurring opinion in the *Marylanders* case and the reason that Judge Motz and Judge Murnaghan say they would treat it a little bit differently is because they say redistricting is an animal all unto itself. They use the term that it is *sui generis*. Legislative redistricting is a *sui generis* process. While it is an exercise of legislative power, it's not a routine exercise of that power. And the enactment of statutes ordinarily involves the implementation of public policy by a duly elected -- constituted legislative body. Redistricting involves the establishment of the electoral structure by which the legislative body becomes duly constituted. Inevitably, it directly involves the self-interests of the legislators themselves.

They're saying there that is the reason why they think there might be a little bit more leeway in what goes on because we're talking about redistricting, which is unlike

anything else the legislature does and which brings these initial concerns.

The *Baldus* case reaches essentially the same conclusion, adding that legislative immunity was waived by hiring somebody outside the legislature to draw the districts.

And the *Favors* case basically says the same. It says that some courts have waived -- have considered legislative immunity to be qualified in the context of redistricting.

I am not aware of a case where a Court has found that immunity is qualified in that same way in the context of a Section 2 case, where what the legislature is doing objectively is instituting public policy like the judges described in Murnaghan -- in *Marylanders*.

THE COURT: So if you -- if you separate out, though, immunity and privilege, would your contention be that privilege is absolute where immunity is absolute, the only exception being these redistricting cases?

MR. PETERS: And criminal cases.

THE COURT: And criminal cases.

MR. PETERS: The case law also carves out that exception.

THE COURT: Well, what about Section 2 cases -- let's assume that that footnote may be part of what they adopted or may be part of what they were determining they

would distinguish the categorical approach that was taken. So setting aside that footnote for now and taking the *EEOC* case and the *McCray* -- do you have *McCray*?

MR. PETERS: I don't believe I have that one with me this morning, Your Honor.

THE COURT: That's the January 30th, 2014. I don't think it has a Westlaw cite yet. It's *McCray versus Maryland Department of Transportation*, which is also in the Title VII context. And the other cases cited there, I think it includes the whole -- it looks like the groups of cases that they cited were all in the employment law context.

MR. PETERS: Well, that is different too, Your Honor, because in the employment law context that's not the legislative process.

That's what the *EEOC versus Washington Suburban Sanitary Commission* makes clear. In that case, the Court said legislative immunity would prevent -- that's the one where the Court said if the EEOC were to serve subpoenas on them seeking the production of documents that involved their -- what they did as legislative actors, that those people receiving the subpoenas would not need to comply. But the Court went on to say what was really at issue in that case was a personnel decision, an employment-type decision they had made.

THE COURT: Well, I think that -- I think that --

that was my reading as well. But that raises my question, which is that personnel decision, when it reaches the point of being a legislative act, a funding decision, then that ventured into the area of legislative immunity that would then have a corresponding privilege that went with it, the immunity there being a complete immunity from the claim itself, which then implicates all the Title VII case law. Is the municipality liable? Is the State liable? What is the basis of a Title VII claim against the various entities that might be involved.

And taking the issue that the redistricting cases might be a different category and the criminal cases might be a different category, then what do we do with the Section 2 cases because the other District Court decisions -- I don't know what the answer might be on Section 2 cases where you're looking at not pure immunity and more of just a privilege.

MR. PETERS: I think, Your Honor, the very simple answer is this: The Courts have said legislative immunity or privilege does not apply when there is an investigation of a criminal act involved because you can't evade the criminal process that way. Immunity and privilege only apply in the civil context. So we have that.

The Court has -- the Courts have said consistently that if what we're talking about is not the legislative process

but some other hat, if you will, that the public body wears when they're doing what's involved in the claim, like an employment hat, like a personnel-decision hat, that's not generally applicable to everybody but -- and the *EEOC* case seemed -- I mean, they took away the funding for one person's position and so that was really a personnel case. So what they've said there is that if what we're talking about is not the legislative process itself but something else, then the immunity and the privilege do not come into play. And then we have some cases that have said in the context of redistricting it comes into play, but there may be more of a balancing act as to exactly how that's going to work.

Those are the exceptions that the Courts have carved out. I think that leaves us with anything else. A Section 2 case would be like a 1983 case or any other case where what's at issue are clearly the legislators acting in their legislative capacity and acting -- taking -- participating in the legislative process; and what we're talking about is, to use the analysis that Judge Motz and Judge Murnaghan used, implementing -- enactments that implement public policy as the General Assembly sees them. Then immunity is, without question, in place. I think that's the distinction the Court is drawing.

THE COURT: And how does that overlap that -- that

immunity that you're brushing with broader strokes there relate or overlap with the underlying -- the 1983, whether you can bring a cause of action at all against the State, whether they're a person under 1983?

MR. PETERS: Right.

THE COURT: Those issues seem to overlap in those cases in ways that make me wonder whether I can import that hole to the Section 2 and that's why I'm looking for Section 2 cases that would make either that distinction or conclude that it applies --

MR. PETERS: And the only one of the cases that I'm aware of this morning that deals with it in the Section 2 context is the *Marylanders* case.

THE COURT: Where we don't have necessarily a definitive determination as to Section 2. We have the --

MR. PETERS: Well, I --

THE COURT: The footnote, that's what you're referring to.

MR. PETERS: Well, I would argue that we do --

THE COURT: Okay.

MR. PETERS: -- because either -- the footnote does speak to it directly. And I read Judge Murnaghan and Judge Motz's concurrence to adopt that analysis; but whether that's right or wrong, where they differ from Judge Smalkin is a case that is in the context of redistricting, which

they say is like no other case. So I think if they say it's like no other case, then that means you don't take that analysis and apply it to another case. They're saying this is *sui generis*. This is something all unto itself. And so because of that we think a different analysis may apply here.

So I don't see them as saying that there is a different analysis for Section 2. I don't see anything in the concurrence that suggests Section 2 requires a different analysis. What they say may require a different analysis is the fact that it is a redistricting case. And given that I don't think there's anything that suggests -- otherwise that suggests that immunity is not in full force simply because it is just a Section 2 case.

I would point out that the cases where the Court's applying the -- many of the cases where the Court is applying immunity, finding it to be there are constitutional challenges. So I don't think that's the determinative thing here. The determinative thing is -- the bottom line -- the Supreme Court and the Fourth Circuit have said immunity is broad -- legislative immunity is broad. It's far-reaching. In the words of the Fourth Circuit, it's practical import is difficult to overstate.

THE COURT: Well, certainly that's true of immunity. And I think that gets back to my first question

to you, which has to do with whether this is a question of immunity or privilege, and I want to visit that again because your contention is that it's immunity full force from any answering --

MR. PETERS: Correct.

THE COURT: -- as to the subpoenas at all. We're going to overlap some into the motion to compel because that's a separate issue in terms of claiming the privilege there. I know that gets into the question of who the parties are and what information the State has, but I think that would be something we'd need to consider in all of this as well. And I'll go ahead and ask as part of that, because I want you to address that, but in the sense that some of these documents may or may not under state law have become public records or may otherwise be available and not subject to any privilege, whether then they would still be subject to a legislative privilege and whether we need to make some more detailed and determinative analysis as to particular types of documents beyond what we have ready to look at today.

MR. PETERS: If I'm understanding you correctly, I would say immunity applies here across the board.

THE COURT: As to the subpoenas?

MR. PETERS: Yes, Your Honor.

THE COURT: Okay.

MR. PETERS: And that's what applies across the board. To the degree that it doesn't, there is a privilege there. State law defines the privilege for legislators to include any communication they have with legislative employees and that none of those communications can be released without the consent of the legislator. It's the legislator's privilege to waive, just like it's the legislator's immunity to waive.

THE COURT: So would communications with constituents be subject to that privilege, the third parties?

MR. PETERS: I think -- I think -- they do not fall under the legislative privilege as established in the statutes. Those are communications between legislators and legislative employees. I think they do fall under the immunity clearly.

THE COURT: Okay. Well, the -- immunity -- I understand you're raising immunity in that sense as to the subpoenas in their entirety.

MR. PETERS: Right.

THE COURT: Let's look at the context of the motion to compel where it's not a subpoena. It is just as part of this suit whether you can claim a privilege for a particular request for production. Are you still claiming immunity on that?

MR. PETERS: Well, I think the distinction is -- or part of the thing we have to bear in mind is when we're talking about immunity we are not just talking about immunity from suit. The -- the --

THE COURT: That's what I want to ask about.

MR. PETERS: The Supreme Court has made it very clear it's not just immunity from suit. It's not just immunity from being a party. It's immunity from even being called to testify. It's immunity from being asked to provide evidence.

THE COURT: I understand that is your contention as to the subpoenas. Is that also your contention as to any requests for production --

MR. PETERS: Yes.

THE COURT: -- as part of the --

MR. PETERS: Yes.

THE COURT: -- between the parties?

MR. PETERS: And I should be clear, too. While I referenced the statutory descriptions of legislative privilege, legislative confidentiality in North Carolina, we also think that privilege flows from the immunity. They are tied together, and that may be one reason why in some decisions there is not a clear distinction between what's immunity and what's privilege. But we think the privilege arises from that immunity. A legislator cannot be --

THE COURT: A privilege arises from the -- how did you relate that back to the state statutes?

MR. PETERS: Well, I -- what I'm trying to say is I think there are two sources for any privilege a legislator might have or legislative privilege. One comes from the same body as the immunity and that same understanding. The other is the legislative confidentiality statutes that are imposed by North Carolina law.

THE COURT: Okay. So viewing those as separate. I thought that was your position, those are separate. I wanted to make sure I followed you.

MR. PETERS: Right. But the bottom line is we think the case law is clear that a legislator cannot be forced to offer evidence. It's not just a matter of not being a party. The legislator cannot be forced to offer evidence without his or her consent. If someone wishes to seek evidence from a legislator about the legislative process, not about employment decisions, not about other things that the legislator may have done even in his or her capacity as a legislator if it was not part of the legislative process, then the legislator cannot be forced to offer that evidence. The legislator has absolute immunity and can waive it or can assert it as he or she chooses.

And the Supreme Court we believe is clear on that. The Fourth Circuit is clear on that. The exceptions that have

been carved out to that are the criminal exceptions and the one exception of redistricting, and that's as far as it goes.

THE COURT: I guess then the question is, again, coming back to whether Section 2 is close enough to the redistricting to potentially bring that within the scope of at least making the privilege more qualified, something that we would address the particulars of.

MR. PETERS: And I don't think it is, Your Honor, at least under the one analysis we have of that, which is the *Marylanders* case because the reason they say it's *sui generis* is because by redistricting the legislature is enacting the districts from which its members will be elected. What the Court said there is that in the normal process of things with most legislation, including this legislation, a duly constituted body is enacting what it believes to be public policy. The exception -- the *sui generis*-ness of the redistricting analysis is that by enacting redistricting the General Assembly is setting the districts from which it will be constituted and so there is a degree of self-interest there, each legislator and his or her district and how that will affect his or her reelection chances. There's a degree of self-interest there that may require it to be treated somewhat differently.

As Mr. Strach pointed out earlier when it comes to

redistricting, voters have no choice what district they're in. They're in the district that is assigned to them by the legislature. But a law like this, like any -- 99 percent of the other laws that the legislature passes are laws that effect -- seek to effectuate public policy and what the General Assembly believes is good public policy. That being the case, it does not fall under the exception that Judge Murnaghan and Judge Motz would carve out.

THE COURT: All right. You mentioned the idea of waiver. Let's come back around to that because I think that at least some of the other cases -- and maybe they're just in the context of redistricting, but there are at least other cases that make a distinction in terms of the higher standard for waiving immunity compared to waiving privilege, which is treated more like a waiver of any other type attorney-client privilege or work-product privilege; and whether there is or would be a waiver of privilege even for certain categories of documents or particular -- either documents that were communicated with third parties, whether those would be subject to a waiver of any privilege that existed; and then also whether ultimately -- if the State's position is or would include presentation of any evidence from any of the individual legislators, whether that would then presumably be a waiver of the privilege; whether we need to go ahead and address now who the State's witnesses

might ultimately be in terms of whether that would ultimately result in a waiver of the privilege in this case.

MR. PETERS: Again, if I'm understanding you correctly, I think certainly if a legislator has provided information to an outside party then that information is discoverable from the outside party. I think immunity -- regardless of whether there is a question of privilege there, I think immunity means that neither a government agency, nor private parties, nor the Court can require the legislator to provide evidence unless that legislator chooses to waive his immunity or her immunity.

THE COURT: And so then what would your position be in the context of ultimately one of those legislators being or offering proof or testimony in the State's behalf in this case?

MR. PETERS: Your Honor, if a legislator chooses to do that, then the legislator has waived immunity and has waived privilege and would be subject to cross-examination, would be subject to any discovery that the parties wanted to take with regard to that legislator. That is exactly what happens in the redistricting context.

In the last round of redistricting, the Chair of the Senate Redistricting Committee, the Chair of the House Redistricting Committee both made the choice to waive their immunity, waive their privilege so that they could testify

about why the districts were drawn the way they were drawn; and in doing so, they were deposed, discovery was served, and there was no objection on the basis of privilege or immunity to that because the legislator has chosen to waive it.

But in this case, all of these legislators have asserted their immunity; and that being the case, we think it's clear that they cannot be forced to provide evidence.

THE COURT: Now, just in terms of managing the case, I'm assuming then that would not be something that you would change your position on later in the case.

MR. PETERS: I have no reason to know why --

THE COURT: I don't want to be in a position where you're claiming immunity now only to offer these legislators as witnesses.

MR. PETERS: As witnesses. Your Honor, I can -- I can say that I know of no reason as things stand now that any of these legislators would choose to waive their immunity, but I am confident that if that decision were made at some point it would be with ample time and opportunity for discovery to be undertaken by the Plaintiffs as to that.

THE COURT: Then let me ask you as well this idea that legislators must individually claim the privilege as to the particulars of what it might be. Do you contend that that doesn't apply for immunity, that they can just claim

immunity as a blanket and not then review any of the particulars?

MR. PETERS: Yes, Your Honor, that's what --

THE COURT: That's your contention.

MR. PETERS: -- that's what the Fourth Circuit said. If the EEOC or private plaintiffs in this case had asked those defendants to produce documents for things they did in their legislative capacity, they would not need to comply; and that's what the Court says.

THE COURT: Again, I want to think through whether there's some distinction in those Title VII cases because legislative immunity in that context, or as I read them and along with the *McCray* case, would include immunity from the claim for any legislative act. That is the legislative immunity that is going on there.

MR. PETERS: That is what's going on in some of those cases, yes, but the Courts are very clear. The Supreme Court has been very clear it's not just when they're defendants. The immunity applies, period, if someone is seeking evidence from a legislator about what he or she did as part of the legislative process. It's not just when they're defendants, not just when they are parties to the action. It may be that most of the cases that are reported arise in that context where the legislator is a party, but the Courts have made that very clear that that's not -- the

immunity is not limited to those circumstances.

THE COURT: All right. I'm going to hear from the other side, unless there's something else you wanted to add.

MR. PETERS: No. That's fine.

THE COURT: All right. Yes, ma'am.

MS. LIEBERMAN: Thank you, Your Honor.

The movants here articulated a breathtakingly broad view of the legislative privilege that's not been adopted by any federal court and if adopted here stands to significantly frustrate the ability of voters to assert claims of intentional discrimination under the Voting Rights Act.

The Plaintiffs make three points in opposition to the motion to quash. Immunity does not equal privilege. Immunity is absolute. The privilege is not and here it yields to discovery because of the recognized strong federal interests in enforcing civil rights statutes like the Voting Rights Act that provide remedies to violations of the Constitution where legislative purpose and intent is forefront and center to the claims being raised. This is not --

THE COURT: What do you make then of these Fourth Circuit cases, the *EEOC* case which essentially seems to view prejudice -- excuse me -- privilege and immunity as coextensive and then the *McCray* which would say even in the

IN THE SUPREME COURT OF THE UNITED STATES

No. 16-833

State of North Carolina, *et al.*,

Petitioners

v.

North Carolina State Conference of the NAACP, *et al.*,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CERTIFICATE OF SERVICE

I, Daniel T. Donovan, a member of the Supreme Court Bar, hereby certify that a copy of the attached filing was served on counsel of record for Petitioners and counsel of record for the United States:

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