No. 16-833

In the Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,
Respondents.

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

REPLY IN SUPPORT OF CONDITIONAL MOTION TO ADD THE NORTH CAROLINA GENERAL ASSEMBLY AS AN ADDITIONAL PETITIONER

THOMAS A. FARR
PHILIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE DEAKINS NASH SMOAK & STEWART, PC
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609

S. KYLE DUNCAN
Counsel of Record
GENE C. SCHAERR
STEPHEN S. SCHWARTZ
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
Kduncan@Schaerr-Duncan.com

Counsel for Petitioner State of North Carolina and for the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, and the North Carolina General Assembly

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

The North Carolina General Assembly has conditionally requested under Supreme Court Rule 21 to be added as an additional Petitioner in this matter, as permitted by this Court's cases, see, *e.g.*, *Mullaney* v. *Anderson*, 342 U.S. 415, 417 (1952), and as expressly authorized by North Carolina statute, see N.C. Gen. Stat. § 1-72.2. Private Respondents' various objections to the General Assembly's request are meritless and only underscore why the Court should add the General Assembly as a Petitioner in order to ensure that some qualified party remains to defend the challenged North Carolina election reforms at issue in this case.

Doing so is necessary because of the extraordinary eleventh-hour attempt by the newly-elected North Carolina Governor Roy Cooper and Attorney General Josh Stein to dismiss the pending certiorari petition over the objections of the General Assembly. See Mot. to Add at 1–2. As already explained in the General Assembly's objection to the motions to dismiss under Rule 46, see Obj. to Mots. to Dismiss at 4–6, since the beginning of this litigation in 2013 the General Assembly has retained private counsel to defend the challenged North Carolina election laws, pursuant to express authorization by North Carolina law and with the explicit acquiescence of then-Attorney General Cooper. Indeed, General Cooper *withdrew* from this litigation following the Fourth Circuit's decision and left the General Assembly's retained counsel as the *only* representative of the State to seek certiorari from this Court. Yet now General Stein—with Governor Cooper's cooperation—seeks to hijack the pending certiorari petition and deprive this Court of the opportunity to review an egregious Fourth Circuit decision, which four members of this Court have already

implicitly deemed certworthy. See *North Carolina* v. *N. Carolina State Conference of NAACP*, 137 S. Ct. 27 (2016) (memorandum) (denying stay over dissent of four justices). As previously explained, not only does General Stein lack authority under the plain terms of North Carolina law to override the General Assembly's decision to defend the challenged laws at issue, but Stein should be barred from participating at all by the canons of professional ethics because he testified at trial *in this case* as a witness *for the Plaintiffs*. See Obj. to Mots. to Dismiss at 8–15.

Predictably, those same Plaintiffs have now joined General Stein to oppose adding the General Assembly as a Petitioner. The Court is thus presented with the unedifying spectacle of private litigants openly collaborating with State officials to foreclose review of a circuit decision which tars that same State with the brush of intentional racial discrimination, which nullifies this Court's *Shelby County* decision, and which establishes a blueprint for overriding numerous other States' electoral laws. See Pet. for Cert. at 13–32.

The simplest way around these political machinations is simply to add the General Assembly as an additional Petitioner to defend the challenged laws on certiorari. The General Assembly and its retained counsel have defended the laws in question all along, and stand by their arguments that they represent the State. Regardless, however, there is no dispute that the undersigned counsel represent the General Assembly itself, see N.C. Gen. Stat. § 120-32.6, nor (aside from the false theories of Private Respondents) that the General Assembly has independent litigating authority. *Id.* § 1-72.2. Indeed, that litigating authority was *designed* for

precisely the situation presented here, where the State officials constitutionally obligated to defend State laws abandon their duty to do so. Permitting the General Assembly to continue the litigation in its own name thus provides a straightforward way for this Court to proceed to the merits—and a far better course than allowing the last-minute schemes of politically motivated State officials to derail review of the panel's misguided decision.

ARGUMENT

I. The General Assembly Has Authority To Intervene.

North Carolina law grants the General Assembly independent litigation authority, including the right to intervene in cases challenging North Carolina statutes. N.C. Gen. Stat. § 1-72.2. Private Respondents raise only one argument against reading Section 1-72.2 as granting the General Assembly authority to participate here: namely, that the statute confers authority to intervene only in *State* court, not federal court. Opp. at 5–6. That frivolous argument is contradicted by the plain terms of Section 1-72.2.

That statute reads, in full:

> The Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State, shall jointly have standing to intervene on behalf of the General Assembly as a party *in any judicial proceeding* challenging a North Carolina statute or provision of the North Carolina Constitution. 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 (emphasis added). The statute's terms authorize participation "in any judicial proceeding"—a phrase that plainly includes federal as well as State cases. Although Private Respondents accuse the General Assembly of "selectively quoting" the statute, Opp. at 5, they barely acknowledge that dispositive language, and provide no explanation why it does not mean what it says.

Unable to avoid the fact that Section 1-72.2's terms authorize the General Assembly to intervene in "*any*" case, Private Respondents seize upon the statute's specification of procedural mechanisms applicable when the General Assembly exercises that authority in State courts. Opp. at 4–5. According to Private Respondents, that provision impliedly precludes intervention in federal court.

That is a bizarre reading of the statute. It makes sense that the statute would specify the applicable procedures for state-court intervention, *i.e.*, that the General Assembly must proceed under North Carolina Rule of Civil Procedure 24 instead of Rule 21, for example. *Compare* N.C. R. Civ. P. 24 (governing intervention as of right and permissively), *with* N.C. R. Civ. P. 21 (providing that "parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action"). But the fact that the statute does not specify the appropriate federal court procedure says nothing about whether participation in federal court is possible, and hardly limits the phrase "*any judicial proceeding*" to less than its plain meaning. To the contrary, the statute's silence regarding federal procedure simply acknowledges that in federal court, the proper mechanism for adding the General Assembly depends on federal law. Indeed, the fact that the statute specifies how

intervention by the General Assembly should work "*in State court*" implies that there are *other* venues where intervention is authorized as well.

Nor do Private Respondents supply any practical reason for their atextual reading of the statute. Challenges to North Carolina statutes could theoretically arise anywhere in the Nation, in a plethora of forums, and there is no reason to imagine why the General Assembly would have tied its own hands everywhere except in local State courts. And it certainly would not have enacted such a strange limitation on its own authority without actually *saying* so.

Private Respondents also fault Petitioners for the absence of a North Carolina state-court case "definitively resolving" that the General Assembly can intervene in federal court—an odd nit to pick, considering the unlikelihood that a *State* court would ever have to evaluate a *federal* intervention, let alone be able to "definitively resolv[e]" it. Opp. at 7. Yet Private Respondents cannot escape the decision of a federal court in North Carolina that *has* permitted intervention under Section 1-72.2. See *Fisher-Borne* v. *Smith*, 14 F. Supp. 3d 699, 703 (M.D.N.C. 2014); Opp. at 7 n.4.[1]

---

[1] Private Respondents downplay the significance of *Fisher-Borne* on the ground that the district court considered intervention in that case "'a very close issue'" and granted it for narrow purposes. Opp. at 7 n.4 (quoting *Fisher-Borne*, 14 F. Supp. 3d at 710). Private Respondents neglect to inform this Court the reason *why* the district court considered the question to be "close": specifically, that it considered the General Assembly's interests to be adequately represented by then-Attorney General Roy Cooper. 14 F. Supp. 3d at 704–10 (analyzing that issue). The district court analyzed that issue at length and in detail. *Id.* The *Fisher-Borne* court's conclusion that the General Assembly had authority to intervene, in contrast, rested on the plain text of Section 1-72.2 and took less than a paragraph. *Id.* at 703.

Private Respondents' reliance on the "close[ness]" of the issue in *Fisher-Borne* is thus inexplicable. The fact that *Governor* Cooper and Attorney General Josh Stein are now actively trying to keep the General Assembly from defending its acts, rather than representing its interests, surely makes this a far easier case than *Fisher-Borne.*

And they fail even to mention a Fourth Circuit decision allowing the General Assembly to intervene on appeal under the same statute. See May 12, 2014 Order, *American Civil Liberties Union of North Carolina* v. *Tata*, No. 13-1030 (4th Cir.) (Attachment A). This Court should do the same: the General Assembly may intervene "in any judicial proceeding," N.C. Gen. Stat. § 1-72.2, and thus may be added "as a party" here.

II. Private Respondents Would Not Be Prejudiced By The General Assembly's Participation

Private Respondents seek to distinguish this case from others where this Court has added petitioners by arguing that because the General Assembly was not a party below, Respondents were unable to obtain certain discovery and so would be prejudiced if the General Assembly became a party now. Opp. at 7–11. Not only is that wrong, but the argument distorts the district court record. Respondents were denied discovery of General Assembly documents not because of its non-party status, but because of well-established principles of legislative privilege. While Private Respondents may still be frustrated by their failure to defeat the General Assembly's assertion of legislative privilege,[2] the reality is that Respondents would never have been entitled to any discovery beyond what the district court allowed, even if the General Assembly had been a party.

Private Respondents support their argument by attaching three district court filings related to discovery of legislative documents, but they neglect to provide this

[2] See also Private Resps.' BIO at 13, 17, 33 (citing the General Assembly's invocation of legislative privilege in opposition to certiorari).

Court with the document that matters most: the district court's order *resolving* the parties' competing arguments over legislative privilege. See Feb. 3, 2015 Order (Attachment B). That document reveals that the Private Respondents' argument is misleading in two respects.

First, Respondents actually obtained considerable discovery of legislative documents. As the district court's opinion recounts, legislative privilege did not reach (1) "documents in the custody of any State agency reflecting communications with any State legislator or legislative staff," Order at 6, (2) "communications between legislators and third parties," *id.* at 7, and (3) communications "between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013." *Id.* Although discovery was not permitted into "communications solely among legislators or between legislators and legislative staff," *id.* at 7–8, Private Respondents' implication that the General Assembly "avoided probative document discovery" altogether, Opp. at 11, or that they "stood in the shadows … in order to foreclose access to direct evidence of discriminatory legislative intent," Opp. at 10,[3] is demonstrably false.

Second, Private Respondents' claim that the General Assembly's non-party status was crucial to denial of further discovery—*i.e.*, that their discovery requests were "turned away *by the General Assembly's shield of non-party status*," Opp. at 11 (emphasis added)—misrepresents the district court's reasoning. The district court's

[3] At a minimum, the notion that the General Assembly "stood in the shadows" cannot be squared with the fact that the General Assembly's retained counsel served as lead counsel for the State in this case since its inception, and as the *only* counsel for the State since the Fourth Circuit panel decision.

seven-page analysis of Respondents' arguments against the privilege made *no* reference to the General Assembly's non-party status. Order at 13–19. Insofar as it discussed party status, the district court noted that "the State of North Carolina is a named party in this litigation, although its legislators are involved in the litigation because of Plaintiffs' subpoenas," *id.* at 12—a fact the district court considered a "countervailing factor[]" *against* legislative privilege. *Id.* at 17. The district court's reasoning does not give the slightest reason to think that Respondents would have been able to defeat legislative privilege if the General Assembly had been a party.

Even aside from their failure to account for the district court's order on legislative privilege, Private Respondents' use of the three documents they do provide is highly misleading as well. Contrary to the Private Respondents' depictions, Opp. at 9, any reliance on the General Assembly's non-party status was at most tangential. In two of those documents, the concept figured only in alternative arguments—one merely in a footnote—in the context of lengthy arguments that legislative privilege foreclosed the requested discovery categorically. Opp. Attachment A at 7 n.4; Opp. Attachment B at 14. Since the district court does not appear to have relied on those points in limiting Respondents' discovery, they can be of no moment now.

The third document—the transcript of a magistrate judge hearing on legislative privilege—says the *opposite* of what Private Respondents suggest. At argument, the General Assembly's counsel did not say that legislative privilege applied *because* the General Assembly was not a party: rather, he explained in detail why legislative privileges applied *even though* the General Assembly was not a party.

Opp. Attachment C at 70:19–:25; *id.* at 70:14–:15 ("I don't think it is because the legislature is not a party to this action."); *id.* at 71:17 (arguing Respondents' issuance of subpoenas was "an action against the legislator" to which legislative privilege applies); *id.* at 87:7–:9 (explaining legislative privilege is "not just immunity from being a party"); *id.* at 88:13–:15 ("[A] legislator cannot be forced to offer evidence. It's not just a matter of not being a party."). As the General Assembly's counsel put it:

> The Supreme Court has been very clear [that] 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.

Id. at 93:17–94:1. Quite obviously, that is not the argument of an attorney who intends to use his client's "non-party status" as a "shield" to avoid discovery. Opp. at 11. The notion that the General Assembly's non-party status was crucial to limiting discovery is thus belied even by Private Respondents' own supposed evidence.

But even if Private Respondents could be prejudiced in some way by the General Assembly's participation, Private Respondents' perspective is entirely one-sided: they ignore the enormous prejudice that would result if Governor Cooper and General Stein were permitted to unilaterally end the defense of major North Carolina election reforms and leave the Fourth Circuit's finding of discriminatory intent undisturbed, over the General Assembly's objection. The General Assembly had no reason to intervene in this case as long as its retained counsel led the litigation, all with the acquiescence of then-General Cooper. To exclude the General Assembly now

that Governor Cooper has changed his tune would work a profound injustice, not only to the General Assembly but to the citizens of North Carolina. Moreover, the Private Respondents are the *prevailing* parties in the lower court, whatever additional discovery they might have wished for. Their burden of having to defend their lower court victory on its own terms is minuscule in comparison to the General Assembly's harm of being tarred, in perpetuity, with the brush of intentional racial discrimination if it is prevented from seeking review of the Fourth Circuit's extraordinary decision.

As a final note, it is worth observing whose names appear on top of the signature page for the filings Private Respondents attach to their opposition—namely, then-Attorney General Cooper's, right next to the attorneys from the Ogletree firm, who were retained by the General Assembly with Cooper's explicit acquiescence. Opp. Attachment A at 13, Opp. Attachment B at 15. Even now, Governor Cooper has not objected to the General Assembly's motion to join as an additional petitioner. But having cooperated with the General Assembly before, it appears that Governor Cooper will now stand by while the Private Respondents seek to close off the General Assembly's procedural options. This Court should not allow State legal officers to pull the rug from under the legislature in that way.

III. The Private Respondents' Vehicle Objections Are Meritless.

The last element of Private Respondents' opposition is their argument that because the General Assembly's authority to join this case rests on a dispute of State

law, the pending petition for certiorari should be denied as a poor vehicle. Opp. 2–3. That is wrong in every way.

To begin with, it directly contradicts the law. Contrary to Private Respondents' argument, this Court on multiple occasions has granted certiorari notwithstanding state-law questions analogous to the ones presented here, and has decided those issues on merits review. See *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2664 (2013) (holding that official proponents of a ballot initiative lacked standing to defend a State law despite a State supreme court decision that "determined that they are 'authorized under California law to appear and assert the state's interest'"); *Karcher* v. *May*, 484 U.S. 72, 81–82 (1987) (rejecting claim that "New Jersey law does not authorize the presiding legislative officers to represent the New Jersey Legislature in litigation" on the ground that the claim "appears to be wrong as a matter of New Jersey law"); see also *Hollingsworth*, 133 S. Ct. at 2669 (Kennedy, J., dissenting) (explaining why "it is necessary to ascertain what persons, if any, have 'authority under state law to represent the State's interests' in federal court"); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 65 (1997) (recounting that the Court's grant of certiorari requested additional briefing on standing, and noting that "we are aware of no Arizona law appointing" petitioners as representatives of the State). Sometimes the Court accepts a party's assertion of litigation authority and sometimes it rejects it, but the Court plainly does *not* regard disagreements on that score as raising insurmountable vehicle problems.

Similarly, many other cases resolve state-law questions of authority to sue, susceptibility to suit, or legal duties. See *Mut. Pharm. Co.* v. *Bartlett*, 133 S. Ct. 2466, 2473 (2013) ("We begin by identifying petitioner's duties under state law."); *Hudson* v. *Palmer*, 468 U.S. 517, 535 (1984) (observing that a State employee cannot claim sovereign immunity under State law for intentional torts); *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 714 (1974) (holding that an entity "would be barred from maintaining the present action under Maine law"); *Mexican Cent. Ry. Co.* v. *Eckman*, 187 U.S. 429, 433 (1903) (addressing the question "whether under the laws of Texas a guardian can sue in his own name to recover damages for injuries sustained by the ward"). The principle that emerges is that when resolution of state-law questions is necessary for resolution of important federal questions otherwise deserving of review, this Court can and does reach them.

Viewed in that light, the supposed vehicle issues raised by Private Respondents are illusory. The statute authorizing the General Assembly to participate as a party and defend the challenged laws is unambiguous, and the Court can easily dispose of the atextual arguments trumped up by Private Respondents. It cannot be that this Court must avoid deciding federal cases of vital importance whenever a respondent throws up a smokescreen of state law arguments.

Private Respondents' further suggestion that the General Assembly's effort to join the case "inject[s] into this case complex questions of State law" can only be described as disingenuous. Opp. at 2. The only officials who have "inject[ed]" State law questions into this case are Governor Cooper and General Stein, by using

procedural gambits in a last-minute effort to abandon their own legislative clients (and deprive those clients of their choice of retained counsel) before the case has concluded. The General Assembly believes that its retained counsel represent the State, but has sought in the alternative to defend its interests on its own litigation authority unambiguously granted by North Carolina law. See *Hollingsworth*, 133 S. Ct. at 2664 ("[A] State must be able to designate agents to represent it in federal court."). This situation—where State executives seek for political reasons to shirk their duty to defend State laws—is precisely the situation that Section 1-72.2 was designed to cover. It is simply extraordinary for Private Respondents to chide the General Assembly for "inject[ing]" State law issues under such circumstances.

Private Respondents' related argument that the General Assembly's motion would force the Court to intrude into "the complex relationship between [North Carolina's] executive and legislative branches" does not even make logical sense. Opp. at 3. Far from *raising* such questions, adding the General Assembly as a party would *avoid* them: whatever litigation authority Governor Cooper and General Stein have, and regardless of who represents the State, it should at least be apparent that the General Assembly can participate in its own right. See N.C. Gen. Stat. § 1-72.2. On the contrary, it is *Private Respondents'* view—which sides with the Governor and Attorney General over the General Assembly—that entails picking winners and losers among branches of the North Carolina government.

Respondents' eleventh-hour procedural gambit does not suggest any vehicle problems, any more than it justifies denying the General Assembly its opportunity to

defend the challenged laws, which it has done from the beginning of this litigation up to filing the certiorari petition now pending before this Court.

CONCLUSION

For the foregoing reasons and those stated in the General Assembly's Motion, the Court should add the General Assembly to this case as an additional Petitioner.

Respectfully submitted,

S. Kyle Duncan
Counsel of Record
Gene C. Schaerr
Stephen S. Schwartz
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
Kduncan@Schaerr-Duncan.com

Thomas A. Farr
Philip J. Strach
Michael D. McKnight
OGLETREE DEAKINS NASH
SMOAK & STEWART, PC
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609

Counsel for Petitioner State of North Carolina and for the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, and the North Carolina General Assembly

March 15, 2017

ATTACHMENT A

FILED: May 12, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1030
(5:11-cv-00470-F)

AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; DEAN DEBNAM; CHRISTOPHER HEANEY; SUSAN HOLLIDAY, CNM,MSN; MARIA MAGHER

Plaintiffs - Appellees

v.

ANTHONY J. TATA, in his official capacity as Secretary of the North Carolina Department of Transportation; JAMES L. FORTE, in his official capacity as Commissioner of the North Carolina Division of Motor Vehicles

Defendants - Appellants

and

MICHAEL GILCHRIST, in his official capacity as Colonel of the North Carolina State Highway Patrol

Defendant

NATIONAL LEGAL FOUNDATION

Amicus Supporting Appellant

O R D E R

Upon consideration of submissions relative to the motion to intervene filed by Thom Tillis, North Carolina Speaker of the House of Representatives, and Phil Berger, President Pro Tempore of the North Carolina Senate, the court grants the motion.

Entered at the direction of Judge Wynn with the concurrence of Chief Judge Traxler, acting as a quorum of the panel pursuant to 28 U.S.C. § 46(d).

For the Court

/s/ Patricia S. Connor, Clerk

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

MEMORANDUM ORDER

THOMAS D. SCHROEDER, District Judge.

Before the court are two objections to the Magistrate Judge's November 20, 2014 discovery Order (the "Order") in these discovery-consolidated cases pursuant to Federal Rule of Civil Procedure 72(a). (Doc. 194 in case 1:13CV861; Doc. 207 in case 1:13CV658; Doc. 205 in case 1:13CV660.)[1] Plaintiffs (Doc. 201) and Defendants — and several subpoenaed North Carolina legislators — (Doc. 204) have filed objections to the Order as well as corresponding responses. (Docs. 207, 208.) For the reasons set forth below, all objections will be overruled.

I. BACKGROUND

This discovery dispute arises in three cases consolidated for discovery that involve race and age discrimination claims brought following the passage of North Carolina Session Law 2013-381 ("SL 2013-381"), known as the Voter Information Verification Act. See 2013 N.C. Sess. Laws 381 (codified in scattered sections of N.C. Gen. Stat. § 163). In League of Women Voters of N.C. v. North Carolina, No. 1:13CV660 (M.D.N.C. filed Aug. 12, 2013), the League of Women Voters of North Carolina and several other organizations and individuals (the "League Plaintiffs") challenge various provisions within SL 2013-381 and bring claims under the Equal Protection Clause of the Fourteenth Amendment to the U.S.

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

Constitution, pursuant to 42 U.S.C. § 1983, and Section 2 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973. In N.C. State Conference of the NAACP v. McCrory, No. 1:13CV658 (M.D.N.C. filed Aug. 12, 2013), the North Carolina State Conference of the NAACP and several individual plaintiffs (the "NAACP Plaintiffs") challenge other provisions of SL 2013-381 and bring claims pursuant to the VRA and the Fourteenth and Fifteenth Amendments, through § 1983. In United States v. North Carolina, No. 1:13CV861 (M.D.N.C. filed Sept. 30, 2013), the United States Department of Justice (the "United States") challenges provisions of SL 2013-381 under the VRA. Finally, the court allowed several young voters (the "Intervenors") to intervene in the League of Women Voters case, with the Intervenors bringing claims under the Fourteenth and Twenty-Sixth Amendments, pursuant to 42 U.S.C. § 1983. (Doc. 62 in case 1:13CV660; 63 ¶¶ 95–106 in case 1:13CV660.) These various parties seek discovery involving State legislators' participation in SL 2013-381's passage.

A. Procedural History

The current discovery dispute has been extensively litigated in this court. Throughout December 2013, Plaintiffs served subpoenas *duces tecum* pursuant to Rule 45 of the Federal Rules of Civil Procedure on several then-sitting North Carolina State legislators: Senators Phil Berger, Tom Apodaca, Thom Goolsby, Ralph Hise, and Bob Rucho, as well as Representatives Thom Tillis,

James Boles, Jr., David Lewis, Tim Moore, Tom Murry, Larry Pittman, Ruth Samuelson, and Harry Warren (collectively, the "legislators"). (Docs. 44-1 through 44-13.) The subpoenas sought production of a variety of documents surrounding the passage of SL 2013-381. (See id.) The legislators moved to quash the subpoenas on the ground of legislative immunity (Doc. 44), and the issue was briefed (Docs. 58, 65). Plaintiffs also moved to compel production of documents previously requested from the State of North Carolina, to which the State had objected on the grounds of legislative immunity and legislative privilege. (E.g., Doc. 58 in case 1:13CV658; Doc. 70 in case 1:13CV660.)

On February 21, 2014, the Magistrate Judge held a hearing on the motions to quash and compel. (Doc. 75.) The court took the motions under advisement and ordered supplemental briefing on the legislative immunity and privilege issues. (Id. at 123.) On February 26, Defendants (including the State, Governor McCrory, and the State Board of Elections), the United States, and the League and NAACP Plaintiffs filed supplemental briefs. (Docs. 70, 72, 73.)

The Magistrate Judge then issued an Order on March 27, 2014, granting in part and denying in part the motions to compel and motions to quash. (Doc. 79.) The March 27 Order concluded that the asserted legislative privilege was not absolute, but qualified, and must be evaluated under a "flexible approach,"

taking into account the serious claims raised under the Constitution and the VRA. (Id. at 6, 9.) The Magistrate Judge directed the parties to meet and confer and to file a joint report by April 7 presenting specific remaining disputes as to particular categories of documents. (Id. at 10.) In so doing, the Magistrate Judge also noted the need for the parties to address whether North Carolina public records law might require the production of certain documents even if they otherwise were subject to a claim of privilege. (Id. at 7.)

The legislators raised multiple objections to the Magistrate Judge's March 27 Order. (Doc. 83 at 2–3.) This court heard oral argument on the objections on May 9, 2014, and, on May 15, 2014, issued a Memorandum Order sustaining the legislators' objections in part and overruling them in part. (Doc. 93.) In relevant part, the court overruled the legislators' objection that legislative privilege is absolute, instead holding that the privilege was qualified. (Id. at 25.) As a result, the court ordered that, after meeting and conferring, the parties file their joint report (previously set for April 7) on or before May 22, 2014. (Id. at 28.) The court also modified the Magistrate Judge's deadline by which Defendants had to notify Plaintiffs of the identity of legislators upon whom they would rely for purposes of their preliminary injunction motions. (Id.)

On May 22, 2014, the parties filed their joint status report, as directed. (Doc. 114.) The report indicated that Defendants agreed to produce documents in the custody of any State agency reflecting communications with any State legislator or legislative staff and that Plaintiffs agreed not to seek communications solely between legislators and their attorneys created after this litigation commenced or communications solely between a legislator and his or her personal aide. (Id. at 1–3.) The report, however, also noted that the parties remained unable to agree on the application of legislative privilege as to four categories of documents: (1) communications between legislators and third parties (outside of State agencies), such as constituents, lobbyists, and public interest groups; (2) communications solely among legislators; (3) communications between legislators and legislative staff (besides personal aides); and (4) communications between legislators and outside counsel prior to the commencement of this litigation. (Id. at 3.) Given this ongoing discovery dispute, the parties requested the opportunity to further brief the legislative privilege issue (id. at 4), which the Magistrate Judge approved in a Text Order on June 4, 2014.

On June 11, 2014, Defendants, the United States, and the League and NAACP Plaintiffs each filed opening briefs on the privilege issue. (Docs. 119, 120, 121.) Those parties then filed response briefs on June 25. (Docs. 139, 142, 143.) After an

apparent pause in activity while the parties litigated Defendants' motion to dismiss, Plaintiffs' motion for a preliminary injunction, and the expedited appeal of this court's preliminary injunction decision to the Fourth Circuit and to the Supreme Court, the discovery dispute resumed on November 7, 2014, when the Magistrate Judge and the parties convened a telephonic status conference to address discovery matters and the pending legislative privilege issue.

B. The Magistrate Judge's November 20, 2014 Order and Subsequent Objections

On November 20, the Magistrate Judge issued the current Order. (Doc. 194.) Addressing the four disputed categories of documents, the Order concluded that legislative privilege did not preclude production of communications between legislators and third parties, nor between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013 (although those communications were still subject to claims of attorney-client and other privilege). (Id. at 2, 13.) The Magistrate Judge ordered production of legislators' communications with third parties and the creation of a privilege log for communications between legislators and outside counsel prior to commencement of this litigation. (Id. at 14.) The Magistrate Judge, however, declined to order the production of, or the creation of a privilege log for, communications solely among legislators or between

legislators and legislative staff. (Id.) The Order concluded that legislative privilege applied to those internal communications, and the court quashed subpoenas and requests for their production. (Id.)

Plaintiffs and Defendants (including third-party legislators) filed their present objections to the November 20 Order. Plaintiffs object to the Order's conclusion that Defendants need not produce or create a privilege for communications solely among legislators or between legislators and legislative staff. (Doc. 201.) Defendants and the legislators object only to the portion of the Order overruling their objection to legislative privilege as to communications between the legislators and third parties, specifically those communications between the legislators and constituents. (Doc. 204 at 2.) No party objected to the portion of the Order requiring the creation of a privilege log for communications between legislators and outside counsel prior to the commencement of this litigation on August 12, 2013.[2]

II. ANALYSIS

A. Standard of Review

This court reviews orders issued by Magistrate Judges in non-dispositive motions for clear error and rulings contrary to law.

[2] In fact, on December 8, 2014, Defendants produced a privilege log reflecting communications between legislators and outside counsel prior to the commencement of this litigation. (Doc. 205 at 7–8.)

Fed. R. Civ. P. 72(a). "[U]nless the result compelled by the Magistrate Judge's ruling is contrary to law or clearly erroneous, the Order[] of the Magistrate Judge will be affirmed." Food Lion, Inc. v. Capital Cities/ABC Inc., 951 F. Supp. 1211, 1213 (M.D.N.C. 1996). Magistrate Judges are generally afforded great deference in discovery rulings due to the "fact-specific character of most discovery disputes." In re Outsidewall Tire Litig., 267 F.R.D. 466, 470 (E.D. Va. 2010). Nevertheless, although rules governing discovery disputes allow discretion, a district court must vacate a Magistrate Judge's order that is clearly erroneous or contrary to law. Id.; cf. In re Grand Jury Subpoena, 341 F.3d 331, 334 (4th Cir. 2003) ("We review factual findings underlying an attorney-client privilege ruling for clear error, and we review the application of legal principles de novo.").

B. Legislative Privilege

Distinct from the legislative immunity afforded federal legislators under Article I of the U.S. Constitution, the legislative privilege of State legislators derives from federal common law. See Tenney v. Brandhove, 341 U.S. 367, 372–76 (1951) (extending State legislators immunity from civil suit through federal common law); EEOC v. Wash. Suburban Sanitary Comm'n, 666 F. Supp. 2d 526, 531 (D. Md. 2009) ("[L]egislative privilege is a derivative of legislative immunity."), aff'd, 631 F.3d 174 (4th Cir. 2011); Favors v. Cuomo, 285 F.R.D. 187, 209 (E.D.N.Y. 2012)

("Legislative privilege is related to, but distinct from, the concept of legislative immunity."). As an issue of federal common law, the application of State legislative privilege falls under Federal Rule of Evidence 501. See Favors, 285 F.R.D. at 209; Florida v. United States, 886 F. Supp. 2d 1301, 1302 (N.D. Fla. 2012). Specifically in the present case, the court is concerned with the scope and application of State legislative privilege in the limited context of the race and age discrimination claims presented under the VRA and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments. Cf. Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292, 304–05 (D. Md. 1992) (noting the "unique nature of legislative redistricting" and that "it directly involves the self-interest of the legislators themselves").

The Magistrate Judge correctly recognized that determining the scope and application of State legislative privilege requires a flexible approach.[3] In assessing discovery requests of State legislators, some courts consider a five-factor balancing test, as

[3] As this court noted in its earlier Memorandum Order on this issue (Doc. 93 at 23 n.11), some courts have compared the legislative privilege to, or even described it as, a "deliberative process privilege." See Doe v. Nebraska, 788 F. Supp. 2d 975, 984 (D. Neb. 2011); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 97–98 (S.D.N.Y. 2003), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); Manzi v. DiCarlo, 982 F. Supp. 125, 130 (E.D.N.Y. 1997) (describing the "deliberative process privilege" as a privilege protecting the decisionmaking of the executive branch); Kay v. City of Rancho Palos Verdes, No. CV 02-03922, 2003 WL 25294710, at *15 (C.D. Cal. Oct. 10, 2003) (same). As before, the court need not define the specific parameters of the deliberative process privilege to decide the current objections.

did the Magistrate Judge. See e.g., Page v. Va. State Bd. of Elections, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014); Doe v. Nebraska, 788 F. Supp. 2d 975, 985–86 (D. Neb. 2011); Rodriguez v. Pataki, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), aff'd, 293 F. Supp. 2d 302 (S.D.N.Y. 2003); Veasey v. Perry, Civ. A. No. 2:13-CV-193, 2014 WL 1340077, at *2 (S.D. Tex. Apr. 3, 2014); Perez v. Perry, Civ. No. 11-CV-360, 2014 WL 106927, at *2 (W.D. Tex. Jan. 8, 2014) (three-judge panel); Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011). But see United States v. Irvin, 127 F.R.D. 169, 173 (C.D. Cal. 1989) (applying an eight-factor balancing test). Those five factors are: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *7.

Several of those factors apply to the communications at issue in the parties' objections. First, legislator communications are certainly relevant to the issue of intent tied to the various claims raised in these cases. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977) ("The 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. In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."); Marylanders, 144 F.R.D. at 305 (concluding that legislative privilege "does not, however, necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy"). Second, these documents are largely unavailable by other means. While Defendants note that substantial documentary evidence has been turned over (Doc. 119 at 13), other documents have not been made available. Defendants have not shown that there are any other paths of discovery reasonably available to Plaintiffs. Third, there is no question that Plaintiffs' allegations in these cases are serious. As one court in this circuit observed, "The right to vote and the rights conferred by the Equal Protection Clause are of cardinal importance." Page, 15 F. Supp. 3d at 667. With regard to the fourth factor, the State of North Carolina is a named party in this litigation, although its legislators are involved in the litigation because of Plaintiffs' subpoenas.

With these four factors, the court considers the intrusion into and deleterious effect on legislative decisionmaking and

activity caused by Plaintiffs' discovery requests at issue in the parties' objections.

1. Plaintiffs' Objection

Plaintiffs object to the Magistrate Judge's Order to the extent that it precluded the production of, or creation of a privilege log for, communications among legislators or between legislators and legislative staff.

The Fourth Circuit has emphasized the protective value of the State legislative privilege. In EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174 (4th Cir. 2011), the court explained, "Legislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." Id. at 181. Legislative privilege also enables legislators and their staff "to focus on their public duties by removing the costs and distractions attending lawsuits." Id. (noting that legislative immunity — of which legislative privilege is an extension — "shields" legislators "from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box"). Importantly, the purposes served by application of legislative privilege extend to discovery procedures. See id. (citing MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (noting that "[d]iscovery procedures can prove just as intrusive" as being named a party to litigation)).

Recognizing the extension of legislative privilege into discovery matters, the Fourth Circuit forecasted that "if [the parties] sought to compel information from legislative actors about their legislative activities, they would not need to comply." Id.

Other courts have similarly illuminated the importance of legislative privilege in the face of discovery demands. In Marylanders for Fair Representation, Inc. v. Schaefer, 144 F.R.D. 292 (D. Md. 1992), a challenge to the constitutionality of a Maryland redistricting plan, a three judge panel in the District Court for Maryland held that "[t]he doctrine of legislative immunity (both in its substantive and testimonial aspects) itself embodies fundamental public policy. It insulates legislators from liability for their official acts and shields them from judicial scrutiny into their deliberative processes." Id. at 304 (Murnaghan and Motz, JJ.) (footnote omitted). Acknowledging, however, that legislative privilege is qualified, not absolute, the panel permitted the deposition of three private citizens who were part of a five-member State committee that also included two State legislators. Id. at 304–05. The decision went on to predict, "We too, however, would flatly prohibit [the two State legislators'] depositions from being taken as to any action they took after the [relevant] legislation reached the floor of the [legislature]." Id. at 305. As a result, the Marylanders court refused to permit the taking of either legislators' deposition but permitted the

deposition of the three private citizens on the committee, thus allowing for discovery "without directly impacting upon legislative sovereignty." Id.

The District Court for South Carolina evinced a similar respect for legislative sovereignty when faced with requests for depositions of State legislators. In a case alleging racial gerrymandering under § 2 of the VRA as well as the Fourteenth and Fifteenth Amendments, that court unequivocally "prohibit[ed] Plaintiffs from inquiring into any matters protected by legislative privilege." Backus v. South Carolina, 3:11-cv-03120 (D.S.C. Feb. 08, 2012) (Doc. 103 in case 3:11CV3120 at 2). The court stated further, "That means Plaintiffs are prohibited from asking any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation." Id.

Courts outside of this circuit also acknowledge the importance of legislative privilege. See Florida, 886 F. Supp. 2d at 1304 (resisting the United States' effort to obtain discovery of State legislators in a preclearance action under § 2 of the VRA and noting, "[T]he legislators have a federal legislative privilege — at least qualified, if not absolute — not to testify in this civil case about the reasons for their votes. The privilege is broad enough to cover all the topics that the intervenors propose to ask them and to cover their personal notes

of the deliberative process."); Favors, 285 F.R.D. at 220 (in redistricting challenge, recognizing that disclosure of legislator communications may "inhibit full and frank deliberations"); Rodriguez, 280 F. Supp. 2d at 102–03 (S.D.N.Y. 2003) (in redistricting challenge, denying motion to compel production of documents concerning deliberations solely among legislators); Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *8 (noting in redistricting challenge that "the need to encourage frank and honest discussion among lawmakers favors nondisclosure."). The value and importance of the legislative privilege is lost if it is not applied to legislative staff and aides. See Gravel v. United States, 408 U.S. 606, 616–17 (1972) (stating that, in the context of the legislative privilege for members of Congress, "the day-to-day work of . . . aides is so critical to the Members' performance that they must be treated as the latter's alter egos"); Page, 15 F. Supp. 3d at 667 (noting in redistricting challenge that "any effort to disclose the communications of legislative aides and assistants who are otherwise eligible to claim the legislative privilege on behalf of their employers threatens to impede future deliberations by the legislature."); Florida, 886 F. Supp. 2d at 1304 (noting in VRA § 2 preclearance action, "The privilege also extends to staff members at least to the extent that the proposed testimony would intrude on the legislators' own deliberative process and their ability to communicate with staff

members on the merits of proposed legislation."); Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *8 (noting in redistricting challenge that "the need for confidentiality between lawmakers and their staff is of utmost importance."); ACORN v. Cnty. of Nassau, No. CV05-2301, 2007 WL 2815810, at *4 (E.D.N.Y. Sept. 25, 2007) (noting in re-zoning case charging discriminatory animus, "Where a legislative aide or staff member performs functions that would be deemed legislative if performed by the legislator himself, the staff member is entitled to the same privilege that would be available to the legislator.").

For the reasons enumerated by the Supreme Court, the Fourth Circuit, and numerous lower courts, this court concludes that, for Plaintiffs' requests for discovery of communications among legislators and between legislators and their staff, the potential intrusion into the legislative process outweighs the countervailing factors.

As a step short of production, Plaintiffs request that Defendants be ordered to produce a privilege log limited to the objective facts relied upon by the legislators. (See Doc. 201 at 11.) But Plaintiffs do not suggest that requesting the State legislators to create such a detailed privilege log is any less intrusive than immediate production. The purposes of legislative privilege — avoiding interference with the legislative process and promoting frank deliberations among legislative decisionmakers —

appear equally applicable to requests for a legislator to produce a log of all documents (and then to litigate whether to produce certain of those documents) as it would to requests for direct production of the documents. See Wash. Suburban, 631 F.3d at 181 (citing MINPECO, S.A. v. Conticommodity Servs., Inc., 844 F.2d 856, 859 (D.C. Cir. 1988) (noting that "[d]iscovery procedures can prove just as intrusive" as being named a party to litigation)); Powell v. Ridge, 247 F.3d 520, 530 (3d Cir. 2001) (Roth, J., concurring) ("If legislative privilege from civil discovery exists, either for a party, as in the instant case, or for a non-party as it may arise in the future, it exists to protect legislators from the burden of having to respond to discovery and of having to deal with the distractions and disruptions that discovery imposes on their ability to carry out their governmental functions."); cf. United States v. Rayburn House Office Building, 497 F.3d 654, 660 (D.C. Cir. 2007) (noting that discovery procedures can prove just as intrusive as naming legislators as parties).

Here, approving Plaintiffs' request for a privilege log of the objective facts State legislators relied upon would undermine the very purpose and function of legislative privilege, unduly intruding into legislative affairs and imposing significant burdens on the legislative process. See Wash. Suburban, 631 F.3d at 181; Page, 15 F. Supp. 3d at 667. As one court facing a similar

request put it:

> [This] conclusion, namely that the privilege extends to objective facts, is supported by its underlying policy goal, namely protecting legislators from interference with their legislative duties. Requiring testimony about communications that reflect objective facts related to legislation subjects legislators to the same burden and inconvenience as requiring them to testify about subjective motivations — the "why" questions. Creating an "objective facts" exception to the legislative process privilege thus undermines its central purpose.

Kay v. City of Rancho Palos Verdes, No. CV 02-03922, 2003 WL 25294710, at *11 (C.D. Cal. Oct. 10, 2003) (citation and quotation marks omitted). Therefore, considering all relevant factors, the court will not order a privilege log of objective facts relied on by the legislators.

For all these reasons, the court finds that the Magistrate Judge's conclusion that the legislative privilege shields the production of, or creation of a privilege log for, communications among legislators or between legislators and legislative staff is neither clearly erroneous nor contrary to law. Plaintiffs' objection is therefore overruled.

2. Defendants' Objection

Although the Magistrate Judge ordered production of all communications between legislators and third parties, Defendants now object only to the production of communications between legislators and constituents, arguing that legislative privilege

extends to those communications.[4] (Doc. 204 at 2–3 ("The instant objections are limited to communications between constituents and legislators.").)

Most importantly, Defendants cite no case in which a court has extended legislative privilege to communications between State legislators and constituents. Rather, several courts have denied State legislators' requests to extend legislative privilege to communications with third parties, including constituents.[5] See Doe, 788 F. Supp. 2d at 987 (stating, without reasoning, that

[4] Defendants lodged no objection as to the production of communications between legislators and third parties functioning as experts or consultants. (See Doc. 217.) Their response brief filed with the Magistrate Judge specifically represents that those communications are not at issue in this case because there are none. (Doc. 139 at 9 (referring to experts and consultants while stating "[n]o such retained or appointed outsiders are involved in the instant case").) Thus, the court's decision does not reach whether the legislative privilege could extend to communications between legislators and third parties functioning as experts or consultants — a proposition for which there is support. See, e.g., ACORN v. Cnty. of Nassau, No. 05CV2301, 2009 WL 2923435, at *6 (E.D.N.Y. Sept. 10, 2009) ("Legislators must be permitted to have discussions and obtain recommendations from experts retained by them to assist in their legislative functions, without vitiating or waiving legislative privilege."); Backus, 3:11-cv-03120 (Doc. 103 at 2) (quashing deposition questions involving "communications between the Senate or the House and 'private consultants or experts'").

[5] Moreover, several cases have assumed that any legislative privilege is waived to the extent a legislator communicates with constituents. See Favors, 285 F.R.D. at 212 ("The law is clear that a legislator waives his or her legislative privilege when the legislator publicly reveals documents related to internal deliberations."); Perez, 2014 WL 106927, at *2 ("To the extent . . . that any legislator, legislative aide, or staff member had conversations or communications with any outsider (e.g. party representatives, non-legislators, or non-legislative staff), any privilege is waived as to the contents of those specific communications."). By finding waiver, these courts necessarily presume that the legislative privilege does not otherwise extend to communications with constituents.

documents that "were communicated to or shared with non-legislative members" must be produced); Rodriguez, 280 F. Supp. 2d at 101 (stating, in *dicta*, that "a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation — a session for which no one could seriously claim privilege"); Favors v. Cuomo, 1:11-cv-05632, (E.D.N.Y. Feb. 8, 2013) (Doc. 201-2 at 18 (holding that "inquiries from members of the public or media and responses thereto" by State legislators were not privileged)); Comm. for a Fair & Balanced Map, 2011 WL 4837508, at *10 (stating that the privilege does not extend to "outsiders," like "lobbyists, members of Congress and the Democratic Congressional Campaign Committee" because those people "could not vote for or against" the law "nor did they work for someone who could"). As one court described, "While legislators are certainly free to seek information from outside sources, they may not assume that every such contact is forever shielded from view." ACORN, 2007 WL 2815810, at *6.

Defendants also oppose disclosure of communications between legislators and constituents on the ground they are protected under the First Amendment's Petition Clause.[6] (Doc. 204 at 7–8.)

[6] The Magistrate Judge found that Defendants had waived this argument by not raising it earlier. This court in its review must consider new arguments made toward an issue raised before the Magistrate Judge, yet it need not address arguments made regarding a new issue. See United States v. George, 971 F.2d 1113, 1118 (4th Cir. 1992) ("[A]s part of its obligation to determine *de novo* any issue to which proper objection is made, a district court is required to consider all arguments directed

Defendants argue that disclosure would chill the constituents' First Amendment rights. (Id.) In support of this argument, Defendants rely on NAACP v. State of Ala. ex rel. Patterson, 357 U.S. 449 (1958). (Id. at 7.) In NAACP, the Supreme Court held that the associational right of the First Amendment's Free Speech Clause protected against disclosure of the NAACP's membership lists. NAACP, 357 U.S. at 462–63. The Supreme Court's holding did not reach the First Amendment right to petition the government.

Defendants further argue that Plaintiffs seek to "have it both ways" by making the current requests for communications between State legislators and constituents but then opposing Defendants' request for production of documents based on the First Amendment. (Doc. 204 at 8.) Defendants, however, have not demonstrated that this is so. As far as the court can tell, Defendants' requests do not appear to have sought communications between legislators and constituents. (See Docs. 204-2 at 4–5, 204–3 at 3–5, 204–4 at 3–6, 204–5 at 4–6, collectively seeking production from several organizations of "[a]ll documents . . . relating to plans for opposing House Bill 589 or proposal for amending any provision of House Bill 589 prior to its ratification by the General Assembly, including but not limited to, training

---

to that issue, regardless of whether they were raised before the magistrate."); Cent. Tel. Co. of Va. v. Sprint Commc'ns Co. of Va., 759 F. Supp. 2d 772, 776 (E.D. Va. 2011), aff'd, 715 F.3d 501 (4th Cir. 2013) (same).

materials, talking points, press releases, speeches, notes of conversations, or drafts of proposed legislation.")

The interests that the State legislative privilege safeguards by limiting intrusions into a legislature's deliberative process are less discernible in the context of documents revealing communications between legislators and constituents. That is because, while a legislator no doubt must be free to meet with constituents as to matters pending before the legislative body, the constituent is always free to disclose every aspect of the encounter. From the legislator's perspective, therefore, it is hard to contend that there is any reasonable expectation of secrecy in this context or serious threat of timidity for fear that the conversation be discovered. As in Marylanders, permitting document discovery as to communications between legislators and private citizens "would provide a means for learning pertinent information without directly impacting upon legislative sovereignty." Marylanders, 144 F.R.D. at 305. This outcome balances respect to the legislative process while acknowledging the qualified and limited character of the State legislative privilege.

Therefore, the court concludes that the Magistrate Judge's determination that communications between State legislators and their constituents are not protected from disclosure by the

legislative privilege is neither clearly erroneous nor contrary to law. Defendants' objection is therefore overruled.

III. CONCLUSION

For the reasons stated,

IT IS THEREFORE ORDERED that the Plaintiffs' Objection (Doc. 201) and the Defendants' Objection (Doc. 204) are OVERRULED.

/s/ Thomas D. Schroeder
United States District Judge

February 4, 2015

No. 16-833

In the Supreme Court of the United States

STATE OF NORTH CAROLINA, *et al.*,
Petitioners,

v.

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,
Respondents.

CERTIFICATE OF SERVICE

I, S. Kyle Duncan, a member of the Supreme Court Bar, hereby certify that:

(1) this Reply was filed by delivering an original and 10 copies on March 15, 2017 to a third-party commercial carrier for next-day delivery to the Clerk; and

(2) one copy of the same Reply was served by delivering it on March 15, 2017 to a third-party commercial carrier for next-day delivery on the following:

Daniel T. Donovan
Kirkland & Ellis, LLP
655 15th Street, NW, Suite 1200
Washington, DC 20004
(202) 879-5000
ddonovan@kirkland.com

Jeffrey B. Wall
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
supremectbriefs@usdoj.gov

Grayson Kelly
Chief Deputy Attorney General
North Carolina Department of Justice
P.O. Box 629 Raleigh, NC 27602-0629
(919) 716-6400
gkelley@ncdoj.gov

S. Kyle Duncan
Counsel of Record for the North Carolina General Assembly et al.