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

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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