No. 342PA19-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, and PAUL KEARNEY, SR., *Plaintiffs-Appellees*, v. TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILLIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate;* DAVID R. LEWIS, *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session*; RALPH E. HISE, *in his official capacity as Chairman of the Senate Select Committee on Election for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; *and* THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *Defendants-Appellants*.	)	From Wake County 18-CVS-15292 No. COA 22-16

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PLAINTIFFS-APPELLEES' MOTION FOR DISQUALIFICATION OF JUSTICE TAMARA PATTERSON BARRINGER

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PLAINTIFFS-APPELLEES' MOTION FOR DISQUALIFICATION OF JUSTICE TAMARA PATTERSON BARRINGER

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiffs Jabari Holmes, Fred Culp, Daniel E. Smith, and Paul Kearney, Sr. respectfully move Associate Justice Tamara Patterson Barringer to disqualify herself from participating in rehearing this case. Disqualification is appropriate pursuant to Canon 3C of the North Carolina Code of Judicial Conduct because Justice Barringer's impartiality may reasonably be questioned for several reasons. As a North Carolina Senator, Justice Barringer actively participated in the events at issue in this case; repeatedly voted in favor of a law that Plaintiffs-Appellees proved at trial was enacted with unconstitutionally discriminatory intent; witnessed firsthand many of the relevant events that were the subject of proof at trial; and has personal knowledge of disputed evidentiary facts, including relevant facts outside of the record, concerning the legislative process that led to the enactment of the law in question in this case.

INTRODUCTION

This matter arises from a constitutional challenge to North Carolina's voter ID law, Senate Bill 824 (2018 N.C. Sess. Law 144) ("S.B. 824"), which was enacted over the veto of Governor Roy Cooper by a lame-duck Republican super-majority on 19 December 2018. Plaintiffs-Appellees filed a complaint alleging, *inter alia*, that S.B. 824 was enacted with the unconstitutional intent to discriminate against African American voters in violation of the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution. After a three-week trial in April of 2021, a majority of the three-judge trial court below concluded that S.B. 824 was unconstitutional and permanently enjoined its implementation. The panel majority found that the

evidence at trial was "sufficient to show that the enactment of S.B. 824 was motivated at least in part by an unconstitutional intent to target African American voters," and "that the Defendants ha[d] failed to prove . . . that S.B. 824 would have been enacted in its present form if it did not tend to discriminate against African American voters." (R p 1000).

One member of the Republican super-majority that voted to pass S.B. 824 and then voted again to override the Governor's veto of that law was Justice Barringer. Justice Barringer was elected to serve in the General Assembly starting 1 January 2013, as a Senator for North Carolina's 17th district. She remained in that position until 1 January 2019. All told, from S.B. 824's introduction on 27 November 2018 to the veto override on 19 December 2018, Justice Barringer voted sixteen times in lock-step with her Republican Senate colleagues to move S.B. 824 towards passage.[1] Throughout that time, upon information and belief, Justice Barringer caucused with her Republican colleagues and was privy to private conversations concerning S.B. 824 among the Senate Republican leaders (including Defendants Berger, Lewis, and Hise) and the Republican bill sponsors Senators Warren Daniel and Joyce Krawiec. Justice Barringer is, therefore, intimately familiar with the sequence of events leading to S.B. 824's enactment, S.B. 824's legislative history, and the intent of the legislators who voted in favor of the law. Each of those facts requires her disqualification.

[1] *See* N.C. Gen. Assembly, Sen. Tamara Barringer Vote History 2017-2018 Session, https://www.ncleg.gov/Legislation/Votes/MemberVoteHistory/2017/S/368 (last visited 20 February 2023).

STATEMENT OF APPELLATE PROCEDURAL HISTORY

Legislative Defendants timely appealed the trial court decision striking down S.B. 824 as discriminatory. Thereafter, Plaintiffs-Appellees sought and obtained, by order of this Court dated 2 March 2022, discretionary review prior to a determination by the Court of Appeals. At the time of that filing, Plaintiffs-Appellees sought the disqualification of Justice Barringer due to her personal involvement in the passage of S.B. 824 (the specifics of which are described at length in this motion). Justice Barringer considered the motion on her own and denied it. The case was then scheduled for oral argument on 3 October 2022 at the historic Chowan County Courthouse in Edenton. On 16 December 2022, a 4-3 majority of this Court (with Justice Barringer in the minority) affirmed the trial court's final decision that S.B. 824 was unconstitutional because it was enacted with an impermissible intent to discriminate against African American voters.

Following the November 2022 election, this Court's judicial composition changed effective 1 January 2023, with Associate Justices Trey Allen and Richard Dietz replacing two of the justices who were part of the majority in the Court's 16 December 2022 decision. On 20 January 2023, Legislative Defendants, pursuant to Rule 31 of the North Carolina Court of Appeals, petitioned this Court for rehearing, arguing, *inter alia*, that the majority erred in affirming the trial court decision. On 3 February 2023, this Court, in a 5-2 split decision, granted Legislative Defendants' Petition for Rehearing. This matter was then assigned a new docket number and scheduled for oral argument on 15 March 2023. In light of this procedural history,

Plaintiffs renew their request for the recusal of Justice Barringer from the consideration of this matter.

STANDARD OF REVIEW

Canon 3C of the North Carolina Code of Judicial Conduct provides that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]" Such instances include cases in which a "judge has a personal bias or prejudice concerning a party," Canon 3(C)(1)(a), when a judge has "personal knowledge of disputed evidentiary facts concerning the proceedings," *id.*, and when a judge has "an interest that could be substantially affected by the outcome of the proceeding," Canon 3(C)(1)(d)(iii).

If there is sufficient force to the allegations contained in a disqualification motion to proceed to findings of facts, or if a reasonable person knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to disqualify in an impartial manner, the judge should either disqualify herself or refer the motion to another judge. *See In re Faircloth*, 153 N.C. App. 565, 570 (2002).

ARGUMENT

Few principles are more fundamental to our system of law than the maxim that "no judge should sit in [her] own case, or participate in a matter in which [she has] a personal interest, or [has] taken sides therein." *Ponder v. Davis*, 233 N.C. 699, 703 (1951). By participating in the rehearing of this case, Justice Barringer would impermissibly violate each of those core principles. Moreover, because of her personal knowledge of disputed facts central to this case, there is an additional risk that

Justice Barringer will reach "an opinion on the merits on some basis other than what [she] learn[s] from [her] participation in the case" as a judge. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). A justice presiding over a case where her own intent is on trial casts an appearance of impropriety over the entire Court. This appearance of impropriety is compounded here where a majority of this Court has already affirmed the trial court's findings that the legislature that passed S.B. 824, and of which Justice Barringer was a member, did so with an impermissible discriminatory purpose.

Under the plain meaning of Canon 3C, Justice Barringer's personal knowledge of disputed facts leading up to the enactment of S.B. 824, her personal knowledge of disputed evidence going to the Defendants' intent, and her votes in support of the challenged legislation at issue in this case, each provide independent and sufficient grounds to justify her disqualification.

I. Justice Barringer Should Disqualify Herself Because She Has Personal Knowledge of Disputed Evidentiary Facts Concerning the Enactment of S.B. 824.

The trial court determined, and a majority of this Court affirmed, that S.B. 824 was motivated by unconstitutionally discriminatory intent based on four categories of circumstantial evidence: (1) the law's historical background; (2) the specific sequence of events leading to the law's enactment, including any departures from the normal legislative process; (3) the legislative history of S.B. 824; and (4) the impact of the law and whether it would bear more heavily on one race than another. (R p 902) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-268 (1977)). Justice Barringer's personal knowledge of facts going to each one of the

Arlington Heights factors is strong grounds for questioning her impartiality.

As reflected in the majority and dissenting opinions of the trial court and this Court, the evidence surrounding each of the *Arlington Heights* factors is at the center of the dispute in this case and will be the focus of the parties' arguments. The panel majority found that the evidence at trial was "sufficient to show that the enactment of S.B. 824 was motivated at least in part by an unconstitutional intent to target African American voters," and "that the Defendants ha[d] failed to prove . . . that S.B. 824 would have been enacted in its present form if it did not tend to discriminate against African American voters." (R p 1000). The dissenting judge, utilizing the same *Arlington Heights* framework, found insufficient "the circumstantial evidence of discriminatory intent" put forth by Plaintiffs, and took the view that S.B. 824 "was supported by other considerations and would have been passed absent any potential impermissible purpose." (R p 1002- 1004). So, for example, where the majority found that the sequence of events leading to the enactment of S.B. 824 was unusual, rushed, and strictly partisan (R p 917- 947), the dissent found the lame-duck legislative session in which S.B. 824 was passed to be normal, open, and bipartisan (R p 1018-1032). And where the majority repeatedly credited Plaintiffs' strong circumstantial evidence as supporting discriminatory intent (*see, e.g.*, R p 978, 982, 985-986), the dissent focused on the absence of "direct evidence" of discriminatory intent (*see, e.g.*, R p 1031-1034, 1056-1057). The majority and dissenting opinions from this Court reflect a similarly divided view of the same facts.

There can be no question, then, that any appellate review of the three-judge

panel's final judgment will continue to focus on the weight of the circumstantial evidence that Plaintiffs offered at trial; the weight of Defendants' proffered nonracial motivations for the passage of S.B. 824; and the significance, if any, of the absence of direct evidence of Defendants' intent. By participating in rehearing, Justice Barringer will necessarily bring to bear personal knowledge of those disputed facts gleaned from her time in the General Assembly, thereby calling her impartiality into question.

Justice Barringer's failure to disqualify herself under such circumstances would conflict with decisions of other appellate courts. In *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *superseded by statute on other grounds as recognized by Lussier v. Dugger*, 904 F.2d 661, 664 (11th Cir. 1990), for example, the U.S. Court of Appeals for the Eleventh Circuit ordered disqualification of the trial judge and remanded the matter for a new trial, before a different judge, because the "trial judge [during his tenure in the state legislature] actively participated in the very events and shaped the very facts that are at issue in th[e] suit" and, by sitting on the trial at issue, was therefore "making factual determinations about bills and legislative fights in which he played an active part." *Id.* at 1544-1546. By declining to disqualify herself in this rehearing, Justice Barringer would be doing the very same thing that the Eleventh Circuit held judges should not do. Justice Barringer—like any other legislator in the 2018 lame duck legislative session—was a potential fact witness in this case. It is simply not reasonable to believe that she will be able to compartmentalize the information that she learned through her personal experience

as a legislator, advocating for the passage of S.B. 824, when trying to assess the weight and credibility to be accorded the evidence that was presented to the three-judge panel at trial.

While Justice Barringer may, in good faith, believe she is up to that task, that introspective analysis is largely irrelevant under Canon 3C. Canon 3C asks only whether a judge's impartiality reasonably might be questioned from the perspective of an objective observer based on all of the circumstances. *See Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978) (concerning the federal analogue to Canon 3C). No objective observer, presented with the disqualification issues in this case, would fail to question Justice Barringer's ability to remain impartial when ruling on the intent that she and her fellow members of the General Assembly acted with when enacting S.B. 824, a law that she herself supported and helped to pass.

Because Justice Barringer possesses personal knowledge of disputed evidentiary facts, she "should disqualify" herself under Canon 3C(1)(a).

II. Justice Barringer Should Disqualify Herself Because She Has Personal Knowledge of Disputed Evidentiary Facts Concerning the Defendants' Intent That Was Shielded From Plaintiffs on Grounds of Legislative Privilege.

Upon information and belief, Justice Barringer caucused with Republican leaders in the Senate and the Republican sponsors of S.B. 824 during the lame duck session in which S.B. 824 was considered and enacted. Accordingly, Justice Barringer likely learned information from these individuals about their strategy for passing the legislation and their motivations for doing so. That information is not in the trial record or the record on appeal because it was purposely withheld from Plaintiffs by the

Legislative Defendants—Justice Barringer's former colleagues—under claims of legislative privilege. But Justice Barringer cannot reasonably un-know that information. For this reason, too, she should disqualify herself.

Defendants have routinely argued that they acted without discriminatory intent in passing S.B. 824 while simultaneously withholding (on grounds of legislative privilege) the very evidence that might show otherwise. With few exceptions, Plaintiffs' best efforts to discover documents or testimony containing the opinions and subjective beliefs of Republican leaders have been thwarted. Indeed, the legislative leaders and sponsors of S.B. 824 each invoked legislative privilege in response to Plaintiffs' written discovery requests early in this litigation. *See* 22 May 2020 Order of Three-Judge Panel, 2 (Ex. A). Those requests sought, among other things, "communications between legislators and with staff, and documents outside of the public legislative record that were considered by legislators in relation to [S.B. 824]." *Id*. The three-judge panel sustained the vast majority of the legislators' privilege assertions,[2] and ultimately no Republican lawmaker gave deposition testimony or took the stand at trial to defend the passage of S.B. 824.

This invocation of legislative privilege prevented Plaintiffs from obtaining direct evidence of what was debated within the Republican caucus meetings and privately among legislators concerning the drafting, development, and enactment of S.B. 824. That evidence would have shed direct light on the underlying motivations

[2] The trial court compelled the production of only 27 documents from a privilege log of 1,290 entries. *See* 24 February 2021 Order of Three-Judge Panel, 3-4 (Ex. B).

of the Republican-led legislature and the extent of Justice Barringer's participation in enacting S.B. 824. Such extrajudicial information, which was strategically withheld from Plaintiffs, speaks directly to serious issues at the heart of this case.

Justice Barringer's personal knowledge of these withheld facts not only raises issues under Canon 3C, but also implicates serious constitutional due process concerns. A Justice, as part of her decision-making process, cannot rely on information in support of one party that was withheld from the other. If Justice Barringer fails to disqualify herself under these circumstances, her participation would violate due process, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), and would fatally undermine any decision reached by this Court in which Justice Barringer is in the majority. As a matter of constitutional due process, as well as under Canon 3C(1)(a), Justice Barringer should disqualify herself.

III. Justice Barringer Should Disqualify Herself Because Her Prior Votes In Support of S.B. 824 Create Reasonable Grounds To Question Her Objectivity.

Plaintiffs proved at trial that S.B. 824 was enacted with the intent to discriminate against African American voters. Justice Barringer herself voted sixteen times with her Republican colleagues in the Senate to enact S.B. 824. This is yet another reason why, under Canon 3C, Justice Barringer should disqualify herself.

This case is not about the passage of legislation later challenged as legislative overreach or as infringing upon the powers of other branches of government. *See North Carolina NAACP v. Moore*, No. 261A18-3 (N.C. 2021). This is a case about intent to discriminate on the basis of race. Justice Barringer has personal and professional interests that could be "substantially affected by the outcome of the

proceeding"—to be blunt, the trial court's judgment and this Court's 16 December 2022 decision each find that Justice Barringer voted in favor of an intentionally discriminatory bill. A reasonable person would have grounds to question Justice Barringer's objectivity if she were asked to serve as judge of her own prior legislative actions with these serious stakes in play. That is why courts have long held that "no judge should sit in [her] own case, or participate in a matter in which [she has] a personal interest, or [has] taken sides therein." *Ponder*, 233 N.C. at 703. And that is exactly what Justice Barringer would be doing if she participates in this case. Under Canon 3(1)(d)(iii), she should disqualify herself.

It is true that prior Justices served in the legislature and then adjudicated statutes passed or amended during their legislative tenure, but that alone does not resolve the disqualification issue in this case. Those precedents most often dealt with statutory interpretation and not the present circumstance where a former legislator would be sitting in judgment of the constitutionality of a law allegedly enacted with discriminatory intent by her and her peers in the legislature. This Court has previously acknowledged that, under certain circumstances, a former legislator should not rule on the constitutionality of legislation. *See, e.g.*, *Stephenson* v. *Bartlett*, 358 N.C. 219, 229 (2004) ("The requirement [under N.C. Gen. Stat. § 1-267.1] that a former member of the General Assembly may not sit as a member of the three-judge panel is sensible insurance against any appearance of conflict of interest."). This is one such circumstance.

Given the personal and professional interests Justice Barringer has in not

being associated with a law enacted with unconstitutional discriminatory intent, she should disqualify herself from this matter pursuant to Canon 3C(1)(d)(iii).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request that Justice Barringer disqualify herself from participating in the rehearing of this case. At the very least, if Justice Barringer will not disqualify herself, in the interest of ensuring the appearance of an impartial judiciary in North Carolina, she should refer this motion to the full Court for disposition without her participation pursuant to this Court's Order of 23 December 2021 concerning recusal or disqualification of a Justice.

Respectfully submitted this the 3rd day of March, 2023.

SOUTHERN COALITION FOR
SOCIAL JUSTICE

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Respectfully submitted this the 3rd day of March, 2023.

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Exhibit A

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 15292

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, and PAUL KEARNEY, SR.,

Plaintiffs,

v.

TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; DAVID R. LEWIS *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session*; RALPH E. HISE *in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

ORDER

THIS MATTER comes before the undersigned three-judge panel upon Plaintiffs' Motion to Compel the production of documents from Legislative Defendants and non-parties Senator Warren Daniel, former Senator Joel Ford, and Senator Joyce Krawiec (hereinafter "non-party Legislators") pursuant to Rules 26, 33, 34, 37, and 45 of the North Carolina Rules of Civil Procedure.

Factual and Procedural Background

Plaintiffs filed this action on December 19, 2018, challenging the facial constitutionality of the enabling legislation to North Carolina's new voter identification requirement, Session Law 2018-144 (hereinafter "S.L. 2018-144"). On July 19, 2019, this Court entered an order denying Defendants' motions to dismiss as to Claim I of Plaintiffs' complaint and granting Defendants' motions to dismiss as to Claims II through VI of Plaintiffs' complaint. A majority of the undersigned three-judge panel also denied Plaintiffs' motion for a preliminary injunction. On February 18, 2020, the North Carolina Court of Appeals concluded that Plaintiffs' claim of intentional discrimination—Claim I of Plaintiffs' complaint—is likely to succeed on the merits and reversed this Court's denial of Plaintiffs' motion for a preliminary injunction pending a trial on the merits. Plaintiffs' sole remaining claim in this action is that S.L. 2018-144 was enacted with racially discriminatory intent.

On August 19, 2019, Plaintiffs served requests for production and interrogatories to Legislative Defendants and subpoenas *duces tecum* to non-party Legislators. In their responses and objections to Plaintiffs' requests and subpoenas, Legislative Defendants and non-party Legislators cited legislative privilege.

The parties disagree as to the scope of legislative privilege regarding two categories of Plaintiffs' requests: communications between legislators and with staff, and documents outside of the public legislative record that were considered by legislators in relation to S.L. 2018-144. On one hand, Legislative Defendants and non-party Legislators take the position that legislative privilege is absolute and shields

from discovery "requests for information about the motives for legislative votes and legislative enactments." *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015). On the other hand, Plaintiffs assert that legislative privilege is a "qualified protection that balances the significance of the interests at stake in the case against the possibility that discovery may impede the legitimate legislative process." (Pls. Reply Bf. at 1).

Plaintiffs ask that this Court compel Legislative Defendants and non-party Legislators to produce the requested documents and communications, or in the alternative, require Legislative Defendants and non-party Legislators to produce a privilege log describing the nature of each document and communication withheld. A hearing on Plaintiffs' Motion to Compel was held on May 13, 2020, and the matter was taken under advisement.

Plaintiffs' Motion to Compel

Upon consideration of Plaintiffs' Motion to Compel, Legislative Defendants' and non-party Legislators' responses in opposition thereto, all supporting briefs of the parties, and the arguments made before this Court, we conclude that legislative privilege is a qualified privilege and that Legislative Defendants and non-party Legislators will be required to produce a privilege log of the discovery withheld.

The decision to grant or deny a motion to compel discovery is within the sound discretion of the trial court. *Sessions v. Sloane*, 248 N.C. App. 370, 381, 789 S.E.2d 844, 854 (2016). In general, "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in a pending action." N.C.G.S. § 1A-1, Rule 26(b)(1). However, the assertion of privilege alone is not

sufficient to allow a party to withhold discovery, and "[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." N.C.G.S. § 1A-1, Rule 26(b)(5)(a); *see also* N.C.G.S. § 1A-1, Rule 45(c)(3)(b).

Accordingly, Legislative Defendants and non-party Legislators shall provide Plaintiffs with a privilege log in conformity with N.C.G.S. § 1A-1, Rule 26(b)(5)(a) and containing the requested discovery from the following five categories of documents and communications outlined by Plaintiffs:

1) communications Legislative Defendants and non-party Legislators had with other members of the General Assembly and legislative staff,
2) materials, outside of the public legislative record, that were considered by the General Assembly, or by individual members, in relation to S.L. 2018-144's photo ID requirement,
3) documents or data related to the impact or effect of S.L. 2018-144's photo ID requirement,
4) documents or data related to voter behavior and demographics, and
5) the identities of any person that Legislative Defendants and non-party Legislators knew to have been involved in the drafting and analysis of S.L. 2018-144.

Moreover, as to communications, the privilege log shall contain information including but not limited to the date and time the communication was sent and received, the sender and recipient(s), and a general description of the subject matter. As to documents including data that was reviewed by the General Assembly or individual members, the privilege log shall contain, to the extent known by Legislative

Defendants and non-party Legislators, the date and time the document was reviewed, the name of the individual(s) who prepared the document, and a general description of the document. Legislative Defendants and non-party Legislators shall comply with Rule 5.7 of the Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015),[1] which governs electronic discovery and requires a party producing documents in an electronic format, or using electronic means to identify potentially responsive documents, to disclose certain information regarding custodians, non-custodial data sources, date ranges, and search methodology.

WHEREFORE, the Court in the exercise of its discretion and for the reasons stated herein, hereby ORDERS:

1. Plaintiffs' Motion to Compel is GRANTED IN PART as to Plaintiffs' request for the production of a privilege log.
    a. Legislative Defendants and each non-party Legislator shall produce a privilege log in accordance with the terms of this Order.
    b. Legislative Defendants and non-party Legislators shall have until June 26, 2020, to produce their respective privilege log to Plaintiffs.
    c. No later than July 27, 2020, Plaintiffs shall notify Legislative Defendants and non-party Legislators in writing of any objections to privilege designations in the produced privilege log.
    d. In the event Plaintiffs notify Legislative Defendants or non-party Legislators of any objections, the parties shall, no later than August 10, 2020, consult and confer in an attempt to reach an agreement as to the discoverability of the objected-to items contained in the privilege log. At the expiration of the consult and confer period, Plaintiffs shall have the opportunity to reapply to this Court for *in camera* review of the remaining disputed items.
2. The remainder of Plaintiffs' requests made pursuant to Rules 26, 33, 34, 37, and 45 of the North Carolina Rules of Civil Procedure in Plaintiffs' Motion to Compel will be STAYED until such time that Plaintiffs reapply to this Court for the remaining relief in Plaintiffs' Motion to Compel.

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[1] The Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015) can be accessed here: https://www.nccourts.gov/assets/documents/local-rules-forms/112.pdf?XAxLgDJvtvgbp9SN0U8SfgoejNvF4gmF

3. In view of the fact that Legislative Defendants and non-parties Senator Warren Daniel, former Senator Joel Ford, and Senator Joyce Krawiec have asserted that legislative privilege affords them an absolute privilege from production of responsive documents, the Court hereby certifies pursuant to Rule 54 of the North Carolina Rules of Civil Procedure this matter for immediate appeal, notwithstanding the interlocutory nature of this order, finding specifically that this order affects substantial rights of Legislative Defendants and non-parties Senator Warren Daniel, former Senator Joel Ford, and Senator Joyce Krawiec.

This the 20 day of May 2020.

Nathaniel J. Poovey, Superior Court Judge

Michael J. O'Foghludha, Superior Court Judge

Vince M. Rozier, Jr., Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Counsel for the State and State Board Defendants

This the 22nd day of May 2020.

Kellie Z. Myers
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Exhibit B

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 15292
JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, and PAUL KEARNEY, SR., *Plaintiffs,* v. TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; DAVID R. LEWIS *in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session*; RALPH E. HISE *in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session*; THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *Defendants.*	**ORDER ON PLAINTIFFS' MOTION TO COMPEL FOLLOWING THE COURT'S *IN CAMERA* REVIEW**

THIS MATTER comes before the undersigned three-judge panel upon Plaintiffs' Motion to Compel Production of Documents from Legislative Defendants and non-parties Senator Warren Daniel, former Senator Joel Ford, and Senator Joyce Krawiec pursuant to Rules 26, 33, 34, 37, and 45 of the North Carolina Rules of Civil Procedure, filed on December 4, 2019, and Plaintiffs' Motion for *In Camera* Review, filed on October 2, 2020, pursuant to this Court's May 22, 2020 Order.

Factual and Procedural Background

This Order incorporates by reference the legal conclusions and the procedural and factual background of the Court's Orders entered May 22, 2020, January 4, 2021, and January 13, 2021, in which the Court previously addressed Plaintiffs' Motion to Compel the production of documents from Legislative Defendants and non-parties Senator Warren Daniel, former Senator Joel Ford, and Senator Joyce Krawiec (collectively, with Legislative Defendants, referred to as "Legislators").

On January 4, 2021, this Court granted Plaintiff's Motion for *In Camera* Review, finding that several categories of communications and documents sought from Legislators by Plaintiffs remained in dispute, even after the parties' several attempts to meet-and-confer. Among the categories of information sought by Plaintiffs are:

1. Documents concerning public relations;
2. Communications between legislative staff;
3. Documents concerning IDs, amendments, and voter fraud; and
4. Documents of then-Senator Joel Ford.

In a supplemental Order entered on January 13, 2021, this Court ordered Legislators to deliver to the Court for *in camera* review copies of a flash drive containing Legislators' privilege log and all corresponding communications and documents to which Legislators claimed a privilege. The remaining requests raised by Plaintiffs in their Motion to Compel remained stayed, pursuant to this Court's May 22, 2020 Order.

The Court's *In Camera* Review

On January 21, 2021, Legislators timely delivered the flash drives, each containing 1) a Microsoft Excel spreadsheet with 1,290 entries designated as protected by legislative privilege, attorney work-product, and/or attorney-client privilege; and 2) PDF copies of the corresponding documents.

After reviewing *in camera* the files submitted by Legislators, the Court has identified a small subset of the documents that should be produced by Legislators to Plaintiffs, in the interest of justice and in the Court's discretion. The Court finds that the below-listed documents are relevant to Plaintiff's claim that Session Law 2018-144 was enacted for an intentionally discriminatory purpose, and are, therefore, discoverable absent a privilege from production. The Court further finds that Legislators properly asserted legislative privilege in regard to the below-listed documents. The Court concludes, however, that the legislative privilege attached to the below-listed documents is outweighed by: their relevance to, and in light of, the serious issues at the heart of this litigation; the public interest in disclosing the below-listed documents; and the proper administration of justice.

Accordingly, Legislators will be required to produce to Plaintiffs the following documents, identified in Legislators' privilege log by the following Bates numbers:

1. P000182.1
2. P000194.1
3. P000226.1
4. P000384.1
5. P000405.1
6. P000595.1
7. P000904.1
8. P000927.1

9. P000987.1
10. P001022.1
11. P001042.1
12. P001169.1
13. P001932.1
14. P002021.1
15. P002046.1
16. P002051.1
17. P002059.1
18. P002497.1
19. P002578.1
20. P002677.1
21. P002681.1
22. P002682.1
23. P002683.1
24. P002684.1
25. P002762.1
26. P002822.1
27. P002827.1

Furthermore, if an above-listed document is more than one page in length, then the entire document as submitted in PDF-form to the Court shall be produced. Finally, the files corresponding to the above-listed Bates numbers shall, when produced to Plaintiffs, be designated by Legislators as "HIGHLY CONFIDENTIAL" under the parties' Third Amended Consent Protective Order Governing Confidential Documents and Information, filed October 8, 2020, and be subject to the corresponding safeguards set forth therein.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Legislators shall produce to Plaintiffs electronic copies of the documents corresponding to the above-listed Bates numbers within ten (10) days of the entry of this Order and in accordance with the terms of this Order.

2. All use of the documents produced by Legislators to Plaintiffs pursuant to this Order shall be limited to the terms agreed upon in the parties' Third Amended Consent Protective Order Governing Confidential Documents and Information.
3. This Order is not intended to constitute precedent in any other matter, but instead shall be limited in application to the parties in this litigation.
4. This Order shall not be construed as a waiver of any claims of privilege by Legislators over the documents being disclosed to Plaintiffs.

SO ORDERED, this the 24 day of February, 2021.

Nathaniel J. Poovey, Superior Court Judge

/s/ Michael J. O'Foghludha
Michael J. O'Foghludha, Superior Court Judge

/s/ Vince M. Rozier, Jr.
Vince M. Rozier, Jr., Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 24 day of February 2021.

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