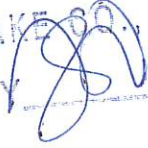


STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

2019 JUN 21 P 2:23

WAKE CO. C.S.C.
BY 

COMMON CAUSE, et al.,
Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR
CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON
REDISTRICTING, et al.,

Defendants.

**PLAINTIFFS' MOTION IN
LIMINE TO PRECLUDE
LEGISLATIVE
DEFENDANTS FROM
INTRODUCING EVIDENCE
OR TESTIMONY UNDER
THE SWORD AND SHIELD
DOCTRINE**

In light of Legislative Defendants' prior assertions of legislative privilege, Plaintiffs move to preclude Legislative Defendants from offering certain evidence or testimony under the sword and shield doctrine. Specifically, Plaintiffs request an order precluding any defendant from offering: (1) testimony from any of the twelve current and former legislators and legislative staff who successfully asserted legislative privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals who asserted legislative privilege, and (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.

BACKGROUND

On January 24, 2019, Plaintiffs served notices of depositions upon all four Legislative Defendants—Senior Chairman of the House Select Committee on Redistricting David R. Lewis, Chairman of the Senate Standing Committee on Redistricting Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, and President Pro Tempore of the Senate Philip E. Berger. *See* Legislative Defendants' Mot. for Protective Order ("Mot."), Exs. 1-4. Plaintiffs noticed the depositions for early March. Also on January 24, Plaintiffs served subpoenas for depositions and documents on eight individuals whom Legislative Defendants had identified in interrogatory responses as being involved in the 2017 redistricting process: Senator Trudy Wade, Senator Wesley Meredith, Senator John Alexander, Senator Dan Bishop, former Senator Robert Rucho, former Representative Nelson Dollar, legislative employee Mark Coggins, and former legislative employee Jim Blaine (collectively, the "non-party legislators and staff"). *See id.*, Exs. 5-12.

On February 4, Legislative Defendants and the non-party legislators and staff—all represented by counsel for Legislative Defendants—moved for a protective order to block Plaintiffs from deposing all four Legislative Defendants and eight other current or former legislators and legislative staffers, on the grounds of legislative privilege and immunity. As the Court noted in its March 25, 2019 order, “[t]he assertion of legislative privilege resulted in the cancellation of duly noticed and subpoenaed depositions of current and former legislators and legislative staffers.” 3/25/19 Order at 4.

Legislative Defendants and the non-party legislators and staff also asserted legislative privilege and immunity in response to Plaintiffs’ document subpoenas and document requests. Based on their assertions of legislative privilege and immunity, the non-party legislators and staff did not produce a single document in response to Plaintiffs’ document subpoenas.

In response to the legislative privilege and immunity assertions, Plaintiffs explained that, while they disagreed with the assertions, Plaintiffs consented to entry of the requested protective order so long as the order specified that Legislative Defendants would be precluded from offering certain evidence and trial testimony that derives from, or is within the knowledge of, the individuals subject to the protective order. A week later, Legislative Defendants purported to “withdraw” the motion for a protective order as to Representative Lewis and Senator Hise. Legislative Defendants purported to take such action just two days before the close of written fact discovery from Legislative Defendants and just four days before Plaintiffs’ expert reports were due.

On March 25, 2019, this Court issued an Order declining to allow Legislative Defendants to withdraw their motion and instead granting the proposed protective order “in full.” 3/25/19 Order at 5. The Court explained that Legislative Defendants’ last-minute “change [in] positions”

with respect to legislative privilege—which they had previously used “as a shield to prevent discovery”—“would provide an unfair benefit to Legislative Defendants and impose an unfair detriment on Plaintiffs.” *Id.* at 4.

This Court noted “the authority provided by Plaintiffs that holds that a party may cannot use a privilege both as a ‘shield’ to prevent discovery and a ‘sword’ to present evidence or claims that relate to the privileged information.” 3/25/19 Order at 5 n.1. The Court concluded that it was “premature for the Court to make rulings on evidentiary matters for trial,” but made clear that its order “in no way prejudice[d] Plaintiffs from seeking to be heard at or prior to trial should Legislative Defendants offer (1) testimony from any of the twelve individuals who have asserted privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature’s intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.” *Id.* at 5 n.1. Plaintiffs now seek such an order.

ARGUMENT

Because Legislative Defendants invoked legislative privilege as a shield to block depositions and to withhold discovery about their intent in enacting the 2017 Plans, they should be precluded from introducing certain evidence or argument at trial as a sword.

It is hornbook law that parties cannot use a privilege as both a “shield” to prevent discovery and a “sword” to present evidence or claims that relate to the privileged information. *State v. Buckner*, 351 N.C. 401, 410, 527 S.E.2d 307, 313 (2000); *Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (1996). A party therefore may not “use[] an assertion of fact

to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion.” *Favors v. Cuomo*, 285 F.R.D. 187, 199 (E.D.N.Y. 2012) (quotation marks omitted). As such, parties face a “choice” of either standing on the privilege or waiving it in order to advance related evidence or claims. *Cantwell v. Cantwell*, 109 N.C. App. 395, 396, 427 S.E.2d 129, 130 (1993). Where a party elects “to stand behind its privilege and refuse[s] to produce” relevant information, “that exercise of the privilege will preclude it from introducing” related evidence at trial. *Belmont Textile Mach. Co. v. Superba, S.A.*, 48 F. Supp. 2d 521, 523 (W.D.N.C. 1999). This principle applies equally to plaintiffs and defendants. *See, e.g., Cantwell*, 109 N.C. App. at 396, 427 S.E.2d at 130.

The sword/shield doctrine fully applies to the assertion of legislative privilege in redistricting cases. “[C]ourts have been loath to allow a legislator to invoke the privilege at the discovery stage, only to selectively waive it thereafter in order to offer evidence to support the legislator’s claims or defenses.” *Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012). Courts thus preclude legislators from offering certain evidence in defense of redistricting plans where those legislators blocked discovery based on legislative privilege. In the recent partisan gerrymandering challenge to Pennsylvania’s congressional districts, the legislative defendants asserted legislative privilege to preclude their depositions and other discovery related to legislative intent. The state trial court upheld the privilege assertions—and then blocked the legislative defendants from introducing evidence related to legislative intent under the sword/shield doctrine. The trial court precluded the defendants “from offering evidence that [the plaintiffs] could not obtain in discovery due to [the] Court’s . . . order” upholding the defendants’ privilege assertions. Trial Tr. at 94, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (attached as Ex. A). The court further made clear that the legislative defendants

could not offer expert testimony that was based on consultations with legislative staff who had been “shielded from [the plaintiffs’] deposition efforts” on the basis of privilege. *Id.* at 32.

The district court in *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012), similarly precluded legislators from introducing evidence at trial pursuant to the sword/shield doctrine. In *Doe*, plaintiffs challenging a Nebraska statute under the Ex Post Facto Clause sought to depose Nebraska legislators regarding their intent and objectives in crafting the statute. The defendants “successfully asserted legislative privileges to thwart the plaintiffs’ effort to get at the truth.” *Id.* at 1126. At trial, the plaintiffs presented evidence that the legislature had acted with impermissible intent. When the defendants sought to challenge that evidence, the court held that they were precluded from doing so under the sword/shield doctrine. “While the defendants and their lawyers were entitled to invoke [legislative privilege]” to withhold discovery, they could not then “claim [at trial] that the evidence is lacking regarding the true motives of the law-makers.” *Id.* “That is, the defendants will not be allowed to use their privilege defenses as both a sword and a shield.” *Id.*

Here, too, Legislative Defendants must face the consequences of asserting legislative privilege to block Plaintiffs from obtaining discovery. Legislative Defendants must at a minimum be precluded from introducing evidence and testimony that Plaintiffs would have been “potentially capable of rebutting” through the discovery that Plaintiffs were denied. *Favors*, 285 F.R.D. at 199. Legislative Defendants, in other words, may not present evidence or testimony that “in fairness requires examination of protected communications” or other discovery. *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

In particular, this Court should preclude Legislative Defendants from offering (1) testimony from any of the twelve individuals who have asserted privilege, (2) evidence or

testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.

The first restriction is straightforward: Legislative Defendants cannot offer testimony from any individual whom Plaintiffs were unable to depose due to the assertions of legislative privilege and legislative immunity.

The second restriction prevents Legislative Defendants from funneling information from those twelve individuals through other witnesses, including experts. The sword/shield doctrine would serve little purpose if a party could circumvent its restrictions by relaying information from shielded witnesses to other witnesses. *See* Ex. A at 32 (explaining that legislative defendants could not introduce expert testimony based on consultations with legislative staff who had been "shielded from [the plaintiffs'] deposition efforts" by privilege assertions).

The third restriction precludes Legislative Defendants from offering evidence or testimony relating to legislative intent, unless the evidence or testimony is based exclusively on the public legislative record or publicly available data. The twelve individuals who asserted legislative privilege and immunity plainly possess knowledge as to the General Assembly's intent in drawing the challenged plans—Legislative Defendants previously identified these individuals as the sole living persons who had any involvement in drawing the state House and state Senate districts in 2017. It would be manifestly unfair for Legislative Defendants to offer evidence or testimony purporting to explain the legislature's intent in drawing specific districts or the maps as a whole, when Plaintiffs were denied the ability to take discovery from the

persons who know the truth regarding the legislature's actual intent. *See Bilzerian*, 926 F.2d at 1292-93 (applying sword/shield doctrine to restrict criminal defendant from offering testimony related to his "intent"). Legislative Defendants should nonetheless be permitted to present evidence and testimony related to legislative intent that is based exclusively on the public legislative record and publicly available data—for example, through expert statistical analysis based on publicly available elections data.

For the second and third restrictions, the date by which to determine whether information or data is "public" or "non-public" should be November 13, 2018, the date on which Plaintiffs filed their complaint. Using that date is necessary to prevent Defendants from selectively making certain information or data "public" after the complaint was filed to support their defenses, while using privilege to block Plaintiffs from deposing or obtaining documents from legislators in order to probe those defenses. Moreover, all three restrictions should apply equally to the Intervenor Defendants and the State Defendants, to prevent Legislative Defendants from circumventing the sword and shield doctrine via the other Defendants.

CONCLUSION

For the foregoing reasons, all Defendants should be barred from offering: (1) testimony from any of the twelve current and former legislators and legislative staff who successfully asserted legislative privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals who asserted legislative privilege, and (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data.

Respectfully submitted this the 21st day of June, 2019.

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**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email* to the following persons:

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

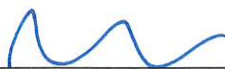
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This the 21st day of June, 2019.



Edwin M. Speas, Jr.

EXHIBIT A

1 IN THE COMMONWEALTH COURT OF PENNSYLVANIA

2 League of Women Voters of Pennsylvania,)
 3 Carmen Febo San Miguel, James Solomon,)
 4 John Greiner, John Capowski, Gretchen)
 Brandt, Thomas Rentschler, Mary Elizabeth)
 5 Lawn, Lisa Isaacs, Don Lancaster, Jordi)
 Comas, Robert Smith, William Marx,)
 6 Richard Mantell, Priscilla McNulty,)
 Thomas Ulrich, Robert McKinstry,)
 Mark Lichty, Lorraine Petrosky,)
)
 7 Petitioners,)
)
 8 v.)
)
) No.)
) 261 M.D. 2017

9 The Commonwealth of Pennsylvania;)
 10 The Pennsylvania General Assembly;)
 Thomas W. Wolf, In His Capacity)
 As Governor of Pennsylvania;)
 11 Michael J. Stack III, In His Capacity As)
 Lieutenant Governor of Pennsylvania And)
 12 President of the Pennsylvania Senate;)
 Michael C. Turzai, In His Capacity As)
 13 Speaker of the Pennsylvania House of)
 Representatives; Joseph B. Scarnati III,)
 14 In His Capacity As Pennsylvania Senate)
 President Pro Tempore; Robert Torres,)
 15 In His Capacity As Acting Secretary of)
 the Commonwealth of Pennsylvania;)
 16 Jonathan M. Marks, In His Capacity)
 As the Commissioner of the Bureau of)
 17 Commissions, Elections, and Legislation)
 of the Pennsylvania Department of State,)
 18)
) Respondents.)
 19

20 COMMONWEALTH COURT OF PENNSYLVANIA, Volume I

21 BEFORE: HONORABLE JUDGE KEVIN BROBSON

22 DATE: DECEMBER 11, 2017; 9:30 A.M.

23 PLACE: COMMONWEALTH COURT
 PENNSYLVANIA JUDICIAL CENTER
 601 COMMONWEALTH AVENUE
 HARRISBURG, PA 17106

24 REPORTED BY: CINDY L. SEBO, RMR, CRR, RPR,

25

1 for certain whether it's happened, and can I
2 use it as a basis to exclude Dr. Gimpel's
3 testimony?

4 MR. CELLA: Your Honor, I believe
5 that what you do know from the record that
6 we've provided is that some information --

7 THE COURT: Well, I understand
8 that. I understand that.

9 My question is -- I find -- I think
10 it would be incredibly compelling if, as a
11 matter of fact, Legislative Respondents'
12 experts have been consulting with
13 nontestifying consultants who you sought to
14 depose but then were shielded. I think that
15 would be an incredibly compelling argument
16 to seek to preclude their experts from
17 testifying.

18 My question is, Is that the argument
19 that you're making? Are you -- are you
20 asserting and are you able to prove that the
21 Legislative Respondents' experts have been
22 consulting with individuals who were
23 shielded from your deposition efforts?

24 MR. CELLA: Your Honor, what we're
25 asserting is that through counsel --

1 THE COURT: Thank you.

2 MR. TUCKER: Thank you.

3 THE COURT: Okay. First is
4 Petitioners' motion to exclude or limit
5 Intervenors' testimony. I'm going to grant
6 motion.

7 As far as the witnesses that the
8 Intervenors are going to call, I'm going to
9 grant the motion and preclude the testimony
10 of a potential -- or of an existing
11 Congressional candidate.

12 The reason why is because I don't
13 think I need an existing Congressional
14 candidate to inform the Court as to how
15 prejudicial a change in the maps will be.

16 I think everybody understands that
17 if the maps change, that that will certainly
18 change who can or cannot run for office and
19 the corresponding burden associated with
20 that.

21 In reality, I'll say, anecdotally,
22 I'm not sure it changes who can or cannot
23 run, because I don't think you need to be a
24 resident of your Congressional district to
25 run for Congress. With that being said, I

1 understand the practical burden associated
2 with being a carpetbagger, so to speak.
3 But, nonetheless, I don't think we need any
4 testimony on that particular inconvenience.

5 I also -- I will also limit the
6 number of witnesses that can testify as
7 party chairs and the number of witnesses
8 that can testify as so-called "Republicans
9 at large." The Intervenors can present the
10 testimony of one party chair and one
11 Republican at large, but the rest of the
12 testimony seems, to me, to be duplicative.

13 So in that regard, that motion will
14 be granted.

15 Next is Petitioners' motion to limit
16 or preclude Legislative Respondents from
17 presenting evidence or argument about
18 intent, motives and activity in enacting the
19 2011 Plans.

20 I'm going to grant that motion to
21 the extent that it seeks to bar
22 Legislative Respondents from offering
23 evidence that Petitioners could not obtain
24 in discovery due to this Court's
25 November 22nd, 2017 order regarding the

1 speech and debate clause, a provision in the
2 Pennsylvania Constitution.

3 As far as the request to limit
4 argument, that's -- we'll wait to see what
5 argument they want to have. But I was
6 concerned in the motion there was some
7 suggestion that they could -- that the
8 Legislative Respondents will be precluded
9 from making any arguments about the evidence
10 that the Petitioners might produce, and that
11 seemed to be overbroad. So we'll deal with
12 that more on a case-by-case basis.

13 But as far as the speech and debate
14 immunity and sword and shield argument, I
15 think the order I just provided on the
16 record adequately addresses Petitioners'
17 concerns.

18 The next motion is Petitioners'
19 motion to exclude the testimony of
20 Dr. Wendy Cho, critical to the expert report
21 of Dr. Chen. I'm going to deny that motion.

22 Next is Plaintiffs' motion to
23 exclude Dr. Gimpel's expert testimony
24 regarding the effect of the 2011 Plans.

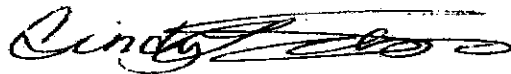
25 The Court has already accepted the

CERTIFICATE

321

COMMONWEALTH OF PENNSYLVANIA:

I, Cindy L. Sebo, a court reporter within and for the Jurisdiction aforesaid, do hereby certify that the foregoing proceeding were pursuant to notice, at the time and place indicated; that the testimony of said was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the proceedings are true record of the testimony given; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.



Cindy L. Sebo, RMR, CRR, RPR, CSR,
CCR, CLR, RSA, LiveDeposition
Authorized Reporter, and Notary Public