IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:15-CV-559

THE CITY OF GREENSBORO, LEWIS A. BRANDON III, JOYCE JOHNSON, NELSON JOHNSON, RICHARD ALAN KORITZ, SANDRA SELF KORITZ, CHARLI MAE SYKES, and MAURICE WARREN II, *Plaintiffs*, v. THE GUILFORD COUNTY BOARD OF ELECTIONS, *Defendant*, MELVIN ALSTON, JEAN BROWN, HURLEY DERRICKSON, STEPHEN GOLIMOWSKI, WAYNE GOODSON, JIM KEE, EARL JONES, SHARON KASICA, and WILLIAM CLARK PORTER, *Defendant-Intervenors*.	)	MEMORANDUM IN OPPOSITIONTO INDIVIDUAL PLAINITFFS' OBJECTION TO DECEMBER 20, 2016 ORDER

NOW COMES Senator Trudy Wade, by and through undersigned counsel, and hereby submits this memorandum in opposition to Individual Plaintiffs' (hereinafter "plaintiffs") objection to Magistrate Judge Webster's December 20, 2016 Order.[1] Specifically, plaintiffs object to that portion of the order that allows Senator Wade's Motion to Quash and prevents plaintiffs from taking her testimony. For the reasons stated in Senator Wade's Memorandum in Support of Motion to Quash filed on June 9,

[1] The undersigned counsel appear solely for the limited purpose of responding to matters related to plaintiffs' subpoenas directed to the above-named legislator.

2016, and incorporated herein by reference, as well as for the reasons stated below, Magistrate Judge Webster's application of the law on legislative privilege is correct as pertains to the plaintiffs' attempt to compel the testimony of Senator Wade.

BACKGROUND

Plaintiffs' Complaint purports to assert claims under 42 U.S.C. § 1983 for defendants' alleged violation of plaintiffs' equal protection rights under both the United States and North Carolina Constitutions resulting from the North Carolina General Assembly's enactment of the Greensboro Act (S.L. 2015-138/House Bill 263), a local bill implementing a new redistricting plan for electing Council members of the Greensboro City Council. [DE 1]

Plaintiffs' May 26, 2016, subpoena to Senator Wade summoned her to appear and testify at a deposition on June 10, 2016. In addition, plaintiffs have issued numerous subpoenas *duces tecum* in this case to legislators and legislative staff, including Senator Wade. (DE 74) The documents sought to be produced in the subpoenas *duces tecum* included documents and communications received, edited, or created by the respective legislators and/or staff that pertain to the purpose for: enacting or supporting any provision in 2015 N.C. Sess. Laws 138; changing the structure or make up of the Greensboro City Council; redistricting the council's composition; changing the voting or other powers of the Mayor of Greensboro; and documents acquired or created while a member of the Conference Committee For House Bill 263. Legislative Respondents produced nearly 1,000 documents in response to the subpoenas *duces tecum.*

Plaintiffs, in their objection, state that the Legislative Respondents produced documents, "in an apparent concession that such documents were not privileged." (DE 113, p 6; *see also* p 18) This statement is clearly inaccurate and baseless. Legislative Respondents have, at all times, maintained that documents and emails between legislators and third parties were privileged, but produced these documents under a *limited waiver*. Most recently, Legislative Respondents reiterated this position in open court during the September 8, 2016 hearing before the Magistrate Judge. Despite having received these documents, plaintiffs issued a subpoena to Senator Wade to appear and testify.

In addition to granting Senator Wade's Motion to Quash, the Magistrate Judge granted in part plaintiffs' motion to compel the production of certain documents under the subpoenas issued by plaintiffs. [DE 111] The Magistrate Judge expressly held:

> [R]equiring Senator Wade to testify at a deposition would be far more intrusive upon her duties and responsibilities as a legislator. The Court finds that prohibiting deposition testimony but requiring Legislative Respondents to produce certain documents strikes the appropriate balance between protecting the legislative process and the need to ensure that Individual Plaintiffs' constitutional rights are not violated.

[DE 111, p 14]

Clearly the Magistrate Judge accorded heavy weight to the production of documents to serve as an alternative to compelling a legislator to sit for a deposition.

ARGUMENT

This memorandum only addresses plaintiffs' objections to the Magistrate Judge's order granting Senator Wade's Motion to Quash. Senator Wade is a member of the North

Carolina General Assembly. There is no question that plaintiffs are not permitted to depose Senator Wade, who is entitled to legislative immunity.

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

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

EEOC v. Wash. Suburban Sanitary Comm'n, 631 F.3d 174, 181 (4th Cir. 2011) (citation and quotations omitted).

Importantly, legislative immunity frees legislators not only from the consequences of litigation, it also frees them "from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). "Because litigation's costs do not fall on named parties alone, this privilege applies whether or not the legislators themselves have been

sued." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. "The purpose of the doctrine [of legislative immunity] is to prevent legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves." *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1988).

In the consolidated VIVA cases, *NAACP v. McCrory*, No. 1:13-CV-658 (M.D.N.C. filed Aug. 12, 2013); *League of Women Voters v State of NC*, No. 1:13-CV-660 (M.D.N.C. filed Aug. 12, 2013); and *USA v. State of NC*, No. 1:13-CV-861 (M.D.N.C. filed Sept. 30, 2013), a dispute arose between legislative members and the plaintiffs. While the dispute concerned the issuance of subpoenas *duces tecum* issued to legislative members, the resulting orders issued by Magistrate Judge Joi Elizabeth Peake and United States District Judge Thomas D. Schroeder, include thorough analyses of legislative immunity and privilege, including testimonial legislative immunity. *NAACP v. McCrory*, No. 1:13-CV-658 at 4 (M.D.N.C. Mar. 27, 2014)(order on motions to quash and motion to compel); *NAACP v. McCrory*, No. 1:13-CV-658 at 20 (M.D.N.C. May 15, 2014)(Memorandum Order) ("Schroeder Order").

> The doctrine of legislative immunity (both in its substantive and testimonial aspects) itself embodies the fundamental public policy. It insulates legislators from liability for their official acts and shields them from judicial scrutiny into their deliberative processes. The doctrine is a bulwark in upholding the separation of powers. It 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.[2]

[2] Notably, in *Marylanders*, the redistricting that is subject of the plaintiffs' complaint involves legislative redistricting. The court specifically observes the fact that legislative redistricting involves the self-interest of the legislators themselves. As such, the court

Id., citing *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (opinion of Murnaghan, J. and Motz, J.)

Similarly, Judge Schroeder recognized that "It is . . . apparent that [state legislators] enjoy a legislative privilege that includes protection from testifying for actions taken within the sphere of legitimate legislative activity." Schroeder Order p.23 (citation and quotations omitted).

This is consistent with well-established rule of law, recognized by the Supreme Court, that: "in some extraordinary instances the members [of a legislative body] 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 304 (Opinion of Murnaghan, J. and Motz, Jr.) (citations and quotations omitted). There is no logical argument that this rule would not extend to depositions. While the better approach under the prevailing case law is that legislators are absolutely immune from being compelled from testifying in deposition, the same result is properly reached in this case by the Magistrate Judge's application of the five part test used to determine whether there is a qualified legislative privilege. *Page v. Virginia State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014). [DE 111, p 8] Plaintiffs complain

---

recognizes that judicial scrutiny into their deliberative process might be necessary to determine legislative motive because of the alleged violation of an overriding free-standing public policy. Even so, the court was not yet willing to allow legislative members of the redistricting commission to testify, and made clear that the legislative members could *never* be deposed concerning their legislative activities. *Marylanders*, 144 F.R.D. at 304 (opinion of Murnaghan, J. and Motz, J.) Here, the redistricting at issue is municipal and there is no legislative self-interest implicated.

that the Magistrate Judge, while conducting a thorough balancing test analysis regarding plaintiffs' motion to compel, failed to conduct a similar analysis regarding Senator Wade's motion to quash. [DE 113, p 12]

The five factors are cited in the Magistrate Judge's order: (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 government in the litigation; and (v) the possibility of future timidity by government employees. *Id*. [DE 113, pp 7-8] On the face of the factors it is apparent that the analysis is identical whether the issue pertains to plaintiffs seeking production of privileged documents or seeking to compel the testimony of a legislator. There simply was no error in that the Magistrate Judge's analysis was equally applicable to the motion to compel and the motion to quash. Both of which are discovery issues.

Furthermore, the legislature acts as one body and not as individual members. Each member of the House of Representatives and of the Senate may have a different motivation for voting for or against any particular piece of legislation; it is the intent of the General Assembly as a whole, then, and not the motivation of any particular legislator that is relevant to the purpose of a law. Every document that could possibly shed light on the legislature's motive as a body has been provided to Plaintiffs. It is also for this reason that plaintiffs' unsubstantiated claims that there is some insidious intent in carrying out the legislative process does not lend itself to contravene the well-established legislative privilege. Whatever process is undertaken is done so by the body of the legislature as a

whole and testimony of one legislator would not advance plaintiffs' argument. This is particularly true where, as here there is simply no evidence of an equal protection or other constitutional violation.

Simply put, the law as applied by Magistrate Judge Webster in this case, does not support a finding that Senator Wade be required to comply with the subpoena to testify. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. The Magistrate Judge correctly concluded that: [T]he circumstances here are not so extraordinary as to require Senator Wade to be deposed. The Court finds that the 'cost and inconvenience [of deposition testimony] and distractions of a trial' would be far more burdensome than any benefit from such testimony, particularly in light of the documents that Legislative Respondents are ordered to produce. *Tenny*, 341 U.S. at 377; *see also* Fed. R. Civ. P. 26(b)(1) & 45(d)(3)(A)(iv)."

Finally, to the extent plaintiffs assert that the court should allow the deposition to proceed "under seal" and then the Court can review the testimony "under seal" to determine whether the benefits of disclosure outweigh the privilege, such assertion is nonsensical. [DE 113, p 18] The legislative privilege is compromised and all the public policy benefits thereto extinguished, the very minute plaintiffs are allowed to depose the Senator. Subsequently presenting her testimony to the Court under seal is of no consequence since the privilege will have already been lost. The Magistrate Judge clearly understood this when he ordered the Legislative Respondents to provide, under seal, privilege logs to the Court and only to the Court.

While Senator Wade respectfully submits that legislative immunity unconditionally prohibits her from being compelled to appear and testify in a deposition, it is not contested that the Magistrate Judge's application of the five-factor test correctly results in plaintiffs' subpoena being quashed.

CONCLUSION

For the foregoing reasons, Senator Wade respectfully prays that the Magistrate Judge's Order quashing the subpoena served on her by plaintiffs be upheld.

This the 6th day of January, 2017.

NORTH CAROLINA DEPARTMENT OF JUSTICE

/s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov

/s/ Melissa L. Trippe
Melissa L. Trippe
Special Deputy Attorney General
N.C.State Bar. No. 13739
mtrippe@ncdoj.com

P.O. Box 629
Raleigh, NC 27602
Telephone: 919.716.6900
Facsimile: 919.716.6763
Counsel for Senator Trudy Wade

CERTIFICATE OF SERVICE

I, Melissa L. Trippe, hereby certify that I have this day electronically filed the foregoing MEMORANDUM IN OPPOSITION TO INDIVIDUAL PLAINITFFS' OBJECTION TO DECEMBER 20, 2016 ORDER with the Clerk of Court using the CM/EFC system which will send notification of such filing to the following:

Jim W. Phillips, Jr
jphillips@brookspierce.com.
Julia C. Ambrose
jambrose@brookspierce.com
D. Bryan Starrett, Jr.
dstarrett@brookspierce.com
Brooks, Pierce, McLendon,
Humphrey & Leonard, L.L.P.
Post Office Box 26000
Greensboro, NC 27420-6000
Counsel for City of Greensboro

Mark Payne, County Attorney
Guilford County Attorney's Office
P.O. Box 3427
Greensboro, NC 27402
mpayne@co.guilford.nc.us
Counsel for Defendant

Anita S. Earls
anita@southerncoalition.org
Allison J. Riggs
allison@southerncoalition.org
Southern Coalition for Social Justice
1415 Hwy. 54, Suite 101
Durham, NC 27707
Counsel for Individual Plaintiffs

This the 6th day of January, 2017.

/s/ Melissa L. Trippe
Melissa L. Trippe
Special Deputy Attorney General