IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THE CITY OF GREENSBORO, LEWIS A. BRANDON, III, JOYCE JOHNSON, NELSON JOHNSON, RICHARD ALAN KORITZ, SANDRA SELF KORITZ, CHARLI MAE SYKES, MAURICE WARREN II, and GEORGEANNA BUTLER WOMACK,	)	
Plaintiffs,	)	
v.	)	1:15-CV-559
THE GUILFORD COUNTY BOARD OF ELECTIONS,	)	
Defendant.	)	

ORDER

In this lawsuit, the individual plaintiffs claim that the North Carolina General Assembly violated their constitutional rights to equal protection in 2015 when it redistricted and otherwise changed the structure of the Greensboro City Council. As is relevant here, the plaintiffs contend that North Carolina Session Law 2015-138 – "the Act" - violates the constitutional requirement of one-person-one-vote and constitutes a racial gerrymander. They seek to depose Senator Trudy Wade, the primary sponsor of the Act, in connection with these claims,[1] and they object to the Magistrate Judge's order granting Senator Wade's motion to quash. *See* Doc. 113 (objecting to order at Doc. 111).

[1] The complaint also challenges a provision of the Act restricting referendum rights. Doc. 109 at ¶ 83. That claim is subject to a pending motion for judgment on the pleadings, *see* Doc. 95, which the Court has converted to a motion for summary judgment. The plaintiffs do not seek to depose Senator Wade in connection with that claim.

The Court has evaluated the topics on which the plaintiffs wish to depose Senator Wade in light of the elements of and defenses to the causes of action at issue.[2] The Court assumes without deciding that racial gerrymandering and one-person-one-vote cases give rise to a qualified exception to the general rule that state legislators cannot be required to testify about the deliberative process associated with passing legislation.[3] The Court further assumes without deciding that the five-part test discussed in *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014), is appropriately applied in this case. Applying this test, the Court finds that the Magistrate Judge was not clearly erroneous in deciding that the Court should not require Senator Wade to sit for a deposition.

This litigation is serious; it concerns the constitutional rights of the citizens of one of North Carolina's larger cities and the legislature's ability to pass legislation governing municipal structure and election processes. At the preliminary injunction stage, the plaintiffs presented substantial evidence in support of their one-person, one-vote claim.[4]

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[2] The subpoena is on the docket at Doc. 119-1. The plaintiffs' non-exhaustive list of topics on which they want to depose Senator Wade can be found in their briefing. Doc. 86 at 6; Doc. 113 at 7.

[3] *See, e.g., Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 333 (E.D. Va. 2015) (collecting and reviewing authorities and holding that the privilege is "qualified" in redistricting cases).

[4] The Court gives no weight to the opinion of Senator Wade's lawyer - unsupported by any evidence or reference to the factual record - that the plaintiffs' claims are "unsubstantiated" and that there is "no evidence of an equal protection . . . violation." Doc. 114 at 7-8; *see INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (declining to consider "[c]ounsel's unsupported assertions in respondent's brief" as evidence); *Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) (per curiam) ("An attorney's unsworn statements in a brief are not evidence."); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1358 (4th Cir. 1995) (holding jury was properly instructed

See Doc. 35 at 20. Senator Wade, as the primary sponsor of the statute at issue, Doc. 86 at 3, has specific knowledge of facts which would be relevant to this case, in which the plaintiffs must show that illegitimate reapportionment factors predominated over legitimate considerations in order to prevail on their one-person-one-vote claim[5] and must show that race predominated in connection with their racial gerrymandering claim.[6]

However, the plaintiffs have and may rely on other evidence, such as documents produced by the legislature,[7] legislative history, and testimony from legislators who are not invoking privilege, *see* Doc. 116 (listing two legislators as trial witnesses), as well as inferences drawn from circumstantial evidence.[8] The State and legislative leaders have chosen not to defend the Act, *see* Doc. 31-2 at 3, and thus this is not a situation where the plaintiffs are required to counter evidence from those actors while hamstrung by a

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that counsel's statements are not evidence); *Estrella v. Brandt*, 682 F.2d 814, 819 (9th Cir. 1982) (holding legal memoranda and oral argument are not evidence); *Skyline Corp. v. NLRB*, 613 F.2d 1328, 1337 (5th Cir. 1980) ("Statements by counsel in briefs are not evidence."); *Davidson v. Robertson*, No. 2:13-cv-1972-DCN, 2015 WL 1056975, at *2 (D.S.C. Mar. 10, 2015).

[5] *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016); *see also Roman v. Sincock*, 377 U.S. 695, 710 (1964).

[6] *See Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Shaw v. Hunt*, 517 U.S. 899, 907-08 (1996); *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

[7] The Magistrate Judge noted that a number of legislators and one legislative staff person produced documents in response to subpoenas duces tecum, and he ordered additional document production after the plaintiffs filed a motion to compel. *See* Doc. 111.

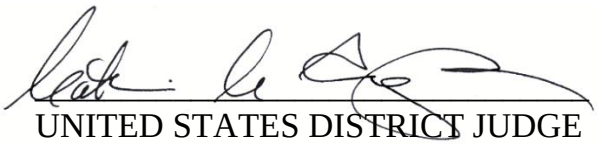
[8] *See Miller*, 515 U.S. at 913, 916 (noting that circumstantial evidence can be persuasive in racial gerrymandering case); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 347 n.7 (4th Cir. 2016) (stating "direct evidence is simply not required" in one-person, one-vote case and suggesting the lack of direct evidence is immaterial when it has "its roots" in an invocation of legislative immunity).

concomitant refusal to be deposed by the legislator most directly involved in the passage of the Act. Finally, a deposition of a legislator is the most intrusive form of inquiry into the legislative process and should be required only in the most unusual of circumstances, in deference to the values underlying the privilege itself.[9]

The Court concludes that the Magistrate Judge appropriately weighed these factors and appropriately granted the motion to quash.

It is **ORDERED** that the plaintiffs' objections, Doc. 113, to the Magistrate Judge's Order, Doc. 111, are **OVERRULED** and the motion to quash, Doc. 79, is **GRANTED**.

This the 26th day of January, 2017.



UNITED STATES DISTRICT JUDGE

[9] *See, e.g.*, *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011). Should it appear at trial that the need for Senator Wade's testimony outweighs the values underlying the privilege, the Court may reconsider the matter.