

**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 SUPPORT OF
MOTION TO QUASH SUBPOENA
SERVED ON SENATOR WADE

NOW COMES Senator Trudy Wade, by and through undersigned counsel, and hereby submit this memorandum in support of her motion to quash.¹

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

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]

Individual plaintiffs (hereinafter "plaintiffs") issued a subpoena to Senator Wade dated May 26, 2016, requiring her to appear and testify at a deposition on Friday, June 10, 2016 at 9:30 a.m. in Greensboro, North Carolina.

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. Despite having received nearly 1,000 documents, plaintiffs have moved to compel the production sought in the subpoenas and issued a subpoena to Senator Wade to appear and testify. In addition to this motion to quash, legislative respondents have filed

a response in opposition to plaintiffs' motion to compel, citing certain legislative privileges and immunities. [DE 77]

ARGUMENT

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 United States 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.” *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). The Supreme Court has expressly extended this protection to state legislators, *Tenney*, 341 U.S. at 372-76, with respect to actions within the “sphere of legitimate legislative activity.” *Tenney*, 341 U.S. at 377. 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).

The scope of legislative immunity is broad. Unlike many privileges, it does not simply attach to the content of communications. Rather, it encompasses all aspects of the legislative process and forbids plaintiffs from compelling Senator Wade to appear and testify. “Where, as here, the suit would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force.” *Schlitz*, 854 F.2d at 45. Indeed, speaking specifically in the context of a federal agency—the Equal Employment Opportunity Agency—attempting to subpoena a local governmental unit for records, the Fourth Circuit stated “[l]egislative privilege against compulsory evidentiary process exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes” and held that “if the EEOC or private plaintiffs sought to compel information from legislative actors about their legislative activities, *they would*

not need to comply.” *Wash. Suburban Sanitary Comm’n*, 631 F.3d at 181 (emphasis added).

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 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

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 that: “The Supreme Court has recognized 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 omitted). There is no logical argument that this rule would not extend to depositions.

In addition to the testimonial legislative immunity enjoyed by Senator Wade, it is anticipated that the information sought by plaintiffs is protected by legislative confidentiality pursuant to Article 17 of North Carolina General Statutes Chapter 120. Legislative confidentiality specifically includes testimony by legislative employees. N.C. Gen. Stat. § 120-132. In addition to the common law privilege addressed herein, N.C. Gen. Stat. § 120-9 protects the speech of members of the General Assembly, and by its enactment, establishes a statutory legislative immunity for those members.

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.

Simply put, the law is clear that Senator Wade is not required and cannot be required to comply with the subpoena to testify. *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. Legislative immunity provides the Senator with absolute protection from the subpoena to testify issued by plaintiffs. For this reason, the subpoena should be quashed.

CONCLUSION

For the foregoing reasons, Senator Wade respectfully prays that the Court quash the subpoenas served on her by plaintiffs.

This the 9th day of June, 2016.

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 SUPPORT OF MOTION TO QUASH SUBPOENA SERVED ON SENATOR WADE 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

Benton G. Sawrey
Narron, O'Hale & Whittington PA
P.O. Box 1567
Smithfield, NC 27577
bsawrey@nowlaw.com
Counsel for Defendant-Intervenors

This the 9th day of June, 2016.

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