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,	)	No. 1:15-cv-559
v.	)	
THE GUILFORD COUNTY BOARD OF ELECTIONS,	)	
Defendant.	)	

INDIVIDUAL PLAINTIFFS' OBJECTION TO ORDER OF DECEMBER 20, 2016 GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL AND GRANTING SENATOR TRUDY WADE'S MOTION TO QUASH

Pursuant to Federal Rule of Civil Procedure 72(a), Lewis A. Brandon III, Joyce Johnson, Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, Charli Mae Sykes, Maurice Warren II, and Georgeanna Butler Womack (hereinafter collectively "Individual Plaintiffs") hereby object to this Court's Order of December 20, 2016 Granting in Part and Denying in Part Individual Plaintiffs' Motion to Compel and Granting Senator Trudy Wade's Motion to Quash. Individual Plaintiffs object specifically to the Order's disposition of the Motion to Quash on the grounds that the Magistrate Judge's application of the law with respect to legislative privilege was clearly erroneous.

INTRODUCTION

On December 20, 2016, Magistrate Judge Joe L. Webster issued an order granting in part and denying in part Individual Plaintiffs' Motion to Compel Compliance with Subpoenas served on seven members and one research staff member of the North Carolina General Assembly (hereinafter "Legislative Respondents"), while granting the Motion to Quash Subpoena Served on Sen. Wade. Doc. 111 (hereinafter "Order"). Individual Plaintiffs do not object to the ruling on the motion to compel, but contend that granting the motion to quash bars Individual Plaintiffs from access to testimony that is highly relevant and uniquely probative of the legislative intent underlying Session Law 2015-138, especially considering the unusual legislative process by which this law was passed. Ascertaining the legislative intent of Sen. Wade, the sponsor of the bill, is relevant to Individual Plaintiffs' claim that Session Law 2015-138 violates their right to equal protection by illegitimately creating population deviations that afford greater weight to the votes of some Greensboro voters, and unconstitutionally used race in the construction of District 2.

The Magistrate Judge failed to correctly apply the law of legislative privilege to this case and erroneously granted Sen. Wade's motion to quash. When the five-part test applicable to claims of legislative privilege is appropriately analyzed in connection with the legislative re-redistricting of a city council that did not request it, with a highly irregular legislative process, closed-door meetings that changed votes and a conference committee report that did not accurately reflect committee proceedings, and where there is no other source of information regarding the legislative intent of the bill sponsor, it is

clear, as Magistrate Judge Webster found with respect to the motion to compel, that legislative privilege should yield to the very limited examination of Sen. Wade that Plaintiffs seek to conduct.

BACKGROUND

This action challenges the redistricting plan for the Greensboro City Council, enacted by the General Assembly in 2015 (Session Law 2015-138), as violating the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Individual Plaintiffs allege that the General Assembly's plan is unconstitutional because it creates population deviations that weight the votes of some Greensboro voters more heavily than others, for illegitimate reasons, and uses race unconstitutionally in the construction of District 2. The three Greensboro districts that are overpopulated when compared to an ideal district are all majority-minority districts. 2d Am. Compl. ¶ 45. Also, by redrawing the districts, the General Assembly pits all four black incumbents on the city council against each other while white incumbents are not similarly treated. *Id.* ¶ 52.

Sen. Wade was the primary sponsor of the bill that proposed to redistrict the Greensboro City Council. *See id.* ¶¶ 19, 26. Senate Bill 36, short titled "Greensboro City Council Changes," was filed February 4, 2015, by Sen. Wade. Senate Bill 36 created a seven single-member district plan for electing members of the Greensboro City Council. As originally filed, the bill made no mention of the ability of Greensboro, via the elected body itself or its citizens using their referendum power, to change the district lines in the future. *See* Senate Bill 36, North Carolina General Assembly, http://www.ncleg.net/

gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=SB36 (Edition 1) (last visited Dec. 23, 2016). The proviso limiting the city's authority to change its boundaries was added in the second edition of the bill, reported out of the Senate Redistricting Committee on March 10, 2015. *Id*. (Edition 2). The bill passed the Senate on March 12, 2015, and then moved to the House. It was assigned to the House Elections Committee, but never debated or voted upon by that committee. *Id.*

The failure of Senate Bill 36 to move through the House, though, was not the end of the story. On June 10, 2015, House Bill 263, short titled "City of Trinity Terms of Election," was modified without notice via a proposed committee substitute bill to include the contents of Senate Bill 36. *See* House Bill 263, North Carolina General Assembly, http://ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=h263 (*hereinafter* "H.B. 263 Legislative History") (Edition 2) (last visited Dec. 23, 2016). Until this point, House Bill 263 contained no provisions related to the Greensboro City Council. *See id.* (Edition 1). During the June 10, 2015, meeting of the Senate Redistricting Committee, Sen. Wade, described as the bill sponsor, briefly explained how the Greensboro provisions of House Bill 263 had changed since their initial presentation in Senate Bill 36—changes that were all minor. Beyond Sen. Wade's brief presentation, debate on House Bill 263 was extremely limited. No public comment was permitted during the committee meeting, and only one member of the Senate was permitted to speak in opposition to the bill. The entire process of introducing, explaining, debating, and voting to favorably report the committee substitute to House Bill 263 lasted less than fifteen minutes. *See* Ex. A to Pls.' Opp. to Mot. to Quash at 8-14, Doc. 86-1. This

substitute version of House Bill 263 passed the Senate on June 11, 2015, and moved to the House. *See* H.B. 263 Legislative History.

The House voted not to concur with the Senate's changes to House Bill 263 on June 29, 2015. *See id.* A conference committee was assembled to meet the following day to caucus on the rejected bill. *See id.* Among other things, the conference committee changed the plan to include eight, rather than seven, single-member districts. *See id.* (Ratified Edition). After the conference committee's report was made public, conference committee member Rep. John Blust stated publicly that the conference report presented to the House on July 2, 2015, did not accord with the report discussed in the conference committee on June 30.[1] When presented with the conference committee report at 11 AM on July 2, the House first voted down the bill. *See id.* Legislative leaders called for a session break, held a closed-door caucus meeting, and then moved to reconsider the bill forty-five minutes later. At that point, several Republican legislators changed their votes, and the conference report was adopted.[2] *See id.* The Senate approved the new law just minutes later, and it was enacted the same day as Session Law 2015-138. *See id.*

Following initiation of this lawsuit and this Court's entry of a preliminary injunction order, during discovery Individual Plaintiffs served upon Sen. Wade and other Legislative Respondents subpoenas for production of documents on February 22, 2016.

[1] Doug Clark, *The Mystery of the Fatal Changes to HB 263*, Greensboro News & Record (July 24, 2015), http://www.greensboro.com/blogs/clark_off_the_record/the-mystery-of-the- fatal-changes-to-hb/article_2e38efaa-31ff-11e5-9dc9-b332377e95a7.html.
[2] Colin Campbell & Taylor Knopf, *Accusations Fly as NC House Changes Course on Greensboro Redistricting*, News & Observer (July 2, 2015), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article26047744.html.

See ECF No. 74-1 (subpoenas *duces tecum* served on Legislative Respondents and Rep. John Blust). These requests were narrowly drawn to elicit documents relevant to this Court's consideration of the claims in this case. The documents Individual Plaintiffs sought from Sen. Wade relate to circumstances surrounding the General Assembly's enactment of Session Law 2015-138 and the development of the redistricting plan challenged in this litigation. Specifically, Individual Plaintiffs sought, among other things, communications with third parties on the topic and documents containing objective facts upon which the legislators relied. *See* ECF No. 74-1. Legislative Respondents largely resisted the subpoenas, producing only documents and emails between legislators and third parties, in an apparent concession that such documents were not privileged. On March 14, 2016, Rep. John Blust of Greensboro separately produced documents relating to the legislative process surrounding House Bill 263, and specifically relating to the conference committee meeting on June 30, 2015. *See* Ex. B to Pls.' Opp. to Mot. to Quash, Doc. 86-2.

The documents produced by Rep. Blust demonstrate two important facts relating to the unusual legislative process surrounding House Bill 263. First, Rep. Blust produced an alternative map that had, upon information and belief, been provided by Rep. Jon Hardister, also from Greensboro, to the conference committee on June 30. That map paired one fewer African-American city council incumbent. *See* Doc. 86-2 at 1; *see* Ex. C to Pls.' Opp. to Mot. to Quash at 8-14, Doc. 86-3. Second, emails produced by Rep. Blust establish that, in fact, the substance of the committee report did change from what the committee discussed on June 30 to what was presented to the House on behalf of the

conference committee on July 2. *See* Doc. 86-2, at 2-3. Rep. Pat Hurley, the primary House proponent of H.B. 263, admitted in an email to Rep. Blust that the bill had been changed from what the conference committee had agreed to. *Id.*

Individual Plaintiffs sought to depose Sen. Wade to inquire as to a number of issues, not limited to: her non-email communications with constituents and lobbyists relating to the Greensboro bill, and where those communications fell in the timeline of the changing bill; objective data, including reports and analyses, available to her at the time of the legislative action; her understanding and analysis of the Hardister map, which paired fewer black incumbents; the racial and partisan data available to her on a sub-precinct level that might have informed the splitting of precincts in District 2; and her awareness or possession of any racially polarized voting studies of Greensboro elections that might support the construction of an additional majority-black district. On June 9, 2016, Sen. Wade filed a motion to quash the May 26, 2016, subpoena for deposition in its entirety, arguing that legislative immunity, privilege, and state confidentiality laws completely relieved her of the obligation of having to comply with the subpoena.

On September 8, 2016, a hearing was held with respect to both the motion to compel and the motion to quash before Magistrate Judge Webster, who took the matters under advisement. On December 20, 2016, Magistrate Judge Webster issued the order in question, granting Sen. Wade's motion to compel, reasoning 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." Order at 14.

ARGUMENT

THE COURT SHOULD SUSTAIN THIS OBJECTION BECAUSE THE MAGISTRATE JUDGE'S ORDER IS CLEARLY ERRONEOUS

I. Standard of Review

If an objection is timely raised to a Magistrate Judge's ruling on a non-dispositive motion, the district court must review and "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see also Gemaehlich v. Johnson*, 599 Fed. App'x 473 (4th Cir. 2014). Although Magistrate Judges are typically afforded deference when ruling on discovery disputes, their rulings must nonetheless be vacated on review if found to be clearly erroneous or contrary to law. *N.C. State Conf. of NCAAP v. McCrory,* No. 1:13-cv-658, 2015 U.S. Dist. LEXIS 13648, at *16-*17 (M.D.N.C. Feb. 4, 2015) (hereinafter "*NC NAACP*"). A finding is clearly erroneous where the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Walton v. Johnson,* 440 F.3d 160, 173-74 (4th Cir. 2006). An order is contrary to law "if the magistrate judge failed to apply or misapplied statutes, case law, or procedural rules." *High Voltage Bevs., LLC v. Coca-Cola Co.,* No. 3:08-cv-367, 2010 U.S. Dist. LEXIS 63308, at *6 (W.D.N.C. June 8, 2010).

II. Legislative Privilege is Not Absolute and Appropriately Must Yield in Some Circumstances, as in the Instant Case

"[B]ecause '[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence,' any such privilege 'must be strictly construed.'" *United States v. Squillacote*, 221 F.3d 542, 560 (4th Cir. 2000) (quoting *Tramel v. United States*, 445 U.S. 40, 50 (1980)). As the

Supreme Court has noted, "where important federal interests are at stake," state legislative privilege must yield. *United States v. Gillock,* 445 U.S. 360, 373 (1980); *see also Doe v. Pittsylvania County,* 842 F. Supp. 2d 906, 921 (W.D. Va. 2012) (recognizing the "very strong federal interest in the enforcement of civil rights statutes that provide remedies for violations of the Constitution" and thus rejecting lawmakers' legislative privilege claims).

Courts apply a well-established five-factor test in determining whether legislative privilege ought to yield in a particular case, regardless of whether the privilege being invoked is testimonial or evidentiary. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100 (S.D.N.Y. 2003); *see also Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 666 (E.D. Va. 2014). Those factors include: (1) the relevance of the evidence sought to be protected; (2) the availability of other evidence; (3) the seriousness of the litigation and issues involved; (4) the role of the government in the litigation; and (5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. *Rodriguez*, 280 F. Supp. 2d at 101.

Additionally, particularly in voting rights cases, federal courts, including those in the Fourth Circuit, have routinely ordered compliance with subpoenas despite claims of legislative privilege. Indeed, citing the Supreme Court's holding in *Gillock,* numerous district courts in the Fourth Circuit have found a limited exception to legislative privilege in cases involving redistricting legislation. *See Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. May 26, 2015); *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d at 657, 665; *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D.

292, 292, 304 (D. Md. 1992). These courts have all noted that "[l]egislative redistricting is a *sui generis* process." *Marylanders*, 144 F.R.D. at 304; *see also Bethune-Hill*, 114 F. Supp. 3d at 331; *Page*, 15 F. Supp. 3d at 665. In *Bethune-Hill*, the court explained the unique nature of redistricting cases by noting that they are "extraordinary" and that "the natural corrective mechanisms built into our republican system of government offer little check upon the very real threat of 'legislative self- entrenchment.'" 114 F. Supp. 3d at 337 (citation omitted). Likewise, in *Page*, the court found that privilege should yield because of the *sui generis* nature of the redistricting at issue in that case. *See* 15 F. Supp. 3d at 665. The court there specifically held that the "significant difference [of redistricting cases] prompted the [*Marylanders*] court to require a flexible approach to resolving discovery objections based on legislative privilege." *Id.* Ultimately, based on the unique nature of redistricting cases, the *Bethune- Hill, Page*, and *Marylanders* courts all held that a flexible, qualified privilege analysis was required.

Similarly, a three-judge panel in a 2011 Texas redistricting case rejected legislative privilege claims there, noting that "any sort of blanket protective order that would insulate witnesses from testifying would be inappropriate." Order at 5, *Perez v. Texas,* No. 5:11-cv-360 (W.D. Tex. Aug. 1, 2011), ECF No. 102. Importantly, that court noted that "[e]ven if the deponent is entitled to invoke the privilege, the application of the privilege depends on the question being posed." *Id.* The court went on to explain:

> [T]he deponents must appear and testify even if it appears likely that the privilege may be invoked in response to certain questions. The deponents may invoke the privilege in response to particular questions, but the deponent must then answer the question subject to the privilege. Those portions of the deposition transcript may then be sealed and submitted to

> the Court for *in camera* review, along with a motion to compel, if the party taking the deposition wishes to use the testimony in these proceedings.

Id. at 5-6. That same panel again ordered legislators to sit for deposition in a later phase of that case, after the challenged plans had been amended by the legislature. *Perez*, No. 5:11-cv-360, 2014 U.S. Dist. LEXIS 1838, *19-*20 (W.D. Tex. Jan. 8, 2014).

Finally, in a recent voting rights challenge to a state voter ID law, a court in the Middle District of Tennessee refused to quash a deposition subpoena served on a state legislator despite claims of legislative privilege. *Nashville Student Organizing Comm. v. Hargett,* 123 F. Supp. 3d 967, 971 (M.D. Tenn. 2015). Applying the five-part balancing test, the *Nashville* court found that "permitting a refusal to testify or excluding relevant evidence" would not result in "a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id*. at 970 (internal citations omitted). Rather, the court found that voting rights cases in particular "implicate . . . the potential that a majority political party has attempted to entrench its own political power by limiting the ability of certain voters to influence . . . the election process," and permitting plaintiffs to take legislators' depositions "creates a more thorough record for the court to evaluate." *Id*. at 971. Accordingly, the court required legislators to attend the depositions and answer the questions posed by the plaintiffs' attorneys, ordering that the transcripts be filed under seal for *in camera* review as to what testimony should be deemed admissible. *Id.*

Though in his Order Magistrate Judge Webster utilized or acknowledged much of this body of law, his ultimate conclusion on the motion to quash appears to be in direct

contradiction to it. This clearly erroneous conclusion is the result of the Court's misapplication of the five-factor balancing test.

III. The Magistrate Judge's Application of the Balancing Test to the Facts Here Was Clearly Erroneous

This Court should find that Magistrate Judge Webster's order with respect to the motion to quash was clearly erroneous because he neglected to make findings of fact to support his application of the five-factor balancing test. Magistrate Judge Webster acknowledged that "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege," Order at 7 (quotations omitted), and further acknowledged that this need and the balancing test employed to discern its propriety may extend to allow for the deposition of legislators, *id.* at 14. Though he engaged in a thorough analysis of the balancing test spanning multiple pages with respect to the motion to compel, on the motion to quash the Magistrate Judge simply concluded that "upon applying the five-factor test to the facts of this particular case . . . the circumstances here are not so extraordinary as to require Sen. Wade to be deposed" without providing any analysis or detailing what facts led him to such a conclusion. As explained in the analysis of the five-factor test below, this conclusion is clearly erroneous in light of the facts and seemingly contradicts the Magistrate Judge's own analysis with respect to the motion to compel.

A. The Relevance of the Evidence and Seriousness of the Issues Being Litigated

With regard to two of the five factors, Individual Plaintiffs can readily make a very strong showing. In order to succeed on their Fourteenth Amendment one person,

one vote claim, Individual Plaintiffs must demonstrate that it is "more probable than not that [the] deviation of less than 10% reflect[ed] the predominance of illegitimate reapportionment factors." *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 16-1270, 2016 U.S. App. LEXIS 12136, at *10 (4th Cir. July 1, 2016) (hereinafter "*RWCA*") (quoting *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016)). In order to succeed on their racial gerrymandering claim, Individual Plaintiffs must demonstrate that race predominated in the way that District 2 lines were drawn. *Ala. Legis, Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015). Individual Plaintiffs seek to depose Sen. Wade on topics directly relevant to the showing they must make in order to establish these constitutional violations, including whether illegitimate reapportionment factors played a predominant role in the deviations among city council districts. Such illegitimate reapportionment factors could include partisan favoritism or an attempt to pair African-American or Democratic council incumbents in single-member districts.

The seriousness of the issue at stake here is clear. As the Fourth Circuit held just months ago in *RWCA*:

> The right to vote is fundamental, and once that right is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Indeed, allowing, through unequal apportionment amongst districts, a vote to be worth more in one district than in another would run counter to our fundamental ideas of democratic government.

2016 U.S. App. LEXIS 12136, at *9. Likewise, the unjustified drawing of district lines on the basis of race is serious and not to be tolerated: "A reapportionment plan that

includes in one district individuals who belong to the same race, but . . . who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Thus, the relevance of the evidence sought and the seriousness of the issues at stake weigh heavily in favor of enforcement of the deposition subpoena.

In his analysis of the balancing test as to the motion to compel, Magistrate Judge Webster acknowledged that the information sought was "highly relevant to the issues in this case," noting the importance of demonstrating discriminatory intent. Order at 8. Magistrate Judge Webster also concluded that the seriousness of the litigation "weighs in favor of disclosure," stating that "[c]ertainly the right to vote is fundamental." Order at 9. Despite these findings, however, Magistrate Judge Webster made no mention of these factors or how they should be weighted in his treatment of the motion to quash.

B. The Availability of Other Evidence

Because the legislative sponsors of Session Law 2015-138 are not proper subjects of Individual Plaintiffs' lawsuit, *see Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015), and have not intervened to defend the law they enacted, Individual Plaintiffs have no recourse short of deposing Sen. Wade to ascertain facts and information relevant to the constitutional questions at issue here.

One of the more common means of accessing information about legislative motive is essentially uninformative in the instant case. The Fourth Circuit relied upon *Arlington Heights* in stating that one method of proving discriminatory intent in Equal Protection cases is by using "contemporary statements by decision-makers on the record or in

minutes of their meetings." *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 819 (4th Cir. 1995) (citing *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977)). However, the legislative process here was extremely secretive and abnormal, with little, and sometimes no, public debate or explanation about the legislative motivations, particularly in reference to the deviations or the construction of District 2, and with the critical conference committee proceedings that resulted in an overnight overhaul of the plan occurring entirely behind closed doors and off the record. Thus, Individual Plaintiffs cannot avail themselves of such evidence.

Finally, production of some third-party emails is not an adequate substitute for deposing Sen. Wade. Many of the emails that were produced were simply forwarded documents, including no email text to provide context or explanation. *See* Ex. D to Pls.' Opp. to Mot. to Quash, Doc. 86-4 (a few examples of Sen. Wade emails that were simply forwarded material with no explanation). This strongly suggests that other communication, via phone or in-person conversation, provided the context for the emails. Those oral communications are no more privileged than the email communications, and without a deposition, Individual Plaintiffs will not be able to fully understand the potential influence that these non-privileged third-party communications had on the legislative process. Since there is little alternative evidence available to illuminate legislative intent, this factor weighs in favor of disclosure.

While Magistrate Judge Webster vaguely touched on this factor in his brief treatment of the motion to quash, he made findings that are clearly erroneous. In his Order, the Magistrate Judge stated that deposing Sen. Wade would be "far more

burdensome than any benefit from such testimony, particularly in light of the documents that Legislative Respondents are ordered to produce." Order at 14. Thus, it appears that Magistrate Judge Webster concluded that evidence not yet available to Individual Plaintiffs, the production of which is not a certainty, has negated Individual Plaintiffs' need to depose Sen. Wade. Because of the course of events surrounding passage of the legislation at issue here, that conclusion is wrong.

Magistrate Judge Webster himself has acknowledged "'the practical reality that officials seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority.'" Order at 9 (quoting *Bethune-Hill,* 114 F. Supp. 3d at 341). Though Individual Plaintiffs do not object to Magistrate Judge Webster's order as it pertains to the motion to compel, it is equally unlikely that Legislative Respondents will self-identify and produce documents and communications that "reflect a violation of the Equal Protection Clause of the Fourteenth Amendment," as this would require Legislative Respondents to characterize their own communications as demonstrating intent to violate the constitution. Order at 10. Additionally, requiring additional production will do little to nothing to provide context for the emails that have already been produced consisting only of forwarded material with no explanation. As stated above, the significance of these communications cannot be determined absent the ability to depose Sen. Wade. It was thus inappropriate for Magistrate Judge Webster to rely on uncertain and unclear future production in conducting this balancing test.

C. The Government's Role in the Litigation

Sen. Wade's role in this litigation—as the primary proponent of legislation to restructure the Greensboro City Council—weighs heavily in favor of any applicable legislative privilege yielding. Sen. Wade had a direct role in the sponsorship and passage of this unconstitutional mid-decade redistricting scheme. She and other members of the General Assembly, through its members, aides and consultants, were primarily responsible for drafting and revising the 2015 challenged plan, and it is these actions that are under scrutiny in this litigation. "[T]he decisionmaking process . . . [itself] *is* the case." *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11-c-5065, 2011 U.S. Dist. LEXIS 117656, at *28-*29 (N.D. Ill. Oct. 12, 2011) (emphasis and alternation in original). Though in his analysis of the motion to compel Magistrate Judge Webster concluded that "'the legislature's direct role in the litigation supports overcoming the privilege,'" Order at 9 (quoting *Bethune-Hill,* 114 F. Supp. 3d at 341), he made no mention of Sen. Wade's integral role in his brief treatment of the motion to quash. Ignoring that fact led him to erroneously conclude that the motion to quash should be granted.

D. The Information Requested Will Not Cause Future Timidity Among Government Employees

Concerns that allowing the subpoena to stand might inhibit legislative deliberations during future legislative activity should weigh less heavily in favor of the privilege in voting rights cases because the intent behind passing the challenged legislation plays a different role from that in, for example, a civil suit seeking the legislative intent in a statutory construction case. *See Baldus v. Members of the Wis.*

Gov't Accountability Bd., No. 11-cv-562, 2011 U.S. Dist. LEXIS 142338, at *2 (E.D. Wis. Dec. 8, 2011) (denying motion to quash and permitting deposition of a legislative aide in redistricting case). Moreover, policy concerns here weigh in favor of the privilege yielding in voting rights cases. Unlike legislative privilege that "encourages the republican values it promotes" as described by the Fourth Circuit, *see EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011), allowing legislators to completely obscure judicial inquiry in cases like this one would insulate legislators' exclusion of citizens from the democratic process.

Additionally, many of the questions that will be posed to Sen. Wade during deposition will not have anything to do with privileged deliberations or motivations, or, even more significantly, will involve areas in which the legislative privilege has been waived, such as in communications with third parties. Thus, where the privilege does not exist, or where it has been waived, there can be no deterrent effect from allowing the deposition to proceed.

Finally, the court can require *in camera* review before admitting the information into evidence or otherwise allowing disclosure. Just as in *Nashville* and *Perez,* this Court should allow the deposition to proceed under seal, and once the questions posed have been answered, then, with a full picture of whether the benefits of disclosure outweigh the privilege, make a ruling on whether or not to exclude the allegedly privileged information. *Nashville,* 123 F. Supp. at 971; Order at 5-6, *Perez*, No. 5:11-cv-360 (W.D. Tex. Aug. 1, 2011), ECF No. 102.

In his discussion of the motion to compel, Magistrate Judge Webster

acknowledged that "the threat to this interest is substantially lowered when individual legislators are not subject to liability." Order at 10 (quoting *Bethune-Hill,* 114 F. Supp. 3d at 342). While with respect the motion to compel the Magistrate Judge concluded that this factor should weigh in favor of Individual Plaintiffs, he made no mention of it with respect to the motion to quash. The Magistrate Judge merely stated, without explanation, that requiring a deposition would be intrusive and a burden upon Sen. Wade. Order at 14. Absent a thorough analysis detailing why the balancing test should yield a different result for Sen. Wade on this factor with respect to the motion to quash where the surrounding circumstances are largely identical to those for Legislative Respondents on the motion to compel, this Court should not allow Magistrate Judge Webster's decision to grant the motion to quash to stand.

IV. This is That Extraordinary Instance Where a Legislator Should Be Forced to Sit For a Deposition

Magistrate Judge Webster recognized the Supreme Court's holding that "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of . . . official action," Order at 14 (quoting *Arlington Heights,* 429 U.S. at 268), but simply concluded—contrary to the facts—"that the circumstances here are not so extraordinary." *Id.* This Court should find Magistrate Judge Webster's conclusion clearly erroneous upon closer examination of the facts.

Certainly the fact that the right of Individual Plaintiffs to vote on an equal basis with other Greensboro residents is at stake alone warrants the enforcement of the deposition subpoena. But beyond that, the indicia of something awry in the legislative

process here also strongly weigh in favor of enforcing the subpoena. In particular, three facts raise the specter of improper legislative activity, and warrant further judicial inquiry: (1) on July 2, 2015, the House voted down the modified House Bill 263, and only after going into a closed-door caucus meeting did enough Republican legislators change their vote in order to secure passage of the bill; (2) the conference committee had in front of it a redistricting plan that paired fewer African-American incumbents, but instead favorably reported out a plan that paired every African-American incumbent on the City Council; and (3) the conference committee report changed between what was actually discussed in committee and what was presented to the House on the committee's behalf. Each of these events suggests that illegitimate motivations, something that needed to be hidden, may have been at play in the enactment of House Bill 263, and this is certainly a case in which this Court would be amply justified in ordering a legislator to be deposed under seal for *in camera* review. *See Nashville,* 123 F. Supp. at 971; Order at 5-6, *Perez*, No. 5:11-cv-360 (W.D. Tex. Aug. 1, 2011), ECF No. 102. Magistrate Judge Webster's finding to the contrary should leave this Court with a "definite and firm conviction that a mistake has been committed." *Walton v. Johnson,* 440 F.3d at 173-74.

CONCLUSION

For the foregoing reasons, Individual Plaintiffs respectfully request that this Court sustain this Objection, set aside Magistrate Judge Webster's December 20, 2016 decision, and deny Senator Wade's Motion to Quash.

Respectfully submitted this 23rd day of December, 2016.

/s/ Emily E. Seawell
Anita S. Earls
N.C. State Bar No. 15597
Allison J. Riggs
N.C. State Bar No. 40028
Emily E. Seawell
N.C. State Bar No. 50207
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380, ext. 115
Facsimile: 919-323-3942
emily@southerncoalition.org

Counsel for Individual Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this day electronically filed the foregoing in the above-titled action with the Clerk of the Court using the CM/ECF system, which will serve via electronic mail the following:

Mark Payne, County Attorney
GUILFORD COUNTY
ATTORNEY'S OFFICE
P.O. Box 3427
Greensboro, NC 27402
mpayne@co.guilford.nc.us

Counsel for Defendant

Alexander McC. Peters
apeters@ncdoj.gov
Melissa L. Trippe
mtrippe@ncdoj.gov
NORTH CAROLINA
DEPT. OF JUSTICE
P.O. Box 629
Raleigh, NC 27602

Counsel for Senator Trudy Wade

Jim W. Phillips, Jr.
jphillips@brookspierce.com
Julia C. Ambrose
jambrose@brookspierce.com
Bryan Starrett
bstarrett@brookspierce.com
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD LLP
P.O. Box 26000
Greensboro, NC 27420-6000

Counsel for the City of Greensboro

Respectfully submitted this 23rd day of December, 2016.

/s/ Emily E. Seawell
Emily E. Seawell

Counsel for Individual Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ; HAROLD DUTTON, JR.; GREGORY TAMEZ; SERGIO SALINAS; CARMEN RODRIGUEZ; RUDOLFO ORTIZ; NANCY HALL and DOROTHY DEBOSE

Plaintiffs

-and-

EDDIE BERNICE JOHNSON, SHEILA JACKSON-LEE, and ALEXANDER GREEN, MEMBERS OF THE UNITED STATES CONGRESS

-and-

TEXAS LEGISLATIVE BLACK CAUCUS, TEXAS HOUSE OF REPRESENTATIVES

-and-

TEXAS STATE CONFERENCE OF NAACP BRANCHES; HOWARD JEFFERSON, JUANITA WALLACE and REV. BILL LAWSON

Plaintiff-Intervenors

v.

STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas

Defendants

CIVIL ACTION NO.
11-CA-360-OLG-JES-XR
[Lead case]

MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC) Plaintiffs -and- THE HONORABLE HENRY CUELLAR, Member of Congress, CD 28; THE TEXAS DEMOCRATIC PARTY and BOYD RICHIE, in his official capacity as Chair of the Texas Democratic Party; and LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) and its individually named members Plaintiff-Intervenors v. STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; Defendants	CIVIL ACTION NO. SA-11-CA-361-OLG-JES-XR [Consolidated case]
TEXAS LATINO REDISTRICTING TASK FORCE, JOEY CARDENAS, ALEX JIMENEZ, EMELDA MENENDEZ, TOMACITA OLIVARES, JOSE OLIVARES, ALEJANDRO ORTIZ, AND REBECCA ORTIZ Plaintiffs v. RICK PERRY, in his official capacity as Governor of the State of Texas Defendants	CIVIL ACTION NO. SA-11-CA-490-OLG-JES-XR [Consolidated case]

MARGARITA V. QUESADA; ROMEO MUNOZ; MARC VEASEY; JANE HAMILTON; LYMAN KING; and JOHN JENKINS Plaintiffs v. RICK PERRY, in his official capacity as Governor of the State of Texas; and HOPE ANDRADE, in her official capacity as Secretary of State for the State of Texas Defendants	CIVIL ACTION NO. SA-11-CA-592-OLG-JES-XR [Consolidated case]

JOHN T. MORRIS Plaintiff v. STATE OF TEXAS; RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; and HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas Defendants	CIVIL ACTION NO. SA-11-CA-615-OLG-JES-XR [Consolidated case]

EDDIE RODRIGUEZ, MILTON GERARD WASHINGTON, BRUCE ELFANT, ALEX SERNA, SANDRA SERNA, BETTY F. LOPEZ, DAVID GONZALEZ, BEATRICE SALOMA, LIONOR SOROLA-POHLMAN; ELIZA ALVARADO; JUANITA VALDEZ-COX; JOSEY MARTINEZ; NINA JO BAKER; TRAVIS COUNTY and CITY OF AUSTIN Plaintiffs v.	

RICK PERRY, in his official capacity as Governor of the State of Texas; DAVID DEWHURST, in his official capacity as Lieutenant Governor of the State of Texas; JOE STRAUS, in his official capacity as Speaker of the Texas House of Representatives; HOPE ANDRADE, in her official capacity as Secretary of State of the State of Texas; STATE OF TEXAS; BOYD RICHIE, in his official capacity as Chair of the Texas Democratic Party; and STEVE MUNISTERI, in his official capacity as Chair of the Republican Party of Texas Defendants	)	CIVIL ACTION NO. SA-11-CA-635-OLG-JES-XR [Consolidated case]

ORDER

Pending before the Court is Defendants' Motion for Protective Order (Dkt. # 62). The Texas Democratic Party (TDP) and Boyd Richie filed a response (Dkt. # 74). The Texas Latino Redistricting Task Force (LULAC) and its individuals members also filed a response (Dkt. # 88). The NAACP Plaintiff-Intervenors filed a response as well (Dkt. # 87).

In their motion, Defendants seek a protective order to "preserve the legislative privilege of witnesses called to testify in this case." (Dkt. # 62, p. 2). Defendants assert that their witnesses will likely face questioning on issues that are integral to the legislative process and that answering such questions will "invade the witnesses' legislative privilege." (Dkt. # 62, p. 2).

The TDP and Mr. Richie contend that a protective order is unwarranted. They claim that Defendants intend to use the privilege as both a sword and a shield and the privilege, if applicable, is qualified and may be waived. The LULAC Plaintiffs contend that the privilege does not apply or, alternatively, that it should be narrowly construed. The NAACP Plaintiffs contend that a blanket protective order would clearly be inappropriate, and if the Court makes any ruling, it should be based on the question being posed to each particular witness.

The Court understands that depositions will begin tomorrow; thus, it has reviewed the motion, response and applicable law in advance thereof. After such review, it clearly appears that any sort of blanket protective order that would insulate witnesses from testifying would be inappropriate. As an evidentiary and testimonial privilege, the legislative privilege is limited and qualified. In re Grand Jury, 821 F.2d 946, 957-58 (3rd Cir. 1987). The privilege may obviously be asserted by legislators and congressmen, who have a function and role in the legislative process. The privilege may also apply to staffers, aides or employees, with certain limitations. Gravel v. United States, 408 U.S. 606, 621-22, 92 S.Ct. 2614 (1972). However, the privilege does not apply to every person who may be deposed in this case, nor does it apply to every question that may be asked during deposition. The privilege is personal to each person who may be entitled to invoke it, and that person may choose to waive the privilege. Even if the deponent is entitled to invoke the privilege, the application of the privilege depends on the question being posed. Even if the privilege is asserted, it may be waived and/or the Court may find that it should not be enforced based on the information being sought and/or other circumstances that may not be readily apparent, such as whether the evidence is available from other sources.

For these reasons, the Court finds that the assertion of the privilege is premature.[1] The Court cannot provide blanket protection to every person who may choose to assert the privilege during the discovery process. Instead, the parties should proceed with depositions and the deponents must appear and testify even if it appears likely that the privilege may be invoked in response to certain questions. The deponents may invoke the privilege in response to particular questions, but the deponent must then answer the question subject to the privilege. Those portions of the deposition

---

[1]Florida Association of Rehabilitation Facilities, Inc. v. State of Florida, 164 F.R.D. 257, 260 (N.D. Fla. 1995)(question as to whether privilege applied was not ripe when witnesses had not appeared and asserted privilege in the context of specific questions).

transcript may then be sealed and submitted to the Court for *in camera* review, along with a motion to compel, if the party taking the deposition wishes to use the testimony in these proceedings. In other words, the testimony will not be disclosed or used unless the Court finds that the privilege does not apply, has been waived and/or should not be enforced.

It is therefore ORDERED that Defendants' Motion for Protective Order (Dkt. # 62) is DENIED without prejudice.

ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

And on behalf of:

Jerry E. Smith
United States Circuit Judge
U.S. Court of Appeals, Fifth Circuit

-and-

Xavier Rodriguez
United States District Judge
Western District of Texas