IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. STATE OF NORTH CAROLINA, *et al.* Defendants.	)	**LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH OR MODIFY SUBPOENA**

INTRODUCTION

Only one week prior to this Court's hearing on the remedy set for July 27, 2017 (but an entire week after the Court set the hearing date), plaintiffs served a subpoena for testimony on Rep. David Lewis. Plaintiffs intend to question Rep. Lewis regarding the legislature's 2017 remedial redistricting plans, none of which have been enacted yet. Rep. Lewis is entitled to legislative privilege from testifying about redistricting plans that do not even exist. Rep. Lewis has not waived his legislative privilege regarding the 2017 remedial plans and plaintiffs' subpoena is simply a blatant fishing expedition and attempt to chill the policymaking rights of Rep. Lewis and other legislators in connection with those plans. Accordingly, this subpoena should be quashed. Alternatively, the Court should modify the subpoena to limit any testimony by Rep. Lewis to redistricting plans on which Rep. Lewis has already waived his legislative privilege, namely, the 2011 legislative and congressional plans, and the 2016 congressional plan, or to information about the 2017 redistricting plans that is publicly known, unless any such testimony or

information is based on statements from legislators who have not waived legislative privilege.

STATEMENT OF FACTS

In response to this Court's August 11, 2016 order striking down several legislative districts for the North Carolina Senate and North Carolina House of Representatives, the legislature on June 29, 2017 created redistricting committees in those legislative chambers. Rep. Lewis is the Chairman of the House Select Committee on Redistricting, the committee that will lead the 2017 legislative redistricting process on behalf of the North Carolina House of Representatives. Unless otherwise ordered by this Court, the legislature intends to enact remedial House and Senate districts ("2017 plans") no later than November 15, 2017. The 2017 plans have not been enacted and do not exist.

In 2011, Rep. Lewis was also the Chairman of the House redistricting committee which led the redistricting process for that chamber. The 2011 legislature enacted House and Senate redistricting plans in July 2011 ("2011 plans"). In subsequent litigation regarding those plans, Rep. Lewis waived his legislative immunity and privilege, and testified and produced documents regarding those plans. Rep. Lewis did not waive any such immunity or privilege prior to enactment of the plans.

In 2016, Rep. Lewis was the Chairman of the House redistricting committee which led the redistricting process for that chamber when the legislature enacted a remedial congressional plan ("2016 plan"). In subsequent litigation regarding that plan, Rep. Lewis waived his legislative immunity and privilege, and testified and produced

documents regarding that plan. Rep. Lewis did not waive any such immunity or privilege prior to enactment of the 2016 plan.

On July 13, 2017 this Court entered an order setting a hearing on the remedial issues in this case. D.E. 165. One week later, on July 20, 2017, plaintiffs served a subpoena on Rep. Lewis directing him to appear for this hearing and provide testimony (the "Subpoena"). The Subpoena does not specify the substance of Rep. Lewis's expected testimony and does not request the production of documents. While plaintiffs have agreed not to ask Rep. Lewis questions that would require the disclosure of information protected by the attorney-client privilege, plaintiffs have refused to refrain from asking Rep. Lewis questions protected by legislative privilege.

ARGUMENT

Rule 45, Fed. R. Civ. P., provides that a "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). When such steps are not taken, Rule 45 allows the Court to quash the subpoena. The rule requires the Court to quash the subpoena when the subpoena "subjects a person to undue burden" or "requires disclosure of privileged or other protected matter." Fed. R. Civ. P. 45(d)(3)(A). The Subpoena directed to Rep. Lewis violates both of these prohibitions and should therefore be quashed.

I. The Subpoena Imposes an Undue Burden on Rep. Lewis.

In assessing undue burden, Rule 45 requires courts to "weigh the burden to the subpoenaed party against the value of the information to the serving party" and also

consider "the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena." *Schaaf v. Smithkline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005) (quoting *Heat & Control, Inc. v. Hester Indus.*, 785 F.2d 1017, 1024 (Fed. Cir. 1986)).

The burden on Rep. Lewis to appear for this hearing is unwarranted and significant. First, plaintiffs provided scant notice to Rep. Lewis. Plaintiffs could have provided notice to Rep. Lewis or his counsel as early as July 13, 2017 of plaintiffs' desire to call Rep. Lewis as a witness at the July 27, 2017 hearing. Instead, plaintiffs waited an entire week to serve the Subpoena. Moreover, while Rep. Lewis intends to appear at the hearing unless the Subpoena is quashed, his appearance comes at significant disruptions to his personal and professional commitments. His appearance also threatens to dispense with the legislative privilege he is entitled to as a state legislator. *See infra* at 5-10.

The burden on Rep. Lewis's personal and professional commitments is not warranted by the relevance of any testimony Rep. Lewis could possibly provide at the hearing, even without legislative privilege. Plaintiffs presumably want to engage Rep. Lewis about the substance of the to-be-enacted 2017 plans, including the process the redistricting committees will employ and other unknowns regarding the plans. Rep. Lewis, however, cannot speak for the entire House Select Committee on Redistricting or the entire House of Representatives, much less the State Senate or its redistricting committee. As the legislative process for enacting new 2017 plans takes shape, many decisions will be made by the various redistricting committees and the house and senate chambers. Rep. Lewis cannot possibly speak to decisions that have not been made by

legislative bodies consisting of dozens of members besides him. Accordingly, Rep. Lewis should not have his personal and professional commitments upended for a fishing expedition that cannot lead to a single relevant catch. The Subpoena should therefore be quashed.

II. The Subpoena Improperly Ignores Rep. Lewis's Legislative Privilege.

The Subpoena is not simply a discovery request to a legislator. It is a command to provide live testimony on a quintessentially legislative issue. Moreover, his testimony would cover a legislative issue – 2017 redistricting – that has not even been resolved or enacted.

The doctrines of legislative immunity and legislative privilege have withstood the test of time. The reason for their longevity lies in the chilling effect the lack of the privilege would have in civil cases challenging duly enacted laws by the people's elected representatives. If state legislators considering and deliberating over important public policies must worry that their political adversaries through civil litigation will be able to discover their confidential deliberations, they will decline to engage in the robust discussion and research necessary for the enactment of laws important to the entire State. Thus, having lost at the ballot box, having lost in legislative committees, and having lost a floor vote on a particular policy choice, political adversaries of the legislative majority may be empowered to effectively inhibit legislators—the direct representatives of the people—from making public policy decisions they deem to be in the best interests of the State.

The Fourth Circuit has emphasized the protective value of the State legislative privilege. In *EEOC v. Wash. Suburban Sanitary Comm'n,* 631 F.3d 174 (4th Cir. 2011), the court explained, "[l]egislative privilege against compulsory evidentiary process exists to safeguard ... legislative immunity and to further encourage the republican values it promotes." *Id.* at 181. Legislative privilege also enables legislators and their staff "to focus on their public duties by removing the costs and distractions attending lawsuits." *Id.* Recognizing the importance of the privilege, the Fourth Circuit forecasted that "if [the parties] sought to compel information from legislative actors about their legislative activities, they would not need to comply." *Id.*

The Fourth Circuit's broad view of immunity and privilege is consistent with the Supreme Court's long-held view that, "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). The Fourth Circuit's broad view of immunity and privilege is also consistent with the Supreme Court's established recognition of a broad right "of legislators to be free from arrest *or civil process* for what they do or say in legislative proceedings." *Tenney*, 341 U.S. at 372 (emphasis added). Recognizing the broad reach of *Tenney*, 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. . . . Legislative immunity thus reinforces representative democracy, fostering public decision making by public servants for the right reasons.

Wash. Suburban Sanitary Comm'n, 631 F.3d at 181. Moreover, the Supreme Court has mandated that legislative immunity, and privileges flowing from it, be interpreted "broadly to effectuate its purposes." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975).

As applied to testimony regarding legislative motive and related matters, the Fourth Circuit has enforced legislative privilege to prohibit such testimony. Indeed, 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.'" *North Carolina State Conference v. McCrory*, D.E. 93 at p. 23 in Case No. 13-861, Order (May 15, 2014) (citing *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 45 (4th Cir. 1988) (quoting *Tenney*, 341 U.S. at 376)); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 305 (D. Md. 1992) (opinion of Murnaghan, Circuit Judge, and Motz, District Judge) (finding that depositions of state legislators would be improper "as to any action which they took after the redistricting legislation reached the floor of the General Assembly"); *Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (holding that state legislators in a case brought under Section 5 of the VRA were privileged from testifying regarding the "reasons for their votes"); *Backus v. South Carolina*, Case No. 3:11-cv-03120-HFF-PMD, Order (D.S.C. Feb. 8, 2012) (quashing

notice of deposition as to "any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation"). Other courts have recognized that the privilege even applies to efforts to gather and process information for possible legislative action. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 416 (D.C. Cir. 1995) (protecting the information-gathering process, including lawmakers' sources of information); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983) (legislator's receipt of "information pertinent to potential legislation or investigation" is protected part of the legislative process).

In *McCrory*, the court outlined the importance that courts have consistently assigned to legislative privilege, especially where a legislator is being asked to testify regarding legislative actions:

> Other courts have similarly illuminated the importance of legislative privilege in the face of discovery demands. In *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992), a challenge to the constitutionality of a Maryland redistricting plan, a three judge panel in the District Court for Maryland held that "[t]he doctrine of legislative immunity (both in its substantive and testimonial aspects) itself embodies fundamental public policy. It insulates legislators from liability for their official acts and shields them from judicial scrutiny into their deliberative processes." *Id.* at 304 (Murnaghan and Motz, JJ.) (footnote omitted). Acknowledging, however, that legislative privilege is qualified, not absolute, the panel permitted the deposition of three private citizens who were part of a five-member State committee that also included two State legislators. *Id.* at 304–05. The decision went on to predict, "We too, however, would flatly prohibit [the two State legislators'] depositions from being taken as to any action they took after the [relevant] legislation reached the floor of the [legislature]." *Id.* at 305. As a result, the *Marylanders* court refused to permit the taking of either legislators' deposition but permitted the deposition of the three private citizens on the committee, thus allowing for discovery "without directly impacting upon legislative sovereignty." *Id.*

> The District Court for South Carolina evinced a similar respect for legislative sovereignty when faced with requests for depositions of State legislators. In a case alleging racial gerrymandering under § 2 of the VRA as well as the Fourteenth and Fifteenth Amendments, that court unequivocally "prohibit[ed] Plaintiffs from inquiring into any matters protected by legislative privilege." *Backus v. South Carolina*, 3:11-cv-03120 (D.S.C. Feb. 08, 2012) (Doc. 103 in case 3:11CV3120 at 2). The court stated further, "That means Plaintiffs are prohibited from asking any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation." *Id.*
>
> Courts outside of this circuit also acknowledge the importance of legislative privilege. *See Florida*, 886 F. Supp. 2d at 1304 (resisting the United States' effort to obtain discovery of State legislators in a preclearance action under § 2 of the VRA and noting, "[T]he legislators have a federal legislative privilege — at least qualified, if not absolute — not to testify in this civil case about the reasons for their votes. The privilege is broad enough to cover all the topics that the intervenors propose to ask them and to cover their personal notes of the deliberative process."); *Favors*, 285 F.R.D. at 220 (in redistricting challenge, recognizing that disclosure of legislator communications may "inhibit full and frank deliberations"); *Rodriguez [v. Pataki*, 280 F. Supp. 2d 89, 102–03 (S.D.N.Y. 2003)] (in redistricting challenge, denying motion to compel production of documents concerning deliberations solely among legislators); *Comm. for a Fair & Balanced Map [v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *8 (N.D. Ill. Oct. 12, 2011)] (noting in redistricting challenge that "the need to encourage frank and honest discussion among lawmakers favors nondisclosure.").

North Carolina State Conference v. McCrory, 2015 WL 12683665, at *5-6 (M.D.N.C. Feb. 4, 2015).

These considerations apply with even greater force here where Rep. Lewis is not only being directed to testify about legislative matters, the legislation he will be asked about does not even exist. Legislative privilege exists so that "full and frank" legislator communications are not inhibited, *Favors v. Cuomo*, 285 F.R.D. 187, 220 (E.D.N.Y. 2012), and that legislators have the freedom to engage in "frank and honest" discussions

among their colleagues. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8. Nowhere is this more needed than in redistricting, an inherently political and extremely difficult legislative exercise.

Plaintiffs' Subpoena threatens to inhibit full, frank, and honest discussions by Rep. Lewis with his colleagues, and will have the effect of affirmatively impeding those discussions and even dissuading Rep. Lewis from having those discussions at all. Rep. Lewis should not be forced to answer questions about a legislative process that has not yet taken place before he has had an opportunity to engage his colleagues in the legislative give and take that will inevitably produce new redistricting plans in 2017. When weighed against the minimal, if any, relevance Rep. Lewis's testimony may bring to bear on the issues facing the Court in the remedial hearing, the intrusion into the legislative privilege requested by plaintiffs is wholly unwarranted and should be denied.

CONCLUSION

The legislative defendants request the Court to quash or modify the Subpoena as requested above, award their reasonable costs and attorney's fees, and other and further relief as the Court deems just and proper.

This the 25th day of July, 2017.

OGLETREE, DEAKINS, NASH
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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing **LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH OR MODIFY SUBPOENA** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 25th day of July 2017.

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