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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426
21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al.,

Plaintiffs,

vs.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

REBECCA HARPER, et al.,

Plaintiffs,

vs.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

MOTION FOR PROTECTIVE ORDER QUASHING NOTICES OF DEPOSITION OF PRESIDENT *PRO TEMPORE* PHILIP E. BERGER, SENATOR WARREN DANIEL, SENATOR PAUL NEWTON AND SPEAKER TIMOTHY K. MOORE

NOW COMES President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Paul Newton, and Speaker Timothy K. Moore (collectively, "Movants"), by and though undersigned counsel and pursuant to Rules 7(b) and 26(c) of the North Carolina Rules of Civil Procedure, and hereby move this Court for a Protective Order providing that the depositions sought by Plaintiffs' Notices of Depositions (attached hereto as Exhibit 1) in the above captioned action not be had on the grounds that (1) each of the Movants is entitled to legislative immunity, and (2) the willingness of non-moving Legislative Defendants to submit to depositions renders depositions

of Movants unnecessary. These two bases constitute good cause under Rule 26(c) for a Protective Order quashing Plaintiffs' Notices of Deposition as to Movants. In support of their motion, Movants show the Court as follows:

1. As described by the U.S. Court of Appeals for the Fourth Circuit, "[l]egislative immunity's practical import is difficult to overstate." *E.E.O.C V. Washington Suburban Sanitary Com'n*, 631 F.3d 174, 181 (4th Cir. 2011). It "provides legislators with the breathing room necessary to make [many of our toughest decisions] in the public's interest." *Id.* "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." *Id.* "Legislative immunity thus reinforces representative democracy, fostering public decision making by public servants for the right reasons." *Id.*

2. Plaintiffs' Notices of Deposition to Movants directly undercut these goals. Their lawsuits endeavor to employ litigation for political gain by overturning redistricting plans created through a process that was the most transparent redistricting process in North Carolina history, by a General Assembly elected shortly before the redistricting process challenged here, under maps expressly held constitutional by this State's courts less than two years prior. In other words, political opponents seek to defeat Movants through litigation after being unable to do so through the ballot box. Plaintiffs' Notices of Deposition divert Movants' attention away from their public duties and violate the well-established and well-settled doctrine of legislative immunity. Accordingly, Movants respectfully ask this Court to acknowledge Movants' assertion of legislative immunity and enter a Protective Order quashing the notices of deposition to President *Pro Tempore* Berger, Senator Daniel, Senator Newton, and Speaker Moore.

3. Prior to filing this motion, counsel for Legislative Defendants and counsel for Plaintiffs conferred on this matter via emails attached hereto as Exhibit 2. Counsel for *Harper* Plaintiffs took the position that Legislative Defendants could not introduce evidence from any witness, including Representative Hall or Senator Hise, who has agreed to waive legislative privilege "that otherwise seeks to explain the General Assembly's intent in drawing the challenged district plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data." *See* Ex. 2 p. 4, purporting to quote a 7/17/19 Order in *Common Cause v. Lewis.*[1] As shown in Exhibit 3, *Harper* Plaintiffs' interpretation of the 7/17/19 Order broadens it significantly from the actual holding, where the Court did, in fact, not impose a blanket limitation on testimony that would shed light on the intent behind the districts, but instead, imposed limitations as to the communications with legislators and staff members who had asserted legislative privilege. *See* Ex. 3 p. 5. Counsel for Legislative Defendants clarified this position, and further clarified that Senator Hise and Representative Hall would not "be using the privilege as a sword in any way" on December 21, 2021. Counsel for Legislative Defendants again asked that the notices of deposition for the Legislators asserting immunity be withdrawn in an effort to avoid motions practice. *See* Ex. 2 p. 3. Counsel for *Harper* Plaintiffs responded that they did not intend to withdraw the notices but opined that the "proper course would be for [Movants] to serve a formal objection on the basis of legislative privilege." *See* Ex. 2 pp. 2-3. Given that the North Carolina Rules of Civil Procedure do not contain a procedure for such objections to deposition notices to named parties, counsel for Legislative Defendants sought clarification on *Harper* Plaintiffs' position. *See* Ex. 2 pp. 1-2. At 10:27 a.m. today, counsel for *Harper* Plaintiffs advised

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[1] This order was actually entered on July 16, 2019 and served on July 17, 2019. A copy of the order is attached hereto as Exhibit 3.

counsel for Legislative Defendants that they would need to seek a protective order. *See* Ex. 2, p. 1.

4. "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (i) that the discovery not be had…" N.C. Gen. Stat § 1A-1, Rule 26(c) (2021).

5. Protective Orders issued under Rule 26(c) are "discretionary" and "reviewable only for abuse of discretion." *Williams v. State Farm Mut. Auto. Ins. Co.*, 67 N.C. App. 271, 273, 312 S.E.2d 905, 907 (1984) (citing *Booker v. Everhart*, 33 N.C. App. 1, 9, 234 S.E.2d 46. 53 (1977), *rev'd on other grounds*, 294 N.C. 146, 240 S.E.2d 360 (1978)).

6. Under well-settled North Carolina law, "[i]ndividuals . . . are entitled to absolute legislative immunity for all actions taken in the sphere of legitimate legislative activity." *Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, 281, 523 S.E.2d 743, 749, *aff'd in part, review dismissed in part on other grounds*, 352 N.C. 671, 535 S.E.2d 32 (2000) (internal quotations removed) (quoting *Bogan v. Scott–Harris*, 523 U.S. 44, 54, 118 S. Ct. 966, 972, 140 L.Ed.2d 79, 88 (1998)).

7. This common law doctrine of legislative immunity has been incorporated into North Carolina statutory law as well: "The members shall have freedom of speech and debate in the General Assembly, and shall not be liable to impeachment or question, in any court or place out of the General Assembly, for words therein spoken." N.C. Gen. Stat § 120-9 (2021).

8. To invoke legislative immunity, a legislator much show "(1) that they were acting in a legislative capacity at the time of the alleged incident; and (2) that their acts were not illegal acts." *Vereen v. Holden*, 121 N.C. App. 779, 782, 468 S.E.2d 471, 473 (1996), *review allowed and remanded*, 345 N.C. 646, 483 S.E.2d 719 (1997); *see also Gravel v. United States*, 408 U.S. 606, 625 (1972) (describing a legislative act as an act that (1) is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings," and (2) relates "to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.").

9. Legislative immunity is "personal" and "may be waived or asserted by each individual legislator." *See Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992). *See also Northfield Dev. Co.* at 282, 523 S.E.2d at 749 (noting that the immunity applies to "individuals").

10. Once asserted, legislative immunity "shield[s] the individual from the consequences of the litigation results and provide[s] a testimonial privilege." *Northfield Dev. Co.* at 282, 523 S.E.2d at 749 (citations omitted); *see also Novack v. City of High Point*, 159 N.C. App. 229, 582 S.E.2d 726 (2003) (unpublished) (available at 2003 WL 21649352 at *6); *Royal Oak Concerned Citizens Assoc. v. Brunswick Cty.*, 233 N.C. App. 143, 149, 756 S.E.2d 833, 836 (2014).

11. Although legislative immunity can be waived, it can only be waived by "explicit and unequivocal renunciation of the protection." *Northfield Dev. Co.* at 282, 523 S.E.2d at 749-50 (internal quotations omitted).

12. North Carolina courts analyzing issues involving legislative immunity generally follow federal case law on legislative immunity, which exhibits robust deference to legislative immunity. *See, e.g.*, *Northfield Dev. Co.* at 281, 523 S.E.2d at 749 (citing *Bogan v. Scott-Harris*, 523 U.S. 44 (1998)); *Vereen* at 782, 468 S.E.2d at 473 (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951) and *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979)).

13. For example, the Fourth Circuit has held that where "the suit would require legislators to testify regarding conduct in their legislative capacity, the doctrine of legislative immunity has full force." *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 45 (4th Cir. 1988), *overruled on other grounds by, Berkley v. Common Council of City of Charleston*, 63 F.3d 295 (4th Cir. 1995).

14. The United States Supreme Court has recognized the right of state 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); *see also Village of Arlington Heights v. Metropolitan Housing Department Corp.*, 429 U.S. 252, 268 n.18 (1977) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)) (emphasis added) (acknowledging that the Court "has recognized ever since [ ] 1810, that judicial inquiries into legislative or executive motivation represent a <u>substantial intrusion</u> into the workings of other branches of government. Placing a decisionmaker on the state is therefore 'usually to be avoided.'").

15. The Supreme Court has held that legislative immunity is to be applied "broadly to effectuate its purposes" in order to "protect the integrity of the legislative process by insuring the independence of individual legislators" and "reinforc[e] the separation of powers so deliberately

established by the Founders." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501, 502 (1975) (citations omitted).

16. Federal courts have shown strong deference to assertions of legislatives privilege in the context of redistricting cases too. For example, in *Marylanders*, a case involving a challenge to Maryland's redistricting maps following the 1990 census, the court rejected the challengers' contention that inquiry into legislative motive justified an abrogation of legislative immunity:

> Plaintiffs cannot, however, inquiry into legislative motive if such an inquiry would necessitate an abrogation of legislative immunity. Contrary to plaintiff's assertions, the immunity enjoyed by state legislators is *absolute*. . . . Thus, legislative immunity, if found, *would* bar inquiry into legislative motive regarding alleged Section 2 violations, just as it would prohibit certain discovery regarding plaintiffs' other claims.

144 F.R.D. at 297 n.12 (citations omitted, emphasis in original); *see also Florida v. United States*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (protecting state legislators from testifying about the "reasons for their votes" in a case alleging Section 5 violations); *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").

17. Plaintiffs' complaints concern core legislative acts: the deliberative and communicative aspects of the North Carolina General Assembly's drafting, negotiating, debating, and voting upon the 2021 redistricting plans for the North Carolina Senate and House of Representatives as well as the state's Congressional delegation. Any testimony elicited from Movants that would be remotely relevant to Plaintiffs' claims necessarily would concern conduct that is fundamentally at the core of the "sphere of legitimate legislative activity" that triggers legislative immunity. *See Northfield Dev. Co.* at 281, 523 S.E.2d at 749.

18. Movants have taken no action to waive that protection, and certainly nothing constituting an "explicit and unequivocal renunciation" of the immunity. *See Northfield Dev. Co.* at 282, 523 S.E.2d at 749-50.

19. Movants' assertion of legislative immunity, therefore, constitutes an absolute shield against efforts to "question [them] in any court," or obligate them to provide testimony in judicial proceedings reviewing the process or its consequences. *See Northfield Dev. Co.* at 282, 523 S.E.2d at 749; N.C. Gen. Stat § 120-9.

20. Accordingly, Movants' invocation of legislative immunity constitutes "good cause" under Rule 26(c) to warrant a Protective Order quashing Notices of Deposition directed to Movants.

21. Moreover, testimony from Movants simply is not needed in this matter. Two of the six legislators – both with direct knowledge of the 2021 redistricting process - named in their official capacities as defendants in Plaintiffs' lawsuits, have agreed to waive their personal legislative immunity. As such, Plaintiffs should be able to obtain all of the testimony and evidence they need with respect to the legislative process at issue from depositions of these remaining legislative defendants.

22. *Marylanders for Fair Representation* provides an example in which a Court did not compel testimony by legislators given the availability of non-legislators to testify with respect to the same matters. In that case, the challenged redistricting plans were drawn by a five-member committee appointed by the governor that included two state legislators and three non-legislators. 144 F.R.D. at 295-96. Plaintiffs noticed depositions of all five commission members. *Id.* at 296. All members of the commission asserted legislative immunity on the grounds that the redistricting

process is inherently legislative, even when components of that process are handled within the executive branch by individuals serving under gubernatorial appointments. *Id.* A two-judge majority of the panel resolved the issue by allowing depositions of the non-legislator members of the commission and deferring a final decision on legislative immunity as to the legislator members until a time when the factual record was more developed. *Id.* at 304-05. In doing so, the court avoided a "direct[ ] impact[ ] upon legislative sovereignty" by allowing litigants access to evidence only available from non-legislators while respecting legislative immunity for commission members who were actual, elected legislators. *Id.* at 305.

23. Although numerous grounds distinguish *Marylanders* from the present matter, its resolution of a question of legislative immunity resonates here. To be clear, Movants stand on far firmer footing to assert legislative immunity than did the legislators in *Marylanders* as Movants' assertions of legislative immunity pertain to conduct as elected legislators within the legislature and acting within the legislative process, not as appointed commissioners on an executive branch commission. Nevertheless, Plaintiffs' argument for allowing depositions of Movants loses all force given the willingness of other legislators to submit to depositions. Plaintiffs will be able to elicit testimony about the legislative process from Senator Hise and Representative Hall thus obviating any need for testimony from Senators Berger, Senator Warren Daniel, Senator Paul Newton, or Speaker Moore.

24. Accordingly, in addition to Movants' assertion of legislative immunity, Plaintiffs' ability to elicit the evidence sought from Movants elsewhere constitutes "good cause" under Rule 26(c) to warrant a Protective Order quashing Notices of Deposition directed to Movants.

WHEREFORE, for the reason set forth above, the Movants respectfully pray that the Court enter a Protective Order quashing the Notices of Deposition served on President *Pro Tempore* Berger, Senator Daniel, Senator Newton, and Speaker Moore.

Respectfully submitted, this the 22nd day of December, 2021.

/s/ Phillip J. Strach

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It is hereby certified that on this the 22nd day of December, 2021, the foregoing was served on the individuals below by email:

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