

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.)
_____)

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION IN LIMINE**

INTRODUCTION

Defendants respectfully file this memorandum in support of their motion *in limine* to preclude the testimony of the six former and current Democratic state legislators which plaintiffs listed on the trial witness list they filed with the Court. (D.E. 76) These individuals include: Senator Dan Blue, Representative Larry Hall, former Senator Dan Clodfelter, former Senator Malcolm Graham, Senator Angela Bryant, and former Senator Eric Mansfield.

ARGUMENT

- I. Testimony of opponents to legislation is not to be afforded any weight and allowing the Democratic legislators to testify will waste the Court's time and resources.**

The legislators should not be allowed to testify. There is strong precedent mandating that no weight be given to testimonial statements made by the opponents of legislation. *See e.g. Raleigh Wake Citizens Assoc. v. Wake Cnty. Bd. of Elections*, _ F.

Supp. 3d __, 2016 WL 1060378, at *29 (E.D.N.C. Feb. 26, 2016) (refusing to credit the opinion testimony of a state senator given “his strong legislative opposition to the 2013 Wake County School Board Plan”); *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 29 (1988) (refusing to credit the testimony of a “vocal opponent” of legislation); *N.L.R.B. v. Fruit & Vegetable Packers & Warehousement, Local 760*, 377 U.S. 58, 66 (1964) (same); *Bryan v. U.S.*, 524 U.S. 184, 196 (1998) (same) . Such testimony has little value to courts because “in their zeal to defeat a bill, [legislative opponents] tend to overstate its reach...[and] [t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.” *N.L.R.B.*, 377 U.S. at 66 (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951)); *Bryan*, 524 U.S. at 196.

Here, each of the six Democratic legislators listed by plaintiffs as trial witnesses are former or current “vocal opponents” of the legislature’s 2011 redistricting plan. As members of the North Carolina Democratic Party, which lost majority control of the General Assembly in 2010 for the first time in 100 years, their “zeal to defeat” a plan which benefits Republican legislators is not shocking. But their self-serving motives render any testimony they may provide insufficient to sustain legal conclusions about the constitutionality of the redistricting plan. As the U.S. Supreme Court has cautioned on numerous occasions their alleged “fears and doubts” about the plan are not an “authoritative guide” by which to determine the General Assembly’s intent in enacting it.

Rule 403 of the Federal Rules of Evidence mandates that even relevant evidence be excluded if “its probative value is substantially outweighed by the danger of... unfair prejudice...undue delay, [and] wasting time.” *See* Fed. R. Evid. 403. Since the Court

cannot credit the testimony of opposition legislators, and their testimony cannot be relied upon in rendering a decision about the plan's constitutionality, it can only serve to waste the Court's valuable time in this trial. Thus, Rule 403 and the interests of judicial economy require that these legislators be precluded from testifying.

II. Additionally, equity requires that the legislators be precluded from testifying if the Court sustains plaintiffs' relevance objections to defense exhibits they contend were "not before the legislature" during the redistricting process in 2011. Because any testimony by the legislators would have likewise not been before the General Assembly in 2011 and would not be relevant.

Defendants anticipate that some of plaintiffs' witnesses, including the Democratic legislators, will testify about the results of local elections in their counties. As an initial matter, defendants deny the relevance of any such testimony but would not otherwise object to the testimony being offered except for a misguided relevance argument being advanced by plaintiffs regarding defendants' proposed trial exhibits. Specifically, plaintiffs have asserted numerous objections to exhibits that they contend are not relevant because they "were not before the General Assembly" during the 2011 redistricting process. One such example concerns exhibits related to monies raised, and spent, by legislative candidates as reported in the *Dickson* affidavit of Erika Churchill and in Ms. Churchill's declaration filed in this case. There is no dispute that this information was a matter of public record at the time the legislature was undertaking its redistricting efforts in 2011. But since there is no report that shows that this information was specifically filed with the legislature plaintiffs believe it is not relevant here. In another instance, plaintiffs object to compilations, made by defense expert Dan Frey, of information that was before

the General Assembly in the form of “stat packs” published with each of the redistricting plans. There is no dispute that these compilations are part of the public record. Yet since these compilations, while made up of information used by the legislature, were not actually filed with the General Assembly plaintiffs again contend they should be excluded as not relevant.

It is defendants’ logical position that any information related to redistricting that was a matter of public record in 2011 is admissible and relevant to this trial. But should the Court agree with plaintiffs’ arguments, the Democratic legislators and other witnesses should be precluded from testifying about their personal knowledge of local election results because this information was similarly not before the legislature in 2011.

CONCLUSION

Based upon the foregoing, the Court should preclude the above named current and former legislators from testifying at trial.

This the 6th day of April, 2016.

NORTH CAROLINA DEPARTMENT OF
JUSTICE

By: /s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr

Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

Edwin M. Speas, Jr.
John W. O'Hale
Carolina P. Mackie
Poyner Spruill LLP
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
espeas@poynerspruill.com
johale@poynerspruill.com
cmackie@poynerspruill.com
Attorneys for Plaintiffs

Anita S. Earls
Allison J. Riggs
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
anita@southerncoalition.org
allisonriggs@southerncoalition.org
Attorneys for Plaintiffs

Adam Stein
Tin Fulton Walker & Owen, PLLC
312 West Franklin Street
Chapel Hill, NC 27516
astein@tinfulton.com
Attorney for Plaintiffs

This the 6th day of April, 2016.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Telephone: 919.787.9700
Facsimile: 919.783.9412
thomas.farr@odnss.com

24405732.1