STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 21 CVS 015426
No. 21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

HARPER PLAINTIFFS' RESPONSE TO LEGISLATIVE DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Under settled North Carolina law, a litigant may not use a privilege as both a "shield" to prevent discovery and a "sword" to present testimony or evidence related to the privileged information. That is precisely what Legislative Defendants seek to do here—they ask the Court to enter a protective order blocking depositions of four legislators based on legislative privilege, while allowing two other legislators to testify at trial about the same privileged matters. The legislative defendants attempted the same gambit in the 2019 *Common Cause* litigation, and the court there rightly rejected it. The court entered the requested protective order, but also held that, under the well-established sword/shield doctrine, the legislative defendants were precluded from offering testimony or evidence at trial—either their own testimony or testimony or evidence from others—related to the privileged information.

That is what should happen here. The dispute here is not whether four Legislative Defendants can invoke legislative privilege to block their depositions; the dispute, rather, is whether Legislative Defendants, having so invoked the privilege to prevent discovery regarding the mapmaking process and legislative intent, can turn around a present evidence or testimony at trial on those topics. They cannot. *Harper* Plaintiffs accordingly consent to entry of the requested protective order so long as the Court precludes Legislative Defendants from using the privilege as a shield (to block depositions) and a sword (to offer testimony or evidence relating to the privileged information).

BACKGROUND

A. 2019 Common Cause Litigation

During discovery in the 2019 *Common Cause* litigation, the plaintiffs noticed depositions of the legislative defendants as well as several non-party legislators and legislative staff involved in the redistricting process. *See* 3/25/19 *Common Cause* Order at 1-2 (attached as Ex. A). The

legislative defendants and non-parties moved for a protective order to block all twelve depositions based on legislative privilege. *Id.* at 2. In response, the plaintiffs explained that they consented to entry of the requested protective order so long as the court specified that the legislative defendants would be precluded from offering evidence and testimony at trial deriving, directly or indirectly, from the legislators who had invoked privilege, and would be precluded from offering "evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data." Plaintiffs' Resp. at 1 (attached as Ex. B). The plaintiffs relied on authority from the North Carolina Supreme Court and other courts holding that a party may not use a privilege both as a "shield" to prevent discovery and a "sword" to present evidence that relates to the privileged information, including by selectively asserting privilege to protect certain legislative information from discovery while claiming the right to introduce other legislative information of their choosing. *Id.* at 3-7. One week later, the legislative defendants purported to partially "withdraw" their motion for protective order—but only as to two of the legislative defendants, Senator Hise and then-Representative Lewis. Ex. A at 2-3.

In March 2019, the *Common Cause* court granted the protective order in full, blocking the depositions and discovery and declining to permit the legislative defendants' partial withdrawal of their motion. The court explained that the legislative defendants' "change [in] position" with respect to legislative privilege, which they had previously used "as a shield to prevent discovery," would "provide an unfair benefit to Legislative Defendants and impose an unfair detriment on Plaintiffs." Ex. A at 4. With trial still several months away, the court found it premature to conclusively resolve the application of the sword/shield doctrine. *Id.* at 5 n.1.

But the court instructed that its order did not prevent the plaintiffs from asking, prior to trial, that the legislative defendants be forbidden from offering "(1) testimony from any of the [individuals] who have asserted privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the … individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless such testimony or evidence is based exclusively on the public legislative record or publicly available data." *Id.*

Before trial, the plaintiffs moved *in limine* seeking such an order. The legislative defendants opposed, arguing that it would be unfair to forbid testimony from individuals who "have never asserted legislative privilege in this matter." Legislative Defendants' Opp. to Pls.' Mot. *in Limine* at 4 (attached as Ex. D). The legislative defendants argued that "[t]hese persons, having not invoked the shield of the privilege, may not now be barred from testifying through plaintiffs' use of this motion as a sword against them." *Id.*

The court disagreed and granted plaintiffs' motion. 7/17/19 *Common Cause* Order at 4-5 (attached as exhibit 3 to Legislative Defendants' motion). Relying on the sword/shield doctrine, the court ordered that the legislative defendants could not introduce any evidence or testimony from "the twelve legislators and legislative staff" encompassed by its prior protective order. *Id.* at 5. The court *further* held that the legislative defendants could introduce "evidence or testimony from legislators or legislative staff who have not previously asserted a claim of legislative privilege," but only "*provided* that Legislative Defendants do *not* offer 1) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the … individuals asserting privilege; or, 2) evidence or testimony 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." *Id.* (emphases added). In other words, the court held that while legislators who had not asserted privilege were not categorically prohibited from testifying at trial, they could not testify about legislative intent in the map-drawing process unless that testimony relied exclusively on public information.

The court subsequently enforced its order at trial to preclude legislator testimony about legislative intent in drawing the challenged maps. The legislative defendants called a non-party legislator to testify, Representative John Bell, who testified primarily on issues unrelated to the map-drawing process covered by the court's sword/shield ruling. But when Representative Bell was asked whether he believed "that Democratic pockets of [certain] Counties were cracked into four separate districts," the plaintiffs objected on the basis of the court's sword/shield ruling, and the court sustained the objection because the testimony "connote[d]" the "intent of a map drawer." Trial Tr. at 1759:22-1763:6 (excerpts attached as Ex. E).

B. This Litigation

On December 14, 2021, *Harper* Plaintiffs served deposition notices on the six Legislative Defendants here: Senator Philip E. Berger, Senator Warren Daniel, Representative Timothy K. Moore, Senator Paul Newton, Representative Destin Hall, and Senator Ralph E. Hise, Jr. On December 20, Legislative Defendants advised that four of the six legislators—Representative Moore and Senators Berger, Daniel, and Newton—intended to assert legislative privilege and would not be testifying as to "the challenged redistricting plans." Mot. Ex. 2 at 5. But Legislative Defendants explained that Representative Hall and Senator Hise had "agreed to waive legislative privilege as it pertains to being deposed," though they "may assert legislative privilege as it relates to specific questions at the depositions or trial." *Id.*

Consistent with the sword/shield ruling in the *Common Cause* case, *Harper* Plaintiffs asked Legislative Defendants to confirm that, because four legislators had invoked privilege, Legislative Defendants would "(1) not try to introduce their testimony at trial, or any 'evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with,' those legislators; and (2) will not introduce 'evidence or testimony' from any witness, including Rep. Hall or Sen. Hise, '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.'" Mot. Ex. 2 at 4 (quoting 7/17/19 *Common Cause* Order at 5). *Harper* Plaintiffs also sought clarification on Senator Hise's and Representative Hall's "partial' invocations of privilege "as it pertains to being deposed." *Id.* Legislative Defendants responded that Senator Hise and Representative Hall also intended to testify "at trial," but that they reserved the right to object on privilege grounds to "questions that would impinge on another legislator's privilege." *Id.* at 3. Legislative Defendants also explained that they disagreed with *Harper* Plaintiffs' understanding of the sword/shield doctrine and the scope of the *Common Cause* order applying it. *Id.*

While *Harper* Plaintiffs explained that they wished to avoid unnecessary motions practice, they explained that in light of the parties' disagreement about these evidentiary questions, it was important to establish a clear record regarding the invocation of legislative privilege and to seek this Court's resolution of the issue, and that Legislative Defendants accordingly should seek a protective order, as they did in 2019. *Id.* at 1. *Harper* Plaintiffs further explained that they did not intend to proceed with the depositions of the four legislators who had invoked legislative privilege. *Id.*

Harper Plaintiffs also informed Legislative Defendants that they would proceed with the depositions of Representative Hall and Senator Hise. *Id.* at 1. Those depositions are scheduled for December 27 and 29. Plaintiffs are conducting these depositions as a protective measure; for the reasons explained in this motion, Plaintiffs' position is that neither Representative Hall nor Senator Hise may testify at trial about legislative intent because Legislative Defendants have used legislative privilege to shield related evidence from discovery.

ARGUMENT

As in the 2019 *Common Cause* case, *Harper* Plaintiffs do not oppose entry of a protective order quashing the deposition notices of certain legislators based on legislative privilege, so long as the Court also forbids Legislative Defendants from offering selective testimony about the map-drawing process and legislative intent, in violation of the sword/shield doctrine. *Harper* Plaintiffs thus request that in any protective order, the Court make clear that Legislative Defendants cannot "offer 1) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the … individuals asserting privilege; or, 2) evidence or testimony 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." 7/17/19 *Common Cause* Order at 5. And the Court should make clear that this is so even if the evidence or testimony comes from legislators who have offered to waive legislative privilege.

That is what the three-judge panel held in *Common Cause* when, facing materially identical invocations of legislative privilege, it entered a pre-trial protective order materially identical to the one Legislative Defendants request here, *i.e.*, prohibiting depositions of legislators. As explained above, the court then enforced that order to preclude testimony from

legislators who had not previously invoked legislative privilege, but whose testimony would violate the well-established sword/shield doctrine. The decision in *Common Cause* was correct. This Court should do the same, and as part of its order should make clear that Legislative Defendants may not introduce testimony at trial from Representative Hall, Senator Hise, or anyone else regarding the legislature's supposed intent in creating the challenged 2021 plans.

Common Cause's sword/shield ruling was dictated by controlling precedent that applies with equal force here. North Carolina courts, like other courts, have long prohibited parties from using privilege "both as a 'shield' to prevent discovery and a 'sword' to present evidence or claims that relate to the privileged information." 7/17/19 *Common Cause* Order at 5 (quoting *State v. Buckner*, 351 N.C. 401, 410 (2000), and *Qurneh v. Colie*, 122 N.C. App. 553, 558 (1996)). A party therefore may not "use[] an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion." *Favors v. Cuomo*, 285 F.R.D. 187, 199 (E.D.N.Y. 2012) (quotation marks omitted). As such, parties face a "choice" of either standing on the privilege or waiving it in order to advance related evidence or claims. *Cantwell v. Cantwell*, 109 N.C. App. 395, 396, 427 S.E.2d 129, 130 (1993). Where a party elects "to stand behind its …. privilege and refuse[s] to produce" relevant information, "that exercise of the privilege will preclude it from introducing" related evidence at trial. *Belmont Textile Mach. Co. v. Superba, S.A.*, 48 F. Supp. 2d 521, 523 (W.D.N.C. 1999). At minimum, the doctrine prevents introduction of evidence or testimony that the opposing party would have been "potentially capable of rebutting" through discovery that the party was denied, *Favors v. Cuomo*, 285 F.R.D. 187, 199 (E.D.N.Y. 2012), or that "in fairness requires examination of protected communications," *United States v. Bilzerian*, 926 F.2d 1285,

1292 (2d Cir. 1991). This principle applies equally to plaintiffs and defendants. *See, e.g.*, *Cantwell*, 109 N.C. App. at 396, 427 S.E.2d at 130.

The sword/shield doctrine fully applies to the assertion of legislative privilege in redistricting cases. "[C]ourts have been loath to allow a legislator to invoke the privilege at the discovery stage, only to selectively waive it thereafter in order to offer evidence to support the legislator's claims or defenses." *Favors*, 285 F.R.D. at 212. Courts thus preclude legislators from offering certain evidence in defense of redistricting plans where those legislators blocked discovery based on legislative privilege. In a challenge to Pennsylvania's congressional districts, the legislative defendants asserted legislative privilege to preclude their depositions and other discovery related to legislative intent in drawing the map. The state trial court upheld the privilege assertions—and then blocked the legislative defendants from introducing evidence related to legislative intent under the sword/shield doctrine. The court precluded the defendants "from offering evidence that [the plaintiffs] could not obtain in discovery due to [the] Court's … order" upholding the legislative defendants' privilege assertions. Trial Tr. at 94, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (excerpts attached as Ex. F). The court further made clear that the legislative defendants could not offer expert testimony that was based on consultations with legislative staff who had been "shielded from [the plaintiffs'] deposition efforts" on the basis of legislative privilege. *Id.* at 32.

The district court in *Doe v. Nebraska*, 898 F. Supp. 2d 1086 (D. Neb. 2012), similarly precluded legislators from introducing evidence at trial pursuant to the sword/shield doctrine. In *Doe*, plaintiffs challenging a Nebraska statute under the Ex Post Facto Clause sought to depose Nebraska legislators regarding their intent and objectives in crafting the statute. The defendants "successfully asserted legislative privileges to thwart the plaintiffs' effort to get at the truth." *Id.*

at 1126. At trial, the plaintiffs presented evidence that the legislature had acted with impermissible intent. When the defendants sought to challenge that evidence, the court held that they were precluded from doing so under the sword/shield doctrine. "While the defendants and their lawyers were entitled to invoke [legislative privilege]" to withhold discovery, they could not then "claim [at trial] that the evidence is lacking regarding the true motives of the law-makers." *Id.* "That is, the defendants will not be allowed to use their privilege defenses as both a sword and a shield." *Id.*

Legislative Defendants' requested protective order squarely implicates the sword/shield doctrine. As Legislative Defendants explain, four of them have invoked legislative privilege as "an absolute shield" from discovery. Mot. 8. They have done so specifically to preclude depositions regarding "the challenged redistricting plans." Mot. Ex. 2 at 5. Yet two other Legislative Defendants—Senator Hise and Representative Hall—"have agreed to waive their personal legislative immunity." Mot. 8. Both of these legislators have "direct knowledge of the 2021 redistricting process," and Legislative Defendants intend to use them to introduce testimony "with respect to the legislative process at issue," *i.e.*, the drawing of the 2021 plans. Mot. 8. Legislative Defendants have explained that both legislators intend to testify "at trial," Mot. Ex. 2 at 3, and that they intend to testify specifically about the 2021 redistricting process over which the four other legislators have invoked legislative privilege to block discovery.

This is precisely the situation the sword/shield doctrine prohibits. Plaintiffs would be prevented from obtaining information directly relevant to their claims that Legislative Defendants intentionally drew district lines to disadvantage Democrats, from individuals who have direct knowledge of and participated in the legislature's mapmaking process. Senators Daniel and Newton, for example, are co-sponsors of the enacted Senate plan and the enacted

congressional plan. And Speaker Moore and President Berger were likely significantly involved in the mapmaking process as well. That is the quintessential "shield." Legislative Defendants meanwhile would be able to selectively waive privilege on behalf of individual legislators whom they think will provide favorable testimony on that subject and offer their testimony affirmatively, to rebut other evidence of impermissible intent. That is the quintessential "sword." *See, e.g.*, *Favors*, 285 F.R.D. at 212. Legislative Defendants cannot do this, any more than a criminal defendant with two lawyers could waive attorney-client privilege as to communications with one lawyer and not the other about the same topic. *See Bilzerian*, 926 F.2d at 1292-93.

Indeed, the context here exacerbates the prejudice to Plaintiffs. The four Legislative Defendants who have invoked privilege are likely to have significant, and likely unique, knowledge about the process leading to enactment of the 2021 Plans. Plaintiffs have alleged that although Legislative Defendants nominally prohibited the use of partisan data in the drawing of maps, the maps were in fact drawn with such data—a practice enabled by Legislative Defendants' refusal to police the materials that legislators and staff could bring into the map-drawing room. *Harper* Am. Compl. ¶¶ 106-108; *see Harper* Mot. for Prelim. Inj. at 6-8. Representative Hall—Chairman of the House Redistricting Committee and one of the two legislators who has waived privilege—stated in response to questions about whether there had been "maps drawn outside of this building that any of us have been privy to," that he "ha[d] not contributed to the drawing of any map" outside the confines of the legislative chamber but could not "speak for other members of this committee." Oct. 5, 2021 H. Redistricting Comm. Hr'g Tr. at 61:19-62:2 (excerpts attached as Ex. G). Representative Hall thus appears likely to testify that he has no knowledge of the use of outside materials or data reflecting partisan considerations.

Meanwhile, the Legislative Defendants who have invoked privilege—all in leadership positions, including two co-chairs of the Senate Redistricting Committee—may well have the direct knowledge that Representative Hall disclaimed. In other words, Plaintiffs will have been prevented from eliciting testimony from other legislators who might themselves have analyzed the partisan characteristics of the maps or worked with others who did so. And, of course, it is likely that Legislative Defendants chose to unilaterally offer particular legislators to testify, while selectively using legislative privilege to shield the testimony of others, based on their assessment of which legislators' testimony would be most favorable to the defense. Again, that is precisely what the sword/shield doctrine is designed to prevent.

Moreover, Legislative Defendants have indicated that the two legislators who have waived privilege have done so only *partially*, as they may still invoke privilege to object to "questions that would impinge on another legislator's privilege." Mot. Ex. 2 at 3. Whatever the scope of this cryptic caveat, it threatens to further impede access to relevant information on the very topic over which other legislators have categorically invoked privilege to block any questioning. In short, Legislative Defendants' "partial" waiver would lay the groundwork for Representative Hall and Senator Hise to present favorable testimony regarding legislative intent in one breath and refuse to disclose unfavorable information on the same topic in the next. This sort of prejudicial information asymmetry is the foundational purpose of sword/shield doctrine, and the Court should enforce it here.

Notably, Legislative Defendants devote the entire body of their motion to defending their assertions of legislative privilege—assertions that Plaintiffs have not contested. By contrast, Legislative Defendants identify no authority suggesting that the sword/shield doctrine would permit the trial testimony they intend to introduce from Representative Hall or Senator Hise.

Legislative Defendants briefly suggest that the 2019 *Common Cause* order did not "impose a blanket limitation" on testimony and evidence under the sword/shield doctrine but instead "imposed limitations as to the communications with legislators and staff members who had asserted legislative privilege." Mot. 3. That is wrong. Plaintiffs in *Common Cause* requested—and the court granted—an order not only restricting testimony from those legislators and staff who had *invoked* privilege, but broadly precluding "evidence or testimony that derives … from" those who had asserted privilege *or*, most relevant here, "evidence or testimony *that otherwise seeks to explain the General Assembly's intent* in drawing the challenged district plans," even if it came from other legislators who had not invoked privilege. 7/17/19 *Common Cause* Order at 5 (emphasis added). The reason Legislative Defendants resisted such an order is that, in their view, it would forbid testimony "about the relevant redistricting plans" from individuals who "have never asserted legislative privilege in this matter." Ex. D at 4. Yet this restriction, plaintiffs explained in their *motion in limine*, was necessary because it would be "manifestly unfair for Legislative Defendants to offer evidence or testimony purporting to explain the legislature's intent in drawing specific districts or the maps as a whole, when Plaintiffs were denied the ability to take discovery from the persons who know the truth regarding the legislature's actual intent." Ex. C at 6-7. The court agreed, and subsequently enforced its sword/shield ruling by sustaining objections to testimony about the map-drawing process and legislative intent from Representative Bell, who had not previously invoked legislative privilege. *Supra* p. 4; *see* Ex. E.

In any event, the *Common Cause* court did not break any new ground in its application of the sword/shield doctrine. It straightforwardly applied blackletter law preventing the selective use of privilege to prejudice an opposing party. *Supra* pp. 7-8. That established doctrine, not

Common Cause's particular application, is what forbids Legislative Defendants from introducing legislative testimony related to the very matters as to which they have shielded discovery.

CONCLUSION

The Court should enter a protective order based on Legislative Defendants' invocation of legislative privilege, but in doing so should forbid Legislative Defendants from "offer[ing] 1) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the … individuals asserting privilege; or, 2) evidence or testimony 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," 7/17/19 *Common Cause* Order at 5—even if such testimony or evidence comes from a legislator who has not asserted privilege.

Respectfully submitted, this the 23rd day of December, 2021.

By:/s/ Narendra K. Ghosh

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to counsel for all other parties.

This the 23rd day of December, 2021.

_/s/ Samuel F. Callahan_____
Samuel F. Callahan (admitted *pro hac vice*)