EXHIBIT A

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 014001
COMMON CAUSE, *et al.* *Plaintiffs*, v. Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, *et al.*, *Defendants.*	ORDER GRANTING LEGISLATIVE DEFENDANTS' MOTION FOR A PROTECTIVE ORDER AND PLAINTIFFS' FIRST MOTION TO COMPEL

THIS MATTER comes before the undersigned three-judge panel upon Legislative Defendants' Motion for a Protective Order, Plaintiffs' First Motion to Compel discovery responses from Legislative Defendants, and Plaintiffs' Second Motion to Compel discovery responses from Legislative Defendants.

Procedural and Factual Background

On November 13, 2018, Plaintiffs served a first set of interrogatories and requests for production of documents on Legislative Defendants. On January 4, 2019, Legislative Defendants served initial responses to Plaintiffs' first discovery requests. On January 16, 2019, Plaintiffs served a second set of interrogatories on Legislative Defendants. On January 25, 2019, Plaintiffs served a third set of interrogatories on Legislative Defendants.

On January 24, 2019, Plaintiffs issued notices of deposition to Representative David R. Lewis ("Defendant Lewis"), Senator Ralph E. Hise ("Defendant Hise"), Speaker of the N.C. House Timothy K. Moore, and President Pro Tempore of the N.C. Senate Philip E. Berger, and subpoenas to Legislative Employee Mark

Coggins, Senator Trudy Wade, Representative Nelson Dollar, Senator Wesley Meredith, Senator John Alexander, Senator Robert Rucho, Former Legislative Employee Jim Blaine, and Senator Dan Bishop. On February 5, 2019, Legislative Defendants and the subpoenaed deponents filed a motion for a protective order in response to Plaintiffs' notices of deposition and subpoenas, claiming legislative immunity and privilege. Legislative Defendants did not calendar this motion for hearing.

On February 15, 2019, the parties entered into a stipulated proposed case management order setting forth deadlines for completion of discovery.

Also on February 15, 2019, Legislative Defendants served supplemental responses to Plaintiffs' initial discovery requests, along with initial responses to Plaintiffs' second and third sets of interrogatories. On February 19, 2019, Plaintiffs filed their first motion to compel. On February 22, 2019, Plaintiffs filed their second motion to compel. Neither party calendared these motions for hearing.

On March 13, 2019, the Court upon its own motion entered a case management order for the purposes of setting out an orderly process for the submission of filed papers to the Court and requests for hearings. The parties have since responded to or made their position known as to each motion in accordance with the March 13, 2019, case management order and requested a hearing on the motions.

In Legislative Defendants' email correspondence to the Court on March 18, 2019, stating their position on the motion for a protective order, Legislative

Defendants for the first time asserted that Defendants Lewis and Hise no longer wished to assert legislative privilege.

On March 21, 2019, a telephonic hearing was held on Legislative Defendants' motion for a protective order and Plaintiffs' first and second motions to compel. The matters were taken under advisement.

After considering the motions, the matters contained therein, and the parties' respective briefs, position statements, and arguments on the motions, and having reviewed the record proper, the Court in its discretion rules on the motions as follows:

Legislative Defendants' Motion for a Protective Order

Legislative Defendants' motion seeks to prohibit Plaintiffs from deposing four Legislative Defendants and eight current or former legislators and legislative staffers, on the grounds of legislative immunity and legislative privilege.

Plaintiffs disagree with Legislative Defendants' assertions of legislative privilege and immunity, but do not oppose the entry of the requested protective order so long as the order specifies that Legislative Defendants are precluded from offering certain evidence and testimony at trial under the principle that a privilege may not be used as both a sword and a shield. Plaintiffs oppose Legislative Defendants' request to withdraw the motion as to Defendants Lewis and Hise, and request that the Court enter the protective order as to all twelve individuals originally named in the motion.

From Legislative Defendants' initial responses to Plaintiffs' first discovery requests on January 4, 2019 to March 18, 2019 – two days before the March 20 deadline (agreed to by all parties) for the completion of written discovery from the Defendants – Legislative Defendants have asserted legislative privilege. Although no privilege log has been provided, presumably Legislative Defendants have relied upon this privilege to withhold interrogatory responses and documents requested through discovery. Upon the filing of a motion for a protective order on February 5, 2019, Legislative Defendants formalized their assertion of legislative privilege for twelve named legislators and legislative staffers. The assertion of legislative privilege resulted in the cancellation of duly noticed and subpoenaed depositions of current and former legislators and legislative staffers, including Senator Hise and Representative Lewis.

Now, only two days before the deadline for completion of written discovery from Defendants and only four days before the deadline for submission of Plaintiffs' expert reports, Legislative Defendants have purported to waive legislative immunity and privilege for Representative Lewis and Senator Hise, but no others. The Court finds and concludes that to allow Legislative Defendants, who heretofore have used legislative immunity and privilege as a shield to prevent discovery by Plaintiffs, to now change positions with respect to this material matter would provide an unfair benefit to Legislative Defendants and impose an unfair detriment on Plaintiffs. Accordingly, the Court concludes that Legislative Defendants are estopped at this late stage in the discovery process from withdrawing their claim of

legislative privilege as to Defendants Lewis and Hise, and Legislative Defendants' motion for a protective order, as filed on February 5, 2019, must be granted in full.[1]

Plaintiffs' First Motion to Compel

Plaintiffs' motion seeks to compel: 1) answers to interrogatories #1-4, #5, #7, #12-13, #14-18 from Plaintiffs' first set of interrogatories and #1-4 from Plaintiffs' third set of interrogatories; 2) production of a privilege log; and, 3) production of records responsive to Plaintiffs' requests for production. Legislative Defendants contend their answers to Plaintiffs' interrogatories and responses to Plaintiffs' requests for production of documents has been adequate thus far.

"Whether or not [a] party's motion to compel discovery should be granted or denied is within the trial court's sound discretion." *Wagoner v. Elkin City Sch. Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123 (1994). "When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents,

[1] The Court takes note of the authority provided by Plaintiffs that holds that a party cannot use a privilege both as a "shield" to prevent discovery and a "sword" to present evidence or claims that relate to the privileged information. *See, e.g. State v. Buckner*, 351 N.C. 401, 410 (2000); *Qurneh v. Colie,* 122 N.C. App. 553, 558 (1996). A party therefore may not "use [] an assertion of fact to influence a 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). While it is premature for the Court to make rulings on evidentiary matters for trial, this Order in no way prejudices Plaintiffs from seeking to be heard at or prior to trial should Legislative Defendants offer (1) testimony from any of the twelve 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 twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature'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.

communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." N.C.G.S. § 1A-1, Rule 26(b)(5)(a). Rule 5.7 of the Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015)[2] governs electronic discovery and requires a party producing documents in an electronic format to disclose certain information regarding custodians, non-custodial data sources, date ranges, and search methodology.

The Court, in its discretion, grants Plaintiffs' requests in the first motion to compel. Legislative Defendants shall respond in full, subject to *bona fide* assertions of privilege or immunity, to the following interrogatories and requests for production as follows:

- Third set of interrogatories, #1-4: Legislative Defendants must identify each person who was involved in developing the district boundaries for the 2017 plans, describe the nature of their involvement, provide their affiliations, and provide the names of any entities that paid their fees or expenses. Simply referring to the record is insufficient.
- First set of interrogatories, #5: Legislative Defendants must respond to Interrogatory #5. The identities of legal counsel and consultants that provided advice to Legislative Defendants is not privileged information protected by the attorney-client privilege.
- First set of interrogatories, #12-13: Legislative Defendants must respond to Interrogatories #12-13. Per Interrogatory #12, Legislative Defendants must identify what formulas or algorithms were used, if any. Per Interrogatory #13, Legislative Defendants must identify and describe the partisanship scores or estimates as requested. The terms "formulas or algorithms" and "partisanship scores or estimates" are not vague.
- First set of interrogatories, #14-18: Legislative Defendants must respond to Interrogatories #14-18. Legislative Defendants' response that the information requested in these interrogatories "may be ascertained from a review of the documents produced" is insufficient.

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[2] The Local Rules for Civil Superior Court, Tenth Judicial District (as amended in 2015) can be accessed here: https://www.nccourts.gov/assets/documents/local-rules-forms/112.pdf?XAxLgDJvtvgbp9SN0U8SfgoejNvF4gmF

- Records responsive: Legislative Defendants must produce all records responsive to Plaintiffs' requests for production. If asserting a claim of privilege, then Legislative Defendants must produce a privilege log in accordance with N.C.G.S. § 1A-1, Rule 26(b)(5)(a).
- Electronic discovery: Legislative Defendants must disclose information regarding custodians, non-custodial data sources, date ranges, and search methodology of discovery produced in electronic format in accordance with Rule 5.7 of the Local Rules for Civil Superior Court, Tenth Judicial District.

Plaintiffs' Second Motion to Compel

Plaintiffs' second motion sought to compel the identification of the home addresses of the incumbents in place at the time the 2011 and 2017 state legislative plans were adopted. Legislative Defendants initially produced a list of preferred mailing addresses, including P.O. Boxes; however, on March 14, 2019, Legislative Defendants produced the requested information. The parties now agree Plaintiffs' request for the home addresses in the second motion to compel is moot; however, Plaintiffs request costs and fees.

For the foregoing reasons, the Court, in its discretion, denies as moot Plaintiffs' request in the second motion to compel that Legislative Defendants provide the information requested in Plaintiffs' second set of interrogatories.

Conclusion

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS as follows:

1. Legislative Defendants' motion for a protective order is GRANTED in full.
2. Plaintiffs' first motion to compel is GRANTED in part as follows:

a. Legislative Defendants shall provide Plaintiffs with complete answers to Interrogatories #1-4, #5, #12-13, and #14-18 by April 3, 2019;
b. Legislative Defendants shall provide Plaintiffs with complete responses to Plaintiffs' Requests for Production by April 3, 2019;
c. If withholding documents on a claim of privilege, Legislative Defendants shall provide a privilege log by April 3, 2019; and,
d. At this time, the Court will hold open the issue of Plaintiffs' request for attorneys' fees and costs to consider the matter if Legislative Defendants fail to comply with the terms of this Order.

3. Plaintiffs' second motion to compel is DENIED AS MOOT in part as follows:
   a. Plaintiffs' request that Legislative Defendants provide the information requested in Plaintiffs' second set of interrogatories is denied as moot; and,
   b. At this time, the Court will hold open the issue of Plaintiffs' request for attorneys' fees and costs to consider the matter if Legislative Defendants fail to comply with the terms of this Order.
4. The parties' February 15, 2019, stipulated proposed case management order is amended as follows:
   a. Plaintiffs' expert witness reports are due April 8, 2019; and
   b. All other deadlines shall remain unchanged.

SO ORDERED, this the 25th day of March, 2019.

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by depositing the same in the custody of the of the United States Postal Service, First Class postage prepaid, and by email, addressed as follows:

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This the 25th day of March, 2019.

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EXHIBIT B

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

2019 MAR 11 P 3:21

18 CVS 014001

WAKE CO., C.S.C.

BY

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, et al.,

Defendants.

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

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INTRODUCTION

Legislative Defendants have filed a motion for a protective order to preclude Plaintiffs from taking the depositions of all four Legislative Defendants and of eight other current or former legislators and legislative staffers, all on the grounds of legislative privilege and immunity. While Plaintiffs disagree with these assertions of legislative privilege and immunity, Plaintiffs do not oppose the entry of the requested protective order so long as the order specifies that Legislative Defendants will be precluded from offering certain evidence and testimony at trial under the well-established principle that a privilege may not be used as a sword and a shield. In other words, Plaintiffs ask this Court to confirm that, because Legislative Defendants have moved to block discovery into legislative intent and into the facts surrounding their adoption of the challenged maps, Legislative Defendants cannot themselves offer such evidence at trial.

In particular, the protective order should specify that Legislative Defendants may not offer (1) testimony from any of the twelve 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 twelve 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. If the Court is not prepared to enter such an order at this time, Plaintiffs request the opportunity to file a substantive opposition to Legislative Defendants' privilege and immunity assertions, which are overbroad under N.C. Gen. Stat. § 120-133(a).

Plaintiffs request that the Court act quickly on this motion to ensure that, if the discovery is to go forward, Plaintiffs have time to take that discovery within the time allotted under the agreed scheduling order. The parties attempted to negotiate a stipulated resolution of the

protective order, but those negotiations reached an impasse. Plaintiffs note that the discovery covered by Legislative Defendants' motion for a protective order is distinct from the discovery at issue in Plaintiffs' First and Second Motions to Compel, which remain pending.

BACKGROUND

On January 24, 2019, Plaintiffs served notices of depositions upon all four Legislative Defendants—Senior Chairman of the House Select Committee on Redistricting David R. Lewis, Chairman of the Senate Standing Committee on Redistricting Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, and President Pro Tempore of the Senate Philip E. Berger. *See* Legislative Defendants' Mot. for Protective Order ("Mot."), Exs. 1-4. Plaintiffs noticed the depositions for March 5, March 7, March 11, and March 12. Also on January 24, Plaintiffs served subpoenas for depositions and documents on eight individuals whom Legislative Defendants had identified in interrogatory responses as being involved in the 2017 redistricting process: Senator Trudy Wade, Senator Wesley Meredith, Senator John Alexander, Senator Dan Bishop, former Senator Robert Rucho, former Representative Nelson Dollar, legislative employee Mark Coggins, and former legislative employee Jim Blaine (collectively, the "non-party legislators and staff"). *See id.*, Exs. 5-12. Plaintiffs noticed the depositions of these individuals for dates between February 27 and March 20. Counsel for Legislative Defendants agreed to accept service of the subpoenas for these individuals and is representing them here.

On February 4, Legislative Defendants and the non-party legislators and staff filed a motion "for a protective order prohibiting plaintiffs from taking [their] depositions on the grounds of legislative immunity and legislative privilege." Mot. 3. That same day, the non-party legislators and staff responded to Plaintiffs' document subpoenas, asserting legislative privilege

and legislative immunity and refusing to produce any documents. Legislative Defendants similarly have asserted legislative privilege in response to Plaintiffs' document requests to them.

After the motion for a protective order was filed, the parties attempted to negotiate a consensual resolution to the dispute, but those negotiations reached an impasse.

ARGUMENT

While Plaintiffs believe that Legislative Defendants' assertions of legislative privilege and immunity are overbroad and erroneous in light of N.C. Gen. Stat. § 120-133(a), Plaintiffs do not oppose the entry of the requested protective order so long as the order specifies that Legislative Defendants will be precluded from offering certain evidence and testimony at trial that derives from, or is within the knowledge of, the individuals subject to the protective order.

I. Legislative Defendants May Not Use Legislative Privilege as a Sword and a Shield

It is hornbook law that parties cannot use a privilege as both a "shield" to prevent discovery and a "sword" to present evidence or claims that relate to the privileged information. *State v. Buckner*, 351 N.C. 401, 410, 527 S.E.2d 307, 313 (2000); *Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (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). This principle applies equally to plaintiffs and defendants. *See, e.g.*, *Cantwell*, 109 N.C. App. at 396, 427 S.E.2d a 130.

Courts have applied the sword/shield doctrine to assertions of legislative privilege. "[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 (citing *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 2011 WL 4837508, at *11 (N.D. Ill. Oct. 12, 2011)).

Courts have even applied the principle in redistricting lawsuits specifically, denying legislators the ability to offer certain evidence in defense of redistricting plans where those legislators blocked discovery based on legislative privilege. In the recent partisan gerrymandering challenge to Pennsylvania's congressional districts, the legislative defendants asserted legislative privilege to preclude their depositions and other discovery related to legislative intent. The state trial court upheld the privilege assertions, blocking the requested discovery, and the plaintiffs in turn moved to preclude the defendants from introducing evidence related to legislative intent under the sword/shield doctrine. The trial court granted the motion and precluded the defendants "from offering evidence that [the plaintiffs] could not obtain in discovery due to [the] Court's . . . order" upholding the defendants' privilege assertions. Trial Tr. at 94, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (attached as Ex. A). 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 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, a constitutional challenge to a Nebraska statute under the Ex Post Facto Clause, the plaintiffs 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, and when the defendants sought to challenge that evidence, the court held that they were precluded from doing so given their prior privilege assertions. "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 [were] not . . . allowed to use their privilege defenses as both a sword and a shield." *Id.*

Here, too, Legislative Defendants must face the consequences of asserting legislative privilege to block Plaintiffs from obtaining discovery. Plaintiffs do not ask this Court to impose the extent of limitations that were imposed in *Doe*, but Legislative Defendants must at a minimum be precluded from introducing evidence and testimony that Plaintiffs would have been "potentially capable of rebutting" through the discovery that Plaintiffs were denied. *Favors*, 285 F.R.D. at 199. Legislative Defendants, in other words, may not present evidence or testimony that "in fairness requires examination of protected communications" or other discovery. *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

II. Plaintiffs Do Not Oppose the Protective Order if the Court Imposes Appropriate Limitations on the Evidence and Testimony That Defendants May Offer at Trial

Plaintiffs do not oppose the court's entry of the requested protective order if the court specifies that Legislative Defendants may not offer (1) testimony from any of the twelve individuals asserting legislative privilege and legislative immunity (2) evidence or testimony that derives directly or indirectly from non-public information from, or non-public communications

with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless that testimony or evidence is based exclusively on the public legislative record or publicly available data.

The first restriction is straightforward: Legislative Defendants cannot offer testimony from any individual whom Plaintiffs were unable to depose due to the assertions of legislative privilege and legislative immunity.

The second restriction prevents Legislative Defendants from funneling information from those twelve individuals through other witnesses, including experts. The sword/shield doctrine would serve little purpose if a party could circumvent its restrictions by relaying information from shielded witnesses to other witnesses. *See* Ex. A at 9 (explaining that legislative defendants could not introduce expert testimony based on consultations with legislative staff who had been "shielded from [the plaintiffs'] deposition efforts" by privilege assertions).[1]

The third and final restriction precludes Legislative Defendants from offering evidence or testimony relating to legislative intent, unless the evidence or testimony is based exclusively on the public legislative record or publicly available data. The General Assembly's intent in drawing the challenged plans is uniquely within the knowledge of the twelve individuals asserting legislative privilege, as Legislative Defendants have identified these individuals as the sole living persons who had any involvement in drawing the state House and state Senate districts in 2017. 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

[1] This order of course would also prevent the twelve individuals from funneling information to witnesses for the Intervenor Defendants, who are closely aligned with Legislative Defendants.

the truth regarding the legislature's actual intent. *See Bilzerian*, 926 F.2d at 1292-93 (applying sword/shield doctrine to restrict criminal defendant from offering testimony related to his "intent"). That said, Plaintiffs believe that Legislative Defendants should be permitted to present evidence and testimony related to legislative intent that is based exclusive on the public legislative record and publicly available data (*e.g.*, expert statistical analysis based on publicly available elections data).[2]

III. In the Alternative, Plaintiffs Request the Opportunity to Challenge Legislative Defendants' Privilege Assertions

Given the expedited schedule in this case, Plaintiffs have decided not to oppose the motion for a protective order—and thus to forgo important discovery to which Plaintiffs are entitled—if the Court specifies that the order will carry the routine consequences set forth above. However, if the Court is not inclined to enter such a protective order at this time, then Plaintiffs will file a brief challenging the privilege and immunity assertions. The blanket assertions that have been made to prevent essentially any discovery are clearly overbroad in light of N.C. Gen. Stat. § 120-133(a). That statute waives legislative privilege over any communications between legislators and staff—and over staff entirely—in relation to redistricting legislation.

***

WHEREFORE, Plaintiffs do not oppose the court's entry of the requested protective order if the court specifies that Legislative Defendants may not offer (1) testimony from any of the twelve individuals asserting legislative privilege and legislative immunity (2) evidence or testimony that derives directly or indirectly from non-public information from, or non-public

[2] For the second and third restrictions, the date by which to determine whether information or data is "public" or "non-public" should be November 13, 2018, the date that Plaintiffs filed the complaint in this case. That specification is necessary to prevent Defendants from selectively making certain information or data "public" now where that information might support Defendants' defenses in this matter, while continuing to assert privilege to allow Plaintiffs to probe those defenses by deposing or obtaining documents from legislators.

communications with, the twelve individuals asserting privilege, or (3) evidence or testimony that otherwise seeks to explain the legislature's intent in drawing the challenged districting plans, unless that testimony or evidence is based exclusively on the public legislative record or publicly available data. In the alternative, Plaintiffs request the opportunity to file a substantive opposition to Legislative Defendants' assertions of legislative privilege and legislative immunity.

Respectfully submitted this the 11th day of March, 2019

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This the 11th day of March, 2019.

Edwin M. Speas, Jr.

EXHIBIT C

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, et al.,

Defendants.

PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE LEGISLATIVE DEFENDANTS FROM INTRODUCING EVIDENCE OR TESTIMONY UNDER THE SWORD AND SHIELD DOCTRINE

In light of Legislative Defendants' prior assertions of legislative privilege, Plaintiffs move to preclude Legislative Defendants from offering certain evidence or testimony under the sword and shield doctrine. Specifically, Plaintiffs request an order precluding any defendant from offering: (1) testimony from any of the twelve current and former legislators and legislative staff who successfully asserted legislative privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals who asserted legislative privilege, and (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.

BACKGROUND

On January 24, 2019, Plaintiffs served notices of depositions upon all four Legislative Defendants—Senior Chairman of the House Select Committee on Redistricting David R. Lewis, Chairman of the Senate Standing Committee on Redistricting Ralph E. Hise, Jr., Speaker of the House Timothy K. Moore, and President Pro Tempore of the Senate Philip E. Berger. *See* Legislative Defendants' Mot. for Protective Order ("Mot."), Exs. 1-4. Plaintiffs noticed the depositions for early March. Also on January 24, Plaintiffs served subpoenas for depositions and documents on eight individuals whom Legislative Defendants had identified in interrogatory responses as being involved in the 2017 redistricting process: Senator Trudy Wade, Senator Wesley Meredith, Senator John Alexander, Senator Dan Bishop, former Senator Robert Rucho, former Representative Nelson Dollar, legislative employee Mark Coggins, and former legislative employee Jim Blaine (collectively, the "non-party legislators and staff"). *See id.*, Exs. 5-12.

On February 4, Legislative Defendants and the non-party legislators and staff—all represented by counsel for Legislative Defendants—moved for a protective order to block Plaintiffs from deposing all four Legislative Defendants and eight other current or former legislators and legislative staffers, on the grounds of legislative privilege and immunity. As the Court noted in its March 25, 2019 order, "[t]he assertion of legislative privilege resulted in the cancellation of duly noticed and subpoenaed depositions of current and former legislators and legislative staffers." 3/25/19 Order at 4.

Legislative Defendants and the non-party legislators and staff also asserted legislative privilege and immunity in response to Plaintiffs' document subpoenas and document requests. Based on their assertions of legislative privilege and immunity, the non-party legislators and staff did not produce a single document in response to Plaintiffs' document subpoenas.

In response to the legislative privilege and immunity assertions, Plaintiffs explained that, while they disagreed with the assertions, Plaintiffs consented to entry of the requested protective order so long as the order specified that Legislative Defendants would be precluded from offering certain evidence and trial testimony that derives from, or is within the knowledge of, the individuals subject to the protective order. A week later, Legislative Defendants purported to "withdraw" the motion for a protective order as to Representative Lewis and Senator Hise. Legislative Defendants purported to take such action just two days before the close of written fact discovery from Legislative Defendants and just four days before Plaintiffs' expert reports were due.

On March 25, 2019, this Court issued an Order declining to allow Legislative Defendants to withdraw their motion and instead granting the proposed protective order "in full." 3/25/19 Order at 5. The Court explained that Legislative Defendants' last-minute "change [in] positions"

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." *Id.* at 4.

This Court noted "the authority provided by Plaintiffs that holds that a party may cannot use a privilege both as a 'shield' to prevent discovery and a 'sword' to present evidence or claims that relate to the privileged information." 3/25/19 Order at 5 n.1. The Court concluded that it was "premature for the Court to make rulings on evidentiary matters for trial," but made clear that its order "in no way prejudice[d] Plaintiffs from seeking to be heard at or prior to trial should Legislative Defendants offer (1) testimony from any of the twelve 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 twelve 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.* at 5 n.1. Plaintiffs now seek such an order.

ARGUMENT

Because Legislative Defendants invoked legislative privilege as a shield to block depositions and to withhold discovery about their intent in enacting the 2017 Plans, they should be precluded from introducing certain evidence or argument at trial as a sword.

It is hornbook law that parties cannot use a privilege as both a "shield" to prevent discovery and a "sword" to present evidence or claims that relate to the privileged information. *State v. Buckner*, 351 N.C. 401, 410, 527 S.E.2d 307, 313 (2000); *Qurneh v. Colie*, 122 N.C. App. 553, 558, 471 S.E.2d 433, 436 (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). 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 v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012). Courts thus preclude legislators from offering certain evidence in defense of redistricting plans where those legislators blocked discovery based on legislative privilege. In the recent partisan gerrymandering challenge to Pennsylvania's congressional districts, the legislative defendants asserted legislative privilege to preclude their depositions and other discovery related to legislative intent. 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 trial court precluded the defendants "from offering evidence that [the plaintiffs] could not obtain in discovery due to [the] Court's . . . order" upholding the defendants' privilege assertions. Trial Tr. at 94, *League of Women Voters of Pa. v. Commonwealth*, No. 261 M.D. 2017 (attached as Ex. A). 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 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.*

Here, too, Legislative Defendants must face the consequences of asserting legislative privilege to block Plaintiffs from obtaining discovery. Legislative Defendants must at a minimum be precluded from introducing evidence and testimony that Plaintiffs would have been "potentially capable of rebutting" through the discovery that Plaintiffs were denied. *Favors*, 285 F.R.D. at 199. Legislative Defendants, in other words, may not present evidence or testimony that "in fairness requires examination of protected communications" or other discovery. *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991).

In particular, this Court should preclude Legislative Defendants from offering (1) testimony from any of the twelve 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 twelve 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.

The first restriction is straightforward: Legislative Defendants cannot offer testimony from any individual whom Plaintiffs were unable to depose due to the assertions of legislative privilege and legislative immunity.

The second restriction prevents Legislative Defendants from funneling information from those twelve individuals through other witnesses, including experts. The sword/shield doctrine would serve little purpose if a party could circumvent its restrictions by relaying information from shielded witnesses to other witnesses. *See* Ex. A at 32 (explaining that legislative defendants could not introduce expert testimony based on consultations with legislative staff who had been "shielded from [the plaintiffs'] deposition efforts" by privilege assertions).

The third restriction precludes Legislative Defendants from offering evidence or testimony relating to legislative intent, unless the evidence or testimony is based exclusively on the public legislative record or publicly available data. The twelve individuals who asserted legislative privilege and immunity plainly possess knowledge as to the General Assembly's intent in drawing the challenged plans—Legislative Defendants previously identified these individuals as the sole living persons who had any involvement in drawing the state House and state Senate districts in 2017. 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. *See Bilzerian*, 926 F.2d at 1292-93 (applying sword/shield doctrine to restrict criminal defendant from offering testimony related to his "intent"). Legislative Defendants should nonetheless be permitted to present evidence and testimony related to legislative intent that is based exclusively on the public legislative record and publicly available data—for example, through expert statistical analysis based on publicly available elections data.

For the second and third restrictions, the date by which to determine whether information or data is "public" or "non-public" should be November 13, 2018, the date on which Plaintiffs filed their complaint. Using that date is necessary to prevent Defendants from selectively making certain information or data "public" after the complaint was filed to support their defenses, while using privilege to block Plaintiffs from deposing or obtaining documents from legislators in order to probe those defenses. Moreover, all three restrictions should apply equally to the Intervenor Defendants and the State Defendants, to prevent Legislative Defendants from circumventing the sword and shield doctrine via the other Defendants.

CONCLUSION

For the foregoing reasons, all Defendants should be barred from offering: (1) testimony from any of the twelve current and former legislators and legislative staff who successfully asserted legislative privilege, (2) evidence or testimony that derives directly or indirectly from non-public information provided by, or non-public communications with, the twelve individuals who asserted legislative privilege, and (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.

Respectfully submitted this the 21st day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email* to the following persons:

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This the 21st day of June, 2019.

Edwin M. Speas, Jr.

EXHIBIT D

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Case No. 18 CVS 014001
COMMON CAUSE; *et al.* *Plaintiffs*, v. DAVID R. LEWIS, *et al.* *Defendants*.	**LEGISLATIVE DEFENDANTS' RESPONSE TO MOTION IN LIMINE TO PRECLUDE LEGISLATIVE DEFENDANTS FROM INTRODUCING EVIDENCE OR TESTIMONY UNDER THE SWORD AND SHIELD DOCTRINE**

Plaintiffs' motion regarding the sword and shield doctrine is breathtakingly overbroad and should be denied.

Plaintiffs seek to bar any legislator from testifying or offering any evidence at trial regardless of whether the legislator asserted legislative privilege. This is despite the fact that well before the discovery period expired, legislative defendants disclosed numerous legislators with knowledge of the redistricting process, criteria, and districts drawn and enacted in 2017. None of those legislators has asserted legislative privilege; indeed, despite having this information for months, plaintiffs never attempted to subpoena or depose them. Plaintiffs should not now be able to hide facts known by these legislators from the court.

FACTUAL BACKGROUND

On January 24, 2019, plaintiffs served numerous deposition notices and/or subpoenas for the legislative defendants and others covered by legislative privilege. These notices and subpoenas were limited to the following: Rep. Lewis, Sen. Hise, Speaker Moore, Sen. Berger, Sen. Wade, Sen. Meredith, Sen. Alexander, Sen. Bishop, former Sen. Rucho, former Rep. Dollar, Mark Coggins, and Jim Blaine.

On February 4, 2019, legislative defendants served a motion for protective order regarding the deposition notices issued by plaintiffs. The non-parties also served objections to the deposition and document subpoenas on the same day.

After the motion for protective order was served, the parties thereafter began discussions and negotiations regarding a resolution to the privilege issue. While the parties were discussing the legislative privilege issue, plaintiffs filed their first motion to compel on February 19, 2019. Plaintiffs allowed the motion to sit in the court file for nearly a month before taking appropriate action to have it heard by the court.

On March 25, 2019, the court entered an order granting plaintiffs' first motion to compel in part. Part of the order required supplementation of certain interrogatory answers by April 3, 2019.

Legislative defendants complied with the order. As pertinent here, on April 3, 2019, legislative defendants supplemented their answer to Interrogatory No. 1, which sought the identification of persons who were involved in the "drawing or revising [of] district boundaries for the 2017 Plans, or in the development of criteria used in drawing or revising district boundaries for the 2017 Plans." See Legislative Defendants' Second Supplemental Objections and Responses to Plaintiffs' First Set of Interrogatories (4/3/19), attached as Exhibit A.

The supplemental response stated:

> In addition, the State Senate and State House redistricting committee members were involved in the redistricting, including specifically the Republican members of each committee. The Republican members of the State Senate committee were: Sen. Ralph Hise, Chairman, Sen. Dan Bishop, Sen. Harry Brown,

Sen. Warren Daniel, Sen. Kathy Harrington, Sen. Brent Jackson, Sen. Michael V. Lee, Sen. Paul Newton, Sen. Bill Rabon, and Sen. Trudy Wade.

The Republican members of the State House committee were: Rep. David Lewis, Senior Chairman, Rep. Nelson Dollar, Chairman, Rep. John Bell, Vice Chairman, Rep. Sarah Stevens, Vice Chairman, Rep. John Szoka, Vice Chairman, Rep. Jon Torbett, Vice Chairman, Rep. Bill Brawley, Rep. Justin Burr, Rep. Ted Davis, Rep. Jimmy Dixon, Rep. Josh Dobson, Rep. Andy Dulin, Rep. Holly Grange, Rep. Destin Hall, Rep. Jon Hardister, Rep. Kelly Hastings, Rep. Julia Howard, Rep. Pat Hurley, Rep. Linda Johnson, Rep. Bert Jones, Rep. Jonathan Jordan, Rep. Chris Malone, Rep. David Rogers, Rep. Jason Saine, and Rep. Michael Speciale.

The Republican members of the State House and State Senate redistricting committees *have knowledge of the redistricting process, criteria, and districts drawn and enacted in 2017.*

Ex. A. at 4-5 (emphasis added).

Plaintiffs did not seek to subpoena or depose any of the individuals identified in legislative defendants' supplemental response. The deadline for written discovery expired on April 17, 2019 and the deadline for fact witness discovery expired May 17, 2019.

ARGUMENT

Plaintiffs' motion is overbroad and rests on a factually incorrect proposition.[1] Plaintiffs claim that the twelve individuals who asserted legislative privilege in February

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[1] Legislative defendants do not intend to offer any evidence, directly or indirectly, from the individuals who were the subject of the February protective order motion. However, legislative

2019 were identified by legislative defendants as the "sole living persons who had any involvement in drawing the state House and state Senate districts in 2017." Motion at 6. That is demonstrably false. On April 3, 2019, legislative defendants identified at least 30 additional persons who were involved in the 2017 redistricting. Legislative defendants also explicitly described their knowledge as of "the redistricting process, criteria, and districts drawn and enacted in 2017."

Thus, as of April 3, 2019, plaintiffs were on notice of additional individuals they should seek to depose or subpoena in order to obtain all facts known by relevant legislators about the 2017 redistricting. Plaintiffs failed to do so. It would be manifestly unjust for the legislative defendants to be barred from offering facts about the relevant redistricting plans from legislators who have never been subpoenaed and, more importantly, have never asserted legislative privilege in this matter. These 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.

CONCLUSION

For the foregoing reasons, plaintiffs' motion regarding the sword and shield doctrine should be denied.

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defendants reserve the right to seek leave to call such individuals as witnesses at trial to the extent necessary to defend legislative defendants against any baseless accusations allowed at trial that are related to the files produced by Stephanie Hofeller Lizon.

This the 1st day of July, 2019.

Respectfully submitted,

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This is to certify that the undersigned has this day served the foregoing in the above titled action upon all other parties to this cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal;

[X] By email transmittal;

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This the 1st day of July, 2019.

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EXHIBIT E

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
* * * * * * * * * * * * * * * * * * * *

COMMON CAUSE, et al, Plaintiffs, versus Representative DAVID R LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al, Defendants.	)	WAKE COUNTY 18 CVS 14001 VOLUME VIII OF X Pages 1695-1901

* *

TRANSCRIPT

Wednesday, July 24, 2019

* *

Transcript of proceedings in the General Court of Justice, Superior Court Division, Wake County, Hillsborough Street, Raleigh, North Carolina, held on July 23, 2019, at Campbell Law School, Hillsborough Street, Raleigh, North Carolina, before the Honorable Paul C. Ridgeway, Joseph N. Crosswhite and Alama L. Hinton, Judges Presiding.

APPEARANCES:

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10:59:24 Am I right to understand, Representative Bell, that
10:59:28 your on House District is located within this county grouping?
10:59:32 A. Yes.
10:59:32 Q. That's House District 10 on the eastern side?
10:59:37 A. Correct.
10:59:40 Q. Now, to frame this for the Court, Plaintiffs concede
10:59:45 in their Complaint that House Districts 21 and 22 were redrawn
10:59:51 by the special master. And Plaintiffs do not make any
11:00:00 allegations about your own district, House District 10. So,
11:00:05 therefore, our discussion today is going to focus on the
11:00:09 remaining House districts. Those are Districts 26, 28, 51,
11:00:19 and 53.
11:00:21 Now, looking at those four House districts,
11:00:28 understanding that this is your own county grouping, I have a
11:00:32 question for you about a point that Plaintiffs allege. They
11:00:36 allege that the General Assembly cracked the Democratic
11:00:40 pockets of Johnston, Harnett and Lee Counties into four
11:00:47 separate districts -- those are Districts 26, 28, 53 and 51 --
11:00:56 so that none of these four districts would lean towards
11:01:02 Democrats. I was quoting there from the first amended
11:01:05 Complaint at paragraphs 136 through 137.
11:01:12 Do you agree, Representative Bell, that Democratic
11:01:15 pockets of Johnston, Harnett and Lee Counties were cracked
11:01:22 into four separate districts?
11:01:24 MR. JONES: Objection, Your Honor. The

11:01:28 sword/shield doctrine, which we've briefed and already have an
11:01:33 in limine ruling from this Court, precludes Legislative
11:01:35 Defendants from introducing any evidence or testimony, and I'm
11:01:41 just reading from the Court's in limine order: Any evidence
11:01:45 or testimony that derives directly or indirectly from
11:01:49 nonpublic information provided by our communications with the
11:01:54 legislators who have invoked legislative privilege or any
11:01:58 evidence or testimony otherwise seeking to explain the General
11:02:01 Assembly's intent in drawing any of these districts, unless
11:02:05 such testimony or evidence is based exclusively on the public
11:02:10 legislative record or publicly available data, and I don't
11:02:13 believe there's been any foundation laid as to what the basis
11:02:16 for this witness' testimony is going to be, to the extent the
11:02:21 basis is anything other than exclusively publicly available
11:02:24 legislative record or other publicly available data, it's
11:02:27 clearly barred by the Court's in limine ruling on the
11:02:31 sword/shield doctrine.
11:02:32 THE COURT: All right.
11:02:32 MS. MCKNIGHT: Yes, Your Honor. So what
11:02:34 Plaintiffs' counsel is quoting from is the Court's order in
11:02:38 March. I'm looking at it right here.
11:02:40 MR. JONES: No, that's not right. I was quoting
11:02:42 from the Court's order a couple days ago.
11:02:45 THE COURT: Let's move on.
11:02:47 MS. MCKNIGHT: Okay. Sure. And I'd welcome him to

11:02:50 speak when it's his turn.

11:02:52 For now, I focus on the Court's March order, in
11:02:55 which in a footnote the Court was responding to a motion by
11:02:59 Plaintiffs related to legislative privilege.

11:03:02 The first issue is that we are not providing the
11:03:06 Court with testimony from any of the 12 individuals who
11:03:10 asserted privilege in this case. Plaintiffs, I'm sure, would
11:03:14 concede that Representative Bell did not assert legislative
11:03:19 privilege.

11:03:19 Second, I am not eliciting testimony about the
11:03:23 legislature's intent; rather, as I've already laid the
11:03:28 foundation for, I am asking Representative Bell about the
11:03:31 county grouping in which his own district resides. Earlier
11:03:36 today before the break, he laid a foundation for why he knows
11:03:39 about both his area and the politics related to that area,
11:03:46 whether -- and the composition of his district.

11:03:50 Now, another important point, the Court issued a
11:03:53 summary ruling on July 10 from the July 10 hearings where it
11:03:58 stated, quote, Legislative Defendants are not precluded from
11:04:03 offering evidence from legislators who have not asserted
11:04:11 legislative privilege. That is what we are offering now.
11:04:13 Again, we are not offering evidence of intent. We are
11:04:16 offering evidence testimony from Representative Bell based on
11:04:19 his own experience and understanding of his district.

11:04:22 MR. JONES: Your Honors --

Are you finished?

MS. MCKNIGHT: Yes.

MR. GERSCH: I apologize for speaking out of turn before.

Just to clarify. I was reading earlier from the Court's order on outstanding pretrial motions, which is dated July 17th. That's just a few days ago. This is the Court's in limine ruling granting our motion in limine on this exact issue. And it says exactly the things that I read, including that Legislative Defendants are precluded from putting on any evidence or testimony about the General Assembly's intent unless it is based exclusively on the public legislative record or publicly available data.

And to be clear, the question of whether these districts are -- whether the Democratic voters are cracked, that is absolutely a question that goes to intent. Cracking and packing voters is intentional partisan gerrymandering. That's what this whole case is about.

THE COURT: We're going to sustain the objection.

He is a person with presumably personal knowledge of this geographic area. He resides in this cluster. He's run for office in this cluster. He can certainly testify about his personal experience as to where Democrats are located, where Republicans are located, but we agree with the Plaintiffs that the use of the term "cracked" is directly tied

11:06:50 to an intent of a map drawer, as we've been using it
11:06:55 throughout this trial. Whether something is "cracked" or
11:06:57 "packed" is a term of art that we believe connotes intent this
11:07:02 time. But if you are talking about geography, political
11:07:03 geography in a cluster, it's based on his personal
11:07:09 observation, that would be permitted.
11:07:13 MS. MCKNIGHT: Thank you, Your Honor.
11:07:19 Q. Now, Representative Bell, looking at the map on page
11:07:23 38, again, focusing on Districts 28, 26, 53 and 51, would you
11:07:31 say you are familiar with the districts, the geographic area
11:07:37 that makes up Districts 28, 26, 53 and 51?
11:07:43 A. I'm familiar.
11:07:44 Q. Okay. Are you familiar with some of the political
11:07:47 makeup of those districts?
11:07:50 A. Yes, some of them.
11:07:55 Q. And do you believe -- and here I ask you to take
11:07:58 care. I am not interested in any intent of the legislature.
11:08:02 I am focused on your belief as a Representative from this area
11:08:08 understanding the makeup of these districts. Do you
11:08:11 believe -- and let me step back.
11:08:14 Are you able to identify for the Court the areas of
11:08:18 Johnston, Harnett and Lee Counties on this map?
11:08:22 A. Yes.
11:08:22 Q. Where are those counties?
11:08:25 A. District 26 and 28 would be Johnston County, 53

EXHIBIT F

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

League of Women Voters of Pennsylvania, Carmen Febo San Miguel, James Solomon, John Greiner, John Capowski, Gretchen Brandt, Thomas Rentschler, Mary Elizabeth Lawn, Lisa Isaacs, Don Lancaster, Jordi Comas, Robert Smith, William Marx, Richard Mantell, Priscilla McNulty, Thomas Ulrich, Robert McKinstry, Mark Lichty, Lorraine Petrosky,

Petitioners,

v.

No. 261 M.D. 2017

The Commonwealth of Pennsylvania; The Pennsylvania General Assembly; Thomas W. Wolf, In His Capacity As Governor of Pennsylvania; Michael J. Stack III, In His Capacity As Lieutenant Governor of Pennsylvania And President of the Pennsylvania Senate; Michael C. Turzai, In His Capacity As Speaker of the Pennsylvania House of Representatives; Joseph B. Scarnati III, In His Capacity As Pennsylvania Senate President Pro Tempore; Robert Torres, In His Capacity As Acting Secretary of the Commonwealth of Pennsylvania; Jonathan M. Marks, In His Capacity As the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State,

Respondents.

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COMMONWEALTH COURT OF PENNSYLVANIA, Volume I

BEFORE: HONORABLE JUDGE KEVIN BROBSON

DATE: DECEMBER 11, 2017; 9:30 A.M.

PLACE: COMMONWEALTH COURT
PENNSYLVANIA JUDICIAL CENTER
601 COMMONWEALTH AVENUE
HARRISBURG, PA 17106

REPORTED BY: CINDY L. SEBO, RMR, CRR, RPR,

for certain whether it's happened, and can I use it as a basis to exclude Dr. Gimpel's testimony?

MR. CELLA: Your Honor, I believe that what you do know from the record that we've provided is that some information --

THE COURT: Well, I understand that. I understand that.

My question is -- I find -- I think it would be incredibly compelling if, as a matter of fact, Legislative Respondents' experts have been consulting with nontestifying consultants who you sought to depose but then were shielded. I think that would be an incredibly compelling argument to seek to preclude their experts from testifying.

My question is, Is that the argument that you're making? Are you -- are you asserting and are you able to prove that the Legislative Respondents' experts have been consulting with individuals who were shielded from your deposition efforts?

MR. CELLA: Your Honor, what we're asserting is that through counsel --

THE COURT: Thank you.

MR. TUCKER: Thank you.

THE COURT: Okay. First is Petitioners' motion to exclude or limit Intervenors' testimony. I'm going to grant motion.

As far as the witnesses that the Intervenors are going to call, I'm going to grant the motion and preclude the testimony of a potential -- or of an existing Congressional candidate.

The reason why is because I don't think I need an existing Congressional candidate to inform the Court as to how prejudicial a change in the maps will be.

I think everybody understands that if the maps change, that that will certainly change who can or cannot run for office and the corresponding burden associated with that.

In reality, I'll say, anecdotally, I'm not sure it changes who can or cannot run, because I don't think you need to be a resident of your Congressional district to run for Congress. With that being said, I

understand the practical burden associated with being a carpetbagger, so to speak. But, nonetheless, I don't think we need any testimony on that particular inconvenience.

I also -- I will also limit the number of witnesses that can testify as party chairs and the number of witnesses that can testify as so-called "Republicans at large." The Intervenors can present the testimony of one party chair and one Republican at large, but the rest of the testimony seems, to me, to be duplicative.

So in that regard, that motion will be granted.

Next is Petitioners' motion to limit or preclude Legislative Respondents from presenting evidence or argument about intent, motives and activity in enacting the 2011 Plans.

I'm going to grant that motion to the extent that it seeks to bar Legislative Respondents from offering evidence that Petitioners could not obtain in discovery due to this Court's November 22nd, 2017 order regarding the

speech and debate clause, a provision in the Pennsylvania Constitution.

As far as the request to limit argument, that's -- we'll wait to see what argument they want to have. But I was concerned in the motion there was some suggestion that they could -- that the Legislative Respondents will be precluded from making any arguments about the evidence that the Petitioners might produce, and that seemed to be overbroad. So we'll deal with that more on a case-by-case basis.

But as far as the speech and debate immunity and sword and shield argument, I think the order I just provided on the record adequately addresses Petitioners' concerns.

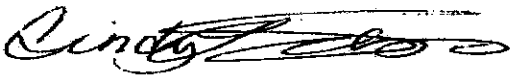
The next motion is Petitioners' motion to exclude the testimony of Dr. Wendy Cho, critical to the expert report of Dr. Chen. I'm going to deny that motion.

Next is Plaintiffs' motion to exclude Dr. Gimpel's expert testimony regarding the effect of the 2011 Plans.

The Court has already accepted the

COMMONWEALTH OF PENNSYLVANIA:

I, Cindy L. Sebo, a court reporter within and for the Jurisdiction aforesaid, do hereby certify that the foregoing proceeding were pursuant to notice, at the time and place indicated; that the testimony of said was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the proceedings are true record of the testimony given; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.



Cindy L. Sebo, RMR, CRR, RPR, CSR,
CCR, CLR, RSA, LiveDeposition
Authorized Reporter, and Notary Public

EXHIBIT G

TRANSCRIPTION OF AUDIO FILE

NORTH CAROLINA HOUSE COMMITTEE

ON REDISTRICTING

OCTOBER 5, 2021

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sure what we can do with the technology, but we are absolutely happy to look into what our options are, and report that back to the chair.

REPRESENTATIVE HAWKINS: Okay. I also heard you were Erika Churchill, and you can do all things, but just putting that out there.

MS. CHURCHILL: Speaking French is not one of those things.

REPRESENTATIVE HAWKINS: Okay. 10-4. Just --

CHAIRMAN HALL: I believe she said not yet.

REPRESENTATIVE HAWKINS: Follow up, Mr. Chairman.

VICE CHAIR SAINE: You're recognized for a follow-up.

REPRESENTATIVE HAWKINS: And this is just, you know, full transparency, Mr. Chairman, so that the public can know that we're, you know, working with all cards up. Is there, you know, any -- I want to make sure that there have been no maps drawn outside of this building that any of us have been privy to. Can we say that unequivocally that that's been the case?

CHAIRMAN HALL: I can't speak for other members of this committee. What I'll say is that I

have not contributed to the drawing of any map, at all.

REPRESENTATIVE HAWKINS: Awesome. Thank you, Mr. Chair.

VICE CHAIR SAINE: Thank you.

Representative Warren.

REPRESENTATIVE WARREN: Thank you. I propose this to the Chair, but probably going to deflect it to Ms. Churchill. Can you explain what the matrix is on page 2 of this stack of maps?

VICE CHAIR SAINE: Ms. Churchill.

REPRESENTATIVE WARREN: I knew it. She can do anything.

CHAIRMAN HALL: When we're using the word "matrix," generally I'm going to go ahead and deflect that one on over.

MS. CHURCHILL: So, Representative Warren, I'm not sure that it is a matrix in the form that many people think of when you say that word. But it was our attempt to keep up with how the group from Duke was allocating the options to create the eight different combinations for a fully assigned statewide map.

So when you see the A1 option in the Duke House 01 through 04, that is associated with the

CERTIFICATE OF TRANSCRIPTIONIST

I certify that the foregoing is a true and accurate transcript of the digital recording provided to me in this matter.

I do further certify that I am neither a relative, nor employee, nor attorney of any of the parties to this action, and that I am not financially interested in the action.

Julie Thompson, CET-1036