IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al*., Plaintiffs, v. PATRICK LLOYD MCCRORY, in his official capacity as Governor of North Carolina, *et al*., Defendants.	1:13CV658
LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, *et al*., Plaintiffs, *and* LOUIS M. DUKE, *et al*., Plaintiffs-Intervenors, v. THE STATE OF NORTH CAROLINA, *et al*., Defendants.	1:13CV660
UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF NORTH CAROLINA, *et al*., Defendants.	1:13CV861

MEMORANDUM IN SUPPORT OF MOTION TO QUASH TRIAL SUBPOENA OF SENATOR BILL COOK

NOW COMES Senator Bill Cook and defendants, by and through undersigned counsel, and hereby move to quash the trial subpoena served on him by plaintiffs-intervenors in the above-captioned matter. In support of this motion, defendants and Senator Cook show the Court the following:

INTRODUCTION

Plaintiffs-Intervenors' trial subpoena of North Carolina State Senator Bill Cook, seemingly issued only for the purpose of pressuring defendants to withdraw their valid objection to double-hearsay contained in a newspaper article plaintiffs-intervenors wish to introduce into evidence, should be quashed. Specifically, plaintiffs-intervenors served their subpoena at approximately 3:05 p.m. (in the middle of a witness examination) on Friday, July 17, 2015 with the stated goal of forcing Senator Cook to appear before this Court on Tuesday, July 21, 2015, with notice of only *one* business day between issuance of the subpoena and required compliance. Plaintiffs-Intervenors issued their subpoena knowing that the United States Supreme Court, as well as this Court, recognizes that state legislators enjoy a legislative privilege protecting them from testifying about actions they take in their legislative capacity. Moreover, plaintiffs-intervenors are well aware that the North Carolina General Assembly is currently in session in Raleigh, North Carolina which precludes Senator Cook from being able to travel to Winston-Salem to testify in this trial even if he did not enjoy the legislative privilege recognized by this Court. Simply put, plaintiffs-intervenors' subpoena was issued for no other reason than to harass

defendants and Senator Cook, resulting in a waste of this Court's time and resources. The subpoena should be quashed.

ARGUMENT

I. The Subpoena Fails to Allow Sufficient Time for Compliance.

Plaintiffs-Intervenors issued the Cook subpoena at 3:05 p.m. on Friday, July 17 commanding Senator Cook to appear before this Court on Tuesday, July 21, with only one business day in between service and expected compliance. Issuance of a subpoena to any witness, much less a state Senator participating in a pending Session of the North Carolina General Assembly, in such a manner is oppressive and the subpoena should be quashed for this reason alone.

II. The Subpoena is Grossly Untimely.

Despite the fact that these cases have been pending for nearly two years, plaintiffs-intervenors waited until the last possible second, and during trial, to issue this subpoena to a sitting legislator. The Court should not tolerate this for several reasons.

First, the issue of legislator testimony by deposition could have been litigated during the lengthy and extended discovery period in these matters. As this Court has noted during the trial, the Court spent a great deal of judicial time and energy resolving the legislative immunity and privilege issues in this case. The District Judge alone issued two lengthy memorandum opinions on the subject over a span of nine months. (May 15, 2014 Memorandum Order (ECF 105 in Case No. 13-cv-658)) ("2014 Order"); (February 4, 2015 Memorandum Order (ECF 231 in Case No. 13-cv-658)) ("2015 Order"). In the

2014 Order, the Court specifically noted that plaintiffs advised the Court that they had noticed the depositions of several legislators but had agreed to await the Court's ruling before proceeding further. (2014 Order, p.24 n.12) That ruling was issued on May 15, 2014 and neither plaintiffs nor plaintiffs-intervenors "proceed[ed] further" with the depositions. Had they done so, the issue of whether legislators can be compelled to testify at deposition or otherwise on matters within the sphere of legislative activity and, if so, the extent of any such testimony, could have been resolved months, if not an entire year, before trial. Moreover, the issue could have been resolved in due course, with a hearing and full briefing, rather than in the middle of a trial involving dozens of other witnesses and hundreds of exhibits.

Second, the issue of possible legislator testimony during trial could also have been litigated well before now. Counsel for plaintiffs-intervenors have known since at least June 11, 2015 that defendants would object to trial subpoenas issued to legislators. Counsel for defendants made that very clear in an email to counsel for plaintiffs-intervenors on June 11, 2015 and in subsequent emails. Rather than issuing subpoenas and bringing this issue to the Court's attention before trial, plaintiffs-intervenors sat on it and waited until a Friday afternoon in the middle of trial. Accordingly, the subpoena should be quashed.

Finally, plaintiffs did not include Senator Cook on their final joint witness list. (ECF 309-1 in Case No. 13-cv-658) Accordingly, the Court should exclude any testimony from this undisclosed witness for that reason alone.

III. State Legislators Enjoy a Judicially Recognized Legislative Privilege that Protects Them From Testifying About "Actions Taken Within the Sphere of Legitimate Legislative Activity."

The United States Supreme Court and the Fourth Circuit Court of Appeals have long recognized a broad right of legislators to be free from "civil process for what they do or say in legislative proceedings." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *See also EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174 (4th Cir. 2011). As stated previously in this action, the practical import of legislative immunity and legislative privilege cannot be overstated. Numerous courts have noted the importance of the doctrines in protecting legislators from "the costs and distractions of attending lawsuits," "from political wars of attrition," and from having public service deterred by "the threat of liability." *Wash. Suburban Sanitary Comm'n*, 631 F.3d at 181. As a result, "judicial inquiries into legislative… motivation represent a substantial intrusion into the workings of other branches of government," and "[p]lacing a decision-maker on the [witness] stand is therefore usually to be avoided." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, n. 18 (1977).

Significantly, in ruling on defendants' previous motion to quash plaintiffs' subpoena *duces tecum* of state legislators, this Court noted that in addition to immunity from suit, "[i]t is also apparent that [state legislators] enjoy a legislative privilege that includes protection from *testifying* for actions taken within the sphere of legitimate legislative activity." (2014 Order, p. 23) (emphasis added) (internal quotations omitted) (*citing Schlitz v. Commonwealth of Va.*, 854 F.2d 43, 45 (4th Cir. 1988) ("where, as here, the suit would require the legislators to testify regarding conduct in their legislative

capacity, the doctrine of legislative immunity has full force"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992) (depositions of state legislators would be improper "as to any action which they took after redistricting legislation reached the floor of the General Assembly); *Backus v. South Carolina*, Case No. 3:11-cv-03120-HFF-PMD, Order (D.S.C. Feb. 8, 2012) (quashing notice of deposition as to "any questions concerning communications or deliberations involving legislators… motives in enacting legislation"); *Florida v. U.S.*, 886 F. Supp. 2d 1301, 1304 (N.D. Fla. 2012) (holding that state legislators in a case brought under Section 5 of the Voting Rights Act were privileged from testifying regarding the "reasons for their votes")).

Senator Bill Cook is a member of the North Carolina General Assembly. The subpoena served on him by plaintiffs-intervenors is addressed to him in his legislative capacity. Plainly, plaintiffs-intervenors wish to compel Senator Cook to testify about the legislature's enactment of S.L. 2013-381 and other legislative matters in which he has been involved. However, as detailed above, he is entitled to legislative privilege that prevents him from being forced to testify about actions undertaken in his official legislative capacity. This privilege was clearly outlined by the Fourth Circuit in *Wash. Suburban*. Specifically that court noted:

> As members of the most representative branch, legislators bear significant responsibility for many of [a state's] toughest decisions, [including] the content of the laws that will shape our society… Legislative immunity provides legislators with the breathing room necessary to make these choices in the public's interest, in a way uninhibited by judicial interference and undistorted by fear of personal liability. It allows them to focus on their public duties by removing the cost and distractions of attending lawsuits. It

> shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box… Legislative immunity thus reinforces representative democracy, fostering public decision making by public servants…. [legislative immunity and privilege] applies whether or not the legislators themselves have been sued.

Wash. Suburban Sanitary Comm'n, 631 F.3d at 181.

The only purpose plaintiffs-intervenors could have in attempting to compel Senator Cook's testimony at trial would be to illicit evidence about the motivations and negotiations involved in the creation of the S.L. 2013-381 and other legislation. As the *Wash*. *Suburban* Court noted, state legislators are responsible for "tough decisions" regarding the content of the laws that "shape our society." Senator Cook should be protected from testifying about his part in the decisions that created North Carolina's voting laws. Senator Cook should be allowed to undertake his public duties without fear of being hauled into federal court on the whim of a party in the middle of a federal trial.[1]

Indeed, by serving a subpoena on Senator Cook, while knowing that the General Assembly is in session, plaintiffs-intervenors will be precluding him from focusing on his legislative duties, and instead force him to focus on the "cost and distraction of attending [a] law suit." This clearly is not in the public's interest and certainly will not "foster public decision making by [North Carolina's] public servants" in the future.

Undermining the foundation of democratic policies necessitating the immunity and privilege of legislators is particularly inappropriate where, as is this case here, the plaintiffs have already been provided copious amounts of information through prolonged

[1] As recently as 2014, the Fourth Circuit re-affirmed that legislative immunity "prevents those who were defeated in elections from waging a political war through litigation." *McCray v. Md. Dep't of Transp.*, 2014 WL 323272 at *4 (4th Cir. Jan. 30, 2014).

discovery, the entire legislative record and history of the law being challenged, additional correspondence between legislators and third parties such as state agencies and their constituents, and the testimony of dozens of witnesses by deposition and during the trial.

CONCLUSION

The subpoena to Senator Cook is grossly untimely and raises legal issues that plaintiffs could have asked this Court to resolve months if not over a year ago. Moreover, Senator Cook is entitled to a legislative privilege that protects him from being hauled into federal court (especially at the last minute and as an undisclosed witness) to testify about his legislative activities. For that reason, and for other good cause as defendants and Senator Cook have shown herein, plaintiffs-intervenors' subpoena of Senator Bill Cook should be quashed.

This the 19th day of July, 2015.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This, the 19th day of July, 2015.

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General Information

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Federal Nature of Suit	Civil Rights - Voting[441]
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