STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al.,

Plaintiffs,

vs.

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

Defendants.

REBECCA HARPER, et al.,

Plaintiffs,

vs.

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

Defendants.

REPLY TO *HARPER* PLAINTIFFS' RESPONSE TO MOTION FOR PROTECTIVE ORDER QUASHING NOTICES OF DEPOSITION OF SENATOR PHILIP E. BERGER, SENATOR WARREN DANIEL, SENATOR PAUL NEWTON, AND REPRESENTATIVE TIMOTHY K. MOORE

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Paul Newton, and Speaker Timothy K. Moore (collectively, "Movants"), by and though undersigned counsel and pursuant to the Scheduling Order entered by this Court on December 23, 2021 and Rules 7(b) and 26(c) of the North Carolina Rules of Civil Procedure, and hereby reply to *Harper* Plaintiffs' Response to the Movants' Motion for a Protective Order. Movants show the Court as follows:

ARGUMENT

The *Harper* Plaintiffs would have this Court believe that the dispute over Movants' Motion for a Protective Order centers on questions about the sword-and-shield doctrine. It does not. Rather, this dispute arises out of *Harper* Plaintiffs' fundamental misunderstanding (or refusal to acknowledge) core aspects of legislative privilege under well-settled North Carolina law. Further, *Harper* Plaintiffs' efforts on all sides of this Motion constitute an improper attempt to have this Court rule on a premature issue better resolved at trial.

As noted in Movants' motion, North Carolina law is clear that Legislative Privilege is personal to the legislator. *See Northfield Development Company v. City of Burlington*, 136 N.C. App. 272, 282, 523 S.E.2d 743, 749, *aff'd in part, review dismissed in part on other grounds*, 352 N.C. 671, 535 S.E.2d 32 (2000)*; accord Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992). Movants' position on this point of law—and its application to their Motion for a Protective Order—has been made as clear as possible to *Harper* Plaintiffs from the moment that they noticed depositions of all of the Legislative Defendants. First, counsel informed *Harper* Plaintiffs that certain legislator defendants have waived legislative privilege as to redistricting (Senator Hise and Representative Hall) and that others have not (the Movants). **Motion for Protective Order, Ex. 2 at 5.** Second, Legislative Defendants told *Harper* Plaintiffs' counsel that Senator Hise and Representative Hall would not provide testimony—whether in depositions or at trial—that would violate the legislative privilege of another member of the legislature.[1] **Mot. Ex. 2 at 3** ("[I]f [Senator Hise or Representative Hall] are asked questions that

[1] *Harper* Plaintiffs' counsel has attempted to frame Movants' position as a "partial" waiver, even going so far as to place the word in quotation marks to suggest its use by Legislative Defendants. To be clear, this is spin by *Harper* Plaintiffs; Legislative Defendants have expressly rejected

would impinge on another legislator's privilege, or involve areas outside of redistricting, then they reserve the right to make an appropriate objection at the time."). Finally, Legislative Defendants clearly communicated to *Harper* Plaintiffs' counsel that "Rep. Hall or Sen. Hise will [not] be using the privilege as a sword in any way." *Id.* Each of these three positions are consistent—indeed, mandated—by clear North Carolina law that legislative privilege is personal to each individual legislator.

Harper Plaintiffs' argument rests on a premise fundamentally at odds with this doctrine—that an assertion of privilege by one legislator equates to an assertion of privilege by the legislature as a whole. That notion is simply irreconcilable with the clear North Carolina precedent cited above. Moreover, a scenario in which one legislator could effectively invoke privilege for the entire legislature, thereby barring all other legislators from testifying in defense of the legislature's actions, would be wholly unworkable and unjust. *Harper* Plaintiffs' construction of the doctrine would emasculate the privilege by requiring unanimity among every member of the body as to whether to testify or raise privilege. And it would eliminate the rule that legislative privilege belongs individually to each legislator by permitting the choices of some legislators to eliminate the choices of others. Their framing would be incompatible with every other privilege, as these all can be asserted or waived at the discretion of the holder. *Harper* Plaintiffs cite no other context where their rule applies or could even conceivably be applied.

As such, the fundamentally-flawed premise on which *Harper* Plaintiffs rely wholly undercuts their argument about the role that the sword-and-shield doctrine plays in this matter, especially at this juncture in litigation. The sword-and-shield doctrine, as applied to legislative

framing their position as a "partial" waiver. **Mot. Ex. 2 at 3** ("Rep. Hall and Sen. Hise are not asserting a 'partial' waiver of legislative privilege.")].

privilege, precludes evidence relating to the intent of an individual legislator who had previously invoked legislative privilege during discovery. But, because the privilege is specific to each legislator, the doctrine does not prevent a different legislator from testifying merely because of the first legislator's assertion of privilege. As such, *Harper* Plaintiffs' analogy to a criminal defendant with two lawyers is inapposite. **Response at 10.** The present matter does not involve a single defendant, but multiple ones. *Each* defendant has unique knowledge and insight, each is entitled to pursue his defense as he sees fit, and as a legislator, each has his own decision to make with respect to legislative privilege. *Harper* Plaintiffs will have a full opportunity to depose Senator Hise and Representative Hall about any matter which they would testify at trial. Indeed, Legislative Defendants' Counsel has indicated expressly to *Harper* Plaintiffs that Senator Hise and Representative Hall will not "us[e] the privilege as a sword in any way." **Mot. Ex 2. at 3**. Whether other individual defendants waive or invoke their respective legislative privileges does not affect the sword and shield analysis as to Senators Hise and Representative Hall.

Harper Plaintiffs' attempts to bolster their analysis by citing other cases fail. *Common Cause v. Lewis* is distinguishable and non-binding. Final orders of North Carolina's trial division do not create precedent, a fact all the more true with respect to discrete, interlocutory orders on trial testimony. Even so, the circumstances facing the court in *Common Cause* are wholly distinct from those underlying the present Motion. In *Common Cause*, the Court's order only came after Legislative Defendants who had invoked privilege throughout discovery later sought to waive privilege and testify at trial. Here, Senator Hise and Representative Hall have expressly waived legislative privilege at the beginning of discovery, providing *Harper* Plaintiffs with the full ability to depose them about any matter that they will testify at trial. Stated differently, Legislative Defendants will not seek to introduce evidence at trial that they were denied access to during

discovery. *Harper* Plaintiffs' argument may have merit if one of the Movants who now invokes legislative privilege were later to seek to testify at trial, or if another trial witness sought to testify about one of the Movant's intent. But neither are the case here. *Harper* Plaintiffs therefore cannot show prejudice and their overly-expansive interpretation of the *Common Cause* order is inapplicable and misplaced in this context. *Harper* Plaintiffs' reliance on caselaw from other jurisdictions fails for similar reasons, as they arise from different facts, different procedural postures, and in any event, are not binding on this Court.

Yet, even if the sword and shield doctrine were to become applicable at trial, based on testimony elicited at trial, the court is fully capable of addressing the issue at trial. And the fact that *Harper* Plaintiffs insist on pushing the issue now reveals *Harper* Plaintiffs' true motive in manufacturing this dispute. *Harper* Plaintiffs' Response says that Legislative Defendants "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*…" **Response at 1** (emphasis added). Movant's Motion, however, says nothing about trial testimony. Movants have asked only that the Court quash their respective notices of deposition. And they filed this Motion only because *Harper* Plaintiffs' counsel repeatedly refused to withdraw the deposition notices and because *Harper* Plaintiffs' counsel expressly asked the Legislative Defendants to file the motion. **Mot. Ex. 2 at 1** (*Harper* Plaintiffs' counsel stating "we believe you should seek a protective order based on legislative privilege."). *Harper* Plaintiffs' suggestion that they "explained that they wished to avoid unnecessary motions practice," **Response at 5**, is disingenuous, at best.

In fact, *Harper* Plaintiffs' tactics reveal that they are the ones pushing the Court to resolve speculative trial issues prematurely. The introduction to their Response identifies "the dispute [as] whether Legislative Defendants, having so invoked the privilege to prevent discovery regarding

the mapmaking process and legislative intent, can turn around a [sic] present evidence or testimony at trial on these topics." **Response at 1**. *Harper* Plaintiffs' actions here are pure gamesmanship; to recap, *Harper* Plaintiffs issued Notices of Deposition, then refused to withdraw some of those Notices, even after acknowledging legislative privilege and agreeing that they will not take those depositions, thereby forcing (indeed, expressly instructing) Movants to seek a protective order. Now *Harper* Plaintiffs tell this Court that they "wished to avoid unnecessary motions practice," while, in the same breath, asking this Court to use this manufactured dispute as a vehicle to issue a premature order on a speculative issue concerning trial testimony. Even after the court suggested that the motion may be moot, *Harper* Plaintiffs insisted on pushing forward. *Harper* Plaintiffs' conduct would be unacceptable in the course of standard litigation, not to mention litigation occurring on an extremely expedited timeline during the holidays. The Court should not stand for it.

WHEREFORE, for the reason set forth above, the Movants respectfully pray that the Court grant a Protective Order quashing the Notices of Deposition served on President *Pro Tempore* Berger, Senators, Daniel, and Newton, and Speaker Moore, and all any and all other relief that the Court deems appropriate.

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

/s/ Phillip J. Strach

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It is hereby certified that on this the 23rd day of December, 2021, the foregoing was served on the individuals below by email:

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