

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:24-CV-00026-D-RN

JOYCE SYKES FITCH, MARK MIXON,
SHERRYREED ROBINSON, and
ADRIANA BLAKEMAN, individually
and as members of THE CONCERNED
CITIZENS OF TYRRELL COUNTY,

Plaintiffs,

v.

TYRRELL COUNTY,

Defendant.

**DEFENDANT’S MEMORANDUM
OF LAW IN SUPPORT OF MOTION
FOR PROTECTIVE ORDER
PROHIBITING DEPOSITIONS**

Defendant Tyrrell County submits this memorandum of law in support of its motion for protective order to preclude its elected county commissioners from giving deposition testimony, pursuant to Fed. R. Civ. P. 26(c) and local rules 7.1 and 7.2.

NATURE OF THE CASE

Plaintiffs sued Tyrrell County over a panel on a Confederate monument that reads, in part, “In Appreciation of our Faithful Slaves.” [DE 19] Tyrrell County moved to dismiss the suit, arguing that it cannot remove, relocate, or alter the monument in any way due to North Carolina’s Monument Protection Act, codified at N.C. Gen. Stat. § 100-2.1 [DE 20, 21]

This Court granted the motion, in part, and dismissed plaintiffs’ claim for relief under 42 U.S.C. § 1982. [DE 26] It allowed plaintiffs’ 42 U.S.C. § 1983 claim for a fourteenth amendment equal protection violation to proceed. [Id.]

Now, plaintiffs seek to depose Tyrrell County commissioners regarding the monument. The commissioners, however, have legislative privilege from testifying about their decisions regarding the monument because these decisions amount to core policymaking. And the commissioners have not waived this privilege. In turn, this Court should enter a protective order that prohibits the commissioners' compelled testimony because they have legislative privilege.

ARGUMENT

Federal, state, and local legislators have absolute immunity from civil liability for their legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998). In fact, since “municipal legislators are closer to their constituents than either their state or federal counterparts, they are, perhaps, the most vulnerable to and least able to defend lawsuits caused by the passage of legislation.” *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992) (citations omitted).

This legislative immunity also functions as an evidentiary and testimonial privilege. *Miles-Un-Ltd., Inc. v. Town of New Shoreham, R.I.*, 917 F. Supp. 91, 98 (D. N.H. 1996). This privilege promotes the immunity's purpose, which is to ensure that “legislators acting within the realm of legitimate legislative activity, should not be required to be a party to a civil action concerning legislative activities, nor should they be required to testify regarding their actions.” *Id.*

Two questions dictate whether legislative privilege attaches: (1) is the action truly legislative, and (2) has the legislator waived the privilege. *Alexander v. Holden*,

66 F.3d 62, 65 (4th Cir. 1995); *A Helping Hand, LLC v. Balt. County*, 295 F. Supp. 2d 585, 590 (D. Md. 2003). Both questions favor privilege here.

1. Decisions regarding the monument are legislative because they involve broad policy considerations.

Legislative privilege, by its very nature, attaches only to legislative actions. *Alexander*, 66 F.3d at 65. An action is legislative when it involves “generalizations concerning a policy or state of affairs and the establishment of a general policy affecting the larger population.” *Id.* (quoting *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992) (internal quotations omitted)). Legislative privilege precludes testimony on decisions regarding these “broad policy considerations.” *Id.* (internal citations omitted).

So, for instance, a legislative decision to elect a state judge is a “core legislative function,” so legislative immunity prohibited the legislators from testifying “as to their motives for declining to reelect plaintiff.” *Schlitz v. Virginia*, 584 F.2d 43, 46 (4th Cir. 1988) (overruled on other grounds by *Berkley v. Common Council*, 63 F.3d 295, 303 (4th Cir. 1995) (en banc)). Likewise, local council members had legislative privilege regarding their decision to adopt an electoral plan that the plaintiffs argued violated the voting rights act. *Simpson v. City of Hampton*, 166 F.R.D. 16, 19 (E.D. Va. 1996). And local selectman had legislative privileges regarding adopted regulations that governed how members of the public could use the town common.

Knights of Columbus v. Town of Lexington, 138 F. Supp. 2d 136, 140-41 (Dist. Mass. 2001).¹

On the other hand, if the issue “singles out specifiable individuals,” the decision may be administrative. *Alexander*, 66 F.3d at 66 (citing *Acevedo-Cordero*, 958 F.2d at 23. The classic example is a decision to fire one person or reduce their salary. *Id.* But a policy decision that one person or a group of persons disagree with is not administrative just because it affects them different from others. *Knights of Columbus*, 138 F. Supp. 2d at 140-41 (ruling that local regulations regarding use of town square were legislative, even though plaintiffs complained that regulation uniquely affected request to display nativity scene).

The Tyrrell County commissioners’ decisions regarding the monument are quintessentially legislative. These decisions affect all county citizens. The decisions reflect “broad policy considerations” following a deliberative process. And these decisions were not administrative and geared toward one person, like a decision to terminate a municipal employee. In turn, the commissioners’ legislative privilege precludes their testimony in this case.

¹ See also *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City School Dist.*, 81 F. Supp. 2d 1199, 1204 (D. Utah 2000) (ruling that “[i]f scrutiny of legislative motive would be inappropriate for the court itself to undertake at this stage of the case, it seems likewise inappropriate for parties to invoke the court’s machinery to conduct the same kind of scrutiny of individual Board members’ motivations through deposition discovery.”). See also *Cooper v. Lee County Board of Supervisors*, 966 F. Supp. 411, 416 (W.D. Va. 1997) (acknowledging that individual board members enjoy testimonial privilege flowing from doctrine of legislative immunity and noting that plaintiff must establish his prima facie case without benefit of supervisors’ testimony).

2. The commissioners have not waived their legislative privilege.

Legislative privilege “is personal: it belongs to the individual members of a local legislature, not the municipality as a whole.” *A Helping Hand*, 295 F. Supp. 2d at 590 (citing *Berkley*, 63 F.3d at 296 (4th Cir. 1995)). As such, a municipality cannot waive the privilege, the individual legislators “must do so for themselves.” *Id.*

Courts do not infer that a legislator has waived their privilege. Instead, waiver “can be found only after explicit and unequivocal renunciations of the protection.” *A Helping Hand*, 295 F. Supp. 2d at 591 (internal citations omitted). In this way, a council member did not waive immunity by speaking to the press about issues pertaining to a bill. *Id.* This is because “meetings with constituents and interest groups are ordinary legislative business and fall within the scope of the immunity.” *Id.* (citing *Bruce v. Riddle*, 631 F.2d 272, 279-80 (4th Cir. 1980)). A legislature only waives immunity when they testify “fully and completely” about a policymaking choice. *See e.g., Trombetta v. Bd. of Educ.*, 2004 U.S. Dist. LEXIS 6916 (N.D. Ill. Apr. 22, 2004).

The Tyrrell County commissioners have not testified “fully and completely” regarding their policymaking decisions surrounding the monument. Their comments at public meetings reflect ordinary legislative business that does not amount to waiver. In turn, the commissioners have not waived their legislative privilege, and plaintiffs cannot compel their testimony.

CONCLUSION

The Tyrrell County commissioners have legislative immunity for their

decisions regarding the monument, and they have not waived that immunity. In turn, this Court should enter a protective order that prohibits the plaintiffs from seeking deposition testimony from any current or former commissioners regarding the monument.

This the 5th day of January 2026.

CRANFILL SUMNER LLP

BY: /s/ Steven A. Bader
 STEVEN A. BADER
 N.C. State Bar No. 55931
 Email: sbader@cshlaw.com
 MARISSA K. JENSEN
 N.C. State Bar No. 46153
 Email: mjensen@cshlaw.com
 Post Office Box 27808
 Raleigh, North Carolina 27611-7808
 Telephone: 919-828-5100

PATRICK H. FLANAGAN
 N.C. State Bar No. 17407
 Email: phf@cshlaw.com
 Post Office Box 30787
 Charlotte, NC 28230
 Telephone: (704) 332-8300

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2026 I electronically filed the foregoing *Memorandum in Support of Motion for Protective Order Prohibiting Depositions* with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel of record:

Jaelyn D. Miller
 Ian M. Mance
 Emancipate NC
 P.O. Box 309
 Durham, NC 27702
 Email: jaelyn@emancipatenc.org
 Email: ian@emancipatenc.org
Attorneys for Plaintiff

CRANFILL SUMNER LLP

BY: /s/ Steven A. Bader
 STEVEN A. BADER
 N.C. State Bar No. 55931
 Email: sbader@cshlaw.com
 MARISSA K. JENSEN
 N.C. State Bar No. 46153
 Email: mjensen@cshlaw.com
 Post Office Box 27808
 Raleigh, North Carolina 27611-7808
 Telephone: 919-828-5100

Attorneys for Defendant