IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

* *

MOTION FOR PROTECTIVE ORDER AND TO QUASH NON-PARTY DEPOSITION SUBPOENAS SERVED ON THOMAS V. MIKE MILLER, JR., MICHAEL E. BUSCH, JEANNE HITCHCOCK, AND RICHARD STEWART

For the reasons stated in the accompanying memorandum, Thomas V. Mike Miller, Jr., President of the Maryland Senate, Michael E. Busch, Speaker of the Maryland House of Delegates, Jeanne Hitchcock, and Richard Stewart, through counsel, move for a protective order and to quash the non-party deposition subpoenas served on them by the plaintiffs, on the ground that their legislative privilege against compulsory evidentiary process protects them from being compelled to testify in this matter about their legislative activity. Further, the deposition subpoenas served on President Miller and Speaker Busch are unduly burdensome and should be quashed for that reason as well.

A proposed order is attached.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

Dated: January 9, 2017

___/s/__Jennifer L. Katz_____

JENNIFER L. KATZ (Bar No. 28973)
SARAH W. RICE (Bar No. 29113)
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7005 (tel.); (410) 576-6955 (fax)
jkatz@oag.state.md.us

KATHRYN ROWE (Bar No. 09853)
Assistant Attorney General
104 Legislative Services Building
90 State Circle
Annapolis, Maryland 21401
(410) 946-5600 (tel.); (410) 946-5601 (fax)
krowe@oag.state.md.us

Attorneys for Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, Richard Stewart

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MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER AND TO QUASH NON-PARTY DEPOSITION SUBPOENAS SERVED ON THOMAS V. MIKE MILLER, JR., MICHAEL E. BUSCH, JEANNE HITCHCOCK, AND RICHARD STEWART

On December 19, 2016, Plaintiffs' counsel served subpoenas for deposition on Maryland Senate President Thomas V. Mike Miller, Jr., Speaker of the Maryland House of Delegates Michael E. Busch, Jeanne Hitchcock, and Richard Stewart, all non-parties in this matter. *See* Ex. 2. All four of the subjects of these subpoenas were appointed by Governor Martin O'Malley to serve on the Governor's Redistricting Advisory Committee ("GRAC") in connection with the Maryland redistricting process that took place in 2011, following the 2010 census. The purpose of the GRAC was to hold public hearings, receive public comment, and draft a recommended plan for the State's legislative and congressional redistricting. President Miller, Speaker Busch, Jeanne Hitchcock, and Richard Stewart, as well as their personal legislative staff, have legislative privilege against compulsory evidentiary process regarding any matter relevant to this litigation, and thus the subpoenas

for their depositions should be quashed. Moreover, plaintiffs' attorneys failed to confer with President Miller, Speaker Busch, Jeanne Hitchcock, Richard Stewart, or their attorneys within the Attorney General's Office as to the date of the requested depositions in violation of Discovery Guideline 4. Failure to confer has resulted in plaintiffs noting deposition dates in the middle of Maryland's 90-day General Assembly session, posing an undue burden on President Miller and Speaker Busch.

BACKGROUND

The redrawing of the boundaries of congressional districts in Maryland is done by ordinary legislation, passed in the ordinary manner, although it is developed and introduced by the Governor. For this reason, the Maryland Attorney General's Office has consistently advised that the bill specifying congressional districts, like most bills, may be petitioned to referendum. 46 *Opinions of the Attorney General* 90, 90-91 (1961). In fact, the law by which the congressional boundaries were drawn in 1961 was petitioned to referendum and rejected by the voters in 1962. *See* Laws of Maryland 1963 at 2251. The 2011 map at issue here was enacted as Chapter 1 during a special session of the General Assembly in 2011. That bill was also petitioned to referendum, but this time voters approved the redistricting plan in the 2012 general election.[1]

[1] The Maryland State Board of Elections website publishes election results. The 2012 election results for the referred question on the congressional plan, which was Question 5, can be found at www.elections.maryland.gov/elections/2012/results/general/gen_qresults_2012_4_00_1.html. The results show that 64.1 percent voted "For" the redistricting plan and 35.9 percent voted "Against."

Governor O'Malley announced the formation of the Governor's Redistricting Advisory Committee for the 2011 redistricting process on July 4, 2011. The five-member committee was created to "hold public hearings, receive public comment, and draft a recommended plan for the State's legislative and congressional redistricting." Press Release, Office of the Governor, *O'Malley Announces Members of The Governor's Redistricting Advisory Committee* (July 4, 2011) *available at* http://www.pgpost.com/1.html (last accessed January 6, 2017). Jeanne Hitchcock served as the chair of the committee and President Miller, Speaker Busch, and Richard Stewart were appointed as members. *Id.* With respect to the Congressional plan, the GRAC was charged with drafting the plan and presenting the draft to the Governor before the Special Session of the General Assembly to take place in October 2011. *Id.* Senate Bill 1, which ultimately enacted the 2011 congressional redistricting plan, was introduced on October 17, 2011 on the Governor's request. SB1 Electronic Bill File, http://mgaleg.maryland.gov/webmga/frmMain.aspx?tab=subject3&ys=2011s1/billfile/sb0001.htm (last accessed Jan. 6, 2017).

Plaintiffs' deposition subpoenas follow their receipt of thousands of pages of non-privileged documents; 76 joint stipulations, including stipulations as to the existence of legislators' public statements, audio files of legislative proceedings, demographic and political data files; and draft maps considered by the GRAC to which legislative privilege was waived for the first time in order to facilitate this litigation. These materials were produced by defendants in the above-captioned matter, the Maryland Department of Legislative Services, members of the GRAC, including Speaker Miller and President

Busch, and the Maryland Department of Planning. Moreover, plaintiffs have access to election and voter data kept by the State Board of Elections[2] and to the files of former Governor O'Malley and his staff that are available to the public at the State Archives on the same terms that would apply to the State Board of Elections.[3]

Despite this Court's prior statement that plaintiffs must prove their novel cause of action by direct or circumstantial *objective* evidence (Doc. 88, 33-34), plaintiffs seek, through these deposition subpoenas, to invade the heart of *subjective* legislative deliberation and intent of individuals engaged in a quintessentially legislative activity. Moreover, they have sought to do so without regard to the sitting legislators' significant and weighty public obligations during the Maryland General Assembly's regular session. Although the proper conduct of redistricting is of high public importance, compelling testimony from former GRAC members on topics related to their service on the GRAC during the short Maryland legislative session is an unwarranted invasion of the "republican

[2] Plaintiffs have made no discovery request pertaining to general election and voter data kept by the State Board of Elections. The only discovery request made was specifically targeted at which election and voter data files were considered by the GRAC. The State Board of Elections did not have, and could not obtain, data responsive to that request, and Senator Miller and Speaker Busch have asserted legislative privilege with regard to that data. To the extent the State Board of Elections discovers any additional indication that specific election data was presented to the GRAC or other state agencies for purposes of redistricting, that data will be provided. The State Board of Elections did respond to a request under Maryland's access to public records law made by plaintiffs' attorneys with the general information about how to request these files, which are available to the public for noncommercial, elections purposes for a reasonable fee.

[3] Governor O'Malley's papers, including any papers retained at the end of the administration by his staff, have been gifted to the State Archives. These papers have not yet been accessioned to the Archives and the State Archivist has informed the State Board of Elections that any state agency would be subject to the same access restrictions and fees that are imposed on public requesters.

values" the legislative privilege was designed to promote. *E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011) (hereinafter "*WSSC*").

ARGUMENT

I. THE SUBJECTS OF THE SUBPOENAS HAVE A TESTIMONIAL PRIVILEGE PROTECTING THEM FROM COMPULSORY PROCESS AIMED AT DISCOVERING THEIR MOTIVATION IN ENGAGING IN LEGISLATIVE ACTIVITY.

Under Maryland law, as members of the General Assembly, legislators and their staff are protected from liability for or inquiry into their legislative activities by an absolute constitutional privilege contained in Maryland Declaration of Rights Article 10 and Maryland Constitution Article III, § 18. *Mandel v. O'Hara*, 320 Md. 103, 113 (1990); *Blondes v. State*, 16 Md. App. 165 (1972). This immunity applies to all acts that are legislative in nature. *Mandel*, 320 Md. at 106. "The policy is to free the officer from the necessity of submitting [the officer's] purposes, motives and beliefs to the uncertain appraisal of juries or even judges." *Id.* This immunity and the attendant legislative privilege is not qualified or conditional, but absolute. *Id.* at 107, 134.

Maryland legislators are also immune from suit arising from their legislative activities and protected from compulsion to testify about their legislative activities under federal law. *See Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951) (extending legislative immunity and legislative privilege to state legislators as an application of federal common law). In *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998), the Supreme Court highlighted the "venerable tradition" of protecting State legislators from liability for their legislative activities by application of an absolute immunity from suit. As the Court recognized,

whether at the federal, state, or local level, "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Id.* at 52.

The Fourth Circuit treats a state legislator's absolute legislative immunity from suit and legislative privilege against compulsory evidentiary process as "parallel concept[s]." *WSSC*, 631 F.3d at 180. This is because the legislative privilege "exists to safeguard . . . legislative immunity and to further encourage the republican values it promotes." *Id.* at 181. Legislative immunity's "practical import is difficult to overstate. As members of the most representative branch, legislators bear significant responsibility for many of our toughest decisions, from the content of the laws that will shape our society to the size, structure, and staffing of the executive and administrative bodies carrying them out." *Id.* at 181. *See also McCray v. Maryland Dept. of Transportation*, 741 F.3d 480, 485 (4th Cir. 2014); *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462, 470 (4th Cir. 2012).

"Absolute immunity enables legislators to be free, not only from 'the consequences of litigation's results, *but also from the burden of defending themselves.*'" *Id.* (quoting *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967))) (emphasis added in *WSSC*). And "[b]ecause litigation's costs do not fall on named parties alone," the Fourth Circuit has explained that legislative "privilege applies whether or not the legislators themselves have been sued." *WSSC*, 631 F.3d at 181. Accordingly, in the Fourth Circuit, legislative privilege is treated as absolute, and where a party seeks "to compel information from legislative actors about their legislative activities, they would not need to comply." *Id.* (citing *Burtnick*, 76 F.3d at 613); *see also*

Burtnick, 76 F.3d at 613 (noting that the plaintiff would have to make a prima facie ADEA case without testimony from city council members unless they waived the privilege).

The members of the GRAC were engaged in legislative activity during their service on the GRAC. "It is axiomatic that . . . the preparation and introduction of legislation for the legislature" is legislative activity. *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 300 (D. Md. 1992). The members' activities and contribution to any draft maps, reports, or other materials that resulted in SB1 are legislative in nature, regardless of the nominally executive nature of the GRAC. *Id.* at 301. Thus, any effort to compel testimony from those individuals engaging in the legislative activity of drafting the 2011 redistricting plan should be rejected. *WSSC*, 631 F.3d at 181.

Plaintiffs cannot demonstrate that President Miller's, Speaker Busch's, Jeanne Hitchcock's, or Richard Stewart's legislative privilege should be pierced for any reason. The Supreme Court has never held that the legislative privilege should yield in a challenge to a redistricting law because of the nature of the constitutional claim. *Contrast United States v. Gillock*, 445 U.S. 360, 373 (1980) (privilege yields in criminal prosecutions). And when discussing types of evidence that may shed light on whether an "invidious discriminatory purpose was a motiving factor" of a legislative act in the absence of objective direct and circumstantial evidence, the Court was careful to note that while there may be "some extraordinary instances" when legislators "might be called to the stand at trial to testify concerning the purpose of the official action, . . . *even then* such testimony frequently will be barred by privilege." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268 (1977) (emphasis added) (discussing methods of

proof of intent in equal protection zoning case). *Id.* At the same time, the Court also pointed out that it "has recognized, ever since *Fletcher v. Peck*, 6 Cranch 87, 130-131, 3 L. Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decisionmaker on the stand is therefore 'usually to be avoided.'" 429 U.S. at 268 n.18.

Notably, this is not a case where the Plaintiffs must adduce evidence of subjective legislative motivation to prevail. Rather, the plaintiffs seek to pierce the legislative privilege to gather evidence of subjective intent when such evidence would be *insufficient* to prove their claim. This Court has held that plaintiffs must prove their cause of action through objective evidence of intent, not subjective evidence, thus making clear that this is not an "extraordinary instance" as contemplated in *Village of Arlington Heights*. Moreover, it is quite common for redistricting plans to be challenged. In Maryland alone, in addition to this lawsuit, complainants have filed ten separate actions in federal district court challenging Maryland's last two redistricting plans.[4] Many of these challenges required proof of legislative intent as an element of causes of action like equal protection

[4] *See Steele v. Glendening*, WMN-02-1102 (D. Md. June 13, 2002); *Mitchell v. Glendening*, WMN-02-602 (D. Md. July 8, 2002); *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543 (D. Md. 2002), *aff'd*, 332 F.3d 769 (4th Cir. 2003); *Kimble v. State of Maryland*, No. AMD-02-02-2984 (D. Md. June 10, 2004), *aff'd* (4th Cir. Feb. 1, 2005); *Martin v. Maryland*, RDB–11–00904, 2011 WL 5151755 (D. Md. Oct. 27, 2011); *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012); *Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Parrott v. Lamone*, No. CV GLR-15-1849, 2016 WL 4445319 (D. Md. Aug. 24, 2016), *appeal dismissed* 2017 WL 69143 (Jan 09, 2017); *Bouchat v. Maryland*, No. CV ELH-15-2417, 2016 WL 4699415 (D. Md. Sept. 7, 2016), *appeal dismissed* (Oct. 5, 2016).

claims or partisan gerrymandering. The same testing of redistricting plans happens throughout the country. The National Conference of State Legislators compiled data after the 2000 census demonstrating that the redistricting plans of some 40 states were challenged in dozens and dozens of lawsuits.[5] Allowing legislative privilege to be pierced in these cases merely because the plaintiffs have put forth a cause of action that requires proof of intent would render the privilege meaningless in the context of redistricting.

There is also nothing extraordinary about the plaintiff's chosen cause of action. In a precisely analogous cause of action challenging state legislation on the theory that it was unconstitutional under the First Amendment because it was enacted to retaliate against the plaintiffs for their engagement in certain political activities, the Fourth Circuit held that it was error for a trial court to admit the testimony of sixteen current and former legislators on the topic of their motivation in enacting the statute. *South Carolina Education Ass'n v. Campbell*, 883 F.2d 1251, 1260 (4th Cir. 1989). With regard to the compelled testimony of the legislators, the court stated:

> Such an inquiry is inimical to the independence of the legislative branch and inconsistent with the constitutional concept of separation of powers. Moreover, probing inquiries by federal courts into the motivations of legislatures by calling representatives to testify concerning their motivations and those of their colleagues will doubtlessly have a chilling effect on the legislative process.

Id. at 1261-62. *See also North Carolina State Conf. v. McCrory*, 2015 WL 12683665 (M.D.N.C. Feb. 4, 2015) (even when cause of action requires proof of motive, requiring

[5] Data can be found at www.ncsl.org/research/redistricting/2000s-redistricting-case-summaries.aspx#CA.

production of intralegislative communication would "undermine the very purpose and function of legislative privilege, unduly intruding into legislative affairs and imposing significant burdens on the legislative process").

Prior to the Supreme Court's unanimous decision in *Bogan v. Scott-Harris*, highlighting the importance and "venerable tradition" of state legislative immunity, 523 U.S. at 52, the 3-judge court in *Marylanders for Fair Representation v. Schaefer* held that the legislative privilege doctrine does not "necessarily prohibit judicial inquiry into legislative motive where the challenged legislative action is alleged to have violated an overriding, free-standing public policy." 144 F.R.D. at 304 (citing *Village of Arlington Heights*, 429 U.S. at 268). Thus, the court ordered depositions of the three non-legislator members of the GRAC and reserved ruling on the questions of whether the Senate President and Speaker of the House could be deposed. *Id.* at 305.

When the district court had occasion to revisit *Marylanders for Fair Representation* in litigation following the 2002 redistricting process, Judge Nickerson recognized that the three-judge court in that case made its decision to allow depositions of non-legislator members without the benefit of the Supreme Court's opinion in *Bogan*. In *Bogan*, the Court stated "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." 523 U.S. at 54. Judge Nickerson therefore held that because participation in the redistricting process was legislative in nature, the deposition subpoenas served on legislator and non-legislator members of the GRAC should be quashed. Judge Nickerson also concluded that there was no overriding public policy that could justify setting aside that privilege, because the cause of action in

that case was based on § 2 of the voting rights act and did not require proof of legislative motive. *Mitchell v. Glendening*, No. 11 Civ. 02-602 (D. Md. June 4, 2002), slip op. 6-7, attached as Ex. 3.

Here, too, the subjects of the deposition subpoenas participated in legislative activity through serving on the GRAC. Although legislative motive is an element of the plaintiffs' cause of action, as in *Miller*, the GRAC members' *subjective* intent is not. This Court's opinion is clear: to prove the cause of action plaintiffs urge, "the plaintiff must produce objective evidence" of specific intent. Doc. 88, 34 (emphasis added). Just like in *Mitchell*, there is no overriding policy objective that would cause legislative privilege to yield here because the plaintiff's cause of action can and must be established without evidence of subjective intent.

Moreover, since the decision in *Marylanders for Fair Representation* nearly 25 years ago, the Fourth Circuit has rejected the intrusion of federal courts into the legislative motives of state actors and has treated state legislative privilege on par with the "parallel concept" of absolute legislative immunity, *WSSC*, 631 F.3d at 180, which applies regardless of a legislator's motives, *Bogan*, 523 U.S. at 54.

Two in-circuit district courts considering redistricting challenges have employed a balancing test to weigh the application of legislative privilege to material sought to prove subjective motives or intent of legislators. *Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. 2015) (involving allegations of racial gerrymandering in violation of the Equal Protection Clause); *Page v. Virginia State Bd. of Elections*, 15 F.

Supp. 3d 657, 665-68 (E.D. Va. 2014) (same). Notably, no depositions were ordered in either case.[6]

This five-factor "test examines: '(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of government in the litigation;' and (v) the purposes of the privilege." *Bethune-Hill*, 114 F. Supp. 3d at 338 (quoting *Page*, 15 F. Supp. 3d at 666). It appears that this test was first used in the context of redistricting by a magistrate judge in the Southern District of New York, who imported it, without comment, from a case reciting the balancing test used in the Second Circuit when applying the official information (also known as deliberative process) privilege. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 100–01 (S.D.N.Y.), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003) (quoting *In re Franklin Nat. Bank Sec. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)). Since that time, other courts have used the same balancing test, relying on *Rodriguez*. *See Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elecs.*, Case No. 11C5065, 2011 WL 4837508 (N.D.Ill. Oct. 12, 2011); *Baldus v. Brennan*, No. 74 No. 11-CV-1011, slip op. at 4 (E.D.Wis. Dec. 8, 2011); *Favors v. Cuomo* (*Favors I*), 285 F.R.D. 187 (E.D.N.Y. 2012); *Hall v. Louisiana*, 2014 WL 1652791, *9 (M.D.La. April 23, 2014).

The *Bethune-Hill* court recognized that the legislative privilege "has a wider sweep based on different purposes" from the deliberative process privilege, but nonetheless went on to apply the five-factor test. 114 F. Supp. 3d at 338. The court found that the "totality

[6] In *Page*, 15 F. Supp. 3d at 660, depositions of legislators were initially sought but later abandoned, and in *Bethune-Hill*, only documents were sought.

of circumstances" warranted "selective disclosure" of privileged documents in the House of Delegates' possession. *Id*. at 342. In *Page*, the district court found that the scope of the legislative privilege did not encompass a consultant hired by a party caucus, 15 F. Supp. 3d at 664, but went on to apply the five-factor test, finding that the factors weighed in favor of disclosing documents related to redistricting, *id.* at 665-68. The court observed, however, that "any effort to disclose the communications of legislative aides and assistants who are otherwise eligible to claim the legislative privilege on behalf of their employers threatens to impede future deliberations by the legislature. Other courts have taken this threat quite seriously, and have sought to mitigate it." *Id*. at 667 (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003)). Indeed, even among those courts adopting the five-factor text, counsel has found no federal court decision, and the plaintiffs have identified none in their motion to compel (ECF No. 111), that has ordered depositions of legislators or principle beneficiaries of legislative immunity.[7]

In light of the Fourth Circuit's treatment of legislative privilege and because of the absence of extraordinary circumstances in this case, this Court need not apply the five-factor test to quash the deposition subpoenas on legislative immunity grounds. However, even if this Court were inclined to apply the balancing test, the balance here weighs in favor of quashing the subpoenas. First, as to relevance, this Court has stated that the plaintiffs "must produce *objective* evidence" of specific intent, Doc. 88, 34 (emphasis

[7] In one case, *Baldus*, the court ordered depositions of an outside consultant and a legislative aide who had worked extensively with the consultant, raising significant waiver issues.

added), a type of evidence that cannot be adduced through depositions of GRAC members. Second, there is ample other relevant evidence available to the plaintiffs in this case. Plaintiffs have received through their numerous party and non-party discovery and public information act requests thousands of pages of documents, recordings of legislator statements, transcripts of public hearings of the GRAC, electronic versions of maps, election and voter data, bill files, and draft maps considered by the GRAC, made available by waiver made by Speaker Busch and President Miller specifically to aid the progress of this litigation. This available evidence is consistent with the types of evidence the Supreme Court described in *Village of Arlington Heights*, circumstantial or direct, that a plaintiff could use to sufficiently show improper legislative motive. Examples of such evidence include the historical background of the legislation, the specific sequence of events leading up to the legislation, departures from the normal procedural process, substantive departures, "particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." Additionally, the legislative history may be highly relevant, including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 267-68.

Finally, although constitutional challenge to a redistricting plan is no doubt a serious matter, as the Supreme Court, the Fourth Circuit and numerous other courts have continuously emphasized, allowing litigants to subject legislators and others involved in legislative activity to compulsory process should only be allowed in the most extraordinary of circumstances. "Inquiries into congressional motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Intrusion into the inner

workings of a sister branch of government should be limited, and allowing depositions of individuals engaged in legislative activity after *Bogan v. Scott-Harris* would be a break with a consistent application in the Fourth Circuit of legislative privilege as an absolute testimonial privilege.

II. AS TO PRESIDENT MILLER AND SPEAKER BUSCH, THE SUBPOENAS SHOULD BE QUASHED FOR THE INDEPENDENT REASON THAT THEY ARE UNDULY BURDENSOME.

As discussed above, the deposition subpoenas should be quashed on legislative privilege grounds. Moreover, prior to serving the deposition subpoenas, plaintiffs' counsel failed to engage in any good-faith effort to coordinate deposition dates with President Miller, Speaker Busch, Jeanne Hitchcock, Richard Stewart, or their attorneys in the Attorney General's Office, as is expected under the local rules of this Court. L.R. App. A, Guideline 4(a). President Miller and Speaker Busch are not available to be deposed on the dates for which they have been subpoenaed to testify, January 27, 2017 at 9:30 am and February 3, 2017 at 9:30 am, respectively, because those dates fall in the middle of the 90-day legislative session of the Maryland General Assembly.

The Maryland General Assembly will reconvene on January 11, 2017 and will adjourn on April 10, 2017. Given the restrictions of a 90-day legislative session and mandatory deadlines at each stage during which bills are considered, President Miller and Speaker Busch have extensive legislative responsibilities on each day that the General Assembly is in session.[8] See Ex. 4, Decl. of Joy R. Walker, ¶ 4; and Ex. 5, Decl. of Valerie

[8] The mandatory deadlines can be viewed online at http://mgaleg.maryland.gov/pubs-current/current-session-dates.pdf.

G. Kwiatkowski, ¶ 4. On each day of the 90-day legislative session, the absence of either President Miller or Speaker Busch would pose considerable scheduling constraints. *Id.*

President Miller will preside over the Maryland State Senate on Friday, January 27, 2017, beginning at 11am, making him unavailable for a 9:30am deposition in Bethesda, Maryland on that date. See Ex. 4 ¶ 5. Similarly, Speaker Busch will preside over the Maryland House of Delegates on Friday, February 3, 2017, beginning at 11am, making him unavailable for a 9:30am deposition in Bethesda, Maryland on that date. See Ex. 5 ¶ 5. Further, both members of the Leadership have meetings with their local delegations prior to presiding over their respective bodies, and based on a typical day during session, both members of the Leadership will have committee hearings, meetings with other legislators, meetings with constituents, meetings with advocacy groups, meetings with Executive Branch officials, and other legislative business for the remainder of the days on which they are subpoenaed to testify. Ex. 4 ¶¶ 5-7; Ex. 5 ¶¶ 5-7.

From the initial scheduling conference with this Court, the plaintiffs have indicated their intent to depose the members of the GRAC. Given the overlap of the discovery period that they proposed and the legislative session, the plaintiffs should have anticipated that any deposition of the leadership of the General Assembly would have to take place prior to the start of the 2017 legislative session. The plaintiffs had ample time to seek to depose President Miller and Speaker Busch during the discovery period and prior to the start of the legislative session and yet failed to do so. That failure should not be excused in such a way as to hinder the work of the Maryland General Assembly during the limited 90-day legislative session.

CONCLUSION

For the reasons set forth above, this Court should enter a protective order and quash the non-party deposition subpoenas served on Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, and Richard Stewart.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

Dated: January 9, 2017

___/s/__Jennifer L. Katz_____
JENNIFER L. KATZ (Bar No. 28973)
SARAH W. RICE (Bar No. 29113)
Assistant Attorneys General
Office of the Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7005 (tel.); (410) 576-6955 (fax)
jkatz@oag.state.md.us

KATHRYN ROWE (Bar No. 09853)
Assistant Attorney General
104 Legislative Services Building
90 State Circle
Annapolis, Maryland 21401
(410) 946-5600 (tel.); (410) 946-5601 (fax)
krowe@oag.state.md.us

Attorneys for Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, Richard Stewart

TABLE OF EXHIBITS

Exhibit No. Title

1. Intentionally left blank

2. Deposition subpoenas served on Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, Richard Stewart

3. *Mitchell v. Glendening*, No. 11 Civ. 02-602 (D. Md. June 4, 2002) (opinion and order quashing deposition subpoenas)

4. Declaration of Joy R. Walker

5. Declaration of Valerie G. Kwiatkowski

CIVIL LITIGATION DIVISION
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Office of the Attorney General

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Maryland

O. John Benisek, et al.
Plaintiff
v.
Linda Lamone, et al.
Defendant

Civil Action No. JKB-13-3233

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Thomas V. Miller c/o Sarah Rice, Esq., Assistant Attorney General, Office of the Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, MD 21202

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Lerch, Early & Brewer, Chtd. 3 Bethesda Metro Center, Suite 460 Bethesda, MD 20814	01/27/2017 9:30 am

The deposition will be recorded by this method: Audio; stenographic

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 12/16/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* O. John Benisek, et al., who issues or requests this subpoena, are:

Stephen M. Medlock, Esq.; Mayer Brown LLP, 1999 K Street NW, Washington, DC 20006; 202-263-3221; smedlock@mayerbrown.com

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. JKB-13-3233

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises-- or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

CIVIL LITIGATION DIVISION
RECEIVED
DEC 19 2016
Office of the Attorney General

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Maryland

O. John Benisek, et al.
Plaintiff
v.
Linda Lamone, et al.
Defendant

Civil Action No. JKB-13-3233

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Michael E. Busch c/o Sarah Rice, Esq., Assistant Attorney General, Office of the Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, MD 21202

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment: -

Place:	Date and Time:
Lerch, Early & Brewer, Chtd. 3 Bethesda Metro Center, Suite 460 Bethesda, MD 20814	02/03/2017 9:30 am

The deposition will be recorded by this method: Audio; stenographic

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

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Date: 12/16/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* O. John Benisek, et al., who issues or requests this subpoena, are:

Stephen M. Medlock, Esq.; Mayer Brown LLP, 1999 K Street NW, Washington, DC 20006; 202-263-3221; smedlock@mayerbrown.com

Notice to the person who issues or requests this subpoena

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Civil Action No. JKB-13-3233

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on *(date)* _____ .

☐ I served the subpoena by delivering a copy to the named individual as follows: _____

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_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

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(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

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(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

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(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

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(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

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For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

CIVIL LITIGATION DIVISION
RECEIVED
DEC 19 2016
Office of the Attorney General

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Maryland

O. John Benisek, et al.
Plaintiff
v.
Linda Lamone, et al.
Defendant

Civil Action No. JKB-13-3233

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Jeanne Hitchcock c/o Sarah Rice, Esq., Assistant Attorney General, Office of the Attorney General, 200 St. Paul Place, 20th Floor, Baltimore, MD 21202

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Lerch, Early & Brewer, Chtd. 3 Bethesda Metro Center, Suite 460 Bethesda, MD 20814	01/25/2016 9:30 am

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Date: 12/16/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* O. John Benisek, et al., who issues or requests this subpoena, are:

Stephen M. Medlock, Esq.; Mayer Brown LLP, 1999 K Street NW, Washington, DC 20006; 202-263-3221; smedlock@mayerbrown.com

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Civil Action No. JKB-13-3233

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on *(date)* _____ .

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_____ on *(date)* _____ ; or

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Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

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Printed name and title

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Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

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(i) disclosing a trade secret or other confidential research, development, or commercial information; or
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(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
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SWR 11:40am 12/20/16

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Maryland

O. John Benisek, et al.
Plaintiff
v.
Linda Lamone, et al.
Defendant

Civil Action No. JKB-13-3233

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Richard Stewart; 12703 Longwater Dr.; Bowie, MD 20721

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Lerch, Early & Brewer, Chtd. 3 Bethesda Metro Center, Suite 460 Bethesda, MD 20814	01/27/2017 9:30 am

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Signature of Clerk or Deputy Clerk *Attorney's signature*

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AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. JKB-13-3233

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(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) ***Appearance Not Required.*** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) ***Objections.*** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) ***When Required.*** On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) ***When Permitted.*** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) ***Specifying Conditions as an Alternative.*** In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) ***Documents.*** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) ***Form for Producing Electronically Stored Information Not Specified.*** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) ***Electronically Stored Information Produced in Only One Form.*** The person responding need not produce the same electronically stored information in more than one form.

(D) ***Inaccessible Electronically Stored Information.*** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) ***Information Withheld.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) ***Information Produced.*** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CLARENCE MITCHELL, IV	:	
	:	
v.		Civil Action WMN-02-602
	:	
PARIS GLENDENING	:	

MEMORANDUM

Before the Court is Defendant's Motion for Protective Order to Quash Notice of Depositions, Paper No. 8. The motion is ripe for the Court's consideration. Upon review of the pleadings and applicable case law, the Court determines that no hearing is necessary and that the motion will be granted.

Article III, § 5 of the Maryland Constitution requires the governor, following each decennial census and after holding public hearings, to prepare a plan setting forth the boundaries of the legislative districts for electing members of the Maryland State Senate and House of Delegates. After receiving the results of the 2000 Census, Governor Glendening appointed five individuals to serve on the Governor's Redistricting Advisory Committee (GRAC), including: Senator Thomas V. Mike Miller, Jr., President of the Maryland Senate; Delegate Casper R. Taylor, Jr., Speaker of the Maryland House of Delegates; Isaiah Leggett, Montgomery County Councilman; Secretary of State John T. Willis;

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and Worcester County Commissioner Louise L. Gulyas. Karl S. Aro, Executive Director of the Maryland General Assembly's Department of Legislative Services, also assisted in the preparation of legislation and analysis of the proposed legislative district boundaries.

After conducting a public hearing and receiving the Committee's recommendations, the Governor submitted the redistricting plan to the General Assembly as Senate Joint Resolution 3 and House Joint Resolution 3 on January 9, 2002. In accordance with the provisions of Article III, § 5, the redistricting plan became law on February 22, 2002.[1]

The Complaint filed in this matter contains a single count alleging that the apportionment of Senate District 44 in Maryland's 2002 legislative redistricting plan violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973, by denying African-American residents an equal opportunity to participate in the political process and to elect representatives of their choice. As part of the discovery process, Plaintiff gave Defendant notice that he seeks to depose Governor Glendening, Senator Miller, Delegate Taylor, Councilman Leggett, and Mr. Aro. Defendant has

[1] Article III, § 5 provides that if the General Assembly fails to act, either by ratifying the Governor's plan or by proposing one of its own, within 45 days from the introduction of the Governor's plan, the Governor's plan will become law. That is what occurred in this case.

moved for a protective order to quash Plaintiff's notice of depositions, on the ground that all five individuals are protected by legislative immunity.

The doctrine of legislative immunity is well established and has been discussed in detail previously by this Court. See, Marylanders for Fair Representation v. Schafer, 144 F.R.D. 292, 296-300 (D. Md. 1992). Legislative immunity not only provides protection from civil liability, it also functions as an evidentiary and testimonial privilege. See, Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Schlitz v. Commonwealth of Virginia, 854 F.2d 43, 45 (4th Cir. 1988), overruled on other grounds by Berkeley v. Common Council of City of Charleston, 63 F.3d 295 (4th Cir. 1995). The immunity "attaches to all actions taken 'in the sphere of legitimate legislative activity.'" Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) (quoting Tenney v. Brandlove, 341 U.S. 367, 376 (1951)). Whether an act is within this sphere for purposes of legislative immunity turns on the "nature of the act" and does not depend on the actor's title or position. Bogan, 523 U.S. at 55 (noting that "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions").

Courts have not precisely defined which acts are to be deemed legislative for immunity purposes. It is settled,

however, that legitimate legislative action must be both substantively legislative and procedurally legislative. See, Ryan v. Burlington County, 889 F.2d 1286, 1291 (3d Cir. 1989). Acts which are legislative in substance involve "policy-making decisions of a general scope, or . . . line-drawing." Id. To be procedurally legislative, the act must be "passed by means of established legislative procedures" and "constitutionally accepted procedures of enacting the legislation must be followed . . . ." Id.

The parties in the instant case agree that the act of drafting the redistricting plan and presenting it to the General Assembly is substantively legislative. See, Pl.'s Opp. at 6; see also Schaefer, 144 F.R.D. at 304 (finding that Maryland's legislative redistricting process is "an exercise of legislative power"). Plaintiff argues, however, that the redistricting plan fails to meet the second, procedural prong of the test for legislative immunity. According to Plaintiff, the redistricting plan's journey through the General Assembly was plagued with several violations of the Senate Rules. Plaintiff alleges, without any supporting documentation, that (1) the plan was not referred to the Senate Rules Committee as it should have been under the rules; (2) technical changes were made to the plan that did not conform to procedures for making such amendments; and (3)

the plan was reprinted in violation of Senate Rule 52, which governs committee reprints. See, Pl.'s Opp. at 6.

Although significant procedural deficiencies in the enactment of legislation may serve to strip actors of legislative immunity, courts have rejected the notion that "a mere technical violation of the statutory procedures specified for legislative action, by itself, converts an otherwise legislative action into an administrative action [to which legislative immunity would not apply]." Acierno v. Cloutier, 40 F.3d 597, 614 (3d Cir. 1994). Plaintiff has not argued that the alleged rule violations rendered the enactment of the redistricting plan unconstitutional. Cf. Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983) (holding one-house legislative veto unconstitutional). Plaintiff's allegations were not mentioned in his Complaint, nor are they supported by any evidence that, as Plaintiff now asserts, "the methods taken to enact the redistricting plan in question completely obliterated the very deliberative processes legislative immunity seeks to protect." Pl.'s Opp. at 7. Without more, this Court cannot conclude that the alleged Senate Rule violations transformed the legislative acts of the redistricting plan's drafters (or others involved in the creation of the plan) into "non-legislative" acts undeserving of legislative immunity.

Finally, Plaintiff argues that legislative immunity should not prohibit judicial inquiry into legislative purpose where the challenged action is alleged to have violated "an overriding, free-standing public policy." Pl.'s Opp. at 4. Plaintiff's reliance on this principle is misplaced for at least two reasons. First, Plaintiff cites as precedent the Schaefer case, decided by this Court at the time of Maryland's last decennial redistricting plan. 144 F.R.D. 292. There, in a similar discovery dispute, Judges Murnaghan and Motz, sitting on a three-judge panel, held that three civilian members of the Governor's redistricting committee were not entitled to legislative immunity's testimonial privilege.[2] That decision relied in part on a Supreme Court case that recognized that "[i]n some extraordinary instances" legislators may be compelled to testify at trial about their legislative motives, when such motives are integral to the claims at hand. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 268 (1977). The plaintiffs in Schaefer, however, had brought claims in which legislative motive or intent was an element, whereas Plaintiff's sole claim in the instant case, brought under § 2 of the Voting Rights Act, does

[2] Apparently this decision was an unusual one. The Supreme Court of Texas recently searched case law for decisions in which persons acting in a legislative capacity were compelled to testify, and found only the Schaefer case. In re Perry, 60 S.W.2d 857, 862 n. 2 (Tex. 2001).

not require any proof of motive. See, Thornburg v. Gingles, 478 U.S. 30 (1986). Indeed, it does not appear that the motives or intentions of GRAC members, or others involved in the design of the plan, are at all relevant to Plaintiff's § 2 claim.

Second, Plaintiff appears to assume that Schaefer and Arlington Heights stand for the proposition that considerations of motive ought to factor into the legislative immunity inquiry. This idea was soundly rejected by a unanimous Supreme Court in Bogan v. Scott-Harris, 523 U.S. 44 (1998). There, the Court reiterated the long-standing principle that "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." Id. at 54. Therefore, the Court stated, the appropriate inquiry for determining whether an actor is entitled to legislative immunity is "whether, stripped of all considerations of intent and motive, [the actors'] actions were legislative." Id. at 55. In this case, they clearly were, notwithstanding Plaintiff's interest in the motives of the plan's designers.

For the foregoing reasons, Defendant's Motion for Protective Order to Quash Notice of Depositions will be granted. A separate order will issue.

William M. Nickerson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CLARENCE MITCHELL, IV	:	
	:	
v.		Civil Action WMN-02-602
	:	
PARIS GLENDENING	:	

ORDER

Pursuant to the foregoing Memorandum, and for the reasons stated therein, IT IS this 3rd day of June, 2002, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion for Protective Order to Quash Notice of Depositions, Paper No. 8, is hereby GRANTED, in that the notices of the depositions of Governor Paris Glendening, State Senator Thomas V. Mike Miller, Jr., Delegate Casper R. Taylor, Jr., Isaiah "Ike" Leggett, and Karl S. Aro are hereby quashed; and

2. That the Clerk of the Court shall mail or transmit copies of this Memorandum and Order to all counsel of record.

William M. Nickerson
United States District Judge

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EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE., *et al.*,	*	
Defendants.	*	

* *

DECLARATION OF JOY R. WALKER

I, Joy R. Walker, under penalty of perjury, declare and state:

1. I am over the age of 18 and am competent to testify to the matters stated below.

2. Since 1988, I have worked in the office of the Maryland Senate President, Thomas V. Mike Miller, Jr., and have been the Office Manager since 1998.

3. In the role of Office Manager, I maintain President Miller's schedule.

4. The Maryland General Assembly will reconvene on January 11, 2017 and will adjourn on April 10, 2017. Given the restrictions of a 90-day legislative session and mandatory deadlines at each stage during which bills are considered, President Miller has extensive legislative responsibilities on each day that the Senate is in session. Having President Miller unavailable for legislative business even for a day during session would pose considerable scheduling challenges.

5. On Friday, January 27, 2017, President Miller has a meeting with the Southern Maryland Delegation at 9:30 am. Thereafter, he must preside over the Maryland Senate beginning at 11am until the Senate recesses for the day.

6. Based on Senator Miller's typical day during the legislative session, I anticipate that after the Senate recesses for the day, Senator Miller will have committee hearings, meetings with other legislators, meetings with constituents, meetings with advocacy groups, meetings with Executive Branch officials, and other legislative business for the remainder of the day.

7. On the Friday of the last week of January during the 2016 legislative session, President Miller had the Southern Maryland Delegation meeting at 9:30 am, following by two meetings with constituent groups at 10:30 am, followed by his duties of presiding over the Senate at 11 am, followed by 6 meetings throughout the remainder of the afternoon.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

January 6, 2017
Date

Joy R. Walker
Joy R. Walker

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE., *et al.*,	*	
Defendants.	*	

* *

DECLARATION OF VALERIE G. KWIATKOWSKI

I, Valerie G. Kwiatkowski, under penalty of perjury, declare and state:

1. I am over the age of 18 and am competent to testify to the matters stated below.

2. Since May 2014, I have been the Assistant to the Speaker in the office of the Maryland House Speaker Michael E. Busch.

3. In the role of Assistant to the Speaker, I maintain Speaker Busch's schedule.

4. The Maryland General Assembly will reconvene on January 11, 2017 and will adjourn on April 10, 2017. Given the restrictions of a 90-day legislative session and mandatory deadlines at each stage during which bills are considered, Speaker Busch has extensive legislative responsibilities on each day that the House is in session. Having Speaker Busch unavailable for legislative business even for a day during session would pose considerable scheduling challenges.

5. On Friday, February 3, 2017, Speaker Busch has a meeting with the Anne Arundel County Delegation beginning at 8:30am. Thereafter, he must preside over the Maryland House of Delegates beginning at 11am until the House of Delegates recesses for the day.

6. Based on Speaker Busch's typical day during the legislative session, I anticipate that after the House recesses for the day, Speaker Busch will have committee hearings, meetings with other legislators, meetings with constituents, meetings with

advocacy groups, meetings with Executive Branch officials, and other legislative business for the remainder of the day.

7. On the Friday of the last week of January during the 2016 legislative session, Speaker Busch had an Anne Arundel County Delegation meeting at 8:30am, a speaking engagement at 9:30am, following by a meeting with a legislator at 10:45am, before assuming his duties of presiding over the House of Delegates at 11am. Speaker Busch had three meetings in the afternoon following the House floor session.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

1/6/17
Date

Valerie G. Kwiatkowski

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,	*	
Plaintiffs,	*	
v.	*	Case No. 13-cv-3233
LINDA H. LAMONE, *et al.*,	*	
Defendants.	*	

* *

ORDER

Upon consideration of the motion for protective order and to quash non-party deposition subpoenas served on Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, and Richard Stewart, and opposition thereto, it is this _____ day of _____, 2017, ORDERED:

That the motion for protective order and to quash non-party deposition subpoenas (ECF No. 112) is GRANTED, and

That the subpoenas for deposition served on non-parties Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, and Richard Stewart are hereby QUASHED.

_____
United States District Judge
James K. Bredar