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.	*	

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OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL NON-PARTIES JEANNE D. HITCHCOCK, THOMAS V. "MIKE" MILLER JR., MICHAEL E. BUSCH, AND RICHARD STEWART TO TESTIFY AT DEPOSITION, AND TO COMPEL NON-PARTIES THOMAS V. "MIKE" MILLER JR., MICHAEL E. BUSCH, AND RICHARD S. MADALENO JR. TO PRODUCE DOCUMENTS

Non-parties Jeanne D. Hitchcock, Senate President Thomas V. Mike Miller, Jr., House Speaker Michael E. Busch, Richard Stewart, and Senator Richard S. Madaleno, Jr. hereby state their opposition to plaintiff's motion to compel certain non-parties to testify at deposition and produce documents under Rule 45(g) and Local Rules 104.7 and 104.8. These non-parties each are protected from the broad scope of the subpoenas issued to them with respect to their legislative activities in preparing and considering SB 1, the bill setting forth Maryland's 2011 congressional redistricting plan by legislative privilege, which they have properly invoked in response to those subpoenas.[1]

[1] Non- parties Jeanne D. Hitchcock, Senate President Thomas V. Mike Miller, Jr., House Speaker Michael E. Busch, and Richard Stewart hereby expressly incorporate by reference their memorandum supporting their motion for protective order and to quash the subpoenas for deposition issued to them. (ECF No. 114 and exhibits).

BACKGROUND

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 16, 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. 16, 2017). Senator Madaleno voted in favor of SB1. Senate Vote Record no. 24, Special Session 2011, http://mgaleg.maryland.gov/webmga/frmMain.aspx?ys=2011s1/votes/senate/0024.htm (last accessed Jan. 16, 2017).

It is the non-parties' activity in drafting and considering the contents of SB1 that plaintiffs seek now to probe through widely cast subpoenas for deposition and documents. Plaintiffs proffer that they seek to depose the non-parties to question them about "(among

other things) their intent and motivations for drawing the lines of the Sixth Congressional District as they did, the data that they used and how they used it, and the vote dilution that resulted from the Plan as enacted," (ECF No. 110-3 at 12), which they assert are elements of proof of their claim. Any knowledge or information in the possession of the non-party deposition subpoena targets on these three topics is limited to their subjective impressions, motivations, and thoughts in participating in the drafting and passage of SB1. Plaintiffs have identified no topic which is not solely aimed at probing the non-party deposition subpoena target's legislative activity.

Plaintiffs have incorrectly described this Court's explanation of their burden of proof. This Court has articulated the standard for plaintiffs' claim as including three elements: intent, injury, and causation. ECF No. 88 at 32. This Court went on to articulate "several important *limitations*" on the elements of the claim that would "help ensure that courts will not needlessly intervene in what is quintessentially a political process." *Id.* (emphasis added). It is from these limitations that plaintiffs erroneously borrow to articulate the elements they must prove. The limitations articulated by this Court set forth that plaintiffs *may not* 1) assert that the legislature cannot, in any sense, take "political consideration into account in reshaping its electoral districts" through consideration of data; 2) use subjective evidence; and 3) allege injury where no election outcome was affected by the conduct. *Id.* at 32-34. Plaintiffs "must rely on objective evidence," "either direct or circumstantial," in setting forth proof of legislative intent. *Id.* In creating this limitation on plaintiffs' claim, this Court is soundly echoing long lines of Fourth Circuit

precedent holding that "the individual motives of legislators, even if those motives are demonstrated to conflict with the expressed purpose of the enacted legislation, are rarely relevant to a court's consideration of the legitimacy of the legislation." *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146 (4th Cir. 1991); *see also S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1261 (4th Cir. 1989) (holding it was error for district court to admit testimony of legislators regarding their intent in passing legislation in a First Amendment retaliation claim challenging that legislation).

Plaintiffs have been afforded access to, through joint stipulations, public information act requests, and responses to party discovery, thousands of pages of documents and electronic files including elections and voter data provided to the Department of Planning by defendants in this action for use by the GRAC; the bill files for SB1 and other redistricting legislation considered in the 2011 Special Session; audio recordings of house, senate, and committee proceedings; submissions, including comments and maps, by third parties to the GRAC; transcripts of public hearings held by the GRAC; and stipulations regarding the authenticity of public statements made by various legislators in the press. Moreover, in response to the subpoenas at issue here, plaintiffs admit that they have been afforded access to an additional approximately 166 pages of documents.[2] These pages include, under a limited waiver of privilege undertaken

[2] Plaintiffs express some vague, unarticulated skepticism that Ms. Hitchcock and Mr. Stewart produced few or no documents in response to the subpoenas for documents. However, it is entirely unsurprising that Ms. Hitchcock and Mr. Stewart had few responsive documents. Ms. Hitchcock and Mr. Stewart are no longer in state service. Any documents they possessed regarding their service on the GRAC are records belonging to the GRAC

to facilitate this litigation, copies of draft maps considered by the GRAC. Moreover, President Miller and Speaker Busch provided 38 additional pages in response to public information act requests submitted by plaintiffs' counsel. Contrary to plaintiffs' claims, non-parties have never asserted that no current or former state official can be compelled "to answer *any* question or produce *any* document concerning legislative intent or the legislative process *at all*."[3] Instead, non-parties have cooperated with requests made of them by plaintiffs' counsel and defendants' counsel in producing all non-privileged information in their possession for use in this lawsuit, going so far as to consider waiver on a document-by-document basis. Moreover, plaintiffs have not sought the testimony of any current or former state official who was not intimately involved in the legislative activity of preparing SB1 in order to answer questions about objective legislative intent or the legislative process. Plaintiffs have been provided with ample objective evidence of legislative intent and the legislative process by both nonparties and defendants.

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and it would have been unusual for an appointee leaving state service to retain records. The documents Mr. Stewart provided were from his personal electronic mail account, he was not provided with a state electronic mail address during his service. By contrast, Ms. Hitchcock simultaneously served as a high-level staff member of the Governor's office; her electronic mail stayed in the control of the Governor's office when she departed.

[3] To the extent plaintiffs here complain about their efforts to conduct "informal discovery" by making ex parte contact with sitting legislators, this complaint is more fully addressed in the Defendants' response to the Plaintiffs' motions to compel, which is being served on the Plaintiffs contemporaneously with this motion pursuant to Local Rule 104.8. Suffice it to say here, counsel to the non-parties has consistently expressed (a) an exception to their objection insofar as plaintiffs wished to discuss redress of grievances (or, in other words, some process to redraw the current Congressional map, rather than seeking to interview, without benefit of counsel, potential witnesses in this case); and (b) a willingness to facilitate interviews with members of the General Assembly who wished to speak with plaintiffs' counsel.

ARGUMENT

I. THE SUBJECTS OF THE SUBPOENAS HAVE A 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. Additionally, Senator Madaleno's assertions of the legislative privilege center around his consideration and development of his position as to SB1—in other words, they are assertions of privilege over the formation of his subjective intent and motivations for voting for the bill.

Plaintiffs cannot demonstrate that the non-parties' 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. The Fourth Circuit, in its consideration of the categories of claims that might properly include inquiry into legislative motive has listed "race and sex discrimination cases,[] and establishment of religion cases,[] as well as cases challenging statutes which on their face *directly* inhibit or have the inevitable effect of inhibiting freedom of speech or related constitutional rights." *Campbell*, 883 F.2d at 1259. Omitted from that list were First Amendment retaliation claims to facially constitutional statutes, like the one at issue in *Campbell*. *Id.*

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 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

[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).

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

on the topic of their motivation in enacting the statute. *Campbell*, 883 F.2d at 1260. 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 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. 1.

Here, too, the subjects of the deposition subpoenas participated in legislative activity through serving on the GRAC. The privilege has been asserted in response to the subpoenas for documents only so far as it relates to communications and documents evidencing President Miller's, Speaker Busch's, and Senator Madaleno's legislative activity in drafting or forming opinions about SB1 pre-passage. Although legislative motive is an element of the plaintiffs' cause of action, as in *Mitchell*, 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.

[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.

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 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 reject plaintiffs' motion to compel on legislative privilege grounds. However, even if this Court were inclined to apply the balancing test, the balance here weighs in favor of denying the motion.

First, as to relevance, this Court has stated that the plaintiffs "must rely on *objective* evidence" of specific intent, ECF No. 88 at 33 (emphasis added), a type of evidence that cannot be adduced through depositions of GRAC members or access to documents used as part of pre-passage legislative deliberation. Plaintiffs have failed to explain how "testimonial and documentary evidence regarding the intent and motive of the GRAC members and legislators who drafted and approved the Plan goes to the very heart of this case" (Pls.' Mem. at 22) when this Court has made pains to note that only objective evidence is relevant proof of plaintiffs' claim. This Court's foresight in making that limitation obviates the need for document by document decisionmaking or review about claims of legislative privilege. As the Eleventh Circuit has explained in describing error in a district court's decision to allow depositions of legislators to go forward in a First Amendment retaliation claim:

[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.

> the factual heart of the retaliation claim and the scope of the legislative privilege [are] one and the same: the subjective motivations of those acting in a legislative capacity. Any material, documents, or information that [does] not go to legislative motive [is] irrelevant to the retaliation claim, while any that [does] go to legislative motive [is] covered by the legislative privilege.

In re Hubbard, 803 F.3d 1298, 1310 (11th Cir. 2015). Because the scope of relevant evidence is coextensive with the scope of the privilege, there is no need to engage in the balancing test after consideration of the first prong. However, even if relevance is only one factor, it is by necessity a weighty one because the legislative privilege's important protective purposes should not be forced to yield unnecessarily.

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. To the extent plaintiffs claim to want access to the "real proof" in this case, "the contemporaneous record in the redistricting process," (ECF No. 110-3 at 24 (quoting *Bethune-Hill*, 114 F. Supp. 3d at 341)), they have had it. 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. All of this information is public record and has been identified and produced to plaintiffs.

Third, a constitutional challenge to the method by which our representative democracy is conducted is serious. However, so too are the considerations protected by the legislative privilege. And, as explained above, even if each such constitutional challenge is serious, these challenges are also numerous. Here, plaintiffs brought suit about one year after the first election under the plan had taken place and about sixteen months after the flurry of other constitutional challenges to the plan had been finally resolved. Moreover, the plaintiffs did not bring claims involving motives or the intent of the legislature until they filed their second amended complaint in March 2016. *Compare* ECF 1 at 3 *with* ECF 44. Therefore while serious, plaintiffs have not pressed their claims with any particular urgency.

Fourth, the opponents to this motion are the House and Senate leaders of the General Assembly of Maryland, former members of the GRAC, and Senator Madaleno. All are non-parties to this case. Plaintiffs' assertions that non-party status weigh in favor of setting aside the privilege are contradicted by the Fourth Circuit's own statements that "because litigation's costs do not fall on named parties alone," the legislative "privilege applies whether or not the legislators themselves have been sued." *WSSC*, 631 F.3d at 181.

Plaintiffs need not name legislators or their staff to suits in order to cause great disruption in their legislative work, "[d]iscovery procedures can prove just as intrusive." *Id.* (quoting *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C.Cir.1988)). Such disruption is evident here, where the parties' discovery schedule has allowed for a large portion of the fact discovery period to overlap with Maryland's General Assembly session.

Finally, legislative privilege's core essence is at issue here, where plaintiffs press subpoenas issued after extensive productions have already been made, where public information act requests to these same officials have already been answered, and where plaintiffs seek information beyond the scope of that needed to prove their claims. The purposes of the privilege are threefold, to allow legislators: (1) who "bear significant responsibility for many of our toughest decisions," "the breathing room necessary to make these choices in the public's interest;" (2) to focus on their public duties (never more pressing than during Maryland's General Assembly Regular Session) without "the costs and distractions attending lawsuits," including fending off opponents who seek to defeat them in the courts as an alternative to the ballot box; and (3) the opportunity to serve, despite the existence of other options, increasing the "caliber of our elected officials" and their staff members who might otherwise be deterred from service. *WSSC*, 631 F.3d at 181. Requiring attendance at depositions and disclosure of correspondence and papers that reflect the decisionmaking process of legislators and close aides, after extensive efforts have been made to provide nonprivileged materials, will significantly burden the legislators and deter their aides and future legislators from service. Moreover, disclosure to the public of the exact factors considered in formulating and passing the 2011 redistricting plan is

impossible, given that there were five members of the GRAC, their staff, the Governor and his office staff, 188 members of the General Assembly and ultimately over one million voters who were motivated to adopt the plan. Selective disclosure of the subjective motivations of particular legislators or staff members would unfairly represent the process constructed and relied upon by the General Assembly and Governor's office to be transparent, subject to public input, and ultimately in the public's best interest.

II. THE NON-PARTIES ARE NOT REQUIRED TO FURTHER PARTICULARIZE THEIR CLAIMS OF LEGISLATIVE PRIVILEGE

As the Fourth Circuit has stated, "[d]iscovery procedures can prove just as intrusive" as suit itself. *WSSC*, 631 F.3d at 181 (quoting *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859 (D.C.Cir.1988)); *see also Powell v. Ridge*, 247 F.3d 520, 530 (3d Cir. 2001) (Roth, J., concurring) (legislative privilege from civil discovery, when it exists, "exists to protect legislators from the burden of having to respond to discovery and of having to deal with the distractions and disruptions that discovery imposes on their ability to carry out their governmental functions."); *N. Carolina State Conference v. McCrory*, No. 1:13CV658, 2015 WL 12683665, at *6 (M.D.N.C. Feb. 4, 2015) ("The purposes of legislative privilege — avoiding interference with the legislative process and promoting frank deliberations among legislative decisionmakers — appear equally applicable to requests for a legislator to produce a log of all documents (and then to litigate whether to produce certain of those documents) as it would to requests for direct production of the documents.") The privilege logs produced to plaintiffs and reproduced at Plaintiff's Exhibits O, P, and Q are an attempt to balance the requirement to keep privileged material

secret, the burdens in producing factual information related to the communications and documents at issue, and plaintiffs' ability to test claims of privilege. Plaintiffs make no objection to specific entries on the log, nor do they specifically articulate what facts would satisfy their criteria for an adequate privilege log here, where identities of communicants are one of the privileged items. Nevertheless, Speaker Miller, President Busch, and Senator Madaleno have made several clarifying edits to these logs attached as Exhibits 2, 3, and 4.

None of the cases cited by plaintiffs for the proposition that failure to produce a privilege log could waive privileges involved assertions of the legislative privilege, and in no case was an inadequate privilege log, as opposed to an absent one, held to have waived a privilege. *Mezu v. Morgan State U.*, 269 F.R.D. 565, 577 (D. Md. 2010) (no privilege log provided); *Herbalife Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 2006 WL 2715164, at *4 (N.D.W. Va. 2006) (privilege log was actually provided and no waiver found); *Ruran v. Beth El Temple of W. Hartford, Inc.*, 226 F.R.D. 165, 168-169 (D. Conn. 2005) (defendant failed to produce a privilege log); *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 20-21 (D.D.C. 2004) (after numerous attempts to obtain a privilege log "a privilege log was provided and, therefore, the issue of waiver is not raised.") Non-parties here have offered enough information for plaintiffs to assess whether the documents sought have the required elements of legislative privilege, or, at least, to allow plaintiffs to

particularize the information that they lack.[8] But plaintiffs have made no attempts to do so, either in prior conference of counsel or in their present motion.

Plaintiffs also make no explanation why, when they issued deposition subpoenas whose "sole reason for existing was to probe the subjective motivations of the legislators," *In re Hubbard*, 803 F.3d at 1310, who drafted SB1, a blanket assertion of the legislative privilege is improper. In fact, plaintiffs have identified no subject matter that they would wish to depose any of the nonparties about other than their subjective intents and motivations in drafting the legislation, either in the notice, through conference with counsel, or in their motion to compel.

Plaintiffs' assertion that there is some question as to whether each of the non-party legislative actors who are subjects of this motion has personally asserted the privilege is similarly unsupported. In fact, plaintiffs issued subpoenas to individual legislative actors, who, through counsel, made specific assertions of legislative privilege in response. Counsel did, in fact, consult with each of their clients regarding the assertions of legislative

[8] To the extent plaintiffs complain that individuals are only identified by their relationship to the legislator at issue, their complaints are unjustified. The identity of the people to whom a legislator turns for counsel in undertaking legislative activity is at the very heart of the privilege, as is the assignment or choice of legislative staff to a particular issue. Especially given the plaintiffs' tactic of expanding their non-party discovery efforts to each person copied on any communication, where staff members' valuable time is at stake, it is exactly this sort of harassment the legislative privilege is designed to protect against.

privilege as is evident by their assertion, on behalf of each individual legislative actor, of the legislative privilege in response to the subpoena.[9]

III. SENATOR MADALENO'S PUBLIC STATEMENTS WAIVE PRIVILEGE WITH RESPECT TO NO OTHER DOCUMENTS OR COMMUNICATIONS

Plaintiffs seek to compel documents from Senator Madaleno based on an alleged waiver. The premise of their waiver argument is the source of its flaw—Senator Madaleno made public statements related to his theories and views on the redistricting process months before the draft map was made available. The statements cited by plaintiffs are either (1) forward-looking; (2) hypothetical considerations; or (3) general comments on the map-drawing process. Not a single statement identified by plaintiffs is a statement by Senator Madaleno about his subjective intentions (or any motivation or intention) in formulating his voting choice or input into SB1. Taken to its logical conclusion, plaintiffs' argument would have any legislator who gives her time to lecture students about customary procedures of the bill passage process waive the legislative privilege with regard to her participation in all legislative activity resulting in bill passage.

Senator Madaleno has not asserted the privilege in connection with those publicly available statements. Instead, Senator Madaleno has asserted the privilege over communications, which have never been made public, that touch upon his own motivations and reasons for voting in favor of SB1. Plaintiffs simply make no argument as to why

[9] Plaintiffs bring this concern to non-parties' attention for the first time in this motion. Although burdensome to the non-parties, if this Court finds response to subpoenas through counsel as inadequate to establish individual assertion of the legislative privilege, affidavits can be secured to support these assertions.

unrelated public statements would waive the asserted privilege. *Cf. Favors I*, 285 F.R.D. at 213 (dissemination of certain emails did not waive "the privilege as to other documents and communications"); *see also Bethune-Hill v. Virginia State Bd. of Elections*, 114 F. Supp. 3d at 345 n.8 (legislators may waive privilege with respect to certain documents and communications subject only to as much subject matter waiver as is necessary "to ensure that fair context is provided").

CONCLUSION

For the reasons set forth above, this Court should deny plaintiffs' motion to compel in its entirety.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

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___/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, and Richard S. Madaleno, Jr.

TABLE OF EXHIBITS

Exhibit No. Title

1. *Mitchell v. Glendening*, No. 11 Civ. 02-602 (D. Md. June 4, 2002), slip op.

2. Revised Privilege Log for Senator Richard S. Madaleno, Jr. with Comparison Copy

3. Revised Privilege Log for Senator Thomas V. Mike Miller, Jr. with Comparison Copy

4. Revised Privilege Log for Speaker Michael E. Busch with Comparison Copy