IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al. *Plaintiffs*, vs. Linda H. Lamone, et al., *Defendants*.	Case No. 13-cv-3233 Three-Judge Court

PLAINTIFFS' OPPOSITION TO 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

Michael B. Kimberly, Bar No. 19086
Paul W. Hughes, Bar No. 28967
Stephen Medlock, *pro hac vice*
E. Brantley Webb, *pro hac vice*
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)

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INTRODUCTION

The motion to quash is the latest example of the State's consistent effort to prevent Plaintiffs from conducting meaningful discovery on legislative intent.

First, the State obstructed Plaintiffs' efforts to obtain evidence through informal discovery. In particular, the Maryland Attorney General's Office asserted that it has an attorney-client relationship with *every* current employee of the State of Maryland, including all sitting legislators (Ex. A); and has refused to allow us to interview any such employees except under onerous conditions that would have made such interviews pointless. Ex. B. The State also has obstructed our efforts to contact *former* employees of the State, asserting that such contact would violate Maryland Rule of Professional Conduct 4.4(b) and threatening motions for protective orders. Ex. C.

Stymied in our efforts to collect evidence informally from third parties, we sought discovery from Defendants directly, serving interrogatories and requests for production and admission. Exs. D-J. Defendants have responded, in the main, by insisting that they lack control of any and every document outside the custody of the State Board of Elections, and that they lack knowledge of any matter outside the narrow scope of the Board's duties. Exs. K-O. In the State's view, every Maryland agency is an island, with no obligation or practical ability to obtain documents or information from any other.

Obstructed once again, we next sought command discovery from non-party legislators and non-party state agencies through third-party document and deposition subpoenas. Ex. P (sample of subpoenas). That alternative approach has now been met with similar stonewalling, this time taking the form of the state legislative privilege. In the State's view, the privilege excuses all current and former legislators and their staff from sitting for depositions or producing responsive documents bearing on the question of legislative motive, purpose, or intent. Motion to Quash 5-15; Ex. K.

This latest effort to prevent meaningful discovery must be rejected. As we explain in our parallel motions to compel,[1] the state legislative privilege—a creature of federal common law—does not shield state officials from having to answer serious and plausible allegations that their conduct has violated the federal Constitution, especially in cases of broad public importance like this one. *See* 12/29 Motion 10-15; 1/3 Motion 12-15.

In resisting that conclusion, the State says almost nothing of substance. It cannot, for example, cite a single federal redistricting lawsuit in which a court has upheld the kind of hyper-aggressive, blanket assertion of state legislative privilege at issue here, and it offers no compelling response to the nine cases emphatically *rejecting* such assertion of privilege that we cited in our motions to compel. The State instead points to a handful of state-law cases with no application in this federal lawsuit (Motion to Quash 5) and easily-distinguishable Fourth Circuit and Supreme Court cases that address fundamentally different assertions of privilege (*id. at* 5-6, 10-11).

What is more, we explained in our motion to compel compliance with the deposition subpoenas that the parties purporting to assert state legislative privilege had failed to support their assertion with the necessary facts and evidence. 1/3 Motion 23-26. That same deficiency is on full display here. Despite having been alerted to this issue in our motion to compel—filed six days before the motion to quash—the State still offers no evidence establishing that the relevant legislators or former state officials have *themselves* asserted the privilege or proving any of the other facts necessary to support the privilege. These omissions are striking, because each of the subpoena targets moving to quash has

[1] In addition to the motion to compel third-party compliance filed electronically on January 3, 2017, Plaintiffs served a companion motion to compel Defendants' compliance, pursuant to Local Rule 104.8(a), on December 29, 2016. We cite the motion directed at Defendants as the "12/29 Motion" and the motion directed a third parties as the "1/3 Motion." The parties have agree that the briefing of the 12/29 Motion will follow the same schedule entered by the Court for the 1/3 Motion and the State's motion to quash. *See* Dkt. 114 (order entered 1/10/17).

unambiguously *waived* any absolute privilege by answering our document subpoenas on their merits, in some cases producing documents. We have consistently raised waiver as an issue in this respect, yet the State ignores it altogether.

Against this background, the motion to quash should be denied. What is more, the motions to compel should be granted, and Defendants and each of the third-party subpoena targets should be ordered to produce responsive documents and answer questions at deposition concerning legislative motive and intent.

REASONS FOR DENYING THE MOTION

A. State legislative privilege cannot be asserted in an absolute or blanket fashion in cases like this one

1. We explained in our motions to compel that the state legislative privilege has its very weakest application in cases like this one—that is, in cases where individual law-makers are not themselves named as defendants and thus face no threat of personal liability, where the request for relief is injunctive only, and where the privilege "stands as a barrier to the vindication of important federal interests and insulates against effective redress of public rights." *See* 12/29 Motion at 17 (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 334 (E.D. Va. 2015) (three-judge district court)); 1/3 Motion 14 (same). Simply put, in federal redistricting cases like this, "[t]he argument that 'legislative privilege is an impenetrable shield that completely insulates any disclosure of documents'" or appearances at deposition "is not tenable." *Bethune-Hill*, 114 F. Supp. 3d at 336 (quoting *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657, 665 (E.D. Va. 2014) (three-judge district court), in turn quoting *EEOC v. Wash. Suburban Sanitary Comm'n*, 666 F. Supp. 2d 526, 532 (D. Md. 2009), *aff'd* 631 F.3d 174 (4th Cir. 2011))).

The State talks past this point. Instead—citing state-law sources—it insists that "legislators and their staff are protected," absolutely and without qualification, "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." Motion to Quash 5 (citing *Mandel v. O'Hara*, 320 Md. 103, 113 (1990); *Blondes v. State*, 16 Md. App. 165 (1972)). But there is an obvious problem with that position: This is a federal lawsuit, as to which federal law supplies the substantive law of decision. Under the plain terms of Federal Rule of Evidence 501, therefore, state evidentiary privileges are flatly inapplicable. *See Richardson v. Sexual Assault/Spouse Abuse Res. Ctr., Inc.*, 270 F.R.D. 223, 228 (D. Md. 2010).

That leaves the State to assert legislative privilege under federal common law only. With respect to federal common law, the State cites *EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174 (4th Cir. 2011), for the proposition that even under the federal framework, the state legislative privilege is "absolute." Motion to Quash 6. But not one page later, the State admits that this is wrong, reciting the Supreme Court's own, unambiguous words: "In extraordinary instances [legislators] might be called to the stand at trial to testify concerning the purpose of [an] official action." *Id. at* 7 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)).

There is no doubt, moreover, that plausible constitutional challenges to congressional redistricting plans pending before three-judge district courts are *exactly* the kind of extraordinary cases in which the privilege must give way.[2] As we have noted repeatedly throughout this litigation, "[a]llegations of unconstitutional bias in apportionment are most serious claims" (*Vieth v. Jubelirer*, 541 U.S. 267, 311-312 (2004) (Kennedy, J., concurring))—so much so that Congress provided a special procedure for hearing them, with an

[2] Citing to *South Carolina Education Association v. Campbell*, 883 F.2d 1251 (4th Cir. 1989), the State asserts that "[t]here is nothing extraordinary about the plaintiff's [sic] chosen cause of action." Motion to Quash 9. But *Campbell* involved a claim for redress of private injuries for denial of "payroll deductions." 883 F.2d at 1252. Narrow, private claims like that bear no resemblance to the weighty public-rights claims at issue here.

appeal as of right straight to the Supreme Court. *See* 28 U.S.C. §§ 1253, 2284(a). *See generally* 12/29 Motion 13-17; 1/3 Motion 11-12, 14.

The qualified applicability of the privilege here is all the more apparent because no legislator bears any risk of personal liability in this case. It should go without saying that when the person asserting privilege is not him or herself a defendant in the action, "[t]he inhibiting effect [of the threat of liability] is significantly reduced, if not eliminated." *Owen v. City of Indep.*, 445 U.S. 622, 656 (1980). It likewise should go without saying that "a judicially crafted evidentiary privilege based on federal common law," cannot "trump the need for direct evidence that is highly relevant to the adjudication of public rights guaranteed by . . . the [federal] Constitution, especially where no threat to legislative immunity itself is presented." *Bethune-Hill*, 114 F. Supp. 3d at 337.

We cited all of these cases and made these points in our motions to compel, but the State ignores them.

2.a. Against this background (and as we noted in our motions to compel (12/29 Motion 17; 1/3 Motion 15)), there is a "litany of recent federal decisions . . . involving federal constitutional challenges premised on the right to vote" holding "that the [state legislative] privilege [does] not (at least in part) shield state legislators from producing responsive records or testifying at deposition." *Nashville Student Organizing Comm. v. Hargett*, 123 F. Supp. 3d 967, 969 (M.D. Tenn. 2015) (citing *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 95-96 (S.D.N.Y. 2003) (three-judge district court); *Favors v. Cuomo*, 285 F.R.D. 187, 214 (E.D.N.Y. 2012) (three-judge district court); *Perez v. Perry*, 2014 WL 106927, at *1 (W.D. Tex. 2014) (three-judge district court); *Veasey v. Perry*, 2014 WL 1340077, at *1 (S.D. Tex. 2014), *aff'd in part and rev'd in part*, 796 F.3d 487 (5th Cir. 2015); *Bethune-Hill*, 114 F. Supp. 3d at 337; *Baldus v. Members of Wis. Gov't Accountability Bd.*, 2011 WL 6122542, at *2 (E.D. Wis. 2011) (three-judge district court);

Page, 15 F. Supp. 3d at 666). *See also Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D. Md. 1992) (three-judge court).

It is worth mentioning, moreover, that during the December 5, 2016 oral argument in *McCrory v. Harris*—a racial gerrymandering case pending before the Supreme Court as No. 15-1262—the Justices of the Supreme Court and the parties' advocates discussed at length the testimony of several state legislators on the topic of legislative intent. Tellingly, not one Justice—indeed, not even counsel for the State of Virginia—expressed the slightest surprise or concern that members of the state legislature had been compelled to testify. *See* https://www.oyez.org/cases/2016/15-1262. *See also Harris v. McCrory*, 159 F. Supp. 3d 600, 617 (M.D.N.C. 2016) (three-judge district court) (discussing testimony of state legislators). Likewise, the State is wrong to insinuate that no testimony was compelled in *Bethune-Hill*. *See* Motion to Quash 12 n.6. In fact, after Virginia lost the legislative-privilege argument with respect to documents, several legislators gave testimony on legislative intent, both in depositions and at trial. *See, e.g.*, Trial Transcript (Jul. 8, 2015) at 262:17, *Bethune-Hill,* 114 F. Supp. 3d 323 (ECF No. 100) (testimony of Delegate S. Chris Jones); *id* at 406:22-24 (referencing Delegate Jones's deposition).

b. In response to this overwhelming weight of authority demonstrating the state legislators may be compelled to testify in federal redistricting cases that turn on the question of legislative intent, Defendants cite a hodgepodge of easily distinguishable cases. First, they point to the Supreme Court's decision in *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998), which they vaguely describe as supporting the "venerable tradition" of legislative privilege. Motion to Quash 5, 10-11. But as they readily admit, *Bogan* concerned legislators' "absolute immunity from suit" when the plaintiff seeks monetary damages to redress private injuries caused by a legislator's "legislative activities." *Id.* at 5. The holding in that case concerned what conduct, exactly, qualifies as legislative activity—an issue not

in dispute here. Besides that, the facts of *Bogan* don't match this case at all. We have not sued state legislators individually, and we do not seek monetary damages. Nor is the goal of this lawsuit to redress private injuries; we seek instead an injunction vindicating important public rights protected by the First Amendment. *See Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring). Again, it is in just this context that other courts have held that the privilege yields. *See, e.g.*, *Bethune-Hill*, 114 F. Supp. 3d at 334-336.

Defendants next cite a handful of Fourth Circuit cases. There are two things to say about that. First, "[t]he doctrine of *stare decisis* . . . commands that lower courts follow the precedent of courts who review their decisions." *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1112 n.3 (S.D. Ohio) (Gwin., J., concurring), *aff'd* 540 U.S. 1013 (2003). Because the decisions of a three-judge district court are "reviewable only by the Supreme Court," "logic suggests" that three-judge district courts "are not bound by circuit authority" and "only Supreme Court holdings . . . have controlling authority." *Id*. Accordingly, while the opinions of the Fourth Circuit "may persuade," they do not bind. *Id.*

In any event, none of the Fourth Circuit decisions cited by the State supports the assertion of privilege in this case. In *WSSC*, the court rejected the claim of privilege in that case as "premature" and affirmed the district court's order compelling WSSC to comply with the EEOC's subpoena. 631 F.3d at 177. That holding has no relevance here. In *McCray v. Maryland Department of Transportation*, the court likewise rejected the assertion of privilege, holding that it was not applicable because the "lawsuit [was] aimed at discrimination that occurred before any legislative activity began" and any assertion of privilege was in any event "premature." 741 F.3d 480, 487 (4th Cir. 2014). That holding too is inapposite. Finally, the decision in *Kensington Volunteer Fire Department v. Montgomery County*, *Inc.*, 684 F.3d 462 (4th Cir. 2012), concerned the invocation of legislative immunity from suit, not the evidentiary privilege. Again, because Plaintiffs here are not seeking

monetary damages in redress for private injuries caused by individual legislators, *Kensington* is likewise wide of the mark.

That leaves the State with a single, unpublished district court decision approving the assertion of privilege by the members of the GRAC after the 2000 redistricting. *See* Motion to Quash 11 (citing *Mitchell v. Glendenning*, No. WMN-02-602 (D. Md. June 4, 2002)). But unpublished opinions are not persuasive authority when (as here) "they are against the clear weight of current published authority." *Chase v. Peay*, 286 F. Supp. 2d 523, 528 n.8 (D. Md. 2003), *aff'd* 98 F. App'x 253 (4th Cir. 2004). And in any event, the court in *Mitchell* upheld the assertion of privilege only because the plaintiff's claim in that case "d[id] not require any proof of [legislative] motive" (*Mitchell*, slip op. at 6-7), which obviously can't be said here. We made both of these points in our motions to compel (12/29 Motion 17 n.2; 1/3 Motion 15 n.1); yet again, the State ignores our arguments.

B. The State has not met its burden under the applicable balancing test

It follows from the analysis above that the state legislative privilege must apply here in a qualified manner, if at all. And the State does not disagree that the appropriate framework for qualified application of the privilege is the five-factor balancing test employed in *Bethune-Hill*. *See* Motion to Quash 12.

Before turning to the substance of the balancing test, however, an important point bears emphasis. The State says in its motion to quash (at 7) that "Plaintiffs cannot demonstrate that [the] legislative privilege should be pierced for any reason." That gets matters backwards. Because the legislative privilege "exist[s] against the backdrop of the general principle that all reasonable and reliable measures should be employed to ascertain the truth of a disputed matter" (*Page*, 15 F. Supp. 3d at 660), it is the party asserting the privilege—here, the State—who "has the burden of demonstrating its applicability" (*NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011)), not the other way

around. The question, therefore, is not whether Plaintiffs have established that the privilege "should be pierced"; it is instead, whether the State has established that the privilege should be *permitted*. As we now explain, it has not.

We showed in our motions to compel that all five factors of the balancing test counsel overwhelmingly favor of disclosure. In particular, the evidence sought (both testimonial and documentary) is directly relevant to our claim; no other evidence would be as probative of legislative intent; the issues raised in the complaint are of the utmost seriousness; the individuals whose testimony and documents are sought were among the central characters in the alleged constitutional violation; and compelling disclosure would not conflict with the historic purposes of the legislative privilege. *See* 12/29 Motion 15-23; 1/3 Motion 16-22.

The State resists our arguments as to only the first and fifth factors.

1. As to the first factor, we explained in our motions to compel that testimony from members of the GRAC and other legislators would be highly relevant, direct evidence of legislative intent. That is hardly a controversial proposition; indeed, "to bar evidence as to the state of mind of a witness when the issue itself is . . . her state of mind" is "to deny the [Plaintiffs] the most direct proof available on the controverted issue." *Pittsburgh & New England Trucking Co. v. NLRB*, 643 F.2d 175, 178 (4th Cir. 1981). Put another way, "personal testimony [is] the best evidence of [a person's] intent." *United States v. De La Garza*, 462 F.2d 304, 307 (D.C. Cir. 1972); *cf., e.g.*, *United States v. Kokenis*, 662 F.3d 919, 929 (7th Cir. 2011) ("a defendant's own testimony" is typically "the best evidence of that defendant's good faith"). And in redistricting cases like this one that turn on the question of legislative intent, "proof of [the] legislative body's discriminatory intent is relevant and extremely important." *Baldus*, 2011 WL 6122542, at *1.

The State attempts to obfuscate this basic point by noting that the Court's opinion calls for "'objective evidence' of specific intent" (Motion to Quash 11) and asserting that testimony from the GRAC members would be "subjective evidence," not "objective evidence" (*id*. at 8). Elsewhere, the State describes first-person testimony as relevant only to "subjective intent," which it says is not an element of our claim. *Id*. at 8, 11.

The State is confusing two different issues. The question is not whether Plaintiffs have to prove "objective intent" or "subjective intent." Intent, which describes a person's "state of mind" (Fed. R. Evid. 803(3)), "is always subjective." *Haeberle v. Tex. Int'l Airlines*, 738 F.2d 1434, 1440 (5th Cir. 1984). The question, instead, is whether testimony straight from the horse's mouth is the best evidence of *specific* intent—which is to say, would such testimony bear directly and objectively on the GRAC's and legislature's intent to commit the acts comprising the constitutional violation alleged in the complaint? *See* "Intent," *Black's Law Dictionary* (10th ed. 2014). *Of course it would*. It is for precisely this reason that Rule of Evidence 803 exempts from exclusion hearsay statements that bear on state of mind, including motive and intent. *See* Fed. R. Evid. 803(3).

2. Finally, the State suggests—apparently with respect to the final factor of the balancing test—that the privilege should be upheld because it implicates an "[i]ntrusion" by the courts "into the inner workings of a sister branch of government." Motion to Quash 14-15. That is clearly wrong. As we noted in our motion to compel (12/29 Motion 12-15; 1/3 Motion 12-15), the state legislative privilege, as it applies in federal court, is a reflection of no more than federal-state comity. Because it implicates the actions of *state* officials, "federal interference in the state legislative process is *not* on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch." *United States v. Gillock*, 445 U.S. 360, 370 (1980) (emphasis added). Consistent with so much else, the State simply ignores the law on this point.

C. The subpoena targets have waived their privilege and otherwise failed to support their assertion of privilege with evidence

More fundamentally, the State offers no evidence in support of the proposed deponents' assertion of privilege. Once again, any individual asserting the privilege "has the burden of proving the preliminary facts of the privilege." *Bethune-Hill*, 114 F. Supp. 3d at 344 (quoting *Legislative Privilege*, 26A Fed. Prac. & Proc. Evid. § 5675 (1st ed.)). That means that it is insufficient to offer up "[a] conclusory assertion" without more. *Page*, 15 F. Supp. 3d at 661. On the contrary, "the proponent of a privilege must 'demonstrate specific facts showing that the [documents or deposition answers] were privileged.'" *Bethune-Hill*, 114 F. Supp. 3d at 344 (quoting *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 751 (E.D. Va. 2007)). That is an unavoidable requirement, given both that the privilege "may be waived" (*Schaefer*, 144 F.R.D. at 298), and that it applies only to the "integral steps" of the legislative process, not to post-enactment issues, documents, or communications (*Bethune-Hill*, 114 F. Supp. 3d at 342-45).

The failure of evidence is especially problematic here because, with respect to our document requests, the subpoena targets each have responded to the subpoenas on their merits, unambiguously waiving any claim to absolute privilege or immunity from answering compulsory process. *See* Exs. Q-R. What is more, Senator Miller has selectively waived privilege with respect to certain responsive documents (*see* Ex. R at 2 ("President Miller waives privilege to the maps")) as has Jeanne Hitchcock with respect to statements not made during legislative briefings (*see* Ex. O at Resp. 10). It is well settled that when "information has been voluntarily and selectively disclosed . . ., fairness requires a finding that the [asserted] privilege has been waived as to the disclosed information and all information on the same subject." *Fox v. California Sierra Fin. Servs.*, 120 F.R.D. 520, 527 (N.D. Cal. 1988) (attorney-client privilege). *Cf. Favors*, 285 F.R.D. at 212 (the legislative

privilege "is waived if the purported legislator testifies, at a deposition or otherwise, on supposedly privileged matters"). That is the case here.

For its part, the State ignores all of this—despite that we have raised waiver as an issue in both of the motions to compel, filed around one week before the motion to quash. *See* 12/29 Motion 2-3; 1/3 Motion 26-27. Indeed, the State ignores its obligation to prove the applicability of the privilege altogether, despite that we made this more general point in the motions to compel, as well. *See* 12/29 Motion 19-21; 1/3 Motion 12-15.

"[O]ne does not prove entitlement to legislative (or, indeed, any) privilege simply by asserting it." *Bethune-Hill*, 114 F. Supp. 3d at 342. Quite the contrary, the privilege "must be proved." *Id*. The subpoena targets have done none of this; we have no declarations, no documents, and no evidence of any kind. Instead, we have only a conclusory assertion of privilege—an assertion that is contradicted by conduct that plainly *waives* the privilege. This alone is reason to deny the motion to quash and grant the motions to compel.

D. The floodgates will remain closed

Unable to defend their assertion of privilege on its merits, the State falls back to the old canard that denying the privilege in this case would open the floodgates. Thus, it says that denying the privilege here "would render the privilege meaningless in the context of redistricting [lawsuits]," which are "quite common." Motion to Quash 8-9. That is silly.

Plaintiffs in redistricting cases, as in all federal lawsuits, must first state a "plausible claim for relief" before their complaints will "unlock the doors of discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). While Defendants cite a series of nine redistricting cases disposed of over the past fifteen years (hardly a tidal wave), they ignore that all but one—*one*—were dismissed on the pleadings, without discovery of any kind. And the one case that made it past the pleadings—*Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md.

2011) (three-judge district court). *aff'd* 133 S. Ct. 29 (2012)—was litigated to trial in about two weeks following a cooperative exchange of declarations.

Thus the only redistricting cases in which the State truly needs to worry about compelled disclosure of testimony and documents bearing on legislative intent are those very rare cases—like this one—where the plaintiffs state a plausible claim for relief that has an element legislative intent, and whether the State otherwise attempts to prevent meaningful discovery on that element.

E. Senator Miller and Speaker Busch did not meet or confer on the issue of burden and inconvenience

One final point warrants mention. The State complains that Plaintiffs "failed to engage in any good faith-effort to coordinate deposition dates." Motion to Quash 15. We declined to coordinate dates only because the State already had made clear its intent to assert privilege as a basis for avoiding the depositions altogether. There would have been little point to coordinating dates that none of the proposed deponents intended to honor. Needless to say, if the Court compels the proposed deponents to testify, we will coordinate with them and their counsel to find a time that is workable for everyone, including during evenings or weekends if necessary, as we have with respect to other deponents in this case. *See* Ex. S.

What is more, the road goes both ways. Senator Miller and Speaker Busch object for the first time in their motion to quash that the proposed depositions here would be unduly burdensome. Motion to Quash 15-16. Their counsel did not meet and confer with counsel for Plaintiffs before interposing this objection, in violation of Guideline 1 of the District of Maryland Local Rules.

Once again, if the Court compels the proposed deponents to testify, counsel for Plaintiffs will work diligently with their counsel to make workable arrangements for the

depositions. But it is surely cannot be the case the Senator Miller and Speaker Busch are effectively immune from compulsory process simply because the General Assembly is in session. Doubtless, Senator Miller and Speaker Busch are busy professionals (just as are Plaintiffs and their counsel)—but they can surely find a handful of hours over the next few weeks to give testimony in this important federal constitutional case.

CONCLUSION

The motion to quash should be denied, and the motions to compel should be granted. Defendants and each of the third-party subpoena targets should be ordered to produce responsive documents and to sit for, and answer questions at, deposition without regard for any assertion of legislative privilege.

Dated: January 16, 2017

Respectfully submitted,

/s/ *Michael B. Kimberly*

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
Stephen Medlock, *pro hac vice*
E. Brantley Webb, *pro hac vice*
Mayer Brown LLP
1999 K Street NW
Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2017, a copy of the foregoing Opposition to Motion for Protective Order and to Quash Non-Party Subpoenas Served on Thomas V. Mike Miller, Jr., Michael E. Busch, Jeanne Hitchcock, and Richard Stewart was filed in the United States District Court for the District of Maryland, electronically served upon all counsel of record through the Court's CM/ECF system, and served via electronic mail upon counsel for non-parties Thomas V. Miller Jr., Michael E. Busch, Jeanne D. Hitchcock, and Richard Stewart.

/s/ *Stephen M. Medlock*

Michael B. Kimberly, Bar No. 19086
mkimberly@mayerbrown.com
Paul W. Hughes, Bar No. 28967
Stephen M. Medlock, *pro hac vice*
E. Brantley Webb, *pro hac vice*
Mayer Brown LLP
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Washington, D.C. 20006
(202) 263-3127 (office)
(202) 263-3300 (facsimile)