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' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL NON-PARTIES TO TESTIFY AND PRODUCE DOCUMENTS

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The State's opposition to our motion to compel Mike Miller, Michael Busch, Jeanne Hitchcock, Richard Stewart, and Richard Madaleno to produce documents and appear at deposition for the most part rehashes what the State has said in its prior briefs. But "bad argument[s] do[] not improve with repetition." *Carr v. United* States, 560 U.S. 438, 462 (2010) (Alito, J., dissenting). Thus, the State continues to make the same errors that we identified in our opposition to the motion to quash (Dkt. No. 120) and talks past the arguments that we made in our motion to compel (Dkt. No. 111). Rather than rehashing our responses in kind, we instead incorporate by reference our opposition to the State's motion to quash (Dkt. No. 120) and offer a few short clarifications.

1. Testimony from the members of the GRAC and General Assembly will provide direct, objective evidence of specific intent. The State insists that the testimony of these officials would bear only on their "subjective impressions, motivations, and thoughts." Dkt. No. 119 at 3. But that is plainly wrong. As the State itself acknowledges, we have proposed asking not only direct questions concerning the GRAC and General Assembly members' personal "intent and motivations," but also questions concerning "the data that they used and how they used it." *Id*. (quoting Dkt. No. 111 at 12). There would be nothing "subjective" about the GRAC and General Assembly members' answers to questions about the data and analyses that they employed to draft the Plan or the results that those data and analyses indicated the Plan would achieve. Nor would there be anything subjective about answers to questions concerning the contemporaneous discussions and documents shared by and among the GRAC and the General Assembly at the time. *Cf*. Dkt. No. 119 at 17 (acknowledging that "'contemporary statements by members of the decisionmaking body'" are "highly

relevant") (quoting *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)).

The point of taking the GRAC and General Assembly members' testimony, therefore, is not just to elicit explanations like, "My motivation at the time was such and so." Rather, the point is to get to the bottom of what *happened* and what they *considered*. That is exactly the sort of objective evidence that would be highly probative of the specific-intent element of our claim. To say otherwise makes no sense.

The State thus misses the point when it cites *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991), for the proposition that the "individual motives of legislators" are irrelevant (Dkt. No. 119 at 4); the point is to elicit objective evidence concerning the facts surrounding GRAC's and General Assembly's deliberations. The inapplicability of *D.G. Restaurant* is especially clear because that case involved a claim pursuant to which the Court refused to "look behind the express language of the [statute]" to determine legislative purpose. 953 F.2d at 147. The same goes for *South Carolina Education Association v. Campbell*, 883 F.2d 1251 (4th Cir. 1989). Not even the State suggests that, for purposes of proving specific intent in this case, Plaintiffs are limited to the text of S.B. 1 and no more. On the contrary, gerrymandering cases pending before three-judge courts often involve testimony of legislators. *See* Dkt. No. 120 at 5-6.[1]

2. The State accuses us of "incorrectly describ[ing] this Court's explanation of [Plaintiffs'] burden of proof." Dkt. No. 119 at 3. That is a puzzling assertion. We have

[1] Our opposition to the State's motion to quash suggested that testimony was compelled in *Bethune-Hill*. We are since informed by counsel for the plaintiffs in that case that the legislators' testimony was given voluntarily. That said, voluntary testimony was given there only after the court had rejected the invocation of legislative privilege with respect to documents. It is therefore likely that the one led to the other.

consistently maintained that the documents and depositions we seek are probative of the specific-intent element of our claim. On that score, the Court was quite clear that "[t]he practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations . . . infringes [their] representational right[s]." *Shapiro v. McManus*, 2016 WL 4445320, at *9 (D. Md. 2016). Thus, a plaintiff establishes a violation of the First Amendment when he shows that "those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." *Id.* at *10. Those are exactly the issues at which our document and deposition subpoenas are directed.

The State nevertheless asserts that our articulation of the specific-intent element of our claim has "incorrectly" "borrow[ed]" from the supposed "limitations" that the Court preemptively placed on discovery. *See* Dkt. No. 119 at 3. In honesty, we do not know what the State is talking about.

True, the Court explained that application of the First Amendment retaliation doctrine to partisan gerrymandering "does not prohibit a legislature from taking *any* political consideration into account in reshaping its electoral districts." *Shapiro*, 2016 WL 4445320, at *10. But we have never suggested otherwise—nor does this issue have anything to do with the third-party subpoenas at issue here.

Also true, the Court explained that plaintiffs must adduce "objective evidence" bearing on the "specific intent" of "those responsible for the map." *Shapiro*, 2016 WL 4445320, at *10, *11. While the Court said that objective evidence is required, it did not say that evidence of subjective impressions is forbidden as categorically irrelevant.

Moreover, we have just explained that the GRAC members' testimony will serve as objective evidence that is probative of their specific intent in cases like this one.

Finally, the Court also explained that Plaintiffs must establish "a palpable and concrete harm." *Shapiro*, 2016 WL 4445320, at *11. But that, too, is a matter on which we have never disagreed—nor, again, is it in any way relevant to the GRAC members' depositions or documents.

3. Testimony from the members of the GRAC would be the most probative evidence of specific intent. As we explained in the introduction to our opposition to the motion to quash (Dkt. No. 120 at 1-3), the State has taken every opportunity to obstruct our discovery efforts with respect to legislative intent. We therefore have been denied access to almost all data, communications, and other documents bearing on the subject. As an example, the State candidly admits that it has refused to produce the "election and voter data files [that] were [actually] considered by the GRAC" because "[t]he 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." Dkt. No. 112-1, at 4 n.2. This is precisely the sort of the key "objective evidence" that Plaintiffs would like to obtain to in order to prove specific intent circumstantially; yet they have been denied access at every turn.

The State attempts to distract from its own refusal to produce the key documents, communications, and data by declaring that it has magnanimously "afforded access to . . . thousands of pages of documents and electronic files including elections and voter data provided to the Department of Planning." Dkt. No. 119 at 4. But most of those pages were provided to Plaintiffs *unsolicited* through the joint stipulations process, and they apparently are not the documents or adjusted data actually relied

upon by the GRAC. Dumping thousands of pages of less relevant documents is no substitute for actually providing meaningful discovery. Regardless, there is no denying that the GRAC member's testimony would be substantially more probative of specific intent than would generic data that the GRAC did not even consider.

The State also says that legislative history is probative of legislative intent. Dkt. No. 119 at 16-17. But as it turns out, the floor statements are largely *not* probative of the intent question—in large part because SB 1 was rushed through both chambers of the General Assembly in just 72 hours. What is more, as we explained in the opening memorandum (at 18), government officials "seldom, if ever, announce on the record that they are pursuing a particular course of action because of [a] desire to discriminate." *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982). The State does not deny that is true here.

4. The individuals asserting the privilege have consistently waived it in various ways. Although they purport to assert the privilege on an "absolute" basis to avoid having to respond to compulsory process at all, for example, each of the relevant third-party subpoena targets here has responded to our document subpoenas (although they have done so by producing no or very few documents). Having complied with Plaintiffs' compulsory document subpoenas in this way, it is hard to see how the same individuals can insist that they are nevertheless absolutely immune from compulsory process with respect to depositions. Simply put, they cannot; they have waived any absolute privilege they might have had, even assuming that they had it to begin with.

Beyond that, Senator Miller and Jeanne Hitchcock have each waived privilege with respect to the question of legislative deliberations. *See* 12/29 Motion at 28-31;Dkt. No. 111 at 26-27. For example, Senator Miller has disclosed four proposed maps con-

sidered by the GRAC. *See* Dkt No. 119 at 4-5. For her part, Hitchcock has disclosed what particular topics were not discussed at GRAC briefings for the General Assembly. *See* Dkt. No. 120-16 at Supp. Resp. 10. As the Fourth Circuit has explained with respect to the attorney-client privilege, a "voluntary disclosure" of this sort "not only waives the privilege as to the specific information revealed, but also waives the privilege as to the subject matter of the disclosure" as a whole. *Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998) (citing *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 125 (4th Cir. 1994); *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992); *United States v. Pollard*, 856 F.2d 619, 623 (4th Cir. 1988); *In re Grand Jury Proceedings*, 727 F.2d 1352, 1357; *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). The reason why is clear; otherwise, litigants could manipulate the fact-finding process by selectively disclosing documents and communications in ways that paint only half-truths. For just that reason—to ensure the entire story is told, and not just fragments of it—when an individual holding a privilege discloses *anything* on a given subject, he must disclose *everything*; "subject matter waiver" of this sort "ensure[s] that fair context is provided." *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 345 n.8 (E.D. Va. 2015).

Thus, Senator Miller has waived privilege with respect to *all* of the alternative maps and data considered by the GRAC; absent this broader subject matter waiver, Plaintiffs would be denied a "fair context" within which to understand and evaluate the four maps disclosed. And Hitchcock has waived privilege with respect to all statements made and documents shared during the GRAC's briefings on the proposed Plan to the General Assembly. Again, without a broader subject matter waiver, we would be denied a fair context for evaluating what, in fact, took place at the briefings.

Likewise, Senator Madaleno has waived privilege on the subject of his and the General Assembly's motivations and goals in adopting the Plan. His comments on these matters go to the heart of the issue: Did members of the legislature set out to flip the Sixth District, and if so, how and why? *See* Dkt. No. 111 at 5-6 (Senator Madaleno's statements in speeches). Senator Madaleno cannot be heard to waive his legislative privilege in statements to the public (assuming he had the privilege to invoke in the first place), on the one hand, while then avoiding any factual and evidentiary testing of those statements in this litigation, on the other. He therefore must be compelled to produce all documents in his possession bearing on the question of specific intent and motivation and (if ultimately called upon to do so) to answer questions on the same topic at deposition.

For the foregoing reasons and for the reasons laid out in the motions to compel and the opposition to the State's motion to quash, the motions to compel should be granted and the motion to quash should be denied.

Dated: January 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2017, a copy of the foregoing Reply Brief in Support of Their Motion To Compel Non-Parties to Testify and Produce Documents 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, per agreement, served on counsel for the Non-Parties via electronic mail.

Dated: January 19, 2017

Respectfully submitted,

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